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(*Chief Justice of India*).

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STATE OF BIHAR

v.

KRIPA SHANKAR JAISWAL

1960

October 14

(J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Industrial Dispute—Conciliation proceedings—Unregistered Union—Settlement with—If binding on management—Industrial Disputes Act, 1947 (14 of 1947), ss. 11(2), 12(6), 18(3)(a) and (d).

A settlement was arrived at between the management of Mankatha Distillery and the workmen's union before the conciliation officer. The Union was not registered under the Indian Trade Unions Act on the date of the said settlement. The terms of the settlement not having been carried out by the management the respondent who was the proprietor, and the manager of the said distillery were prosecuted and were convicted by the Magistrate. The Sessions Court, on appeal by the respondent, confirmed the Magistrate's order. On an appeal to the Patna High Court by the respondent the High Court set aside the order of conviction and acquitted the respondent holding that there was no recognised union and that because the conciliation officer had visited the Distillery without giving a reasonable notice, on 18-3-1954 there could be no agreement between the proprietor on one side and the workmen as a whole on the other on the date and it was wrong to suppose that because some workmen had signed the settlement that it bound all the workmen.

Held, that for a dispute to constitute an industrial dispute it is not a requisite condition that it should be sponsored by a recognised union or that all the workmen of an industrial establishment should be parties to it. A settlement arrived at in course of conciliation proceedings falls within s. 18(3)(a) and (d) of the Industrial Disputes Act and as such binds all the workmen though an unregistered union or only some of workmen may have raised the dispute.

The absence of notice under s. 11(2) by the Conciliation Officer does not affect the jurisdiction of the conciliation officer and its only purpose is to apprise the establishment that the person who is coming is the conciliation officer and not a stranger. Any contravention of s. 12(6) in not submitting the report within 14 days may be a breach of duty on the part of the conciliation officer ; it does not affect the legality of the proceedings which terminated as provided in s. 20(2) of the Act.

1960

State of Bihar v. Kripa Shankar Jaiswal

Where a fresh settlement is arrived at between the parties and all disputes are settled, then "public interest does not require that the stale matter should be resuscitated".

Newspapers Limited, Allahabad v. *State Industrial Tribunal, Uttar Pradesh*, [1960] 2 L.L.J. 37, referred to.

Andheri Marol Kurla Bus Service v. *The State of Bombay*, A.I.R. [1959] S.C. 841 and *State of Bihar* v. *Hiralal Kejrilal*, [1960] 1 S.C.R. 726, approved.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 83 of 1959.

Appeal from the judgment and order dated July 25, 1958, of the Patna High Court in Criminal Revisions Nos. 593 and 594 of 1958 arising out of the judgment and order dated March 3, 1958, of the Additional Sessions Judge, Monghyr, in Criminal Appeal No. 286 of 1956.

D. P. Singh and *R. H. Dhebar*, for the appellant.

C. P. Lal, for the respondent.

1960. October 14. The Judgment of the Court was delivered by

Kapur J.

KAPUR J.—This is an appeal brought in pursuance of a certificate under art. 134(1)(c) of the Constitution against the judgment and order of acquittal of the High Court of Patna.

There were certain disputes between the workmen and the Management of Mankatha Distillery of which the proprietor is the respondent. On November 23, 1953, a petition was submitted on behalf of the workmen of the Distillery to the Assistant Labour Commissioner, Bhagalpur, which was signed by one Banarsi Choudhuri on behalf of himself and for and on behalf of the workmen of the Distillery. In this petition, certain grievances of the workmen were set out. Conciliation proceedings were started, and there was an agreement on December 5, 1953, which the High Court has described as 'some sort of agreement'.

On January 12, 1954, an application was made for the registration of the Union of the workmen of the Distillery under the Indian Trade Unions Act, and the same was registered on March 23, 1954, under the

name and style of Mankatha Distillery Mazdoor Panchayat. The Distillery was closed and the workmen were discharged, and thereafter on February 19, 1954, the General Secretary of the Mankatha Distillery Mazdoor Panchayat, even though it was not registered at the time, sent a letter to the Management, protesting against the discharge of the workmen without payment of compensation and objecting to the intention of the employers to re-start the factory after employing other workmen. It was also stated therein that the workers who had been discharged, had been working for some years and a list of such workmen was attached to the letter. The following portion of the letter is relevant for the purposes of this appeal:—

"All the persons, named below, shall work in the factory in legal manner, on monthly salary on permanent basis. It is not only hoped, rather fully believed that you would consider the above facts and gladly accept the same.

On getting a stisfactory reply, all the workers, who had been working in your factory since years, would report themselves to duty and work according to your orders".

Although it is addressed to the proprietors of the Distillery, it seems to have been sent to the Assistant Commissioner of Labour, Bhagalpur, where it was received on February 25, 1954. The following endorsements were made on this letter:—

"Discussed with you. The management is requested to attend conciliation proceeding on 10th March, 1954, at 11 a.m. The Union is also informed accordingly".

Another petition dated March 5, 1954, was sent by the General Secretary of the Distillery Mazdoor Panchayat to the Assistant Labour Commissioner, in which the names of all the persons who had been freshly employed by the proprietors, were mentioned and it was prayed that those who were discharged at the time of the closing of the factory, may be reinstated and wages paid, and a request was made to the Assistant Labour Commissioner to visit and see the situation for himself

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and get the workmen reinstated. The order on this petition was :—

"The parties have been called to-morrow in my office for conciliation. The result of the proceeding may be awaited."

On March 18, 1954, a settlement was arrived at between the management and the workers which is signed by the Conciliation Officer appointed under s. 4 of the Industrial Disputes Act, 1947 (Act 14 of 1947) (hereinafter termed, for the sake of brevity, the Act). This document was signed by the proprietor and the manager of the Distillery and by Banarsi Choudhuri, General Secretary of the Workers' Panchayat and also by six other members of the Panchayat who were evidently the members of the Executive Committee of the Panchayat. The terms of the settlement were as follows :

"1. It is agreed that the workers named in Schedule "A" shall be taken to jobs without break in their services.

2. The new hands appointed after the closure of the factory shall be discharged.

3. If three shifts will start and any other increased opportunity of employment will be available in the factory, the management shall employ only those workers who are left to-day and who had worked in August 1953 and September 1953 in order of seniority.

4. Shri Banarsi Choudhry, Balmiki Singh, Bhaso Singh and Kaltu (?) Singh are accused in a case pending before the Court at Monghyr. The management agrees that if they will be acquitted from the court, they will be given jobs.

5. All the workers will be put in permanent basis as they were previously. The order putting them in the temporary basis after the opening of the Mill (?) is cancelled.

6. The arrears will be paid on monthly basis as before instead of weekly basis as at present after the re-opening of the factory.

7. The grievances raised by the workers and covered by the agreement dated the 5th December,

1953, will be decided by the Labour Commissioner Bihar, Patna and his decision shall be acceptable to and final for the parties.

8. The work of the factory will be resumed immediately.

9. The workers will continue to have all the benefits and privileges which are guaranteed by law or usage and custom.

10. The workers will not be victimised for their Trade Union activities".

The prosecution case is that the terms of the settlement were not carried out in that the old workmen were not re-employed and the newly employed workmen were not discharged. Thereupon, the respondent and the manager of the Distillery, one Ram Narain Lal were prosecuted on a complaint filed by the Labour Superintendent, Mr. L. D. Singh, after sanction of the Government of Bihar had been obtained. Both the accused persons were convicted and sentenced to a fine of Rs. 150 each or, in default, one month's simple imprisonment. The learned Magistrate held that there was an industrial dispute within the meaning of the Act, and that the conciliation settlement dated March 18, 1954, was a valid settlement and the respondent failed to implement the first term of the settlement. Against this order, an appeal was taken to the Sessions Court and the Third Addl. Sessions Judge dismissed the appeal. He confirmed the findings of the learned Magistrate.

Against this order of the Sessions Judge, an appeal was taken to the High Court by the respondent only, and the High Court set aside the order of conviction and acquitted the accused. It held that there was no recognised Union, though there was "some kind of a vague Union" existing, and that because the Conciliation Officer had visited the Distillery without giving a reasonable notice, the "decision of the Conciliation Officer on 18-3-1954, must, therefore, be deemed to be without jurisdiction", and that there was no agreement arrived at between the proprietor on one side and the "labourers" as a whole on the other, and "it is preposterous to suppose that because some labourers

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had signed the settlement that it bound all the labourers. It seems to me that there is a serious defect in this settlement which is described as a decision of the Conciliation Officer dated 18-3-1954". On the ground, therefore, that the settlement was not a settlement which was binding on the respondent, the conviction was set aside.

It would be an erroneous view if it were said that for a dispute to constitute an industrial dispute it is a requisite condition that it should be sponsored by a recognised union or that all the workmen of an industrial establishment should be parties to it. A dispute becomes an industrial dispute even where it is sponsored by a union which is not registered as in the instant case or where the dispute raised is by some only of the workmen because in either case the matter falls within s. 18(3)(a) and (d) of the Act. See also *Newspapers Limited, Allahabad* v. *The State Industrial Tribunal, Uttar Pradesh* (1). The settement of March 18, 1954, arrived at during the conciliation proceedings was signed by the General Secretary and members of the executive committee of the Union though it was unregistered at the time. We cannot therefore give our accord to the decision that the settlement of March 18, 1954, was not a settlement binding between the parties.

The scope and effect of s. 11(2) was raised before us and it was argued that because the conciliation officer did not give any reasonable notice before he came to the Distillery on March 18, 1954, the settlement was not a legal settlement and consequently was not binding on the parties and its breach could not fall within the penal consequences of s. 29 of the Act. Now, s. 11(2) provides:—

"A conciliation officer or a member of a Board or Court or the presiding officer of a Labour Court, Tribunal or National Tribunal may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates".

(1) [1960] 2 L.L.J. 37 at 38.

Section 11 only deals with the procedure and powers of the conciliation officers and sub-section 2 authorises the conciliation officer to enter the premises occupied by any establishment to which the dispute relates after giving a reasonable notice. This notice is only for the purpose of entering the premises to make an enquiry into any existing industrial dispute or an apprehended industrial dispute, and is merely to apprise the establishment that it is the conciliation officer who is coming and not an absolute stranger who has no connection at all with the machinery set up for the purposes of the Act. The absence of a notice under s. 11(2) therefore does not affect the jurisdiction of the Conciliation Officer.

As to what the conciliation officer can and should do, is contained in s. 12 of the Act. Sub-section 1 empowers the conciliation officer to hold conciliation proceedings in the case of a public utility service after notice under s. 22 whereby a mandatory duty is cast upon him to do so, and in other disputes it is his discretion to hold conciliation proceedings in the prescribed manner. Under sub-s. (2) he has to investigate without delay the dispute in all matters affecting the merits of the dispute, and he can do such things as he thinks necessary for inducing the parties to come to a fair and amicable settlement. Sub-section (3) provides that if a settlement of the dispute is arrived at, a report thereof shall be sent to the appropriate Government, and sub-s. (4) also provides for the sending of a similar report to the appropriate Government if no settlement is arrived at. Sub-s. (5) deals with the powers of the Government when a report is received as to the non-settlement of the dispute, and sub-s. (6) which was relied upon provides :—

S. 12(6) "A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government.

Provided that the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute."

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It was argued that because the report had not been sent to the Government within fourteen days of the commencement of the conciliation proceedings, the settlement arrived at was invalid and was not binding. This contention must be repelled because any contravention of s. 12(6) may be a breach of duty on the part of the conciliation officer; that does not affect the legality of the proceedings which terminated as provided in s. 20(2) of the Act. It was so held by this Court in *Andheri Marol Kurla Bus Service* v. *The State of Bombay* (1). It cannot be said, therefore, that the settlement which was arrived at on March 18, 1954, was not a legal settlement and that a breach of it would not attract the penal provisions of s. 29 of the Act.

After the case was decided by the Judicial Magistrate the parties arrived at a fresh settlement on October 6, 1956, which recited:

"That this settlement made this day the 6th October, 1956, at Patna, settles all the pending grievances and/or demands of workmen whatsoever".

As a result of this out of the discharged workmen 25, whose names are given in Appendix A attached to the compromise, were reinstated with effect from October 8, 1956. The claim with regard to the other discharged workmen was withdrawn. This settlement was accepted by the Industrial Tribunal by an order dated October 10, 1956. This shows that all disputes between the parties have been settled and workmen have been reinstated. In view of this in the words of Subba Rao, J., in the *State of Bihar* v. *Hiralal Kejrilal* (2) "public interest does not require that the stale matter should be resuscitated". Therefore we do not think it necessary to interfere under art. 136 with the order of the High Court.

The appeal is therefore dismissed.

Appeal dismissed.

(1) [1959] Supp. 2 S.C.R. 734. (2) [1960] 1 S.C.R. 726, 736.

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October 17.

THE COMMISSIONER OF INCOME-TAX, MADHYA PRADESH & BHOPAL, NAGPUR

v.

BHOPAL TEXTILES LTD., BHOPAL.

(S. K. DAS, M. HIDAYATULLAH, and J. C. SHAH, JJ.)

Income Tax—Supply of goods by non-resident company—Place of payment, when place of receipt of money by seller—Bank when agent of seller—Railway receipt, if document of title of goods —Property in goods, when transferred to buyer.

Respondent, a non-resident company, in the accounting year supplied goods which were sent F. O. R. Bhopal to the buyers in British India. The railway receipts were handed over to a Bank in Bhopal with instructions to hand over the railway receipts to the buyers, who were named as consignees, only on receipt of payment of the bill and collection charges. The branches of the Bank within the taxable territory collected the amounts due from the buyers and transmitted them to Bhopal to the credit of the respondent.

The question was whether the profits in the goods were received or deemed to be received in British India.

Held, that the decision of this Court in *Commissioner of Income-tax* v. *P. M. Rathod & Co.* applied to this case; and the income, profits or gain must be deemed to have been received within the taxable territory.

The fact of payment to the agent determines the place where the money can be said to be received by the seller. Since in the instant case the railway receipts were not to be handed over to the buyers by the Bank, as per instructions of the seller, unless payment for the value of the goods were received by the Bank which instructions the buyers could not countermand, this was sufficient to make the Bank an agent of the seller.

Held, also, that a railway receipt is a document of title to goods, and, for all purposes, represents the goods. When the railway receipt is handed over to the consignee on payment, the property in the goods is transferred.

The Commissioner of Income-tax v. *P. M. Rathod and Co.*, [1960] 1 S.C.R. 401, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 755 of 1957.

Appeal by special leave from the judgment and order dated March 23, 1955, of the former Nagpur High Court in Misc. Civil Case No. 240 of 1953.

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K. N. Rajagopal Sastri, R. H. Dhebar and *D. Gupta*, for the appellant.

Veda Vyasa, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the respondent.

1960. October 17. The Judgment of the Court was delivered by

HIDAYATULLAH J.—This appeal, with special leave, has been filed against the judgment of the Nagpur High Court in a reference under s. 66(1) of the Indian Income-tax Act, 1922, by which the High Court answered the following question in the negative:

"Whether the proportionate profits on the goods of the value of Rs. 4,10,785 were received or were deemed to be received in British India, in the year of account, by or on behalf of the assessee Company within the meaning of Section 4(1)(a) of the Indian Income-tax Act, 1922".

The Commissioner of Income-tax, Madhya Pradesh and Bhopal is the appellant, and the Bhopal Textiles Ltd., Bhopal, is the respondent. For the assessment year 1944-45, the Company which was non-resident was treated as 'resident and ordinarily resident' under s. 4(1)(c) of the Income-tax Act. In the year of account, it had supplied its manufactured articles either to the Government of India or its nominees at Agra, Allahabad and Delhi. Under the orders of the Government, the goods were sent direct to the persons nominated, who made the payment against the goods. The goods were all sent f.o.r. Bhopal, and the railway freight and other charges were to be borne by the buyers to whom the railway receipts made out in the name of the consignees were sent by the Company through the Imperial Bank at Bhopal. The Bhopal Branch sent the railway receipts to branches of the Bank at Agra, Allahabad and Delhi, which collected the amounts due from the buyers, and transmitted them to the Imperial Bank, Bhopal, to the credit of the Company. On these facts, a total sum of Rs. 4,40,373 was held by the Department to have been received in British India. Of that sum, an amount of Rs. 29,588 which represented the receipts

for supplies direct to Government is no longer in dispute. The balance represents the sum, which was the subject-matter of the reference.

The usual appeals followed, and the contention of the Company that the money was not received in British India was not accepted by the Tribunal. The Tribunal did not decide about the place of accrual. A reference was then made by the Tribunal of the question quoted above. The High Court in deciding the reference went into the question of passing of property under the Indian Sale of Goods Act, 1930, and came to the conclusion that since the property in the goods had passed to the buyers, the Imperial Bank of India, Bhopal, must be "deemed to have received the railway receipts as agents of the buyers". Continuing the reason, the learned Judges observed:

"So also the branches of the Bank at Agra, Allahabad and Delhi acted as the agents of the buyers when they collected the money from them and transmitted it to the Bhopal branch. In this view, the profits cannot be said to be received by the assessee Company in British India. It received the money only when it reached the Bhopal branch as a credit to its own account and that was not in British India at the material time".

The case was not decided by the Tribunal on the basis of accrual of the income, profits or gains to the Company. It was decided on the fact of actual receipt, whether it was in British India or in Bhopal, which was then outside the taxable territories. We need not, therefore, concern ourselves with the problem whether property in the goods could be said to have passed absolutely to the buyers without any right of disposal being reserved by the Company. It is a matter of some doubt whether the goods were absolutely at the disposal of the buyers after the railway receipts were handed over to the Bank. It is in evidence—and has been adverted to by the Income-tax Officer—that the Company, when it handed over the railway receipt to the Imperial Bank at Bhopal, did so along with a covering letter in which it asked the Bank to deliver the railway receipt and the bill to

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the buyers against payment of the bill amount *plus* collection charges. In this view of the matter, though we do not express any final opinion, we doubt whether the right of disposal was parted with by the Company.

A railway receipt is a document of title to goods, and, for all purposes, represents the goods. When the railway receipt is handed over to the consignee on payment, the property in the goods is transferred. In this case, it is a matter of considerable doubt whether the property in the goods can be said to have passed to the buyers by the mere fact of the railway receipts being in the name of the consignees, as has been held by the High Court. Since we are not deciding the question of accrual, we do not elaborate the point.

Coming now to the question as to where the amount was received, we have no doubt that the view of the Tribunal was correct. This income was received at Agra, Allahabad or Delhi from the buyers by the Imperial Bank acting as the agent of the Company. The Company had handed over the railway receipts to the Bank, and asked the Bank not to hand over the railway receipts to the buyers, unless payment was received. This was sufficient to make the Bank an agent of the Company. The buyers could not have countermanded the instructions given by the Company to the Bank, which they would, indubitably, have been able to do, if the Bank was their agent. This was laid down by this Court in *The Commissioner of Income-tax* v. *P. M. Rathod and Company* (1). Mr. Veda Vyasa contends that the case is distinguishable on the ground that the railway receipts there were " to self ", whereas here the railway receipts, were made out in the name of the consignee. Nothing turns upon this distinction. The document of title to goods was still the property of the Company till payment for it was received and it was handed over. In this view of the matter, we are of opinion that the ruling in question applies.

Mr. Veda Vyasa finally contended that the agreement between the parties was that the goods were to

(1) [1960] 1 S.C.R. 401.

be sent f.o.r. Bhopal, and that the price was also to be paid there. He contended that the handing over of the railway receipts to the Bank at Bhopal was in furtherance of the agreement, that the money was ultimately obtained by the Bank and handed over at Bhopal also, and that, thus, the money must be deemed to have been received there. This, in our opinion, does not truly represent the character of the transaction. No doubt, under the agreement, payment was to be made at Bhopal; but the circumstances show that that was departed from, and the ordinary mercantile practice of handing over the railway receipts to one's own bankers with a request to hand over the receipts against payment to the buyers was followed. The Bank, as we have shown above, was thus the agent of the sellers, as was laid down in the ruling of this Court, and the fact of payment to the agent determines the place where the money can be said to be received by the Company. That place was at Agra, Allahabad or Delhi. In this view, the income, profits or gains must be deemed to have been received in the taxable territories, and the answer to the question ought to have been in the affirmative.

We accordingly allow the appeal, and answer the question in the affirmative. The appellant will be entitled to his costs here and in the High Court.

Appeal allowed.

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October 18.

M/S. TUNGABHADRA INDUSTRIES LTD.

v.

THE COMMERCIAL TAX OFFICER, KURNOOL.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax—Hydrogenated groundnut oil (Vanaspati), if groundnut oil—Madras General Sales Tax (Turnover and Assessment) Rules, 1939, rr. 4, 5 and 18.

The appellant purchased groundnuts out of which it manufactured groundnut oil; it also refined the oil and hydrogenated it converting it into Vanaspati. It sold the oil in all the three states. Under the Madras General Sales Tax Act, 1939, and the Turnover and Assessment Rules, for determining the taxable turnover the appellant was entitled to deduct the purchase price of the groundnuts from the proceeds of the sale of all groundnut oil. The High Court held that the appellant was entitled to the deduction in respect of the sales of unrefined and refined groundnut oil but not in respect of the sales of hydrogenated oil on the ground that Vanaspati was not "groundnut oil" but a product of groundnut oil.

Held, that the appellant was entitled to the deduction in respect of the sales of hydrogenated groundnut oil also. The hydrogenated groundnut oil continued to be "groundnut oil" notwithstanding the processing which was merely for the purpose of rendering the oil more stable. To be groundnut oil two conditions had to be satisfied—it must be from groundnut and it must be "oil". The hydrogenated oil was from groundnut and in its essential nature it remained an oil. It continued to be used for the same purposes as groundnut oil which had not undergone the process. A liquid state was not an essential characteristic of a vegetable oil; the mere fact that hydrogenation made it semisolid did not alter its character as an oil.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 498 of 1958.

Appeal from the judgment and order dated February 11, 1955, of the Andhra Pradesh High Court in T. R. C. No. 120 of 1953 arising out of the judgment and order dated December 29, 1952, of the Sales Tax Tribunal, Madras, in Tribunal Appeal No. 857 of 1951.

A. V. Viswanatha Sastri, M. Ranganatha Sastri and *M. S. K. Sastri*, for the appellants.

D. Narasaraju, Advocate-General for the State of

Andhra Pradesh, T. V. R. Tatachari, D. Venkatappayya Sastri and *T. M. Sen*, for the respondent.

1960. October 18. The Judgment of the Court was delivered by

AYYANGAR J.—This appeal on a certificate under Art. 133 of the Constitution granted by the High Court of Andhra Pradesh raises for consideration principally the question whether hardened or hydrogenated groundnut oil (commonly called Vanaspati) is "groundnut oil" within the meaning of Rule 18(2) of the Madras General Sales-Tax (Turnover and Assessment) Rules, 1939.

Tungabhadra Industries Ltd.—the appellant in this appeal—has a factory of considerable size at Kurnool in the State of Andhra Pradesh. The company purchases groundnuts and groundnut kernels within the State and manufactures groundnut oil and also refined oil as well as hydrogenated oil all of which it sells. The appeal is concerned with the assessment to sales-tax of this company for the year 1949-50.

Section 3 of the Madras General Sales-Tax Act, 1939, enacts:

"3. (1) Subject to the provisions of this Act,—

(a) every dealer shall pay for each year a tax on his total turnover for such year; and

(b) the tax shall be calculated at the rate of three pies for every rupee in such turnover.

(2).....

(3).....

(4) For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed:

Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed:

Provided that—

(i) in respect of the same transaction of sale, the buyer or the seller, but not both, as determined by such rules as may be prescribed, shall be taxed;

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(ii) where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him."

Rules were made by virtue inter alia of these provisions entitled "The Madras General Sales-Tax Turnover and Assessment Rules, 1939". Of these, those relevant to the present context are Rules 4 & 5. Rule 4 reads:

"4. (1) Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by the dealer.

(2) In the case of the undermentioned goods the gross turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer—

(a) groundnut—".

The result of the combined operation of s. 4(1)&(2) in the case of those who purchased groundnut and having crushed them sold the oil obtained was, that they had to pay tax on both their purchases of groundnut and their sales of oil produced therefrom. This was considered by the rule making authority to be an unfair burden and relief was accordingly provided by Rules 5 and 18 of the same rules, the material portions of which ran:

"5. (1) The tax or taxes under section 3.....shall be levied on the net turnover of a dealer. In determining the net turnover the amounts specified in clauses (a) to (l) shall, subject to the conditions specified therein, be deducted from the gross turnover of a dealer.

Clause (k) of this rule reads:

(k) in the case of a registered manufacturer of groundnut oil and cake, the amount which he is entitled to deduct from his gross turnover under rule 18 subject to the conditions specified in that rule."

(This rule was amended by a notification dated November 9, 1951, by the addition of the words "(other than refined groundnut oil)" after the word

"groundnut oil", but this modification of the rule is not relevant to the present case which is concerned with the assessment of a period anterior to the modification).

Rule 18 referred to here reads, to quote only the material words:

"18. (1) Any dealer who manufactures groundnut oil and cake from groundnut and/or kernel purchased by him may, on application to the assessing authority having jurisdiction over the area in which he carries on his business, be registered as a manufacturer of groundnut oil and cake.

(2) Every such registered manufacturer of groundnut oil will be entitled to a deduction under clause (k) of sub-rule (1) of rule 5 equal to the value of the groundnut and/or kernel, purchased by him and converted into oil and cake if he has paid the tax to the State on such purchases:

Provided that the amount for which the oil is sold is included in his net turnover:

Provided further that the amount of the turnover in respect of which deduction is allowed shall not exceed the amount of the turnover attributable to the groundnut and/or kernel used in the manufacture of oil and included in the net turnover.

Explanation.—For the purpose of this sub-rule—

(a) 143 lb. of groundnut shall be taken to be equivalent to 100 lb. of kernel;

(b) 143 lb. of groundnut or 100 lb. of kernel when converted into oil will normally be taken to yield 40 lb. of oil; and

(c) one candy of oil shall be taken to be equivalent to 500 lb. of oil."

Then follow other provisions not relevant for the purposes of the present appeal.

The appellant was registered as a manufacturer of groundnut oil under r. 18(1). That the appellant purchased the groundnuts, the value of which was claimed as a deduction in the turnover within the State and paid tax on such purchase to the State was not in dispute. Nor was there any controversy that the sale

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price of the oil expressed out of and sold either as raw groundnut oil, refined oil or hydrogenated oil was included in the turnover of the appellant.

The Deputy Commercial Tax Officer, Kurnool, who completed the assessment of the appellant accepted the figures of purchases and sales submitted by it, and dealing with the claim for the deduction of the purchase price of the groundnuts from the proceeds of the sale of all oil by the company—raw, refined and hydrogenated—granted a deduction in respect of the purchase price of the groundnuts attributable to the unrefined oil sold by the appellant, but held that the appellant was not entitled to the deduction claimed in respect of the refined and hydrogenated oil for the reason that it was only unrefined or unprocessed groundnut oil that was connoted by the expression 'groundnut oil' in rule 5(1)(k) read with rule 18(1) and (2) of the Turnover and Assessment Rules. This order of the Deputy Commercial Tax Officer was affirmed by the Commercial Tax Officer on appeal and the appellant filed a further appeal to the Sales-Tax Appellate Tribunal. The second appellate authority upheld the contention of the appellant in regard to the sale of refined oil but rejected it in so far as it related to the sales of hydrogenated oil. The matter was thereafter brought up before the High Court of Andhra Pradesh by a Tax Revision Case filed under s. 13(b)(1) of the Act and the learned Judges upheld the view of the Tribunal and disallowed the claim of the appellant to the deduction claimed in regard to the sales turnover of hydrogenated oil. They granted the certificate under Art. 133 which has enabled the appellant to file an appeal to this Court.

The claim of the appellant to the deduction under r. 18(2) on the sales of refined groundnut oil is no longer in dispute. The ground upon which both the Tribunal as well as the High Court decided against the allowance of the deduction in respect of the sales of hydrogenated oil, while upholding the appellants' case as regards refined oil may be briefly stated thus: The exemption or deduction from the sale-turnover under r. 18(2), is on its terms applicable only to the sale of the oil in the form in which it is when extracted

out of the kernel. When raw groundnut oil is converted into refined oil, there is no doubt processing, but this consists merely in removing from raw groundnut oil that constituent part of the raw oil which is not really oil. The elements removed in the refining process consist of free fatty acids, phosphotides and unsaponifiable matter. After the removal of this non-oleic matter therefore, the oil continues to be groundnut oil and nothing more. The matter removed from the raw groundnut oil not being oil cannot be used, after separation, as oil or for any purpose for which oil could be used. In other words, the processing consists in the non-oily content of the raw oil being separated and removed, rendering the oily content of the oil 100 per cent. For this reason refined oil continues to be groundnut oil within the meaning of rules 5(1)(k) and 18(2) notwithstanding that such oil does not possess the characteristic colour, or taste, odour, etc. of the raw groundnut oil.

But in the case of hydrogenated oil which is prepared from refined oil by the process of passing hydrogen into heated oil in the presence of a catalyst (usually finely powdered nickel), two atoms of hydrogen are absorbed. A portion of the oleic acid which formed a good part of the content of the groundnut oil in its raw state is converted, by the absorption of the hydrogen atoms, into stearic acid and it is this which gives the characteristic appearance as well as the semi-solid condition which it attains. In the language of the Chemist, an inter-molecular or configurational chemical change takes place which results in the hardening of the oil. Though it continues to be the same edible fat that it was before the hardening, and its nutritional properties continue to be the same, it has acquired new properties in that the tendency to rancidity is greatly removed, is easier to keep and to transport. Both the Tribunal as well as the learned Judges of the High Court held that the hydrogenated oil (or Vanaspati) ceased to be groundnut oil by reason of the chemical changes which took place which resulted in the acquisition of new properties including the loss of its fluidity. In other words,

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they held that Vanaspati or hydrogenated oil was not "groundnut oil" but a product of groundnut oil, manufactured out of groundnut oil and therefore not entitled to the benefit of the deduction under r. 18(2).

The arguments of Mr. Visvanatha Sastri for the appellants were briefly two: (1) The reasons behind the rules 5(k) & 18(2) which were designed to afford relief against what would amount practically to double taxation of the same assessee both when he purchased and when he sold the goods, required that the appellants' claim should be allowed. (2) Hydrogenated groundnut oil was no less groundnut oil than either refined or even unrefined oil. The fact that the quality of the oil had been improved does not negative its continuing to be oil and the materials before the departmental authorities and the Court established that it continued to be oil and was nothing more.

The argument based on the reason of the rule cannot carry the appellant far, since in the present case it is an exemption from tax which he invokes and of which he seeks the benefit. If the words of the rule are insufficient to cover the case, the reason behind the rule cannot be availed of to obtain the relief. Nor could it be said to be a case of double taxation of the same goods at the purchase and sale points which is forbidden by s. 3(5) of the Act. If the view adopted by the learned Judges of the High Court that hydrogenated groundnut oil is not "groundnut oil" but a product of groundnut oil were correct, learned Counsel cannot urge that he would still be entitled to the deduction for which provision is made in r. 18(2).

Consequently it is the second of the submissions alone which really requires to be examined. In doing so it would be convenient to consider the reasoning on the basis of which the view that hydrogenated oil was not "groundnut oil" was sought to be sustained before us.

The learned Advocate-General of Andhra Pradesh who appeared for the respondent-Commercial Tax Officer sought to support the decision of the High Court by two lines of reasoning. The first was that

the exemption applied only to the sale of the oil as it emerged from the presser and that any processing of the oil including refining, in order to remove even the impurities and free fatty acids, took it out of the category of "groundnut oil" as used in the rule. In support of this submission he referred us to the Table of Conversion of groundnuts and kernel into oil set out in the Explanation to r. 18(2), extracted earlier, and submitted that the 40 lb. of oil for every 100 lb. of kernel was based on the yield of raw groundnut oil and that this was an indication that nothing other than raw groundnut oil was intended to be covered by the expression "groundnut oil" in the rule.

We must however point out that this last submission has no factual basis to support it. It is not known whether the proportion of 40 lb. of oil for every 100 lb. of kernel represents the average weight of oil extractable from different varieties of groundnut kernels or is the average of the different types of oils which may be produced out of different varieties of kernels. In the absence of any definite data in this regard it is impossible to accept the argument that the Table of Conversion justifies any particular construction of what was meant by "groundnut oil" in the main part of the rule.

Nor is the learned Advocate-General well-founded in his submission that the processing of the oil in order to render it more acceptable to the customer by improving its quality would render the oil a commodity other than "groundnut oil" within the meaning of the rule. For instance, if the oil as extracted were kept still in a vessel for a period of time, the sediment normally present in the oil would settle at the bottom leaving a clear liquid to be drawn out. The learned Advocate-General cannot go so far as to say, that if this physical process was gone through, the oil that was decanted from the sediment which it contained when it issues out of the expresser, ceased to be "groundnut oil" for the purposes of the rule. If the removal of impurities by a process of sedimentation does not render groundnut oil any the less so, it follows that even the process of refining, by the

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application of chemical methods for removing impurities in the oil, would not detract from the resulting oil being " groundnut oil " for the purpose of the rule. It may be mentioned that processes have been discovered by which even on extraction from the oil mill, the oil issues without any trace of free fatty acids. It could hardly be contended that if such processes were adopted what comes out of the expresser is not groundnut oil. The submission of the learned Advocate-General based on a contention that the Tribunal and the learned Judges of the High Court erred in holding that even refined groundnut oil was " groundnut oil " for the purpose of the rule, must be rejected.

The next question is whether if beyond the process of refinement of the oil, the oil is hardened, again by the use of chemical processes it is rendered any the less groundnut oil ". In regard to this, the learned Advocate-General first laid stress on the fact that while normally oil was a viscous liquid, the hydrogenated oil was semi-solid and that this change in its physical state was itself indicative of a substantial modification of the identity of the substance. We are unable to accept this argument. No doubt, several oils are normally viscous fluids, but they do harden and assume semi-solid condition on the lowering of the temperature. Though groundnut oil is, at normal temperature, a viscous liquid, it assumes a semi-solid condition if kept for a long enough time in a refrigerator. It is therefore not correct to say that a liquid state is an essential characteristic of a vegetable oil and that if the oil is not liquid, it ceases to be oil. Mowrah oil and Dhup oil are instances where vegetable oils assume a semi-solid state even at normal temperatures. Neither these, nor cocoanut oil which hardens naturally on even a slight fall in temperature, could be denied the name of oils because of their not being liquid. Other fats like ghee are instances where the physical state does not determine the identity of the commodity.

The next submission of the learned Advocate-General was that in the course of hydrogenation the oil

absorbed two atoms of hydrogen and that there was an inter-molecular change in the content of the substance. This however is not decisive of the matter. The question that has still to be answered is whether hydrogenated oil continues even after the change to be "groundnut oil". If it is, it would be entitled to the benefit of the deduction from the turnover, or to put it slightly differently, the benefit of the deduction from the turnover cannot be denied, unless the hydrogenated groundnut oil has ceased to be "groundnut oil". To be groundnut oil, two conditions have to be satisfied. The oil in question must be from groundnut and secondly the commodity must be "oil". That the hydrogenated oil sold by the appellants was out of groundnut not being in dispute, the only point is whether it continues to be oil even after hydrogenation. Oil is a chemical compound of glycerine with fatty acids or rather a glyceride of a mixture of fatty acids—principally oleic, linoleic, stearic and palmitic, the proportion of the particular fat varying in the case of the oil from different oil-seeds and it remains a glyceride of fatty acids even after the hardening process, though the relative proportion of the different types of fatty acids undergoes a slight change. In its essential nature therefore no change has occurred and it remains an oil—a glyceride of fatty acids—that it was when it issued out of the press.

In our opinion, the learned Judges of the High Court laid an undue emphasis on the addition by way of the absorption of the hydrogen atoms in the process of hardening and on the consequent inter-molecular changes in the oil. The addition of the hydrogen atoms was effected in order to saturate a portion of the oleic and linoleic constituents of the oil and render the oil more stable thus improving its quality and utility. But neither mere absorption of other matter, nor inter-molecular changes necessarily affect the identity of a substance as ordinarily understood. Thus for instance there are absorptions of matter and inter-molecular changes which deteriorate the quality or utility of the oil and it might be interesting to see if such additions and alterations could be taken to

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render it any the less "oil". Groundnut oil when it issues out of the expresser normally contains a large proportion of unsaturated fatty acids—oleic and linoleic—which with other fatty acids which are saturated are in combination with glycerine to form the glyceride which is oil. The unsaturated fatty acids are unstable, i. e., they are subject to oxidative changes. When raw oil is exposed to air particularly if humid and warm, i.e., in a climate such as obtains in Madras, oxygen from the atmosphere is gradually absorbed by the unsaturated acid to form an unstable peroxide (in other words the change involves the addition of two atoms of oxygen) which in its turn decomposes breaking up into aldehydes. It is this oxidative change and particularly the conversion into aldehydes that is believed to be responsible for the sharp unpleasant odour, and the characteristic taste of rancid oil. If nothing were done to retard the process the rancidity may increase to such extent as to render it unfit for human consumption. The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the quality of the oil is improved in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil.

Both the Tribunal as well as the High Court have pointed out that except for its keeping quality without rancidity and ease of packing and transport without leakage, hydrogenated oil serves the same purpose as a cooking medium and has identical food value as refined groundnut oil. There is no use to which the groundnut oil can be put for which the hydrogenated oil could not be used, nor is there any use to which the hydrogenated oil could be put for which the raw oil could not be used. Similarly we consider that hydrogenated oil still continues to be "groundnut oil" notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus improving its keeping qualities for

those who desire to consume groundnut oil. In our opinion, the assessee-company was entitled to the benefit of the deduction of the purchase price of the kernel—or groundnut, under r. 18(2), which went into the manufacture of the hydrogenated groundnut oil from the sale turnover of such oil.

One other point which is involved in the appeal relates to the claim of the appellant to a deduction in respect of the freight-charges included in the price of the commodity. Under r. 5(1)(g) of the Turnover and Assessment Rules, in determining the net turnover of a dealer he is entitled to have deducted from his gross turnover "all amounts falling under the following two heads, *when specified and charged for by the dealer separately, without including them in the price of the goods sold*:

(i) freight;

(ii) .....".

The appellant claimed exemption on a sum of Rs. 3,88,377-13-3 on the ground that it represented the freight in respect of the goods sold by the appellant asserting that they had been charged for separately. The assessing-officer rejected the claim and this rejection was upheld by the departmental authorities and by the High Court in Revision. It would be seen that in order to claim the benefit of this exemption the freight should (1) have been specified and charged for by the dealer separately, and (ii) the same should not have been included in the price of the goods sold. The learned Judges of the High Court held that neither of these conditions was satisfied by the bills produced by the appellant. We consider, the decision of the High Court on this point was correct. In the specimen bill which the learned Counsel for the appellants has placed before us, after setting out the quantity sold by weight (23,760 lb.) the price is specified as 15 annas 9 pies per lb. and the total amount of the price is determined at Rs. 23,388-12-0. From this the railway freight of Rs. 1,439-12-0 is deducted and the balance is shown as the sum on which sales-tax has been computed.

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From the contents of this invoice it would be seen that the appellant has charged a price inclusive of the railway freight and would therefore be outside the terms of r. 5(1)(g) which requires that in order to enable a dealer to claim the deduction it should be charged for separately and not included in the price of goods sold. The conditions of the rule not having been complied with, the appellant was not entitled to the deduction in respect of freight.

The result therefore is that the appeal is allowed in part and the order of the High Court in so far as it denied to the appellant the benefit of the deduction in the turnover provided by r. 18(2) of the Turnover and Assessment Rules is set aside.

In view of the appellant having succeeded only in part, there will be no order as to costs in this appeal.

Appeal allowed in part.

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October 18.

THE STATE OF MAHARASHTRA

v.

VISHNU RAMCHANDRA

(M. HIDAYATULLAH and J. C. SHAH, JJ.)

Externment—Order, if can relate to antecedents of convicted offenders—Statute, if prospective or retrospective—Bombay Police Act, 1951 (22 of 1951), ss. 57(1), 142—Indian Penal Code, ss. 114, 380, 411.

On November 16, 1949, the respondent was convicted under ss. 380 and 114 of the Indian Penal Code. On October 15, 1957, the Deputy Commissioner of Police, Bombay, acting under s. 57(1) of the Bombay Police Act passed an order externing him from the limits of Greater Bombay. Later he was prosecuted and convicted under s. 142 of the Bombay Police Act by the Presidency Magistrate for returning to the area from which he was externed. On an application for revision the High Court acquitted the respondent upholding his contention that s. 57 of the Bombay Police Act was not retrospective and was not applicable unless the conviction on which the externment was based took place after the Act came into force. On appeal by the appellant with the special leave of this Court it was

Held, that though statutes must ordinarily be interpreted prospectively unless the language makes them retrospective, either expressly or by necessary implication, and penal statutes creating new offences are always prospective, penal statutes creating disabilities though ordinarily interpreted prospectively are sometimes interpreted retrospectively when the intention is not to punish but to protect the public from undesirable persons whose past conduct is made the basis of future action.

Midland Ry. Co. v. *Pye*, 10 C.B. (N.S.) 179, *Rex* v. *Birthwhistle*, (1889) 58 L.J. (N.S.) M.C. 158, *Queen* v. *Vine*, [1875] 10 Q.B. 195, *Ex parte Pratt*, [1884] 12 Q.B. 334, *Bourke* v. *Nutt*, [1898] 1 Q.B. 725, *Ganesan* v. *A.K. Joscelyne*, A.I.R. 1957 Cal. 33, *Taher Saifuddin* v. *Tyebbhai Moosaji*, A.I.R. 1953 Bom. 183, *The Queen* v. *Inhabitants of St. Mary Whitechapel*, [1848] 12 Q.B. 120 (E): 116 E.R. 811 and *Rex* v. *Austin*, [1913] 1 K.B. 551, considered and applied.

Section 57 of the Bombay Police Act did not create a new offence but was designed to protect the public from the activities of undesirable persons convicted of particular offences and enabled the authorities to take note of their activities in order to put them outside the areas of their activities for preventing any repetition of such activities in the future.

The verb "has been" as used in s. 57 meant "shall have been". Legislation which takes note of a convicted offender's antecedents for restraining him from his acts cannot be said to be applied retrospectively as long as the action taken against him is after the Act comes into force. The Act in question was thus not applied retrospectively but prospectively.

An externment order must be *bona fide* and must relate to a conviction which is sufficiently proximate in time.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 78 of 1959.

Appeal by special leave from the judgment and order dated November 25, 1958, of the former Bombay High Court in Criminal Revision Application No. 1393 of 1958 arising out of the judgment and order dated September 18, 1958, of the Presidency Magistrate II Class, Mazagaon at Bombay in Case No. 1101/P of 1958.

R. H. Dhebar, for the appellant.

The respondent did not appear.

1960. October 18. The Judgment of the Court was delivered by

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HIDAYATULLAH J.—This is an appeal by the State of Bombay, with the special leave of this Court, against the order of acquittal by the High Court of Bombay of the respondent, Vishnu Ramchandra, who was prosecuted under s. 142 of the Bombay Police Act and sentenced to six months' rigorous imprisonment by the Presidency Magistrate, 2nd Court, Mazagaon, Bombay.

On November 16, 1949, Vishnu Ramchandra was convicted under ss. 380 and 114 of the Indian Penal Code, and sentenced to one month's rigorous imprisonment. On October 15, 1957, the Deputy Commissioner of Police, Bombay, acting under s. 57(a) of the Bombay Police Act (22 of 1951), passed an order against Vishnu Ramchandra which was to operate for one year, externing him from the limits of Greater Bombay. At that time, a prosecution under s. 411 of the Indian Penal Code was pending against Vishnu Ramchandra, and he was not immediately externed, to enable him to attend the case. This prosecution came to an end on July 10, 1958, and resulted in his acquittal. Immediately afterwards, a constable took him outside the limits of Greater Bombay, and left him there. The prosecution case was that he returned to Greater Bombay, and was arrested at Pydhonie on August 24, 1958. He was prosecuted under s. 142 of the Bombay Police Act. His plea that he was forcibly brought back to Pydhonie and arrested was not accepted by the Presidency Magistrate, and he was convicted.

He filed a revision application, which was heard by a learned single Judge of the High Court of Bombay. Three contentions were raised before the High Court. The first was that the Deputy Commissioner of Police had not applied his mind to the facts of the case before making the order of externment. The second was that s. 57 of the Bombay Police Act was prospective, and could not be made applicable, unless the conviction on which the action of externment was based, took place after the coming into force of that Act. The third was that the belief entertained by the Deputy Commissioner that Vishnu Ramchandra was

likely to engage himself in the commission of an offence similar to that for which he was prosecuted was based on the prosecution which was then pending, and that that ground disappeared after his acquittal. The High Court did not consider the first and the third grounds, because it held that the second ground was good.

Section 57 of the Bombay Police Act reads as follows:

"*Removal of persons convicted of certain offences.*—

If a person has been convicted—

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code (XLV of 1860), or

(b) twice of an offence under section 9 or 23 of the Bombay Beggars Act, 1945 (Bom. XXIII of 1945,) or under the Bombay Prevention of Prostitution Act, 1923 (Bom. XI of 1923), or

(c) thrice of an offence within a period of three years under section 4 or 12A of the Bombay Prevention of Gambling Act, 1887 (Bom. IV of 1887), or under the Bombay Prohibition Act, 1949 (Bom. XXV of 1949) the Commissioner, the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself".

In reaching his conclusion, the learned single Judge observed that the legislature had used the present participle "has been" and not the past participle in the opening portion of the section, and that this indicated that the section was intended to be used only where a person was convicted subsequent to the coming into force of the Act. He further observed that being a penal section, it had to be interpreted prospectively. He repelled an argument of the Assistant

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Government Pleader that s. 57 merely re-enacted the provisions of s. 27 of the City of Bombay Police Act, 1902, and that a liability incurred under the older Act was preserved by s. 167 of the Bombay Police Act of 1951. Observing further that the Deputy Commissioner of Police at the time of the passing of the order could not be said to have entertained a belief about the activities of Vishnu Ramchandra based upon his conviction in the year 1949, he held that the order of externment must be regarded as invalid for that reason and also on the ground that the conviction was not after the coming into force of the Act.

At the hearing before us, the respondent was not represented. We have heard Mr. Dhebar in support of the appeal, and, in our opinion, the High Court was not right in the view it had taken of s. 57 of the Act. The question whether an enactment is meant to operate prospectively or retrospectively has to be decided in accordance with well-settled principles. The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statutes makes them retrospective, either expressly or by necessary implication. Penal statutes which create new offences are always prospective, but penal statutes which create disabilities, though ordinarily interpreted prospectively, are sometimes interpreted retrospectively when there is a clear intendment that they are to be applied to past events. The reason why penal statutes are so construed was stated by Erle, C. J., in *Midland Rly. Co.* v. *Pye* (1) in the following words:

"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment".

This principle has now been recognised by our Constitution and established as a Constitutional restriction on legislative power.

(1) 10 C.B. (N.S.) 179, 191.

There are, however, statutes which create no new punishment, but authorise some action based on past conduct. To such statutes, if expressed in language showing retrospective operation, the principle is not applied. As Lord Coleridge, C. J., observed during the course of arguments in *Rex* v. *Birthwhistle* (1):

"Scores of Acts are retrospective, and may without express words be taken to be retrospective, since they are passed to supply a cure to an existing evil." Indeed, in that case which arose under the Married Women (Maintenance in Case of Desertion) Act, 1886, the Act was held retrospective without express words. It was said:

"It was intended to cure an existing evil and to afford to married women a remedy for desertion, whether such desertion took place before the passing of the Act or not."

Another principle which also applies is that an Act designed to protect the public against acts of a harmful character may be construed retrospectively, if the language admits such an interpretation, even though it may equally have a prospective meaning. In *Queen* v. *Vine* (2), which dealt with the disqualification of persons selling spirits by retail if convicted of felony, the Act was applied retrospectively to persons who were convicted before the Act came into operation. Cockburn, C. J., observed:—

"If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public houses in which spirits are retailed being kept by persons of doubtful character...On looking at the Act, the words used seem

(1) (1889) 58 L.J. (N.S.) M.C. 158. (2) [1875] 10 Q.B. 195.

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to import the intention to protect the public against persons convicted in the past as well as in future; the words are in effect equivalent to 'every convicted felon'."

In the same case, Archibald, J., expressed himself forcefully when he observed :—

"I quite agree, if it were simply a penal enactment, that we ought not to give it a retrospective operation ; but it is an enactment with regard to public and social order, and infliction of penalties is merely collateral."

Similarly, in *Ex Parte Pratt* (1), which dealt with the words "a debtor commits an act of bankruptcy" to enable the Court to make a receiving order, Cotton, L. J., gave the words a retrospective operation, observing :—

"I think that no reliance can be placed on the words 'commits' as showing that only acts of bankruptcy committed after the Act came into operation are intended."

In the same case, the observations of Bowen, L. J., were :—

"I think that the more the Act is studied the more it will be found that it is framed in a very peculiar way. I do not mean to say that it is inartistically framed. I think it is framed on the idea that a bankruptcy code is being constructed, and when the present tense is used, it is used, not in relation to time, but as the present tense of logic."

Fry, L. J., added :—

"I entirely agree with Bowen, L. J., as to the meaning of the present tense in the section ; it is used, I think, to express a hypothesis, without regard to time."

In *Bourke* v. *Nutt* (2), Lord Esher, M. R., speaking of these observations of Bowen and Fry, LL. J., observed :—

"...the case seems to show that when the present tense is used in this statute (s. 32 of the Bankruptcy Act, 1883) the time to be considered is the time at

(1) [1884] 12 Q.B. 334. (2) [1894] 1 Q.B. 725.

which the Court has to act, and not the time at which the condition of things on which it has to act came into existence."

Applying the above principles, Lord Esher, M. R., held that the section was not retrospective but prospective, because the important time was that at which it had to be considered whether the person was disqualified and it related to a time after the passing of the Act. He, however, added that "even if it could be said that it is retrospective, its enactments are solely for the public benefit, and the rule that restricts the operation of a penal retrospective statute does not apply, because this statute is not penal."

These principles, though not unanimously expressed, have been accepted in later cases both in England and in India. In *Ganesan* v. *A. K. Joscelyne* (1), Chakravarti, C. J., observed, Sarkar, J. (as he then was), concurring:—

"I may state, however, that in spite of the ordinary and I might almost say cardinal rule of construction that statutes, particularly statutes creating liabilities, ought not to be so construed as to given them a retrospective operation unless there is a clear provision to that effect or a necessary intendment implied in the provisions, there is another principle on which Courts have sometimes acted. It has been held that where the object of an Act is not to inflict punishment on anyone but to protect the public from undesirable persons, bearing the stigma of a conviction or misconduct on their character, the ordinary rule of construction need not be strictly applied."

In *Taher Saifuddin* v. *Tyebbhai Moosaji* (2), the same principles were applied by Chagla, C. J. and Bhagwati, J. (as he then was), and reference was made also to *The Queen* v. *Inhabitants of St. Mary Whitechapel* (3) where Lord Denman, C. J., in his judgment observed:—

"...it was said that the operation of the statute was confined to persons who had become widows after

(1) A.I R. 1957 Cal. 33, 38. (2) A.I.R. 1953 Bom. 183, 186, 187.
(3) [1848] 12 Q.B. 120 (B): 116 E.R. 811.

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the Act passed, and that the presumption against a retrospective statute being intended supported this construction; but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

Now, s. 57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons who have been convicted of offences of a particular kind. The section only enables the authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities. As observed by Phillimore, J., in *Rex* v. *Austin* (1),

"No man has such a vested right in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history."

An offender who has been punished may be restrained in his acts and conduct by some legislation, which takes note of his antecedents; but so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively. The Act in question was thus not applied retrospectively but prospectively.

It remains only to consider if the language of the section bars an action based on past actions before the Act was passed. The verb "has been" is in the present perfect tense, and may mean either "shall have been" or "shall be". Looking, however, to the scheme of the enactment as a whole and particularly the other portions of it, it is manifest that the former meaning is intended. The verb "has been" describes past actions, and, to borrow the language of Fry, L.J., in *Ex Parte Pratt* (2), "is used to express a hypothesis, without regard to time".

An externment order, however, to satisfy the

(1) [1913] 1 K.B. 551, 556. (2) [1884] 12 Q.B. 334.

requirements of s. 57 of the Bombay Police Act, must be made *bona fide*, taking into account a conviction which is sufficiently proximate in time. Since no absolute rule can be laid down, each case must depend on its own facts.

In the result, we set aside the acquittal, and remit the case to the High Court for disposal on the other points urged before it and in the light of observations made here by us.

Appeal allowed.

PANNALAL NANDLAL BHANDARI

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, BOMBAY.

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—General notice—Non-resident liability to submit return—Period of Limitation—Indian Income Tax Act, 1922 (XI of 1922), s. 22(1) & (2), s. 34(1)(a) & (b).

The appellant, a non-resident for the purposes of the Indian Income-tax Act, did not submit returns of certain dividend income accruing to him within the taxable territory. The Income-tax Officer served upon him notices under s. 34 read with s. 22(2) of the Act for assessment of tax in respect of those years. The notices in question were issued within eight years from the end of the years of assessment and were within the period prescribed by s. 34(1)(a). The appellant contended that notices for assessment were governed by cl. (1)(b) of s. 34 and not by cl. (1)(a), even though the appellant had not made a return of his income for the years in question as a general notice under s. 22(1) did not give rise to a liability to submit a return and his inaction did not amount to omission or failure to submit a return as he was a non-resident, and the assessment proceedings were barred by limitation.

Held, that the expression " every person " in s. 22(1) of the Indian Income-tax Act, 1922, includes all persons who are liable to pay tax and non-residents are not exempted from liability to submit a return pursuant to the general notice thereunder.

Once a notice is given by publication in the prescribed manner under s. 22(1), every person whether resident or non-resident whose income exceeds the maximum amount exempt from tax is obliged to submit a return and if he does not do so,

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it will be deemed that there was omission on his part to make a return within the meaning of s. 34(1)(a) of the Indian Income-tax Act. Section 34(1)(b) applied only to those cases where there was no omission or failure to make a return of the income or to make a full and true disclosure of facts material to the assessment.

In the instant case the proceedings for assessment were properly commenced within the period of limitation prescribed by s. 34(1)(a).

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 408 of 1957.

Appeal by Special Leave from the Judgment and Order dated the 28th September, 1955, of the former Bombay High Court in Income-tax Reference No. 5 of 1955.

Sanat P. Mehta, S.-N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the appellant.

A. N. Kripal, R. H. Dhebar and *D. Gupta*, for the respondent.

1960. October 18. The Judgment of the Court was delivered by

Shah J.

SHAH J.—To the appellant who was a non-resident for the purposes of the Indian Income Tax Act, 1922, had accrued in the assessment years 1943-44, 1944-45, 1946-47 and 1947-48 certain dividend income within the taxable territory of British India, but the appellant did not submit returns of his income for those assessment years. In exercise of his powers under s. 34 of the Indian Income Tax Act, 1922, the Income Tax Officer, Bombay City, served upon the appellant notices under s. 34 read with s. 22(2) of the Act for assessment of tax in respect of those years. The notice for the year 1943-44 was served on the appellant on March 27, 1952, for the year 1944-45 on February 16, 1953, for the year 1946-47 on April 4, 1951 and for the year 1947-48 on April 2, 1952. The Income Tax Officer completed the assessments in respect of the years 1943-44, 1944-45 and 1947-48 on May 6, 1953 and for the year 1946-47 on March 19, 1952. The orders of assessment were confirmed by the Appellate Assistant Commissioner and by the Income Tax Appellate Tribunal. At the instance of

the appellant, the Income Tax Appellate Tribunal drew up a statement of the case under s. 66(1) of the Income Tax Act and submitted to the High Court of Judicature at Bombay the following two questions:

(1) Whether the notices issued under s. 22(2) of the Act read with s. 34 of the Act for the assessment years 1943-44, 1944-45, 1946-47 and 1947-48 were served after the period of limitation prescribed by s. 34 of the Act?

(2) If the answer to Question No. 1 is in the affirmative, whether the assessments for the years in question were invalid in law?

The High Court answered the first question in the negative and observed that on that answer, the second question "did not arise". With special leave under Art. 136 of the Constitution, this appeal is preferred by the appellant against the order of the High Court.

The only question which falls to be determined in this appeal is whether the proceedings for assessment were commenced within the period of limitation prescribed for serving notice of assessment under s. 34(1)(a) of the Act. At the material time, by s. 34 (1)(a), the Income Tax Officer was invested with power amongst others to serve at any time within eight years from the end of any year of assessment notice of assessment if he had reason to believe that income, profits or gains had escaped assessment by reason of omission or failure on the part of the assessee to make a return of his income under s. 22 for that year, or to disclose fully and truly all material facts necessary for his assessment of that year. In those cases where the Income Tax Officer had in consequence of information in his possession reason to believe that income, profits or gains had escaped assessment even though there was no omission or failure as mentioned in cl. (a), he could under cl. (b) within four years from the end of the year of assessment serve a notice of assessment. Admittedly, the notices issued by the Income Tax Officer for the years in question were issued within eight years from the end of the years of assessment and if cl. (1)(a) of s. 34 applied, the assessment was not barred by the law of limitation.

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J.

But the appellant contended that the notices for assessment were, even though he had not made a return of his income for the years in question, governed not by cl. (1)(a) of s. 34, but by cl. (1)(b) of s. 34. He contended that being a resident outside the taxable territory in the years of assessment, a general notice under s. 22(1) did not give rise to a liability to submit a return, and his inaction did not amount to omission or failure to submit a return, inviting the applicability of s. 34(1)(a). He submitted that omission or failure to make a return can only arise qua a non-resident, if no return is filed after service of an individual notice under s. 22(2). In other words, the plea is that a notice under s. 22(1) imposes an obligation upon persons resident within the taxable territory and not upon non-residents, and support for this argument is sought to be obtained from s. 1 sub-s. (2) which extended the Income Tax Act at the material time to British India.

The expression "every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax" in s. 22(1) includes all persons who are liable to pay tax and there is nothing in the section or in its context which exempts non-residents from liability to submit a return pursuant to a notice thereunder. The fact that a non-resident assessee may not come to know of the general notice issued under s. 22(1) is not a ground for not giving effect to the plain words used in the section. In terms, the clause read with r. 18 requires every person who has taxable income to submit his return, and if he fails to do so, under s. 34 of the Act the Income Tax Officer may commence proceedings for assessment within the period prescribed by cl. (1)(a). Section 34(1)(b) applies only to those cases where there is no omission or failure to make a return of the income or to make a full and true disclosure of facts material to the assessment. To the appellant though non-resident income had admittedly accrued in the taxable territory and that income exceeded the maximum amount not chargeable to income-tax. The appellant not having submitted a return in pursuance of the notice issued under s. 22(1), the Income Tax

Officer was competent under s. 34(1)(a) to issue notice at any time within eight years of the end of the year of assessment for assessing him to tax. Once a notice is given by publication in the press and in the prescribed manner under s. 22(1), every person whose income exceeds the maximum amount exempt from tax is obliged to submit a return and if he does not do so, it will be deemed that there was omission on his part to a make a return within the meaning of s. 34(1)(a). There is no warrant for the submission that s. 22(1) applies to residents only and that an obligation to make a return on the part of a non-resident can only arise if a notice under sub-s. (2) is served. Under sub-s. (2) it is open to the Income Tax Officer to serve a special notice upon any person requiring him to furnish a return in the prescribed form, but that provision does not derogate from the liability arising under sub-s. (1) to submit a return.

The Income Tax Act extends by s. 1(2) to the taxable territory and not beyond; but within that territory, the Income Tax Officer has power to tax income which accrues, arises or is received, and that is not disputed by the appellant. If power to tax be granted, it is difficult to appreciate the ground on which the plea that the general provision imposing liability upon persons receiving taxable income is subject to an unexpressed limitation that it is to apply only to residents and not to non-residents. The submission that a person liable to pay tax but resident outside the taxable territory must be served with a special notice under s. 22(2) before his inaction in the matter of making a return may be deemed omission within the meaning of s. 34(1) is without force. There is no such express provision made by the statute and none can be implied from the context.

The High Court was therefore right in holding that the proceedings for assessment were properly commenced within the period of limitation prescribed by s. 34(1)(a) from the close of the year of assessment. The appeal fails and is dismissed with costs.

Appeal dismissed.

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October 18.

NATHMAL TOLARAM

v.

SUPERINTENDENT OF TAXES, DHUBRI AND ANOTHER.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax—Reassessment—Jurisdiction of the Sales Tax Officer—High Court's power in References—Advisory jurisdiction—Period of limitation for proceedings for reassessment—Assam Sales Tax Act, 1947 (Assam 17 of 1947), ss. 2(12), 16(2), 19, 19A, 32(8), 34.

The appellants who were dealers registered under the Assam Sales Tax Act, 1947, submitted a return of their turnover for the account period April 1, 1948 to September 30, 1948, which included sales in Assam of all goods other than jute. The Superintendent of Taxes, however, summarily assessed the appellants under sub-s. 4 of s. 17 of the Act by order dated September 30, 1950, to pay tax on sales of jute despatched by them to Calcutta during the account period. The order of assessment was confirmed by the Commissioner of Taxes. On an application by the appellants the Commissioner referred certain questions of law arising out of the assessment to the High Court, which then gave its opinion that as the consignments in question were not sales within the meaning of sub-s. 12 of s. 2 of the Act, they were not taxable, and that as to whether the sales could thereafter be assessed if they fell within the purview of the Explanation to sub-s. 12 of s. 2, it expressed no opinion. On receipt of the opinion the Commissioner directed the Superintendent of Taxes to dispose of the case in accordance with the judgment of the High Court. The Superintendent of Taxes then set aside the order of assessment dated September 30, 1950, and issued a notice to the appellants on January 30, 1953, directing them to produce the necessary evidence in order to enable him to ascertain whether the contract of sale involved in the case came within the purview of the Explanation to sub-s. 12 of s. 2 of the Act. The appellant claimed that the Superintendent had no jurisdiction to commence any further proceeding for assessment as the notice issued to him was beyond three years from the end of the assessment period as provided by s. 19 of the Act.

Held, that the High Court in answering the questions referred to it was exercising an advisory jurisdiction and could not and did not give any direction to the sales tax authorities to proceed to assess or not to assess the appellants to sales tax; it merely gave its opinion that the transactions were not sales within the meaning of s. 2, sub-s. 12 of the Act and were accordingly not taxable.

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Held, further, that the Commissioner not having issued any notice under s. 19A of the Act or exercised his revisional authority under s. 31, but having merely directed the case to be disposed of in accordance with the judgment of the High Court, the Superintendent of Taxes had no jurisdiction to initiate fresh proceedings for reassessment under s. 19 after the expiry of three years from the assessment period.

Commissioner of Income Tax, Bombay Presidency and Aden and others v. *Bombay Trust Corporation Ltd.*, (1936) L.R. 63 I. A. 408, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 196 of 1958.

Appeal by special leave from the judgment and order dated April 27, 1953, of the Assam High Court in Civil Rule No. 66 of 1953.

Sukumar Mitter and *Sukumar Ghose*, for the appellant.

Veda Vyasa and *Naunit Lal*, for the respondents.

1960. October 18. The Judgment of the Court was delivered by

Shah J.

SHAH J.—The appellants are dealers registered under the Assam Sales Tax Act XVII of 1947—hereinafter referred to as the Act. For the account period April 1, 1948 to September 30, 1948, the appellants submitted a return of their turnover which included sales in Assam of all goods other than jute. The Superintendent of Taxes, Dhubri, summarily assessed the appellants under sub-s. 4 of s. 17 of the Act to pay tax on sales of jute despatched by them to Calcutta during the account period. Appeals against the order of assessment to the Assistant Commissioner of Taxes and to the Commissioner of Taxes, Assam, proved unsuccessful. The appellants then applied to the Commissioner of Taxes to refer certain questions arising out of the assessment to the High Court in Assam under s. 34 of the Act. The Commissioner referred the following questions and another to the High Court of Judicature in Assam:

(1) Whether, in view of the aforesaid facts and circumstances the turnover from 20,515 maunds of

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jute mentioned under item (i) is taxable under the Act?

(2) Whether, in view of the aforesaid facts and circumstances the turnover from 5,500 maunds of jute mentioned under item (ii) is taxable under the Act?

(3) Whether, in view of the aforesaid facts and circumstances, the turnover from 25,209 maunds of jute mentioned under item (iii) is taxable under the Act?

In respect of each of the three questions 1 to 3, the High Court recorded the following answer:

"Not being a sale within the meaning of sub-s. 12 of s. 2 of the Act, the consignments are not taxable".

The High Court, however observed:

"As to whether these consignments can hereafter be assessed if they fall within the purview of the Explanation to sub-s. 12 of s. 2, we express no opinion".

As required by s. 32(8) of the Act, the Commissioner of Taxes by his order dated August 1, 1952, directed the Superintendent of Taxes to dispose of the case in accordance with the judgment of the High Court. The Superintendent of Taxes thereafter issued on January 30, 1953, the following notice to the appellants:

"In view of the Hon'ble High Court's order in Sales-tax Reference No. 3 of 1951, the assessment order dated 30th September, 1950, for the return period 30th September, 1948, has been set aside and you are directed to produce necessary evidence, contract papers, account books, etc.....in order to see whether the contract of sale involved in this case come within the purview of the Explanation to sub-s. 12 of s. 2 of the Act".

By their letter dated March 23, 1953, the appellants called upon the Commissioner of Taxes to direct the Superintendent of Taxes not to proceed with the notice. The Commissioner having failed to direct as requested, the appellant petitioned the High Court in Assam under Art. 226 of the Constitution for a writ

prohibiting the Superintendent of Taxes from re-opening and proceeding with the assessment of the appellants under the Assam Sales Tax Act and for a writ quashing the order dated August 1, 1952, passed by the Commissioner. The High Court summarily dismissed the petition. Against the order passed by the High Court, this appeal is filed with special leave under Art. 136 of the Constitution.

The High Court, in answering the questions submitted to it, was exercising an advisory jurisdiction and could not and did not give any direction to the sales tax authorities to proceed to assess or not to assess the appellants to sales tax: it merely recorded its opinion that the transactions referred to in the questions were not sales within the meaning of s. 2, sub-s. 12, of the Act and were accordingly not taxable. Pursuant to the opinion of the High Court, the Commissioner directed the Superintendent of Taxes to dispose of the case "in accordance with" the judgment of the High Court; but the Superintendent of Taxes thought that he was entitled to re-open the assessment proceedings and to assess the appellants in the light of the Explanation to s. 2, sub-s. 12. In so doing, the Superintendent of Taxes, in our judgment, acted without authority. The Superintendent had made the assessment, and that assessment was confirmed in appeal by the Assistant Commissioner. On the questions arising out of that assessment, the High Court had opined that the transactions sought to be assessed were not liable to tax. The Superintendent of Taxes, on this opinion was right in vacating the order of assessment. But any further proceeding for assessment which he sought to commence by issuing a notice requiring the appellants to produce evidence, contract papers, account books, etc. so as to enable him to determine whether the transactions were taxable under the Explanation to sub-s. 12 of s. 2 had to be supported by some authority under the Act. The Superintendent of Taxes has not referred to the authority in exercise of which he issued this notice. It is true that under s. 19 of the Act, the "taxation Officer" if satisfied upon information coming into his possession that any

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dealer has been liable to pay tax under the Act in respect of any period and has failed to apply for registration and to make the return required of him, may at any time within three years of the end of the aforesaid period serve on the dealer a notice containing all or any of the requirements which may be included in a notice under sub-s. 2 of s. 16 and may proceed to assess the dealer in respect of such period. But admittedly, the appellants were registered as dealers and had submitted their returns: the power to reassess could not therefore be exercised by virtue of s. 19 of the Act. Under s. 19-A, the Commissioner has also power, if satisfied upon information coming into his possession, that any turnover in respect of sales of any goods chargeable to tax has escaped assessment during the return period, to serve at any time within three years of the aforesaid period, on the dealer liable to pay the tax in respect of such turnover a notice containing all or any of the requirements which may be included in a notice under sub-s. 2 of s. 16 and may proceed to assess or reassess the dealer in respect of such period. But the Commissioner had not issued any such notice under s. 19A. Nor had the Commissioner in exercise of his revisional authority under s. 31 of the Act set aside the original order of assessment. The Commissioner merely directed under s. 32, sub-s. 8, that the case be disposed of in accordance with the judgment of the High Court, and acting under that direction, the Superintendent of Taxes had no power to reopen the assessment and to call upon the appellants to produce documentary evidence with a view to commence an enquiry whether the sales involved in the case fell " within the purview of the Explanation to s. 2 sub-s. 12 ". In any event, the account period as has already been observed was April 1, 1948 to September 30, 1948, and three years from the end of that period, expired before the date on which the notice was issued. Fresh proceedings for reassessment could not be initiated by the Superintendent of Taxes under s. 19 after the expiry of three years from the assessment period assuming that this could be regarded as a case of failure to apply for

registration and to make a return required of the appellants.

In support of his contention that the Superintendent of Taxes had authority to proceed to reassess the appellants in the light of the observations made in the judgment of the High Court, counsel for the appellants invited our attention to the judgment of the Privy Council in *Commissioner of Income Tax, Bombay Presidency and Aden and others* v. *Bombay Trust Corporation Ltd.* (1). In that case, a foreign company was assessed by the Income Tax authorities in the name of a resident company for profits and gains received by the latter as its agent under ss. 42(1) and 43 of the Indian Income-tax Act, 1922. In a reference under s. 66 of the Income-tax Act, the High Court at Bombay opined that the assessment was illegal. The Commissioner of Income-tax thereafter sent back the case with a direction to set aside the assessment and to make a fresh assessment after making such further enquiry as the Income-tax Officer might think fit. Acting upon that order, the Income-tax Officer required the resident company as agent of the foreign company to produce or cause to be produced books of account for the year of assessment and also to produce such other evidence on which it might seek to rely in respect of its return, and the resident company having failed to produce the books of the foreign company, he proceeded to make an assessment under s. 23(4) of the Income-tax Act, 1922. By its petition under s. 45 of the Specific Relief Act filed in the High Court at Bombay, the resident company prayed for an order for refund of the taxes already paid under the original assessment, and for an order for disposal of certain proceedings initiated by it before the Assistant Commissioner and the Income-tax Officer. The High Court made an order directing refund of tax paid, and further directing cancellation of assessment. In an appeal preferred by the Commissioner of Income-tax against the order of the High Court, it was observed by the Privy Council that the Commissioner was not obliged to discontinue proceedings against the resident

(1) (1936) L.R. 63 I.A. 408.

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company as agent of the foreign company in respect of the year of assessment, and it was within the jurisdiction of the Commissioner under s. 33(2) of the Income-tax Act to direct further enquiry if he thought such an enquiry to be reasonable and to be profitable in the public interest.

The principle of this case has in our judgment no application to the present case. The High Court at Bombay in its advisory jurisdiction had declared the assessment already made to be illegal. But the Commissioner was under s. 33 of the Indian Income-tax Act invested with jurisdiction to direct further enquiry, and he purported to exercise that jurisdiction. The Privy Council rejected the challenge to the exercise of that jurisdiction. In the present case, no proceedings were started by the Commissioner of Taxes in exercise of his revisional authority. The Commissioner of Taxes had directed the Superintendent of Taxes merely to dispose of the case according to the judgment of the High Court, and the Superintendent had to carry out that order. If he was competent—and on that question, we express no opinion—he could, if the conditions precedent to the exercise of his jurisdiction existed, proceed to reassess the appellants. But the proceedings for reassessment were clearly barred because the period prescribed for reassessment had expired. The Superintendent therefore had no power to issue a notice calling upon the appellants to produce evidence to enable him to start an enquiry which was barred by the expiry of the period of limitation prescribed by the Act. In the *Bombay Trust Corporation case* (supra), the Income-tax Officer acted in pursuance of the direction of the Commissioner lawfully given in exercise of revisional authority and reopened the assessment. In the present case, no such direction has been given by an authority competent in that behalf: and the Superintendent had no power to reassess the income under s. 19 assuming that the section applied to a case where the assessee though registered had failed to include his sales in a particular commodity in his turnover, because the period of limitation prescribed in that behalf had expired.

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The appeal must therefore be allowed and the order passed by the High Court set aside. In the circumstances of the case, no useful purpose will be served by remanding the case to the High Court. We accordingly direct that a writ quashing the proceedings commenced by the Superintendent of Taxes, Dhubri, by his notice dated January 30, 1953, be issued. The appellants will be entitled to their costs of the appeal.

Appeal allowed.

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October 19.

THAKUR KESARI SINGH

v.

THE STATE OF RAJASTHAN AND OTHERS.

(JAFER IMAM, A. K. SARKAR and RAGHUBAR DAYAL, JJ.)

Landlord and Tenant—General refusal of payment of rent—Notification by Government—Application for recovery of rent as arrears of land revenue—Rescission of notification—Validity of proceeding—Procedure—Marwar Tenancy Act, 1949 (XXXIX of 1949), s. 85—Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951 (I of 1951), s. 2.

The Marwar Tenancy Act, 1949, now repealed but which was in force in the State of Jodhpur at the relevant period, by s. 85 authorised the Government in case of any general refusal by tenants to pay rent to declare by notification that such rents might be recovered as arrears of land revenue. A notification having been issued by the Government of Rajasthan under that section the appellant, a jagirdar, applied to the Collector thereunder for the recovery of rents due to him from his tenants. The tenants also applied to the Collector stating that notice of the said application should be served on them and they should be given a hearing as required by the rule framed under the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951. The Collector rejected the tenants' application and passed an order directing the recovery of the sum found to be due to the appellant as arrears of land revenue. The Additional Commissioner on appeal and the Board of Revenue in revision upheld the Collector's order. But before the Board passed its order the

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Government rescinded the notification. The High Court on an application under Art. 226 of the Constitution held that although s. 85 of the Tenancy Act had not been repealed by the Revenue Courts Act, 1951, the rules framed under that section had been, and the non-compliance with the rules framed under the latter Act which should have been followed, was an error on the face of the record and quashed the orders directing that since the notification under s. 85 of the Tenancy Act had been rescinded no further action thereunder should be taken by the Collector.

Held, that there could be no doubt that s. 2 of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, 1951, had not repealed s. 85 of the Marwar Tenancy Act, 1949, and that the former Act contemplated its continuance, unfettered by the bar of limitation, and subject to this modification that an application under the section was no longer to be made to the Deputy Commissioner but to the Collector.

Section 85 of the Tenancy Act clearly contemplated that an application thereunder shall be heard and determined in the absence of the tenant. The right given by the section was a summary one and the application must be heard ex parte. It was not, therefore, necessary to serve any notice on the tenants.

It would not be correct to hold that the procedure of a contested proceeding as prescribed by Ch. II of the Rules framed under the Revenue Courts (Procedure and Jurisdiction) Act, 1951, could apply to the application for to apply them would be to wholly defeat its object.

Once a notification under the section had been issued and an application duly made, subsequent rescission of the notification could not divest the appropriate authority of the power already vested in him to dispose of the application.

Crown v. Vaveli, A.I.R. 1949 Lah. 191, held inapplicable.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 277 of 1955.

Appeal from the judgment and order dated April 27, 1954, of the Rajasthan High Court in Civil Mis. Writ No. 1/1954.

N. C. Chatterjee, Suresh Agarwal and *Ganpat Rai*, for the appellant.

R. K. Rastogi and *K. L. Mehta*, for the respondents.

1960. October 19. The Judgment of the Court was delivered by

Imam J.

IMAM J.—The appellant was the Jagirdar of Thikana Rakhi in the Marwar (Jodhpur) area of the State of Rajasthan. Within Thikana Rakhi was the

village of Khakharki. He had a number of tenants under him in the village who paid rent on the basis of a certain share of the produce of the land held.

There was an Act in force in the Marwar area called the Marwar Tenancy Act of 1949, hereafter referred to as the Tenancy Act, which had been passed by His Highness the Maharaja of Jodhpur before the integration of the State of Jodhpur in the State of Rajasthan. That Act now stands repealed but we are concerned with a period when it was in force. Section 78 of that Act provides that when rent is payable by a division of the produce or is based on an estimate or appraisement of the standing crop, the landlord or the tenant may apply to the Tahsildar for making the division, estimate or appraisement, when this could not be done amicably. Section 79 of the Tenancy Act lays down the procedure to be followed at the hearing of such an application and provides that any amount found due as rent by the Tahsildar on that application shall have the effect of a decree for arrears of rent.

On October 31, 1950, the appellant who had some difficulty in realising the rent from his tenants in village Khakharki, made an application under s. 78 of the Tenancy Act to the Tahsildar, Merta, within which the village Khakharki was situate. Before this application was finally disposed of, the Government of Rajasthan issued a Notification under s. 85 of the Tenancy Act which is set out below:

Jaipur, February 22, 1951. No. F. 4(74) Rev./1/51.—Whereas it has been made to appear that the cultivators of the villages mentioned in the Schedule below have refused to pay rent to the persons entitled to collect the same;

Now, therefore, in exercise of the power conferred by sub-sec. (1) of sec. 85 of the Marwar Tenancy Act, 1949 (No. XXXIX of 1949), the Government of Rajasthan is pleased to declare that such rents may be recovered as arrears of land revenue.

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by order of
His Highness the Rajpramukh,
H. D. Ujwal
Secretary to the
Government of Rajasthan,
Revenue Department.

This Notification was published in the Official Gazette on March 3, 1951, and one of the villages mentioned in the Schedule to it, was Khakharki. In view of the Notification, the appellant became entitled under s. 85, the terms of which will be set out later, to have the rents due to him from the tenants of Khakharki realised as arrears of land revenue. Accordingly, on March 9, 1951, he filed an application under that section in the Court of the Collector, Nagaur, within whose jurisdiction lay the village of Khakharki for recovery as arrears of land revenue of the rents due to him for 1950-51 from those tenants of Khakharki who had refused to pay them. Subsequently, on March 26, 1951, the appellant's application under s. 78 of the Tenancy Act was dismissed for reasons which it is not necessary for the purpose of this appeal to state.

On March 29, 1951, the tenants filed an application in the Court of the Collector of Nagaur stating that the notice of the appellant's application under s. 85 of the Tenancy Act should be served on them and they should be heard on that application as this was required by the rules framed under the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act of 1951, hereinafter referred to as the Revenue Courts Act, which governed that application. The Revenue Courts Act was an Act passed by the Rajpramukh of the State of Rajasthan with which the State of Jodhpur had integrated prior thereto, and it applied to the whole State of Rajasthan, including the Marwar area. This Act came into force on January 31, 1951. This application by the tenants was rejected by the Collector. Thereafter, on April 5, 1951, the Collector passed an order by which a total sum of Rs. 38,587-3-0 was found due to the appellant from the tenants on account of rent, other charges and court fees. The

Collector then sent the order to the Tahsildar of Merta for recovering that sum as arrears of land revenue.

The tenants filed an appeal before the Additional Commissioner, Jodhpur, challenging the validity of the order of the Collector dated April 5, 1951. This appeal was dismissed by the Additional Commissioner on November 2, 1951. The tenants then went in revision to the Board of Revenue, Rajasthan. The Board of Revenue took the view that the Revenue Courts Act had not affected the procedure to be followed on the hearing of an application under s. 85 of the Tenancy Act but it remanded the case to the Additional Commissioner as the tenants contended that the Additional Commissioner had not decided other points that arose in the appeal to him. The Additional Commissioner heard the tenants on the other points and again dismissed their appeal on July 7, 1952.

The tenants moved the Board of Revenue in revision against the order of July 7, 1952, also. Before the Board of Revenue could decide the revision case, the Government of Rajasthan on November 1, 1952, published another Notification rescinding the earlier Notification dated February 22, 1951, issued under s. 85 of the Tenancy Act. One of the points argued before the Board of Revenue in this revision case was that in view of the rescission of the Notification, no further proceedings could be taken under s. 85 of the Tenancy Act for recovery of rent as arrears of land revenue. The Board of Revenue rejected this and all other contentions raised on behalf of the tenants and dismissed the revision case on September 29, 1953.

Fortythree of the tenants filed a petition in the High Court for Rajasthan for a writ of certiorari to quash the orders of the Collector, the Additional Commissioner and the Revenue Board, earlier mentioned. The High Court allowed the petition and quashed and set aside these orders and held that the Notification under s. 85 of the Tenancy Act having been cancelled, no further proceedings for realisation of arrears of rent as arrears of land revenue could be taken by the Collector of Nagaur. The High Court however granted a certificate that the case was a fit one for appeal

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to the Supreme Court. Hence the present appeal. The rent found due has not been realised yet by the Tahsildar presumably, in view of the pending proceedings. The respondents to the appeal are the State of Rajasthan and various Revenue Officers of that State and the tenants. This appeal has been contested only by some of the tenants and the other respondents have not appeared before us.

Section 85 of the Tenancy Act is in these terms:

S. 85.—"(1) In case of any general refusal to pay rent to persons entitled to collect the same in any local area the Government may, by notification in the Official Gazette, declare that such rents may be recovered as arrears of land revenue.

(2) In any local area to which a notification made under sub-sec. (1) applies a landlord or any other person to whom an arrear of rent is due, may notwithstanding anything to the contrary in this or any other enactment for the time being in force, instead of suing for recovery of the arrear under this Act apply in writing to the Deputy Commissioner to realise the same, and the Deputy Commissioner shall after satisfying himself that the amount claimed is due, proceed subject to the rules made by the Government to recover such amount with costs and interest as an arrear of land revenue.

(3) The Deputy Commissioner shall not be made a defendant in any suit in respect of an amount for the recovery of which an order has been passed under this section.

(4) Nothing herein contained and no order passed under this section shall debar:—

(a) a landlord from recovering by suit or application any amount due to him which has not been recovered under this section;

(b) a person from whom any amount has been recovered under this section, in excess of the amount due from him, from recovering such excess by suit against the landlord or other person on whose application the arrear was realised.

The first point raised on behalf of the respondents in the High Court was that s. 85 of the Tenancy Act

had itself been repealed by the Revenue Courts Act and no action under that section could be taken after the latter Act had come into force.

The Revenue Courts Act was repealed in 1955 after the judgment of the High Court was delivered but this does not affect the question before us. The long title of the Act states that the Act is intended to provide for and regulate the jurisdiction and procedure of Revenue Courts and Officers, in Rajasthan. The preamble states " Whereas it is expedient, pending the enactment of a comprehensive law for the whole of Rajasthan relating to agricultural tenancy, land tenures, revenue, rent, survey, record, settlement and other matters connected with land, to provide for and regulate the jurisdiction and procedure of revenue courts and officers in relation to such matters arising under the laws in force in the covenanting States of Rajasthan ". Jodhpur was one of the covenanting States and one of the laws in force there, was the Tenancy Act. This Act continued to apply to the territories belonging to the former Jodhpur State which since the integration, formed part of the State of Rajasthan, till that Act was repealed as hereinbefore stated. Section 2 of the Act provides, " On and from the coming into force of this Act all existing laws shall, in so far as they relate to matters dealt with in this Act, be repealed ". It is said that the effect of s. 2 of the Revenue Courts Act is to repeal s. 85 of the Tenancy Act. The High Court was unable to accept this contention and we think rightly. Section 85 of the Tenancy Act would be repealed only if the Revenue Courts Act contained any provision dealing with the matter covered by it. We find no such provision in the Revenue Courts Act. The Revenue Courts Act deals with matters of jurisdiction and procedure of Revenue Courts. It does not deal with any substantive right. This is clear from the provisions of the Revenue Courts Act and, indeed, is not in dispute. Quite clearly, s. 85 creates, on the requisite notification being issued, a substantive right in a landlord to have the rent due to him recovered as arrears of land revenue. We do not find any provision

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in the Revenue Courts Act dealing with the substantive right created by s. 85 of the Tenancy Act. There is, therefore, no foundation for the argument that that section has been repealed by s. 2 of the Revenue Courts Act.

A reference to schedule 1 to Revenue Courts Act which gives a list of suits and applications triable by a Revenue Court and prescribes the periods of limitation applicable to and court fees payable on them can usefully be made now. The schedule is divided into several groups, of which group C contains a list of applications triable by a Collector. Item 2 of this group concerns applications "for realisation of rent as land revenue on the general refusal to pay rent". In regard to the period of limitation for such applications, it is stated there that none exists. We have no doubt that item 2 of group C in the schedule does not confer a substantive right to make an application for realisation of rent as land revenue at all. The purpose of the schedule appears from ss. 7, 9 and 10 of the Act which respectively provide that the jurisdiction of the various revenue courts, the periods of limitation for proceedings maintainable in these Courts and the court fees payable thereon are as stated in the schedule. The schedule is not operative by itself. So item 2 of group C in the schedule does not confer any right to apply for collection of rent as arrears of land revenue. On the other hand, the mention of such an application in the schedule clearly indicates that the Revenue Courts Act recognises that such an application is competent. Since the Revenue Courts Act itself does not authorise such an application, it must be so competent under other existing laws, reference to which has been made in the preamble and s. 2 of the Act. One of such laws is s. 85 of the Tenancy Act. Therefore it seems to us that the Revenue Courts Act, instead of repealing s. 85 of the Tenancy Act contemplates its continuance in force.

It is necessary before leaving this part of the case to refer to Ch. XIII of the Tenancy Act which deals with procedure and jurisdiction. It consists of ss. 118 to 144. Section 118 says that all suits and applications of the nature specified in the second schedule to

the Act shall be heard and determined by a Revenue Court. Section 124 states that all suits and other proceedings especified in the second schedule shall be instituted within the time prescribed for them in that schedule. Section 129 provides that a Deputy Commissioner shall have power to dispose of applications specified in group E of the second schedule. It is not necessary to refer to the other sections in this Chapter. Turning to second schedule, we find that group E is concerned with applications triable by a Deputy Commissioner. Item 4 of this group deals with applications under s. 85 " for collection of rent as land revenue in the event of general refusal to pay ". The period of limitation for such applications is stated there to be " so long as notification remains in force " and this period is stated to commence from the time when the notification under the section is published in the Official Gazette.

Now the Revenue Courts Act provides by s. 7 that all suits and applications of the nature specified in the first and second schedules shall be heard and determined by a revenue court. A revenue court is defined in s. 4(xvi) of this Act as including among others, the Board of Revenue, the Commissioners and the Collectors. We have earlier stated that item 2 of group C in the first schedule to this Act refers to an application under s. 85 of the Tenancy Act, and provides that there shall be no period of limitation for making such an application, and that it shall be made to a Collector. Therefore, for an application under s. 85 of the Tenancy Act the Revenue Courts Act specifies a new revenue court, namely, the Collector, in the place of the Deputy Commissioner mentioned in s. 85 of the Tenancy Act and also makes it free of the bar of limitation. It follows that ss. 7 and 9 of the Revenue Courts Act deal with matters dealt with in ss. 118, 124 and 129 of the Tenancy Act. By virtue of s. 2 of the Revenue Courts Act, ss. 118, 124 and 129 of the Tenancy Act will have to be taken as repealed. There would also consequently be a repeal of item 4 of group E in the second schedule to the Tenancy Act. The position then is that since the coming into force of

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the Revenue Courts Act, there is no period of limitation prescribed for making an application under s. 85 of the Tenancy Act and that application has to be made to a Collector. The application under s. 85 by the appellant in the present case had been made to the Collector, as at the date when it was made the Revenue Courts Act was in force. The repeal of ss. 118, 124 and 129 of the Tenancy Act does not however affect s. 85 of this Act except as hereinbefore stated.

Next it is said that even though s. 85 of the Tenancy Act may not have been repealed, the procedure to be followed in respect of an application made under it is in view of r. 114 in Ch. IV of the rules framed under the Revenue Courts Act is that laid down in Ch. II of these rules and that that procedure was not followed. This, it is contended, constitutes an error apparent on the face of the orders passed by the revenue authorities in this case, and renders them liable to be set aside.

A reference has now to be made to the rules framed under s. 85 of the Tenancy Act. These rules, so far as relevant for our purpose, prescribe that an application by the landlord under the section shall be accompanied by a list in a prescribed form in which is to be stated the dues of the landlord for canal charges, rent, interest and court fees. Rule 34 provides that the Deputy Commissioner shall check the lists by examining the Patwari or by any other suitable method and thereafter enter in the appropriate column in the form, the amounts passed by him as due to the landlord. Under r. 35 he has thereafter to send the list to the Tahsildar who shall then proceed to realise the amount stated in the list by the Deputy Commissioner to be due to the landlord.

It is said on behalf of the tenants that the rules under s. 85 lay down the procedure for the disposal of an application made under that section, and that these rules have been repealed by s. 2 of the Revenue Courts Act, read with r. 114 of the rules framed under that Act. It is contended that the revenue authorities committed an error in following the rules framed

under s. 85 of the Tenancy Act and not those prescribed in Ch. II of the rules made under the Revenue Courts Act.

Now Ch. IV of the rules framed under the Revenue Courts Act consists only of r. 114. That rule provides that the procedure laid down in Ch. II of the same rules shall be followed, so far as it can be made applicable, in all proceedings in revenue courts. In view of s. 7 of the Revenue Courts Act, an application under s. 85 of the Tenancy Act must, since the coming into force of the former Act, be heard and determined by a revenue court. Such an application therefore gives rise to a proceeding in a revenue court and such a proceeding must, it is said, in view of r. 114 be according to the procedure prescribed by Ch. II of the rules framed under the Revenue Courts Act.

It is enough for our purposes to say that Ch. II lays down a procedure for a contested matter, that is to say, it requires that notice of the proceedings should be issued to the respondent to it and he should be given a hearing. It is unnecessary to refer to the detailed procedure prescribed in this chapter for, as no notice of the application had in fact been given to the tenants in this case and they had not been heard on it, it must be held that the procedure laid down in that chapter had not been followed.

The High Court accepted the contention of the tenants that the rules framed under s. 85 of the Tenancy Act had been repealed and that the rules in Ch. II of the rules framed under the Revenue Courts Act applied and should have been followed. It therefore held that there was an error apparent on the face of the record and thereupon set aside the orders of the revenue authorities challenged by the tenants.

We have given our anxious consideration to this question but have been unable to agree with the view taken by the High Court. It seems to us that the rules made under s. 85 of the Tenancy Act had not laid down any special procedure. The only rule relevant in this connection is r. 34 to which we have earlier referred. All that that rule does is to require

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the Deputy Commissioner to check the list, a duty which under the section itself he has to perform, and also makes it necessary for him to examine the patwari for the purpose. The rules do not indicate how the application is to be heard, that is, whether ex parte or on notice.

It seems clear to us that s. 85 itself requires an application made under it to be heard ex parte. First the section does not say that a notice of the application has to be served on the tenant concerned. Secondly, an application under the section can be made only after the notification prescribed has been issued. That notification decides that there has been a general refusal by tenants to pay rent. Therefore the section could not have contemplated that the question whether a tenant had so refused would be heard again on notice to him. Thirdly, in proceedings for recovery of land revenue, the persons liable are not heard and therefore when rent is directed to be recovered as land revenue, it is not contemplated that the tenants should be heard. It is of the essence of such proceedings that there shall be a summary and quick decision. If the procedure laid down in Ch. II of the rules framed under the Revenue Courts Act has to be followed, the entire object of s. 85 of the Tenancy Act would, in our view, be defeated. It seems to us that s. 85 would then really become redundant for then it would contemplate an application for realisation of rent giving rise to a contested proceeding governed by the procedure of a suit and would be a duplication of s. 78 of the Tenancy Act earlier referred to or of s. 80 of the same Act which provides for a suit in a revenue court for the recovery of rent both of which have to be heard as contested proceedings in the presence of the other side. Fourthly, cl. (b) of sub-sec. (4) of s. 85 of the Tenancy Act plainly indicates that the proceeding on an application under that section is to be ex parte. That clause contemplates a suit against a landlord by a tenant from whom an amount in excess of what is legally due has been recovered under the section. Now the amount recovered cannot of course exceed the amount

passed as due by the Deputy Commissioner. So the suit contemplated in s. 85(4)(b) would really be one to contest the correctness of the finding of the Deputy Commissioner as to the amount due. It would be inconceivable that such would be contemplated under the section if the amount has to be decided by the Deputy Commissioner after hearing the tenant. It is clearly not necessary that two contested proceedings, one after the other, in respect of the same question, between the same parties should be provided for.

It seems, therefore, quite clear to us that s. 85 of the Tenancy Act contemplates that the application made under it shall be heard and determined in the absence of the tenant. Indeed this is not really questioned, for, the contention on behalf of the tenants is that the procedure followed is wrong, not because that is not the procedure laid down in the Tenancy Act, but because the Revenue Courts Act and the rules made thereunder had replaced the ex parte procedure provided by the Tenancy Act, by the procedure of a contested proceeding laid down in Ch. II of the rules framed under the Revenue Courts Act and this is the procedure which should have been followed.

Now, once it is found, as we have found, that s. 85 of the Tenancy Act has not been repealed by the Revenue Courts Act except to the extent that an application under it has now to be made to a Collector and not to a Deputy Commissioner as provided in it, the whole of it has to be given effect to. The procedure contemplated by the section is an integral part of the right granted by it, and one cannot be separated from the other. The application made under it has, therefore, still to be heard and determined ex parte.

Rule 114 of the rules framed under the Revenue Courts Act earlier referred to can be of no assistance to the tenants in the present context. It does not in terms purport to repeal s. 85 of the Tenancy Act. We have earlier said the Revenue Courts Act contemplated the continuance in force of s. 85 of the Tenancy Act, and hence no rule framed under the former Act

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could intend by implication to repeal that section. Rule 114 may apply to applications under other provisions of existing laws which are not required by them to be heard ex parte.

In our view, for the reasons aforesaid, the application under that section was properly and correctly heard and determined without notice to the tenants. Such hearing does not disclose any error at all.

Then it is said that after the rescission of the Notification dated February 22, 1951, no further proceeding could be taken under s. 85 of the Tenancy Act. This contention also found favour with the High Court and with this view again we are unable to agree. Sub-section (1) of that section provides for the issue of a notification declaring that certain rents may be recovered as arrears of land revenue. Sub-section (2) states that " in any local area to which a notification made under sub-section (1) applies, a landlord.....to whom an arrear of rent is due, may.....apply in writing to the Deputy Commissioner to realise the same, and the Deputy Commissioner shall after satisfying himself that the amount claimed is due, proceed .....to recover such amount.....as an arrear of land revenue." It is contended that the words " in any local area to which a notification made under sub-section (1) applies " govern both the application by the landlord and the action of the Deputy Commissioner following thereon and therefore the Deputy Commissioner cannot after the rescission of the notification, take any action under the section at all.

It seems to us that this contention of the tenants is not warranted by the language of the section. The words " in any local area to which a notification made under sub-section (1) applies " are concerned with the area and not with the time during which the notification remains in force. That follows from the words " in any local area ". There is no reference anywhere to the currency of the notification in point of time. Item 4 of group E in schedule II to the Tenancy Act earlier referred to, leads to the same conclusion. That item provides that the period of limitation for an application under s. 85 is so long as notification

remains in force. It is clear that if in sub-sec. (2) the words "in any local area to which a notification applies" meant, during the currency of the notification in point to time, there would have been no need to specify a period of limitation in schedule II. We have also earlier pointed out that item 4 of group C in schedule II has been repealed by the corresponding provisions in the Revenue Courts Act. Since the latter Act came into force, the position is that there is no period of limitation for an application under s. 85 of the Tenancy Act. It is impossible, therefore, to contend that the words "in any local area to which a notification made under sub-section (1) applies" indicate that the Deputy Commissioner's power to act when an application under that section is made, exists only so long as the notification remains in force.

It also seems to us that the Deputy Commissioner's power to act arises on an application having been duly made under sub-sec. (2) of s. 85. Even if that application had to be made within the period that the notification remained in force, there would be nothing in sub-sec. (2) to lead to the conclusion that the Deputy Commissioner's power to act on the application would also depend on the notification remaining in force. It may be stated here that in the present case the application had been made before the Notification had been rescinded. Once the notification under s. 85 is issued, power is certainly vested in the appropriate Revenue officers to deal with and dispose of an application made under that section at a time the notification was in force and applied to the particular area. Subsequent cancellation of the notification would not divest the appropriate authority of the power already vested in him to dispose of the application which was properly and duly made under s. 85. In our view, steps can be taken under s. 85 of the Tenancy Act by the appropriate Revenue Officer for realisation of rent found due as arrears of land revenue even after the notification under that section has been rescinded.

Reliance is placed by the learned advocate for the respondents on *Crown* v. *Haveli* (1). In that case it

(1) A.I.R. 1949 Lah. 191.

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was held that further proceedings under a temporary Act could not be continued after it had expired. It is contended that s. 85 of the Tenancy Act was really a temporary Act for it was brought into operation only upon a notification which notification was clearly not intended to be of permanent operation. We are unable to accept this view. The fact, if this be so, that s. 85 is brought into operation by a notification, and that that notification may not be of permanent operation, does not make the section a temporary enactment. We do not think that the principles applicable to interpretation of temporary Acts apply to the case of a provision like s. 85 of the Tenancy Act.

Reliance is also placed on cl. (a) of sub-sec. (4) of s. 85 of the Tenancy Act. It is said that this clause by permitting suits for recovery of rents which have not been recovered under the section, indicates that after the rescission of the Notification, further proceedings cannot be taken under the section. It is contended that cl. (a) contemplates that it may so happen that when a notification is rescinded, the whole amount of rent in respect of which the application under s. 85 had been made, had not been recovered and that cl. (a) permits suit to be filed in respect of the amount which remained unrealised at the date the notification is rescinded. This argument seems to us to beg the question, for, it proceeds on the basis that the suit contemplated by cl. (a) is for the amount of rent which cannot be recovered under the section any more because of the rescission of the notification. Clause (a) however may clearly apply to a case where in spite of a notification under the section, the landlord whether during its currency or later, chooses to proceed by way of a suit under the other provisions of the Tenancy Act.

It is then contended on behalf of the tenants that the Notification of February 22, 1951, was not a valid notification because out of 125 tenants in village Khakharki 82 had paid rent and the remaining 43, who are the respondents in this appeal, were willing to pay but could not pay as the appellant was asking

for larger sums than what were legitimately due to him. It is contended that on these facts it could not be said that there was a general refusal to pay rent within the meaning of s. 85 of the Tenancy Act. Hence, it is said that the Notification was *ultra vires* the section and inoperative. We do not think that the tenants can be allowed to raise this point in this Court. It does not appear to have been raised in the High Court. The High Court's judgment makes no mention of it. Whether it is open for a Court to go behind the notification issued under s. 85 and decide its validity or not, this contention of the tenants raises a question of fact as to how many tenants had refused to pay rent. It also raises a question of interpretation of the words "general refusal to pay" in s. 85. None of these questions was raised at any earlier stage. We are therefore, not inclined to allow the tenants to raise them now.

In the result we allow the appeal with costs here and below.

Appeal allowed.

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THE STATE OF UTTAR PRADESH

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October 25.

(S. K. DAS and J. C. SHAH, JJ.)

Criminal Trial—Defamation of public servant in respect of public function—Complaint before Sessions Judge by Public Prosecutor—If required to be signed by the public servant also—Code of Criminal Procedure, 1898 (V of 1898), ss. 198 and 198-B.

The Public Prosecutor, Kanpur, filed a complaint in the Court of Session, Kanpur, charging the appellants with having published a news item which was false and defamatory of the Chief Minister of Uttar Pradesh. The complaint complied with the requirements of s. 198-B, Code of Criminal Procedure. The appellants contended that the complaint should have complied with the requirements of s. 198 of the Code also and, as it was

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not signed by the Chief Minister, the Sessions Judge had no jurisdiction to entertain it.

Held, that it was not necessary for the Chief Minister also to sign the complaint filed by the Public Prosecutor. The non-obstante clause "notwithstanding anything contained in this Code" in sub-s. (1) of s. 198-B excludes the operation of the other provisions of the Code relating to initiation and trial of the offence of defamation, including s. 198. Sub-section (13) of s. 198-B which provides that the provisions of s. 198-B shall be in addition to and not in derogation of s. 198 merely preserves the right of the person defamed to file a complaint under s. 198. The two sections provide alternative remedies. The provisions in s. 198-B relating to the award of compensation to the accused in case of false and frivolous or vexatious accusation do not affect this conclusion. Normally it is the public servant who moves the Government for taking proceedings and under sub-s. (5) he is required to be examined as a witness to support the prosecution, and it cannot be said that he has no concern with the lodging of a complaint under s. 198-B.

C. B. L. Bhatnagar v. *The State*, A.I.R. 1958 Bom. 196 and *R. Sankar* v. *The State*, I.L.R. (1959) Kerala 195, disapproved.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 130 of 1960.

Appeal by special leave from the judgment and order dated April 28, 1960, of the Allahabad High Court in Criminal Revision No. 1865 of 1959.

N. C. Chatterjee, D. P. Singh, T. S. Venkataraman, R. K. Garg, S. C. Agarwal and *M. K. Ramamurthi*, for the appellants.

G. S. Pathak, G. C. Mathur and *C. P. Lal*, for the respondent.

1960. October 25. The Judgment of the Court was delivered by

Shah J.

SHAH J.—Appellant No. 1 is the editor and appellant No. 2 is the printer and publisher of the "New Age"—an English Weekly news sheet published in Delhi. On May 15, 1959, the Public Prosecutor, Kanpur, filed a complaint in the Court of Session, Kanpur, against the appellants charging them with having published a news item in the issue of the "New Age" dated November 16, 1958, knowing or having good reasons to believe the same to be false and defamatory of the Chief Minister of the State of Uttar Pradesh "in order to harm his reputation in the eyes of

the public in general and among his acquaintances in particular". With this complaint was filed an order under the signature of the Home Secretary to the Government of Uttar Pradesh sanctioning under s. 198B(3)(b) of the Criminal Procedure Code the filing of a complaint by the Public Prosecutor for an offence under s. 500, Indian Penal Code, against the appellants in respect of the news item published on November 16, 1958, under the caption "Explosive situation in Kanpur". The learned Sessions Judge took cognisance of the complaint. After six witnesses were examined on behalf of the prosecution, he framed a charge against the appellants for the offence of defamation in that they had published the news item under the caption "Explosive situation in Kanpur" intending to harm or knowing that they were likely to harm the reputation of the Chief Minister of Uttar Pradesh. The appellants then applied to the High Court of Judicature at Allahabad praying that the order of the Court of Session framing a charge for the offence of defamation be set aside. They submitted that there was no evidence that the Home Secretary to the Government of Uttar Pradesh had applied his mind to the facts of the case before sanctioning prosecution of the appellants; that in any event, the publication was not defamatory of the Chief Minister in respect of his conduct in the discharge of his duties as Chief Minister and that the complaint filed by the Public Prosecutor not having been signed by the Chief Minister who was the aggrieved person, the Sessions Judge had no jurisdiction to entertain the complaint. The High Court rejected all the contentions raised by the appellants. Against the order rejecting the contentions, this appeal with special leave under Art. 136 of the Constitution is preferred by the appellants.

We may state that the observations made by the High Court that whether the publication of the news item in the issue of the "New Age" dated November 16, 1958, under the caption "Explosive situation in Kanpur" was defamatory of the Chief Minister in respect of his conduct in the discharge of his duties

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as Chief Minister were made only for the purpose of deciding the application in revision submitted to them and were not intended to record a final decision as to the defamatory character of that publication. It will be for the Trial Judge when the case is tried before him to arrive at a conclusion on the materials placed before him whether the publication is defamatory of the Chief Minister in respect of his conduct in the discharge of his public functions.

The plea that the sanction was accorded by the Home Secretary to the filing of the complaint without applying his mind is without substance. Siddiqi, an assistant in the Home Department to the Government of Uttar Pradesh, has deposed that he had received the papers in connection with the sanction for the prosecution of the two appellants from the Superintendent, Home Department, with "notings", that he had taken the "notings" and the relevant papers including the offending issue to the Deputy Secretary, that the Deputy Secretary had also made his note on those papers, and that thereafter he—the witness—had taken those papers to M. G. Kaul, Home Secretary, who had perused the "notings" and the note of the Deputy Secretary as also the article in question and after looking into the papers had approved the draft sanction.

It is not disputed that the Home Secretary was authorised to sanction a complaint for defamation of a Minister of the Government of Uttar Pradesh. The evidence clearly discloses that the Home Secretary had applied his mind to all the material facts before him and had then granted the sanction. Mere production of a document which sets out the names of the persons to be prosecuted and the provisions of the statute alleged to be contravened, and purporting to bear the signature of an officer competent to grant the sanction where such sanction is a condition precedent to the exercise of jurisdiction does not invest the court with jurisdiction to try the offence. If the facts which constitute the charge do not appear on the face of the sanction, it must be established by extraneous evidence that those facts were placed

before the authority competent to grant the sanction and that the authority applied his mind to those facts before giving sanction. In the present case, the facts constituting the charge appear on the face of the sanction; and evidence has also been led that the facts were placed before the sanctioning authority, that the authority considered the facts and sanctioned the prosecution.

Section 198B which deals with a certain category of the offences of defamation of high dignitaries of the State, and of Ministers and public servants in respect of their conduct in the discharge of public functions was incorporated in the Code by Act XXVI of 1955. Prior to the incorporation of s. 198B, the only condition precedent to the entertainment of a complaint of defamation by a court competent in that behalf was prescribed by s. 198, viz., that there had to be a complaint by the person aggrieved before the court took cognisance of that offence. By s. 198B, several conditions precedent to the trial of offences falling within that section are prescribed. The material clauses of s. 198B are sub-ss. (1), (3) and (4).

(*1*):— "notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (Act XLV of 1860) (other than the offence of defamation by spoken words) is alleged to have been committed against the President or the Vice-President, or the Governor or Rajpramukh of a State, or a Minister or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognisance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor.

(*3*):—No complaint under sub-s. (1) shall be made by the Public Prosecutor except with the previous sanction,—

(a) in the case of the President or the Vice-President or the Governor of a State, of any Secretary to the Government authorised by him in this behalf;

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(b) in the case of a Minister of the Central Government or of a State Government, of the Secretary to the Council of Ministers, if any, or of any Secretary to the Government authorised in this behalf by the Government concerned; (c) in the case of any other public servant employed in connection with the affairs of the Union or of a State, of the Government concerned.

(4):—No Court of Session shall take cognisance of an offence under sub-s. (1) unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

This section provides for a special procedure for the trial of the offence of defamation of certain specified classes of persons. The conditions necessary for the applicability of sub-s. (1) of s. 198B are:

(1) that the defamation is not by spoken words;

(2) that the offence is alleged to have been committed against the President, or the Vice-President, or the Governor or Rajpramukh of a State, or a Minister or any other public servant employed in connection with the affairs of the Union or of a State;

(3) that the defamation is in respect of the person defamed in the discharge of his public functions;

(4) that a complaint is made in writing by the Public Prosecutor;

(5) that the complaint is made by the Public Prosecutor with the previous sanction of the authorities specified in sub-s. (3); and

(6) that the complaint is made within six months from the date on which the offence is committed.

The Court of Session may entertain a complaint of defamation of the high dignitaries and of Ministers and public servants in respect of their conduct in the discharge of their public functions only if these conditions exist. Section 198 requires that a complaint for defamation may be initiated by the person aggrieved and no period of limitation is prescribed in that behalf. Such a complaint can only be entertained by a Magistrate of the First Class. But s. 198-B in the larger public interest, has made a departure from that rule; the accusation is to be entertained not by a

Magistrate, but by the Court of Session without a committal within six months of the date of the offence on a complaint in writing by the Public Prosecutor with the previous sanction of the specified authorities. It is manifest that by the non-obstante clause, "notwithstanding anything contained in this Code" in sub-s. (1), the operation of diverse provisions of the Code relating to the initiation and trial of the offence of defamation is excluded and prima facie s. 198 is one of those provisions. It is however urged on behalf of the appellants that sub-s. (13) of s. 198-B makes the provisions of s. 198 applicable to a complaint for defamation of persons specified in s. 198-B(1) and provides that cognisance of the offence of defamation cannot be taken by a court except upon a complaint by the person aggrieved, and that the Chief Minister of Uttar Pradesh alleged to be the party aggrieved not having signed the complaint the Court of Session, Kanpur, had no jurisdiction to take cognisance of the complaint. Sub-section (13) provides that "the provisions of this section shall be in addition to, and not in derogation of, those of s. 198". In our judgment, this clause is enacted with a view to state *ex abundanti cautela* that the right of a party aggrieved by publication of a defamatory statement to proceed under s. 198 is not derogated by the enactment of s. 198-B. The expressions, "in addition to" and "not in derogation of" mean the same thing—that s. 198-B is an additional provision and is not intended to take away the right of a person aggrieved even if he belongs to the specified classes and the offence is in respect of his conduct in the discharge of his public functions, to file a complaint in the manner provided by s. 198. "Derogation" means, taking away, lessening or impairing the authority, position or dignity, and the context in in which sub-s. (13) occurs clearly shows that the provisions of s. 198-B do not impair the remedy provided by s. 198. It means that by s. 198-B the right which an aggrieved person has to file a complaint before a Magistrate under s. 198 for the offence of defamation, even if the aggrieved person belongs to the specified classes and the defamation

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is in respect of his conduct in the discharge of his public functions, is not taken away or impaired. If sub-s. (13) be construed as meaning that the provisions of s. 198B are to be read as supplementary to those of s. 198, the non-obstante clause with which sub-s. (1) of s. 198B commences is rendered wholly sterile, and unless the context compels such an interpretation, the court will not be justified in adopting it. There is again inherent indication in ss. 198 and 198B, which supports the view that s. 198B was not intended to be supplementary to s. 198, but was intended to provide an alternative remedy in the case of defamation of persons set out in that section. The expression " complaint " as defined in s. 4, cl. (h) of the Code means " the allegation made orally or in writing *to a Magistrate* with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence..... ". Every complaint of an offence has to be made to a Magistrate competent to take cognisance thereof and not to a Court of Session. A Court of Session under the Code of Criminal Procedure unless otherwise expressly provided, is not competent to entertain a complaint; it can only try a criminal case committed to it. The expression " complaint " in s. 198 is manifestly used in the meaning as defined by s. 4(h). Even a superficial examination of the contention raised by the appellants reveals that if effect be given to it, the utmost confusion would result in working out the provisions of the Code. If beside the complaint filed by the Public Prosecutor under s. 198B, there must also be a complaint by the person aggrieved, two courts would simultaneously be seized of two distinct complaints for the same offence. The complaint by the Public Prosecutor under s. 198B would undoubtedly lie in the Court of Session and the complaint under s. 198 would lie in the court of a Magistrate, because it is a Magistrate who alone can take cognisance of the offence of defamation under s. 198. Thereafter, the complaint under s. 198 may have to be committed to the Court of Session by the Magistrate and it is only after the case is committed to the Court of Session that on the

complaint filed by the Public Prosecutor, the case may proceed. The Legislature could not have intended that in respect of the same offence, there should be two complaints, one in the Court of Session and another in the court of a Magistrate—and either both should be tried, or the proceedings should be consolidated after committal.

Reliance was placed on behalf of the appellants upon sub-ss. (6) to 11 of s. 198B which provide for the award of compensation to the person accused if the court is satisfied that the accusation is false and either frivolous or vexatious, and it was submitted that the Legislature could not have intended that a person who was not the complainant and who was not directly concerned with the proceedings may still be required if so ordered by the court to pay compensation. But sub-s. (5) which provides that a person against whom the offence is alleged to have been committed shall, unless the court for reasons to be recorded otherwise directs, be examined as a witness for the prosecution, clearly indicates that the question whether the complaint was false and either frivolous or vexatious may fall to be determined only if the person complaining to be defamed actively supports the complaint. It cannot therefore be said that s. 198B provides for compensation being awarded against a person who is not concerned with the complaint.

Section 198B is enacted to provide machinery for vindicating the conduct of high dignitaries, Ministers and public servants when they are exposed to defamatory attacks. The section contemplates the institution of proceedings for defamation of two different classes of persons, (1) high dignitaries like the President, the Vice-President, the Governors and Rajpramukhs and (2) Ministers and public servants. it is not disputed that a provision which enables a prosecution to be launched by the State, and at State expense for defamation of members of the first class, having regard to their status in public life, is pre-eminently designed in the public interest, and it would be entirely appropriate that any question of awarding compensation should be raised, even if the complaint for defamation

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be found to be false and frivolous or vexatious. There can be no doubt that in a democratic set up, in order to maintain purity of public behaviour and administration, charges of improper conduct against persons in the second class, in so far as such charges relate to the discharge of their public functions should be investigated. It is also in the public interest that in vindicating his character or conduct, the person defamed should not ordinarily be called upon to bear the burden of what may turn out an expensive and long drawn out proceeding, nor for obvious reasons should he have control over the proceeding. In the vindication of the character or conduct of a private individual who is defamed, the State is primarily not concerned: the party aggrieved may, if he is so minded, take proceedings for obtaining relief. But in the investigation of defamatory charges against Ministers and public servants in the discharge of their public functions, the State is as vitally concerned as the individual defamed. The Legislature has therefore authorised the State to take upon itself the power in appropriate cases to prosecute the offenders. But lest this procedure be abused, provision has been made for the examination of the person defamed and for awarding against him compensation if it be found that the complaint was false and frivolous or vexatious. Normally, a Minister or a public servant defamed in respect of his conduct in the discharge of his public functions would himself move the Government under which he functions for taking proceedings for vindicating his character or conduct. The complaint *eo nomine* in cases under s. 198B, is undoubtedly the Public Prosecutor, but the complaint may, when the person defamed is a Minister or a public servant, properly be regarded as filed at the instance of such Minister or public servant. He has in any case to support the accusation by evidence, and his conduct is exposed to judicial scrutiny. In this context, it would be difficult to hold that a person who has either been instrumental in the initiation of a complaint, or in any event has to support it by his evidence, has no concern with the lodging of the complaint. The court

would obviously award compensation only if it is satisfied that the claim made by the person posing to be aggrieved is false and either frivolous or vexatious.

Section 198B does not provide that before taking cognisance of a complaint, the complaint shall be signed by any person other than the Public Prosecutor. In terms, it contemplates a complaint in writing by the Public Prosecutor and of no one else and it would be an unwarranted addition to sub-s. (1) of the words " and also by the person aggrieved " if the contention urged on behalf of the appellants were accepted. The Legislature not having chosen to provide that the complaint of the Public Prosecutor shall also be signed by the person aggrieved, we will not be justified in the absence of compelling reasons to so hold.

The observation made by Mr. Justice Bavdekar in *C. B. L. Bhatnagar* v. *The State* (1) " What s. 198B(13) .....means.....is that any complaint which may be made under s. 198B must also satisy the provisions of s. 198, that is, the complaint will have to be made both by the person aggrieved, and by the Public Prosecutor ", and by Mr. Justice Raman Nayar in *R. Sanker* v. *The State* (2) that a complaint by a person aggrieved is not dispensed with even in regard to cases falling under s. 198B, do not, in our judgment, correctly interpret sub-s. (13) of s. 198B.

In the view taken by us, this appeal must fail and is dismissed.

Appeal dismissed.

(1) A.I.R. 1958 Bom. 196. (2) I.L.R. (1959) Kerala 195.

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October 25.

MAHARAJADHIRAJA SIR KAMESHWAR SINGH

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

(S. K. DAS and J. C. SHAH, JJ.)

Income Tax--Exemption from taxation—Agricultural income from trust properties—Trustee's remuneration a percentage of such income and resting on trust deed--Remuneration, whether agricultural income—Indian Income-tax Act, 1922 (11 of 1922), ss. 2(1), 4(3)(viii).

The appellant executed a deed of trust settling some of his lands for the maintenance of certain temples and Thakoorbaries. He was to be the trustee of the institutions and was to get 15% of the net income of those lands as trustee's remuneration. Before the income-tax authorities the appellant claimed that as the income received from agricultural properties of the trust by him as trustee was agricultural income in his hands and was by virtue of s. 4(3)(viii) of the Indian Income-tax Act, 1922, exempt from liability to pay tax, the remuneration which by the covenant contained in the deed of trust he received was also exempt under that section because, when he appropriated a fraction of the rent or revenue of agricultural lands towards his remuneration, the original character of the income was not altered.

Held, that the source of the right in which a fraction of the net income of the trust was to be appropriated by the appellant as his remuneration was not in the right to receive rent or revenue of agricultural lands, but rested in the covenant in the deed to receive remuneration for management of the trust, and the character of the income appropriated as remuneration was not the same as the character in which it was received by the appellant as trustee. Consequently, the remuneration not being received as rent or revenue of agricultural lands under a title, legal or beneficial in the property from which the income was received, it was not agricultural income within the meaning of s. 2(1) of the Indian Income-tax Act, 1922, and was not exempt from taxation under s. 4(3)(viii) of the Act.

Nawab Habibulla v. *Commissioner of Income-tax, Bengal*, (1943) L.R. 70 I.A. 14 and *Premier Construction Co. Ltd.* v. *Commissioner of Income-tax, Bombay City*, (1948) L.R. 75 I.A. 246, relied on.

Commissioner of Income-tax, Bihar and Orissa v. *Kameshwar Singh*, (1935) L.R. 62 I.A. 215, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 357 of 1958.

Appeal from the judgment and order dated April 24, 1957, of the Patna High Court in Misc. Judicial Case No. 57 of 1955.

A. V. Viswanatha Sastri and *I. N. Shroff*, for the appellant.

K. N. Rajagopal Sastri and *R. H. Dhebar*, for the respondent.

1960. October 25. The Judgment of the Court was delivered by

Shah J.

SHAH J.—The appellant executed a deed of trust settling certain lands described in schedule "A" and the rents of lands described in schedule "C" for the maintenance of certain temples and Thakoorbaries. The material terms of the deed of trust are:

cl. 6:—"And whereas the declarant feels that a Declaration of Trust should be made whereby the income of a part of the Raj properties may be earmarked and specially devoted to the maintenance of the aforesaid institutions as also the Declarant may as hitherto treat himself and be treated by others as a legal Trustee of the said institutions and the properties out of the income of which the said maintenance is being and will be provided for."

cl. 7:—"The declarant declares that henceforth he holds and will hold the properties detailed at the foot thereof in Schedule "A" in trust for religious purposes of maintaining the religious institutions more fully described in Schedule "B" annexed hereto."

cl. 8:—"The declarant further declares that in all lands now held by him in the aforesaid properties as Bakast or proprietor's private lands as in the schedule "C" which are in direct khas cultivation of the Declarant shall henceforth be or continue to be his tenancy lands for which the Declarant shall pay the rental as noted against such lands, annually to the "trustee for the use and benefit of the aforesaid institutions and the rights of the Declarant in them

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shall be those of a rayat under the Bihar Tenancy Act."

The net income of all the lands set out in Schedule "A" after providing for the expenses of management and the taxes payable thereon was estimated at Rs. 1,81,717 and the net rental of the properties described in Schedule "C" was estimated at Rs. 10,208 and from the aggregate of these two amounts after deducting 15% as trustee's remuneration, the balance of the income estimated at Rs. 1,63,136-4-0 was to be utilised for the objects of the trust.

In the assessee's income determined by the Income-Tax Officer for the assessment year 1950-51, Rs. 6,000 were included as income from non-agricultural properties of the trust. In the view of the Income-tax Officer, the trust was not a public religious trust and the income derived from properties not used for agriculture was not exempt from liability to pay tax in the hands of the appellant. In appeal against the order of assessment, the Appellate Assistant Commissioner held that the income coming to the hands of the appellant from the trust properties was not taxable as private income of the appellant, but in his view, the remuneration amounting to Rs. 21,274 computed at the rate of 15% on the net income of the trust properties in the year in question not being agricultural income in the appellant's hands was liable to be taxed. In appeal to the Income-tax Appellate Tribunal, Patna Bench, Patna, the order passed by the Appellate Assistant Commissioner in so far as it related to remuneration received by the appellant was affirmed. The High Court of Judicature at Patna thereafter at the instance of the appellant directed the Income-tax Appellate Tribunal to submit a statement of the case on five questions set out in the order. The fifth question (which is the only question material in this appeal) was as follows:

"Whether, in the facts and the circumstances of the case, the amount of Rs. 21,274 being the amount paid to the assessee in his character of a Shebait of the Trust properties should have been held to be exempted from taxation on the ground that it is agricultural income ?"

The High Court agreed with the Tribunal that the remuneration was received by the appellant under a contract, and it was not agricultural income, merely because the source of the money was agricultural income. The High Court accordingly answered the fifth question "against the assessee". This appeal is filed by the appellant with leave under s. 66A(2) of the Indian Income-tax Act granted by the High Court limited to the question whether the amount received by the appellant from the trust property in his character as a shebait was exempt from liability to pay income-tax.

The material part of the definition of "Agricultural income" in s. 2(1) is as follows:

"Agricultural income" means

(a) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in the taxable territories or subject to a local rate assessed and collected by officers of the Government as such.

(b).....".

Agricultural income falling under cl. (a) ought manifestly to be received as rent or revenue derived from land used for agricultural purposes. The income received from agricultural properties of the trust by the appellant as trustee was indisputably agricultural income in his hands and it was by virtue of s. 4(3)(viii) exempt from liability to pay tax. The appellant claims that the remuneration which by the convenant contained in the deed of trust he has received is also exempt under s. 4(3)(viii) because, when he appropriated a fraction of the rent or revenue of agricultural lands towards his remuneration, the original character of the income was not altered.

The appellant has no beneficial interest in the lands which are the subject-matter of the trust: nor is he given under the trust a right to receive and appropriate to himself the income of the properties or a part thereof in lieu of any beneficial interest in that income. The source of the right in which a fraction of the net income of the trust is to be appropriated by the appellant as his remuneration is not in the right

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to receive rent or revenue of agricultural lands, but rests in the covenant in the deed to receive remuneration for management of the trust. The income of the trust appropriated by the appellant as remuneration is not received by him as rent or revenue of land; the character of the income appropriated as remuneration due is again not the same as the character in which it was received by the appellant as trustee. Both the source and character of the income are therefore altered when a part of the income of the trust is appropriated by the appellant as his remuneration, and that is so, notwithstanding that computation of remuneration is made as a percentage of the income, a substantial part whereof is derived from lands used for agricultural purposes. The remuneration not being received as rent or revenue of agricultural lands under a title, legal or beneficial in the property from which the income is received, it is not income exempt under s. 4(3)(viii).

We may briefly refer to the authorities which illustrate the meaning of "agricultural income" in s. 2(1) of the Income-tax Act.

In *Nawab Habibulla* v. *Commissioner of Income Tax, Bengal* (1), the Privy Council held that the remuneration received by a mutwalli of a wakf estate, not depending on the nature of the properties or assets which constitute the wakf nor on the amount of income derived from the wakf estate, is not agricultural income within the meaning of s. 2(1) of the Indian Income-tax Act even though the income derived by the wakf estate is from properties used for agricultural purposes.

In *Premier Construction Co., Ltd.* v. *Commissioner of Income Tax, Bombay City* (2), it was held by the Privy Council that income received by an assessee not itself of a character to fall within the definition of agricultural income does not assume the character of agricultural income by reason of the source from which it is derived, or the method by which it is calculated. But if the income received falls within

(1) (1943) L.R. 70 I.A. 14. (2) (1948) L.R. 75 I.A. 246.

the definition of agricultural income, it earns exemption, in whatever character the assessee receives it. In that case, the remuneration payable to a managing agent of a company in consideration of services to be rendered was a minimum annual salary of Rs. 10,000 payable irrespective of whether the company made any profit; but if 10% of the profits made by the company exceeded Rs. 10,000 the agent was to get an additional remuneration calculated as a percentage upon the profits of the company without regard to the source from which those profits were derived. One of the sources of income of the company was agricultural income. It was held by the Privy Council that the assessee received no agricultural income as defined by the Act: he received remuneration under a contract for personal service calculated on the amount of profits earned by the employer.

In *Commissioner of Income Tax, Bihar and Orissa* v. *Kameshwar Singh*(1), income received by a mortgagee who went into possession of properties mortgaged to him was held to be agricultural income; but that was because under the deed of mortgage, the mortgagee was to be in possession of the properties and in his relation to the cultivators of the soil, he stood in the position of landlord dealing directly with them and collecting the rents. The mortgagee had to pay Government revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears, to sue for enhancement or for ejectment and was able to settle lands with raiyats and tenants in all the properties, in fact, he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in the mortgagor's possession. The mortgagee received the income, because of the legal ownership vested in him and even though under the covenant of the mortgage deed, he was required to appropriate the income towards his dues, the income in his hands did not cease to be agricultural income. In *Kameshwar Singh's case* (1), the court was called upon to consider

(1) (1935) L.R. 62 I.A. 215.

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the nature of the primary receipt by the mortgagee and not of the appropriation made under the covenant of the deed of mortgage.

In *K. B. Syed Mohammad Isa and another* v. *Commissioner of Income Tax, Central and United Provinces* (1), the assessee was a mutwalli appointed under two deeds. Under both the deeds, he was to receive agricultural and non-agricultural income and to utilise the same for purposes of the trust. Under one of the two deeds of trust, the balance was to be retained by the mutwalli for his personal expenses and in the other in lieu of his services. It was held by the Allahabad High Court that the residue of the amounts retained by the mutwalli under both the deeds of trust was, as agricultural income, exempt from liability to pay tax. In the view of the court, though the language used in the two deeds of trust was different, the intention of the settler was the same: the mutwalli was required to perform the functions of his office and so long as he did so, he was entitled in consideration of this service to appropriate the residue of the profits. But in each case, the mutwalli was a beneficiary with an obligation attached to his enjoyment of the benefit, and had therefore two capacities, one as mutwalli and the other as beneficiary. The court on those facts held that the balance of the income from the zamindari went "through the mutwalli" to the beneficiary by virtue of an obligation imposed under the terms of the trust deed itself upon the income of the property. The mutwalli was the channel through which the beneficiary received the money and the beneficiary was to all intents and purposes the direct recipient of the income, and there was no change of source and no alteration in the character of the income. It remained agricultural income after it had passed into the hands of the beneficiary. In the present case, the appellant has no beneficial interest in the trust property. The appellant so far as his remuneration is concerned is again not the direct recipient of the income of the trust: the source and the character of the income are

(1) I.L.R. [1942] All. 425.

both altered when agricultural income is appropriated under the covenant in the deed of trust as remuneration for services rendered.

In this view, the appeal fails and is dismissed with costs.

Appeal dismissed.

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October 26

THE DISTRICT BOARD, GHAZIPUR

v.

LAKSHMI NARAIN SHARMA

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Regulation and Control of Trade—District Board, power of—If impliedly repealed—Sanitation, connotation of—U. P. District Boards Act, 1922 (U. P. X of 1922), ss. 91(q) and 174—U. P. Panchayat Raj Act, 1947 (U. P. XXVI of 1947), ss. 15 and 111.

The appellant framed bye-laws for the regulation and control of flour, rice and oil mills under which a licence had to be obtained on payment of licence fee for running a mill. The bye-laws were framed under s. 174 of the U. P. District Boards Act, 1922. The respondent contended that the bye-laws were *ultra vires* and void as the District Boards had been divested of their powers to regulate and control trade under the District Boards Act on account of s. 111 of the U. P. Panchayat Raj Act, 1947, which operated in the same field.

Held, that the bye-laws had been validly made and that the District Boards were not divested of their powers to regulate and control trade under the District Boards Act, 1922, by the provisions of U. P. Panchayat Raj Act, 1947. Section 91(q) of the District Boards Act cast a duty on the District Boards to make provisions for regulating offensive, dangerous or obnoxious trades, callings or practices and s. 174(2)(k) specifically empowered District Boards to make bye-laws in this respect. There was no similar duty or power conferred upon Village Panchayats under the Panchayat Raj Act and consequently the question of the later enactment prevailing over the former did

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not arise. The reference to "sanitation" in s. 15(c) of the Panchayat Raj Act did not cover regulation and control of trade. Though the word "sanitation" in its widest connotation was capable of including this, it was not used in its widest sense in s. 15(c) but only in its ordinary sense in relation to conservancy, drainage and the like. Section 111 of the Panchayat Raj Act was in general terms, but bye-laws could be framed under it only in respect of the functions and duties imposed upon a Gram Panchayat under ss. 15 and 16.

Held, further, that the licence fee charged by the District Board could not be struck down on account of fees being charged from the respondent in respect of his mills under the U. P. Rice and Dal Mills Control Order, 1948, and the U. P. Pure Food Act. The licence fee charged by the District Board was for the regulation of obnoxious trades and the purpose of this regulation was different from the purpose for which fee was charged from the respondent under the Essential Supplies Act and the Pure Food Act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 372 of 1956.

Appeal from the judgment and order dated January 18, 1956, of the Allahabad High Court in Special Appeal No. 43 of 1955.

G. C. Mathur, for the appellant.

G. P. Singh and *K. P. Gupta*, for the respondent.

S. P. Sinha and *P. C. Agarwala*, for Intervener No. 1.

Radheylal Agarwala and *P. C. Agarwala*, for Intervener No. 2.

Frank Anthony and *M. I. Khowaja*, for Intervener No. 3.

1960. October 26. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—This is an appeal on a certificate granted by the Allahabad High Court. The respondent is carrying on the trade of hulling rice, milling grains and extracting oil in village Nandganj within the area of Gaon Sabha Barapur. He obtained licences for the three trades under the United Provinces Rice and Dal Control Order, 1948, as also under the Uttar Pradesh Pure Food Act, 1950. Further the Gaon Sabha also imposed a licence fee of Rs. 6/- and a tax

of Rs. 8/- on each mill within its jurisdiction and the respondent had been paying that as well. In 1953 the District Board, Ghazipur, in which district the village is situate, enforced bye-laws for the regulation and control of flour, rice and oil mills in the rural areas of the district under which a licence has to be obtained by such mills on payment of Rs. 20/- as licence-fee per year per mill. When the respondent was served with a notice to take out a licence for each mill and to pay the licence-fee, he objected to the legality and validity of the levy and thereafter filed a writ petition in the High Court under Art. 226 of the Constitution. His contention in this connection was three-fold, namely—(i) After the constitution of Gaon Sabha Barapur under the U. P. Panchayat Raj Act, No. XXVI of 1947, the District Board had been divested of its power and jurisdiction in the matter of regulation and control of trade under the relevant provisions of the U. P. District Boards Act, No. X of 1922; (ii) the respondent had paid the necessary licence-fees under the U.P. Rice and Dal Control Order, 1948 and the U. P. Pure Food Act, 1950 and could not be asked to pay the licence-fees over again under the District Boards Act; and (iii) in any case the levy was too high and not in proportion to the actual and probable expenses which the District Board would have to incur in controlling or regulating trade and was meant to augment the general revenues of the District Board.

The writ petition was heard by a learned Single Judge of the High Court who appears to have dismissed it *in limine* by a reasoned judgment negativing all the three contentions raised by the respondent. The respondent then went in appeal and the Appeal Court allowed the appeal holding that in view of s. 111 of the Panchayat Raj Act, the District Board had lost its power to make bye-laws for the regulation and control of trade under s. 174 of the District Boards Act. The Appeal Court was further of the view that the levy was not out of proportion to the expenses to be incurred by the District Board in the matter of regulation and control and was not a tax. It did not decide the third point raised on behalf of the

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respondent. The District Board then applied for a certificate to appeal to this Court, which was granted; and that is how the matter has come up before us.

The main question which falls for consideration in this appeal is whether the view of the Appeal Court that the District Board has lost its power to make bye-laws under s. 174 of the District Boards Act for regulation and control of trade in view of s. 111 of the Panchayat Raj Act, is correct. Learned counsel for the appellant puts his argument on this point in two ways. In the first place, he urges that the Panchayat Raj Act does not contain any provision by which the Gaon Sabha or the Gaon Panchayat has been given the power to regulate or control trade and therefore even if the Panchayat Raj Act is to prevail over the District Boards Act, where the two deal with the same matter, this particular power remains in the District Board as it is not included within the powers exercisable by Panchayats under the Panchayat Raj Act. In the alternative, he urges that the intention of the legislature was not that those provisions of the District Boards Act which are common in the two Acts should be repealed by necessary implication, and therefore the District Board's power to control and regulate trade would remain whatever may be the provision of the Panchayat Raj Act.

We shall therefore examine the first contention raised on behalf of the appellant under this head, for if the Panchayat Raj Act has not provided for the control and regulation of trade by the Gaon Sabha or the Gaon Panchayat, there will be no question of any inconsistency between the District Boards Act and the Panchayat Raj Act and therefore no question of the later Act (i. e., the Panchayat Raj Act) prevailing over the earlier Act (i. e., the District Boards Act). Section 91 of the District Boards Act provides for what may be called compulsory duties of District Boards and cl. (q) of this section lays down that every board shall make reasonable provision within the district for regulating offensive, dangerous or obnoxious trades, callings or practices. Section 106 of the District Boards Act gives power to the Board to charge a fee

to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under the District Boards Act. Section 174 gives power to the District Board to frame bye-laws consistent with the Act and with any rules framed by the State Government for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the area and for the furtherance of the administration of the district under the Act. In particular, power is given by s. 174 (2) (k) to the District Board to frame bye-laws for regulating slaughter-houses and offensive, dangerous or obnoxious trades, callings or practices and prescribing fees to defray the expenditure incurred by it for this purpose. It is not in dispute that the District Board has power under these provisions to frame bye-laws for regulation of these trades, (namely, hulling rice, milling grains and extracting oil). Therefore, unless this power is taken away expressly or by necessary implication by any provision of the Panchayat Raj Act, the District Board would be entitled to frame the bye-laws which it did in 1953 and charge licence-fees thereunder.

Turning now to the Panchayat Raj Act, we find that s. 15 of this Act provides for what may be called the compulsory duties of a Gaon Panchayat while s. 16 provides for what may be called its optional duties. Section 111 gives power to the prescribed authority to make bye-laws for a Gaon Panchayat within its jurisdiction consistent with the Act and the Rules made thereunder for the purpose of promoting or maintaining the health, safety and convenience of persons residing within the jurisdiction of a Gaon Panchayat and for furtherance of the administration of Gaon Panchayats under the Act. The prescribed authority in this case is the Executive Committee of the District Board (see s. 56 of the District Boards Act) which may be assumed for present purposes to be different from the District Board as such. The contention on behalf of the appellant is that reading ss. 15 and 16 together with s. 111 it is obvious that regulation or control of trades, callings and practices is not within the purview of the Panchayat Raj Act. There

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respondent. The District Board then applied for a certificate to appeal to this Court, which was granted; and that is how the matter has come up before us.

The main question which falls for consideration in this appeal is whether the view of the Appeal Court that the District Board has lost its power to make bye-laws under s. 174 of the District Boards Act for regulation and control of trade in view of s. 111 of the Panchayat Raj Act, is correct. Learned counsel for the appellant puts his argument on this point in two ways. In the first place, he urges that the Panchayat Raj Act does not contain any provision by which the Gaon Sabha or the Gaon Panchayat has been given the power to regulate or control trade and therefore even if the Panchayat Raj Act is to prevail over the District Boards Act, where the two deal with the same matter, this particular power remains in the District Board as it is not included within the powers exercisable by Panchayats under the Panchayat Raj Act. In the alternative, he urges that the intention of the legislature was not that those provisions of the District Boards Act which are common in the two Acts should be repealed by necessary implication, and therefore the District Board's power to control and regulate trade would remain whatever may be the provision of the Panchayat Raj Act.

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Turning now to the Panchayat Raj Act, we find that s. 15 of this Act provides for what may be called the compulsory duties of a Gaon Panchayat while s. 16 provides for what may be called its optional duties. Section 111 gives power to the prescribed authority to make bye-laws for a Gaon Panchayat within its jurisdiction consistent with the Act and the Rules made thereunder for the purpose of promoting or maintaining the health, safety and convenience of persons residing within the jurisdiction of a Gaon Panchayat and for furtherance of the administration of Gaon Panchayats under the Act. The prescribed authority in this case is the Executive Committee of the District Board (see s. 56 of the District Boards Act) which may be assumed for present purposes to be different from the District Board as such. The contention on behalf of the appellant is that reading ss. 15 and 16 together with s. 111 it is obvious that regulation or control of trades, callings and practices is not within the purview of the Panchayat Raj Act. There

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is no doubt that neither s. 15 nor s. 16 contains any provision corresponding to s. 91(q) of the District Boards Act. Therefore, *prima facie* the Panchayat Raj Act has nothing to do with the regulation or control of offensive, dangerous or obnoxious trades, callings or practices and this power of the District Board is unaffected by anything in the Panchayat Raj Act. Learned counsel for the respondent, however, urges that though there is no specific provision relating to such regulation or control in the Panchayat Raj Act in ss. 15 and 16, this matter of regulation and control is impliedly covered by cl. (c) of s. 15 of the Panchayat Raj Act, which enjoins on a Panchayat the duty to make reasonable provision for sanitation and taking curative and preventive measures to remove and to stop the spread of an epidemic. It is urged that 'sanitation' must be given a very wide meaning and that meaning will include the regulation of offensive, dangerous or obnoxious trades. It may be that on the widest meaning of the word "sanitation" such regulation may be included in it; but looking to the scheme of the District Boards Act as well as the Panchayat Raj Act, it is, in our opinion, not correct to give the widest possible connotation to the word "sanitation" in cl. (c) of s. 15. Section 91(m) of the District Boards Act provides for "public vaccination, sanitation and the prevention of disease"; but in spite of this entry relating to sanitation there are other provisions in s. 91 which deal with what would be covered by "sanitation" if it were to be given the widest possible meaning as, for example, cl. (e) relating to construction and repair of public wells, etc. and drainage works and the supply of water from them; cl. (n) relating to provision of a sufficient supply of pure and wholesome water where the health of the inhabitants is endangered by the insufficiency or unwholesomeness of the existing supply, guarding from pollution water used for human consumption and preventing polluted water from being so used; cl. (r) relating to dissemination of knowledge on such matters as disease, hygiene, sanitation, etc. This will show that the word "sanitation" in cl. (m) of s. 91 is not used in its widest sense.

Similarly in s. 92 (which provides for optional duties of District Boards), cl. (c) refers to reclaiming unhealthy localities; and cl. (i) to conserving and preventing injury or contamination to or pollution of, rivers and other sources of water supply, which matters would be covered within the wide meaning of sanitation. It is obvious therefore that when the word "sanitation" is used in the District Boards Act it is used in a restricted sense. Similarly in the Panchayat Raj Act cl. (c) of s. 15 mentions "sanitation". Clause (g) relates to regulation of places for the disposal of carcases and of other offensive matters which would clearly be covered by "sanitation" in its widest sense and would have been unnecessary if sanitation was to be given its widest meaning in this section. Clause (k) of s. 15 provides for regulation of sources of water supply for drinking purpose which would again be included within the widest meaning of the word "sanitation". Clause (r) provides for allotment of places for storing manure which would again be embraced within the widest meaning of the word "sanitation" and need not have been separately provided for, if sanitation in cl. (c) had the wide meaning urged for it on behalf of the respondent. Further s. 16 (which deals with discretionary functions of a Gaon Panchayat) provides in cl. (c) for filling in of insanitary depressions and levelling of land—a clause which would be unnecessary if "sanitation" has the widest possible meaning. Clause (l) of s. 16 provides for regulating the collection, removal and disposal of manure and sweepings and making arrangement for the disposal of carcases of animals, which again would be covered by cl. (c), if sanitation is to be given the widest possible meaning. Clause (m) provides for prohibiting or regulating the curing, tanning and dyeing of skins within 220 yards of the *abadi*, which again would be covered by the word "sanitation" if it had the wide meaning urged on behalf of the respondent. It would thus be clear that both in the District Boards Act as well as in the Panchayat Raj Act when the word "sanitation" has been used it has not been used in its widest sense; it seems to have been used in its ordinary meaning, i. e., the improvement of sanitary

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conditions specially with regard to dirt and infection and would thus be confined to matters of conservancy and drainge and the like. In the context therefore of both the District Boards Act and the Panchayat Raj Act, it seems to us that the word "sanitation" as used in s. 91 of the District Boards Act and s. 15 of the Panchayat Raj Act is confined to its ordinary meaning in relation to conservancy and drainage and the like with reference to the necessity of avoiding dirt and disease and cannot be given such a wide meaning as to include control or regulation of trades, callings or practices. Section 18 of the Panchayat Raj Act gives a clear indication that it is the ordinary meaning that is intended by the word "sanitation" in cl. (c) of s. 15. Section 18 deals with improvement of sanitation and provides that a Gaon Panchayat may by notice direct the owner or occupier of any land or building, to close, remove, alter, repair, cleanse, disinfect or put in good order any latrine, urinal, water-closet, drain, cesspool or other receptacle for filth, sullage-water, rubbish or refuse and so on; to cleanse, repair, cover, fill up, drain off, deepen or to remove water from a private well, tank, reservoir, pool, pit, depression or excavation therein which may appear to be injurious to health or offensive to the neighbourhood; to clear off any vegetation, undergrowth, prickly pear or scrub-jungle; and to remove any dirt, dung, nightsoil, manure or any noxious or offensive matter therefrom and to cleanse the land or building. It must therefore be held that the Panchayat Raj Act does not provide for control and regulation of trades, callings or practices like s. 91 (q) of the District Boards Act.

It is however urged that even though ss. 15 and 16 do not specifically deal with control and regulation of trades, callings or practices, s. 111 is in very general terms and gives powers to the prescribed authority to frame any bye-laws relating to promotion or maintenance of health, safety and convenience of persons residing within the jurisdiction of a Gaon Panchayat. It is true that these words in s. 111 are of wide amplitude; but they cannot, in our opinion, be widened

beyond the duties imposed on a Gaon Panchayat or Gaon Sabha under ss. 15 and 16 or any other provision of the Panchayat Raj Act. The bye-laws framed under section 111 which are for the promotion or maintenance of health, safety and convenience have also to be in furtherance of the administration of Gaon Panchayats under the Act. Therefore if Gaon Panchayats have administrative functions under ss. 15 and 16 or any other provision of the Act, bye-laws can be framed under s. 111 for these purposes in order to further the administration of Gaon Panchayats. But, if as we have held, Gaon Panchayats are not invested with the duty to control and regulate trades, callings and practices, there can be no question of framing bye-laws in that behalf under s. 111 on the basis of the wide words used therein. The power to frame bye-laws under s. 111 is, in our opinion, conditioned by the duties and functions imposed on a Gaon Panchayat under ss. 15 and 16 as well as other provisions of the Panchayat Raj Act. It is not in dispute that there is no other provision of the Panchayat Raj Act which imposes a duty on Gaon Panchayats to control or regulate trades, callings or practices and therefore the power under s. 111 does not extend to prescribing bye-laws for that purpose. The only other section to which our attention is drawn is s. 37(d) by which a Gaon Sabha has been given the power to impose a tax on trades, callings and professions, not exceeding such rate as may be prescribed. This in our opinion has nothing to do with the regulation of trades, callings and practices and levying of licence-fees in that behalf. What this provision refers to is what is provided in item 60 of List II of the Seventh Schedule and not fees properly so-called. We are therefore of opinion that as the Panchayat Raj Act does not provide for control or regulation of the nature mentioned in s. 91(q) of the District Boards Act, there is no question of the power of the District Board under s. 174 to frame bye-laws and to prescribe fees in that behalf being taken away by s. 111 of the Panchayat Raj Act. It seems that this aspect of the matter was not argued in the High Court at all and it

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appears to have been assumed there that the Panchayat Raj Act also provided for the same matter as was covered by s. 91(q) of the District Boards Act and it was probably on that basis that the High Court held that s. 111 of the Panchayat Raj Act prevailed over s. 174 of the District Boards Act. In the view we have taken it is not necessary to consider the alternative argument raised on behalf of the appellant in respect of this point.

This brings us to the point which was not considered by the Appeal Court, though the learned Single Judge had dealt with it and held against the respondent. That contention is that certain fees are being levied on the respondent in respect of these mills under the U. P. Rice and Dal Mills Control Order, 1948 and the U. P. Pure Food Act and therefore the District Board cannot levy any further licence-fee under s. 91(q) of the District Boards Act read with s. 174. As pointed out by the learned Single Judge, the fees levied under the Control Order of 1948 which depends for its existence on the Essential Supplies Act and under the U. P. Pure Food Act are for different purposes of those Acts. The fee charged by the District Board is for regulation of obnoxious trades and the purpose of this regulation is different from the purpose for which fees are levied under the Essential Supplies Act and the Pure Food Act. Under these circumstances we see no reason for striking down the regulatory provisions made under the District Boards Act and the licence-fee charged thereunder. The fact that there may be some overlapping between the regulatory provisions made under the U. P. Pure Food Act and those made under the District Boards Act can have no relevance on the validity of the bye-laws and the licence-fee charged under them.

In this view of the matter, the appeal is allowed, the order of the Appeal Court set aside and the writ petition dismissed. However, as the point on which the appellant has succeeded in this Court was not specifically raised in the High Court, we order the parties to bear their own costs throughout.

Appeal allowed.

AZIMUNISSA AND OTHERS

v.

THE DEPUTY CUSTODIAN, EVACUEE PROPERTIES, DISTRICT DEORIA AND OTHERS.

October 26.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Evacuee Property—Automatic vesting under invalid Ordinance —Continuance of vesting under subsequent enactments—Validation of—Separation of evacuee interest—Composite Property—Sale of non-evacuee interest—Whether violates fundamental rights—U. P. Administration of Evacuee Property Ordinance, 1949 (U. P. Ordinance I of 1949), ss. 2(c) and 5—Administration of Evacuee Property (Chief Commissioner's Provinces) Ordinance 1949 (Ordinance XII of 1949), s. 5—Administration of Evacuee Property (Chief Commissioner's Provinces) Amendment Ordinance 1949 (Ordinance XX of 1949), s. 8—Administration of Evacuee Property Ordinance 1949 (Ordinance XXVII of 1949), ss. 7 and 8—Administration of Evacuee Property (Amendment) Ordinance 1950 (Ordinance IV of 1950), s. 4—Administration of Evacuee Property Act, 1950 (XXXI of 1950), ss. 7 and 8—Administration of Evacuee Property (Amendment) Act, 1960 (I of 1960), s. 2—Evacuee Interest (Separation) Act, 1951 (LXIV of 1951), s. 10—Constitution of India, Arts. 19(1)(f) and 31.

One K who had a 0-2-3 share in certain properties in Uttar Pradesh went to Pakistan in 1947. The competent Officer took proceedings under the Evacuee Interest (Separation) Act, 1951, to separate the share of K in the property and as the claimants were not prepared to purchase the share of K, he auctioned the entire property under s. 10 of the Act. The petitioners contended that K was not an evacuee, that the property was not composite property, that the proceedings under the Act were void and that s. 10 of the Act was void as it contravened Arts. 31 and 19(1)(f) of the Constitution. The respondents urged that the interest of K in the property had automatically vested in the Custodian under U. P. Ordinance I of 1949 and this vesting was continued by Central Ordinance XII of 1949, by Central Ordinance XXVII of 1949 and Central Act XXXI of 1950 and any legal defect in the vesting was cured by Central Act I of 1960, that the property was accordingly composite property and was properly auctioned under the Separation Act. The Petitioners replied that U. P. Ordinance I of 1949 and Central

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Ordinance XII of 1949, were void for want of legislative competence and there could be no vesting in law under their provisions which could be continued by subsequent Ordinances and Acts.

Held, that the property was composite property and was properly auctioned under the Separation Act. As K was an evacuee under s. 2(c) of the U. P. Ordinance, her property automatically vested in the Custodian under s. 5 and it was continued under the Central Ordinance XII of 1949. Even if these two Ordinances were bad for legislative incompetence the purported vesting thereunder was continued under Central Ordinance XXVII of 1949 and thereafter under Central Act XXXI of 1950 and any legal defect in such vesting was cured by Central Act I of 1960.

Held, further that s. 10(a) of the Separation Act did not contravene Arts. 31 and 19(1)(f) of the Constitution and was not void. As the petitioners were not prepared to purchase the share of K, the Competent Officer acted properly in selling the property by public auction.

ORIGINAL JURISDICTION: Petition No. 56 of 1958.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental rights.

A. V. Viswanatha Sastri and *G. C. Mathur*, for the petitioners.

C. K. Daphtary, Solicitor-General of India, R. B. Nanak Chand and *R. H. Dhebar*, for respondents Nos. 1 to 3.

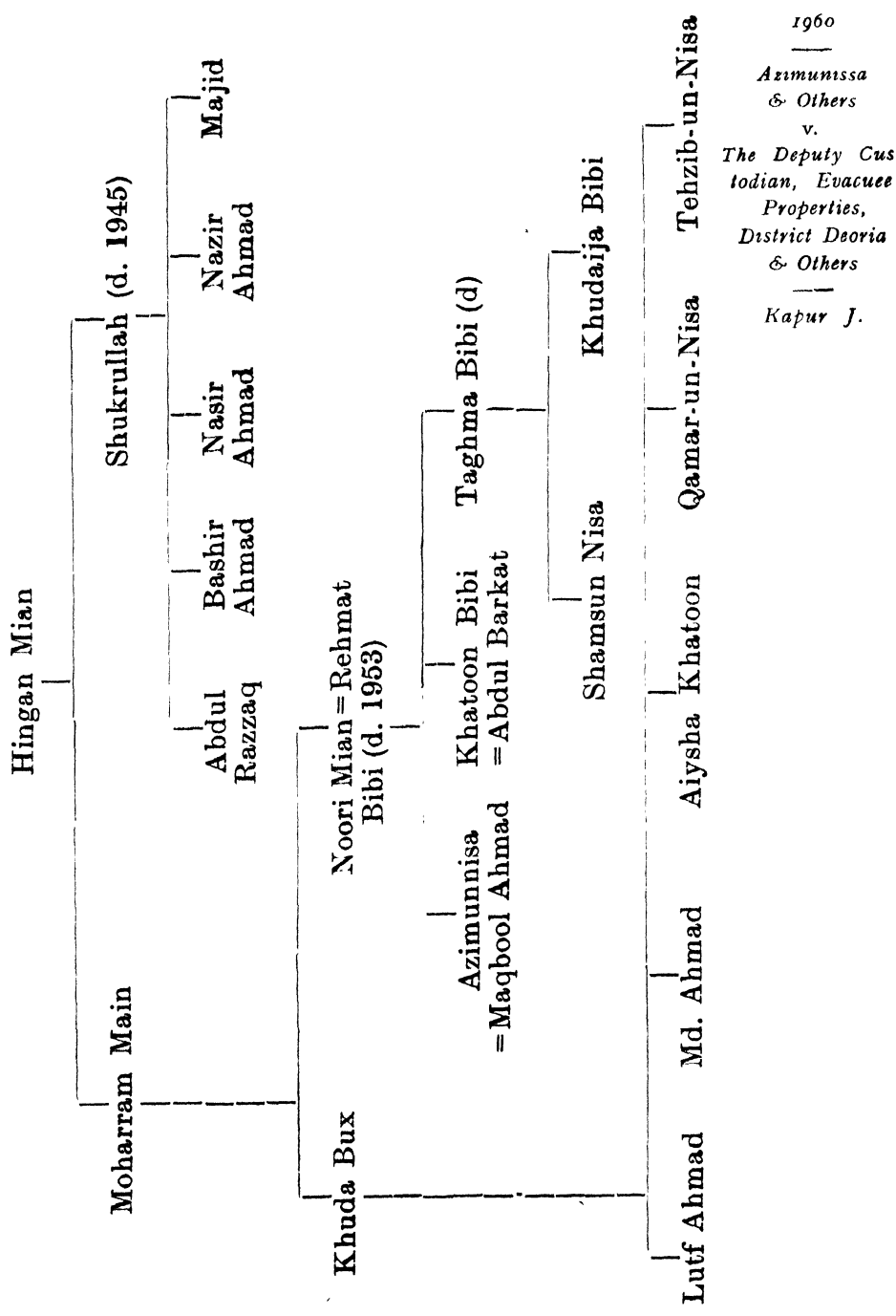
C. K. Daphtary, Solicitor-General of India, Harnam Singh and *I. N. Shroff*, for the respondent No. 4.

J. P. Goyal, for respondents Nos. 5 to 10.

1960. October 26. The Judgment of the Court was delivered by

Kapur J.

KAPUR J.—This is a petition by six persons under article 32 of the Constitution praying for a writ of *certiorari* for calling the records in which certain orders were passed and for the issue of a *mandamus* directing the respondents to restore the property in dispute. The following pedigree table will assist in understanding the case:—


Hingan Mian
Moharram Main
Shukrullah (d. 1945)
Abdul Razzaq
Bashir Ahmad
Nasir Ahmad
Nazir Ahmad
Majid
Khuda Bux
Noori Mian = Rehmat Bibi (d. 1953)
Azimunnisa = Maqbool Ahmad
Khatoon Bibi = Abdul Barkat
Taghma Bibi (d)
Shamsun Nisa
Khudaija Bibi
Lutf Ahmad
Md. Ahmad
Aiysha Khatoon
Qamar-un-Nisa
Tehzib-un-Nisa

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The petitioners alleged that the properties in dispute were acquired by Noori Mian and after his death there was some litigation but as a result of a compromise between the members of the family the shares of the contestants were fixed as follows :—

(a) Rehmat Bibi, Widow	...	0-1-6
(b) Taghma Bibi	...	0-1-5
(c) Khatoon Bibi	...	0-1-9
(d) Azimunnissa	...	0-1-9
(e) Shukrullah	...	0-5-4
(f) Khuda Baksh	...	0-4-3

On August 28, 1942, Shakru-ullah created a waqf-alal-aulad in favour of his sons and nominated Abdul Razzaq as Mutwali (Trustee). Shakr-ullah died in 1945. In the year 1947, Khatoon Bibi, one of the petitioners, went away to Karachi and the ostensible reason stated by her is that she went to look after the ailing sister of her husband who was in Karachi.

On November 22, 1949, a notice was issued to Khatoon Bibi, her manager and servants declaring her to be an evacuee and calling upon her to surrender possession of her property which was described as " Bhatni Noori Chini Mills, zamindari and kashtkari land ". Her husband Abdul Barkat filed objections but it does not appear that any order was passed on those objections. On April 17, 1950, the Administration of Evacuee Property Act, 1950 (XXXI of 1950), hereinafter referred to as the Act, came into force. Another notice was issued to Khatoon Bibi by the Deputy Custodian of Evacuee Property, Deoria, on July 5, 1950, to show cause why she should not be declared an evacuee and why all her property be not declared evacuee property. It is alleged that the notice did not contain any description of the property and was therefore ineffective. This fact is denied by the respondents. In their affidavit it was stated that the property was fully specified and identified and that the notice of July 5, 1950, was by way of abundant caution ; the property of Khatoon Bibi had become evacuee property and had automatically vested in the year 1949. Against this notice also Abdul Barkat filed objections but by an order dated March 7,

1951, these objections were dismissed. The order was as follows:—

"Objection dismissed. Admittedly Bibi Khatoon is an evacuee. The notice is hereby confirmed and the property (sufficiently although not thoroughly) described in the notice is hereby declared to be evacuee property".

No appeal or revision was taken against this order. On January 8, 1953, a notice under s. 7 of the Act was issued against Bashir Ahmad and Nasir Ahmad and by an order dated December 14, 1955, both of them were declared evacuees and their interests in the properties were declared evacuee property. This order by the Assistant Custodian (Judicial) shows that in the notice the properties were described and it was held that both Bashir Ahmad and Nasir Ahmad were evacuees and their interest in the property was evacuee property but as it was composite property the exact shares were left to be determined by the Competent Officer. An appeal was taken by these two evacuees to the Custodian of Evacuee Property, U. P., but it has not yet been decided.

Proceedings were then taken by the Competent Officer under Evacuee Interest (Separation) Act (64 of 1951), hereinafter called the Separation Act. Notices were issued under s. 6 of the Separation Act on February 15, 1954, and the persons to whom notices were issued filed separate claims claiming various shares in the property. The Competent Officer by his order of March 20, 1956, declared the shares of the various evacuees and non-evacuees and also held that as the claimants were not prepared to purchase the shares of the evacuees in the property in dispute the only mode available for partition was by a public auction. He gave directions as to how the property which was the subject matter of *waqf-alal-aulad* was to be separated. As regards the valuation of the property he referred to the valuation made by the Assistant Valuation Officer and Superintendent, Valuation Office, Khan Market, New Delhi, the former at Rs. 7,41,300 for the construction and lands and the latter at Rs. 14,15,000 inclusive of machinery, lands

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and buildings and then tentatively fixed the valuation at Rs. 14,15,000 and again referred the matter to the Superintendent, Valuation Office for final valuation. He held Khatoon Bibi's share to be 0-2-3 and also determined the interest of Bashir Ahmad and Nasir Ahmad and ordered the entire property to be sold by auction. Against this order an appeal was taken to the Appellate Officer. On August 13, 1956, the property in dispute was sold to respondent No. 3 for Rs. 16,05,000. Against this objections were filed by the petitioner Azimunnissa and Abdul Wahid but they were dismissed by the Competent Officer on October 1, 1956. Against this order a revision was taken to the Appellate Officer but both of them were dismissed on October 24, 1957. In the meanwhile the petitioners, on September 27, 1956, filed a petition under Art. 226 in the High Court of Allahabad in which they attacked the validity of the proceedings taken under the Act and also the order of the Competent Officer ordering sale. Some of the points raised by the petitioners were decided in their favour but the petition was dismissed because the petitioners had been guilty of laches as they had slept over their rights for five years and had applied to the High Court when no further notices could be issued under the Act and as no proper action was taken by the petitioners as regards the various orders passed. Against this judgment of the Allahabad High Court in *Azimunnissa & Ors.* v. *Assistant Custodian* (1) and against the order of the Appellate Officer, the petitioners applied for special leave to this court but both these petitions were dismissed on February 10, 1958.

The petitioners have now come to this court under Art. 32 for a writ of certiorari (1) to quash the order of the Assistant Custodian, Deoria, dismissing the objections of the petitioner Khatoon Bibi on March 7, 1951; (2) to quash the order of the Competent Officer dated March 20, 1956 and of the Appellate Officer dated October 24, 1957 and (3) for quashing the sale proceedings ending in the sale of the property dated March 13, 1956 and (4) for a *mandamus* directing the respondents to restore the property to the petitioners.

(1) A.I.R. 1957 All. 561.

Three questions were raised on behalf of the petitioners: (1) that the property was not composite property within the Separation Act; (2) the shares of Khatoon Bibi and of Bashir Ahmad and Nasir Ahmad were not validly declared to be evacuee interest under the various provisions of law and therefore the provisions of the Separation Act did not apply; (3) section 10(a)(iii) of the Separation Act in so far as it directed the sale of non-evacuee property contravenes arts. 19(1)(f) and 31 of the Constitution and was therefore unconstitutional.

The decision of the case mainly depends upon the decision as to whether the property in dispute was composite property. Under s. 2(d) of the Separation Act composite property has been defined:

S. 2(d) "" composite property" means any property which or any property in which an interest has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act 1950 (XXXI of 1950) and—

(i) in which the interest of the evacuee consists of an undivided share in the property held by him as a co-sharer or partner of any other person, not being an evacuee."

and "evacuee interest" is defined in s. 2(e) as:

S. 2(e) "" evacuee interest" in relation to a composite property, means the right, title and interest of an evacuee in that property."

Therefore if it is established that any interest in the property has been declared to be evacuee property or has vested in the Custodian under the Act then the whole will be composite property. For the determination of the question whether any portion of the property in dispute was evacuee property it becomes necessary to refer to the provisions of the various laws which were passed in regard to evacuee property. The property in dispute is situate in what was the United Provinces and the first legislation in that province as it then was, was the United Provinces Administration of Evacuee Property Ordinance, 1949 (U. P. Ordinance No. 1 of 1949), which

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was promulgated on June 24, 1949. In this Ordinance evacuee and evacuee property had the definition which has been continued in the later Ordinances and Acts. By s. 5 of that Ordinance all evacuee property situate in the United Provinces automatically vested in the Custodian and any person in possession of such property was deemed to be holding on behalf of the Custodian (s. 6(2)). As Khatoon Bibi was an evacuee under s. 2(c) of the U. P. Ordinance her property automatically vested in the Custodian under s. 5. But the validity of this Ordinance was successfully challenged by the petitioners in the Allahabad High Court in *Azimunissa* v. *Assistant Custodian* (1). The ground for the challenge was that there was no entry in the lists in the Seventh Schedule of the Constitution Act, 1935, dealing with evacuee property and there was no public notification by the Governor General as required by s. 104 of the Constitution Act, 1935. This Ordinance, i.e., U. P. Ordinance 1 of 1949 expired on August 23, 1949.

On June 13, 1949, the Governor General promulgated the Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance XII of 1949 and it was extended to U. P. on August 23, 1949, by Ordinance XX of 1949 after a resolution was passed by the U. P. Legislature under s. 103 of the Constitution Act. Section 5 of the former provides for the vesting of property in the Custodian as follows :—

S. 5(1) "Subject to the provisions of this Ordinance all evacuee property situate in a Province shall vest in the Custodian for that Province.

(2) Where, immediately before the commencement of this Ordinance any evacuee property in a Province had vested in any person exercising the powers of a Custodian under any corresponding law in force in that Province immediately before such commencement, the evacuee property shall, on the commencement of this Ordinance, be deemed to have vested in the Custodian appointed for the Province under this Ordinance".

Section 8 of Ordinance XX added s. 41 to Ordinance XII of 1949 which was the saving provision.

(1) A.I.R. 1957 All. 561.

Thus under s. 5 in spite of the expiry of the U. P. Ordinance the property of Khatoon Bibi was deemed to have vested in the Custodian under the provisions of Ordinance XII of 1949. But this Ordinance (XII of 1949 as amended by Ordinance XX of 1949) suffered from the same constitutional defect as the U. P. Ordinance 1 of 1949. On August 25, 1949, item 31-B relating to "evacuees" was added to the concurrent list by the Government of India Act (Third Amendment) Act of 1949 and thus this constitutional vacuum was filled up. On October 18, 1949, the Governor General promulgated the Administration of Evacuee Property Ordinance (XXVII of 1949). It repealed Ordinance XII of 1949. Section 7 of this Ordinance provided for declaration of evacuee property and s. 8 for vesting of evacuee property in the Custodian. The relevant portions of s. 7 are :—

S. 7(1) "Where the Custodian is of opinion that any property is evacuee property within the meaning of this Ordinance, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property".

S. 8 "Any property declared to be evacuee property under section 7 shall vest in the Custodian.

(2) Where immediately before the commencement of this Ordinance any evacuee property in a Province had vested in any person exercising the powers of a Custodian under any law repealed hereby, the evacuee property shall, on the commencement of the Ordinance, be deemed to have vested in the Custodian appointed or deemed to have been appointed for the Province under this Ordinance, and shall continue to so vest".

These provisions were materially different from that in the previous Ordinances as there was no automatic vesting in the Custodian.

Thus any vesting under Ordinance XII of 1949 was deemed to be under Ordinance XXVII of 1949 as if the latter had been in force on the date of the vesting. By s. 4 of the Administration of Evacuee

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Property (Amendment) Ordinance IV of 1950, s. 8 of Ordinance XXVII of 1949 was substituted by a revised section s. 8. The relevant portion of this section provided:—

S. 8(2) "Where immediately before the commencement of this Ordinance, any property in a province had vested as evacuee property in any person exercising the powers of a Custodian under any law repealed hereby, the property shall, on the commencement of this Ordinance be deemed to be evacuee property declared as such within the meaning of this Ordinance and shall be deemed to have vested in the Custodian appointed or deemed to have been appointed for the Province under this Ordinance, and shall continue to so vest.

Provided that where, at the commencement of this Ordinance, there is pending before the Custodian for any province any claim preferred to him in respect of any property under section 8 of the Administration of Evacuee Property Ordinance, 1949 (XII of 1949), or under any other corresponding law repealed hereby, then, notwithstanding anything contained in this Ordinance or in any other law for the time being in force such claim shall be disposed of as if the definitions of 'evacuee property' and 'evacuee' contained in section 2 of this Ordinance had become applicable thereto."

Under this provision of the Ordinance the effect as to vesting was that it was deemed to be under this Ordinance.

On April 18, 1950, the Administration of Evacuee Property Act, 1950 (XXXI of 1950), which has been referred to as the Act was passed by Parliament. It repealed Ordinance XXVII of 1949. The definitions of evacuee and evacuee property are the same as in Ordinance XXVII. Section 7 of the Act and s. 8 also are in the same terms. The provisions regarding vesting of evacuee property in the Custodian were also same as in the amended s. 8 of Ordinance XXVII. Section 58 deals with repeals and savings.

Therefore the consequence of s. 8(2) was that property vested under Ordinance XXVII was deemed to

be vested under the corresponding provision of the Act.

On February 27, 1960, the Act was amended by the Administration of Evacuee Property (Amendment) Act 1 of 1960. Sub-section (2-A) was added to s. 8 which was in the following terms :—

(2-A) "Without prejudice to the generality of the provisions contained in sub-section (2) all property which under any law repealed hereby purports to have vested as evacuee property in any person exercising the powers of Custodian in any State shall, notwithstanding any defect in or the invalidity of, such law or any judgment, decree, order of any Court, be deemed for all purposes to have validly vested in that person, as if the provisions of such law had been enacted by Parliament and such property, shall, on the commencement of this Act, be deemed to have been evacuee property declared as such within the meaning of this Act and accordingly, any order made or other action taken by the Custodian or any other authority in relation to such property shall be deemed to have been validly and lawfully made or taken".

The argument raised on behalf of the petitioner was that U. P. Ordinance 1 of 1949, Central Ordinance XII of 1949 and Central Ordinance XX of 1949 were invalid as the legislative competence of the Governor and of the Governor-General in regard to evacuee and evacuee property matters was wanting; and all that sub-s. (2-A) of s. 8 added by Act 1 of 1960 did was to save any vesting which purported to have taken place under Ordinance XXVII but it did not purport to cure any invalidity due to constitutional incompetence and that the law made without constitutional authority could not be validated. Reference was made to *Saghir Ahmad* v. *The State of U. P.* (1) where at page 728 the following statement from Cooley's Constitutional Limitations, Vol. 1, page 384 (note):—

"A statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment

(1) [1955] 1 S.C.R. 707, 728.

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of the Constitution removing the constitutional objection but must be reenacted"
was held to be sound law.

Reference was also made to *M.P.V. Sundararamier & Co.* v. *The State of Andhra Pradesh* (1) where a distinction was drawn between the unconstitutionality due to incompetency of the Legislature and disregard of constitutional prohibitions.

The respondents in reply contended that there was no defect in the notice issued to Khatoon Bibi and her property was properly and sufficiently described therein and that Act 1 of 1960 validated the vesting and removed all defects and invalidity, if any, arising as a result of the deficiencies in the various laws operating on her case.

The first notice to Khatoon Bibi was under Ordinance XXVII dated November 22, 1949, against which her husband Abdul Barkat filed objections but evidently no order was passed on it. The second notice which was given on July 5, 1950, sufficiently specified the property. Against this notice objections were again raised by Abdul Barkat but were dismissed by the order dated March 7, 1951, and no further appeal or revision or any other proceeding was taken against that order and any defects and deficiencies whether of law or otherwise cannot now be raised. It was specifically stated in that order that the property was sufficiently, though not thoroughly, described and that property was declared to be evacuee property. The appellants contested the correctness of the fact that the property was properly described and referred to the judgment of the Allahabad High Court in *Azimunnissa* v. *Assistant Custodian* (2) (p. 568, para 10) which indicates that there was no description of the property. In the view that we are taking this controversy loses its vitality.

The second plea taken by the respondents was that by the insertion of s. 8(2A) in the Act by Act 1 of 1960 retroactive effect was given to the provisions of the Act and the vesting of any evacuee property which purported to have been vested as evacuee property in

(1) [1958] S.C.R. 1422, 1469. (2) A.I.R. 1957 All. 561.

the Custodian was validated notwithstanding any defect in or invalidity of such law and on the commencement of that Act (Act 1 of 1960) the property which purported to have vested in the Custodian was deemed to have been evacuee property declared as such within the meaning of the Act and any order made or action taken by the Custodian must be deemed to have been validly made or taken.

The word "purport" has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable; *Dicker* v. *Angerstein* (1). Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable, s. 8(2-A) by giving a retrospective effect to s. 8(2) of the Act makes the vesting as if it was vesting under s. 8(2) of the Act and therefore the attack on the ground of invalidity cannot be sustained. By s. 5 of U. P. Ordinance 1 of 1949 the property of Khatoon Bibi who became an 'evacuee' under s. 2(c) and her property 'evacuee property' under s. 2(d) was vested in the Custodian of Evacuee Property of the province of U. P. That Ordinance was allowed to lapse. By Central Ordinance XII of 1949 as subsequently amended the vesting of evacuee property was deemed to be under that Ordinance, which in its turn was repealed under s. 55 of Ordinance XXVII of 1949 which was a valid piece of legislation. By s. 8(2) of that Ordinance the vesting under the previous Ordinance was deemed to be under that Ordinance as if it was in force on the date of the vesting. Ordinance XXVII of 1949 was repealed by the Act which contained provisions as to vesting in s. 8(2), which was similarly worded as the corresponding provision of the Ordinance and therefore by a fiction of law the original vesting was to be treated as

(1) (1876) 3 Ch. D. 600, 603.

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if the Act was in force when the first vesting took place. The High Court of Allahabad in *Azimunnissa's case* (1) held the vesting to be invalid because upto the time of Ordinance XII of 1949 and even Ordinance XX of 1949 legislative competence was lacking, and even by the deeming provisions in s. 8(2) of Ordinance XXVII of 1949 or Act XXXI of 1950 there was no valid vesting, because the original vesting was bad. We think it unnecessary to decide as to whether the deeming provision of s. 8(2) of the Act or of Ordinance XXVII of 1949 was sufficient to give validity to the vesting. Section 8(2-A) as introduced into the Act, in our opinion, makes the vesting valid, because it gives validity to the vesting which purported to have taken place as a result of Ordinance XXVII of 1949 even though it was only apparently so and was not so in law, because that is what 'purport' implies.

The effect of s. 8(2-A) is that what purported to have vested under s. 8(2) of Ordinance XXVII of 1949 and which is to be deemed to be vested under s. 8 of the Act which repealed that Ordinance, notwithstanding any invalidity in the original vesting or any decree or order of the Court shall be deemed to be evacuee property validly vested in the Custodian and any order made by the Custodian in relation to the property shall be deemed to be valid. Thus retrospective effect is given to the Act to validate (1) what purports to be vested; (2) removes all defects or invalidity in the vesting or fictional vesting under s. 8(2) of Ordinance XXVII of 1949 or s. 8(2) of the Act which repealed the Ordinance; (3) makes the decrees and judgments to the contrary of any court in regard to the vesting ineffective; (4) makes the property evacuee property by its deeming effect; and (5) validates all orders passed by the Custodian in regard to the property. Because of the retrospective effect given to the Act and the validating effect of Act 1 of 1960 *Saghir Ahmad's case* (2) would have no application. In the view we have taken the other question does not survive and the share of Khatoon Bibi must be held to be evacuee property validly

(1) A.I.R. 1951 All. 561. (2) [1955] 1 S.C.R. 707.

vested in the Custodian. Therefore the property in dispute does fall within the definition of composite property as given in s. 2(d) and cannot be held to be invalid.

It was then argued that by the sale of the property non-evacuees had been illegally deprived of their property and therefore s. 10, cl. (a) contravenes the provisions of Arts. 31 and 19(1)(f). This contention is equally unsubstantial. The relevent provision of s. 10 is as follows :—

"Notwithstanding anything to the contrary in any law or contract or any decree or order of a Civil Court or other authority, the competent officer may, subject to any rules that may be made in this behalf, take all such measures as he may consider necessary for the purpose of separating the interests of the evacuees from those of the claimants in any composite property, and in particular may,—

(a) in the case of any claim of a co-sharer or partner,—

(i) direct the Custodian to pay to the claimant the amount of money assessed in respect of his share in the composite property or deposit the same in a Civil Court having jurisdiction over such property and deliver possession of the property to the Custodian and the claimant may withdraw the amount in deposit in the Civil Court; or

(ii) transfer the property to the claimant on payment by him of the amount of money assessed in respect of the share of the evacuee in the property; or

(iii) sell the property and distribute the sale proceeds thereof between the Custodian and the claimant in proportion to the share of the evacuee and of the claimant in the property; or

(iv) partition the property according to shares of the evacuee and the claimant and deliver possession of the shares allotted to the evacuee and the claimant to the Custodian and the claimant respectively."

Thus the alternatives open to the Competent Officer were four: Of these (1) the payment by the Custodian of the money value of the share of the non-evacuees

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to the non-evacuees; and (2) the payment to the Custodian by the non-evacuees of the money value of the share of the evacuees were not available to him. The former in this case was neither claimed nor could the Custodian be expected to pay such a large sum of money to the non-evacuees. The order of the Competent Officer of March 20, 1956, shows that the non-evacuee co-sharers were not prepared to pay to the Custodian the money value of the shares of the evacuees. Of the remaining alternatives the third alternative was the partitioning of the property but that also was not possible in the present case because of the nature of the composite property which comprised of a sugar mill which in the very nature of things could not be partitioned. Consequently the only available mode of separation was the one adopted by the Custodian, i.e., by sale of the property and division of the sale proceeds. In the circumstances the action of the Competent Officer could not be termed unreasonable or violative of Art. 19(1)(f) nor does it violate Art. 31 because it cannot be said to be deprivation of the non-evacuees of their property without the authority of law.

In the result this petition fails and is dismissed with costs.

Petition dismissed.

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October 26.

TOBACCO MANUFACTURERS (INDIA) LTD.

v.

THE COMMISSIONER OF SALES-TAX, BIHAR, PATNA.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax—Sale-Goods delivered outside State for consumption in the State of first delivery—Goods delivered for consumption in other States—Liability to tax—Constitution of India, Art. 286(1)(a) —Bihar Sales Tax Act.

The appellants who were manufacturers of cigarettes and tobacco in the State of Bihar contested the levy of sales-tax on sales effected by them during the financial years 1949-50 and 1950-51 on the ground that as a direct result of every sale effected by them the goods concerned were delivered outside the State of Bihar and were, therefore, exempted from tax liability under Art. 286(1)(a) of the Constitution. Both the Superintendent of sales-tax and the Deputy Commissioner of sales-tax, Bihar, overruled the objection of the appellants, and following a previous ruling of the Board of Revenue of Bengal in a case known as the *Bengal Timber Case* (61 of 1952) held the appellants liable to pay the tax. The appellants paid the tax demanded but filed an application in revision to the Board of Revenue, claiming a constitutional exemption from tax on every sale effected by them as a result of which goods were delivered outside the State of Bihar—whether the delivery was for consumption in the State of first delivery or not. The Board passed the following order on the revision petition.

"As regards the admitted despatches of the goods outside the State after the 26th January, 1950, when the Constitution came into force, the learned lower court has been guided by the decision of the Board in the *Bengal Timber Case* (No. 61 of 1952). But this ruling of the Board stands superseded by the subsequent decision of the Supreme Court in the *United Motors Case* According to the decision of the Supreme Court, no tax could be levied on despatches to the places outside the state after the 26th January, 1950, and on this point the petitions are allowed, and the sales tax officer directed to recalculate the amount of tax payable by the assessee".

The appellants taking the above order to be in their favour claimed refund of the tax already paid by them and the sales tax authorities contested the position and claimed that they were bound to refund the tax only on those sales wherein the goods were delivered outside the State for consumption in the State of first delivery. The department thereafter sought clarification of the above order. The Board refused to clarify or explain its order and passed an order saying that "no further clarification was really required in view of the specific reference to the judgment of the Supreme Court in the United Motors Case". Thereafter as the authorities still refused to refund the balance of the tax the appellants filed two applications in the High Court for the issue of a writ of *mandamus* to compel the refund. The High Court held that the Board's decision that sales in which the goods were delivered outside the State for consumption, not in the State of first delivery but in other States were also exempted from tax, was wrong and that the appellants were not entitled to a writ of *mandamus* for enforcing a wrong order. On appeal by special leave,

Held, that the proper construction of the Board's orders was that the sales tax officer was directed to decide the relief that

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should be given to the assessee on the officers' interpretation of the decision of this Court in the *United Motors Case*. The Board did not determine the effect of that judgment and did not decide that every sale in which the goods were delivered outside the State of Bihar was exempted from liability to tax.

The principle that a subordinate tribunal should not refuse to carry out the directions of a superior tribunal was therefore not applicable to the instant case.

Bhopal Sugar Mills v. *Commissioner of Income-tax*, [1961] 1 S.C.R. 474, held inapplicable.

The *United Motors Case* merely decided that sales in which goods were delivered outside the State for consumption in the State of first delivery would fall under the Explanation to Art. 286(1) of the Constitution and would therefore be exempted from tax liability, but it did not deal with other sales in which the goods thus delivered were for consumption, not in the State of first delivery but in other states. Such sales would on the order of the Board of Revenue which was binding on the appellant be liable to tax in accordance with the previous decision of the Board of Revenue in the *Bengal Timber Case*.

State of Bombay v. *United Motors (India) Ltd. and Ors.*, [1953] S.C.R. 1069, explained and applied.

Board of Revenue of the State in the Bengal Timber Case, 61 of 1952, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 202 and 203 of 1958.

Appeals from the judgment and decree dated October 5, 1956, of the Patna High Court in Misc. Judicial Cases Nos. 330 and 331 of 1955.

K. D. Chatterjee, S. N. Andley and *J. B. Dadachanji*, for the appellants.

D. P. Singh, for the respondents.

1960. October 26. The Judgment of the Court was delivered by

Ayyangar J.

AYYANGAR J.—These two appeals are from a common judgment of the High Court of Patna dated October 5, 1956, in two petitions under Art. 226 of the Constitution and have been filed pursuant to a certificate granted by the High Court under Art. 132.

The Tobacco Manufacturers (India) Ltd., the appellants in the above appeals are an incorporated company manufacturing cigarettes and tobacco in their factory at Monghyr in the State of Bihar, and these

appeals are concerned with the legality of the levy of sales-tax under the Bihar Sales Tax Act (hereafter referred to as the Act) on the appellants in respect of sales effected during the financial years 1949-50 and 1950-51. The point urged in these appeals is a very narrow one and relates to the proper construction to be placed on certain orders of the Board of Revenue passed in regard to the tax properly leviable for these two years.

The facts relevant to this point are briefly these: The assessment of the appellants for both the years was completed by the Superintendent of Sales Tax, Monghyr, on May 7, 1952, and the total tax liability was determined in the sum of Rs. 6,44,940-2-6 and Rs. 7,46,876-1-3 for the two assessment years 1950-51 and 1951-52 respectively. Before the assessing officer, the appellants contended that all sales effected by them as a direct result of which the goods were delivered outside the State of Bihar were exempted from tax liability under Art. 286(1)(a) of the Constitution. This objection was overruled, the reason assigned being, that the sales were completed in Bihar, and that the entire turnover of the appellants was therefore subjected to tax under the Act. In taking this view the assessing authority followed a previous ruling of the Board of Revenue of the State in the *Bengal Timber case* (Case 61 of 1952). An appeal preferred to the Deputy Commissioner of Sales Tax, Bihar, by the appellants was dismissed on October 8, 1952, on the same grounds.

The appellants paid the tax demanded for both the years and invoked the revisional jurisdiction of the Board of Revenue. In their petitions to the Board the appellants pointed out, that the sales of goods delivered for consumption outside the State of Bihar which involved a tax liability of Rs. 1,23,813-0-2 in the earlier year and Rs. 7,10,185-12-0 in the later year were made up of two types of transactions:

(a) those in which the goods thus delivered were for consumption in the State of first delivery or first destination,

(b) those in which the goods thus delivered were

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for consumption, not in the State of first delivery but in other States.

(These two classes would be referred to hereafter for convenience as type (a) and type (b) respectively). The appellants claimed that on the proper construction of Art. 286(1) & (2) they were entitled to have both these types of sales excluded from their taxable turnover. By the date of the hearing of these petitions by the revisional authority, this Court had rendered the decision in *State of Bombay* v. *United Motors (India) Ltd. and Others* (1) expounding the scope of the explanation to Art. 286(1)(a) and its interrelation to the exemption under Art. 286(2), and naturally this decision was brought to the attention of the member of the Board at the hearing. Without examining whether the decision cited did or did not cover both the two (a) & (b) types of sales effected by the appellants, the Board passed on August 28, 1953, a laconic order in these terms:

"The two points urged in this Court were among those points urged in the Lower Court and they are—

(i) No tax should have been levied on the Company's canteen sales.

(ii) that despatches outside the State for consumption in other States should not have been taxed for the period after the Constitution came into force.

.....

.....

As regards the admitted despatches of goods outside the State after the 26th January, 1950, when the Constitution came into force, the learned Lower Court has been guided by the decision of the Board in the *Bengal Timber case* (Case No. 61 of 1952). But this ruling of the Board stands superseded by the subsequent decision of the Supreme Court in the *United Motor's case.* According to the decision of the Supreme Court, no tax can be levied on despatches to the places outside the State after the 26th January, 1950 and on this point the petition are allowed, and the

(1) [1953] S.C.R 1069.

sales-tax officer directed to recalculate the amount of tax payable by the assessee".

Apparently the appellants understood this order as meaning that all sales, whereunder goods were delivered outside the State, whether or not for consumption in the State of first delivery (i.e., both types (a) & (b)) were exempted from the tax levy. The sales-tax authorities, however, took the order to mean that only those sales in which deliveries were made outside the State for consumption in the State of first destination, i. e., those of type (a) were intended to be exempted, and these rival interpretations were put forward in the correspondence that passed between the appellants and the sales-tax authorities. The appellants made an application for the refund of the amount of tax attributable to all the sales under which goods were delivered outside the State, but the tax authorities sticking to their interpretation of the order of the Board and of their interpretation of the decision of this Court in the *United Motors case* (1) refunded the tax collected on the sales falling within type (a) but refused to refund Rs. 20,923-15-2 for the 1st year and Rs. 1,29,823-5-0 for the later year—these amounts representing the tax on sales of type (b). The appellants however persisted in pressing their claim for the refund of these amounts also.

In this state of affairs, the State of Bihar moved the Board of Revenue to review its order dated August 28, 1953, or at any rate clarify it so as to confine its operation to sales falling within type (a), urging that this would bring it in accord with the interpretation of Art. 286(1) by this Court in the *United Motors case* (1). The appellants objected to the jurisdiction of the Board of Revenue to review its previous decision and on April 25, 1955, it passed the following order:

"These are what appear to be two miscellaneous petitions filed on behalf of the State of Bihar seeking certain clarifications regarding the interpretation of the Board's order dated 28-8-1953 in Cases Nos. 514 of 1952. After argument was heard it was conceded

(1) [1953] S.C.R. 1069.

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by both parties that there is no provision in the Act under which the parties concerned may move the court to clarify or explain the order passed, this function essentially being a matter of legal advice. It was also agreed that no further clarification was really required in view of the specific reference to the judgment of the Supreme Court in the United Motor's case. The petitions are, therefore, rejected."

If the order of the Board dated August 28, 1953, was laconic and ambiguous, the later order dated April 25, 1955, was if anything more obscure. The appellants, however, considered it an order in their favour, because the petition by the State for clarification of the first order on the lines of the interpretation put upon it by the tax authorities had been dismissed, and when the refusal to refund the two sums of tax referred to earlier was continued, they filed two petitions in the High Court of Patna under Art. 226 of the Constitution for the issue of writs of mandamus to compel the refund of the tax on the principal ground that a duty to do so had been imposed by the orders of the Board of Revenue, though the petition made an incidental reference to the appellants being entitled to such refund on a proper construction of Art. 286(1) & (2) of the Constitution, even apart from the order of the Board of Revenue.

The learned Judges of the High Court however in the main considered the question whether on a proper interpretation of the relevant Articles of the Constitution, sales under which goods were delivered outside Bihar but for consumption not in the State of first delivery, were exempt from tax under the Bihar Sales Tax Act and decided the point against the appellants. They next dealt with the central point urged in the petitions, viz., that the Board of Revenue by its order dated August 28, 1953, had allowed the appellant's revision in regard to "the second point" which included sales of all categories whether or not for the purpose of consumption in the State of first destination outside Bihar, and directed the Sales-tax Officer to recompute the tax by allowing this exemption, and that the officer was therefore statutorily bound to

give effect to the order of the Board, be the same right or wrong, particularly when the Board refused to vary or modify it so as to exclude particular types of sales from the scope of the exemption when moved to do so by the State Government. In regard to this point after stating that the orders of the Board of Revenue were ambiguous, the learned Judges proceeded to answer the question on the assumption that the Board of Revenue had directed the officer to recompute the tax on the basis that all the outside sales—both the (a) and the (b) types were exempted from liability. The learned Judges then pointed out that the order of the Board would be clearly erroneous in regard to the (b) type sales—and that the petitioner in a writ of mandamus could not insist on a manifestly wrong order being enforced. The petitions were therefore dismissed.

The appellants applied to the High Court for certificates under Arts. 132 and 133, but the learned Judges granted a certificate under Art. 132 alone and it is on the strength of these certificates that the appeals are before us.

The principal point that Mr. Chatterjee, learned Counsel for the appellants, argued before us related to the duty of the tax authorities to obey the orders of the Board of Revenue and give effect to them, and he submitted that the High Court erred in denying his clients the relief of *mandamus* on the ground that that order was erroneous. In support of this argument learned Counsel sought reliance on a recent decision of this Court in *Bhopal Sugar Mills* v. *Commissioner of Income-tax* (1) in which it was held that when an order was made by a superior tribunal (in that case the Income-tax Appellate Tribunal) directing the Income-tax Officer to compute the income of an assessee on a particular basis and that order had become final, the subordinate officer had no right to disregard the direction, because it was wrong and that the High Court when approached by the assessee for the issue of a writ of *mandamus*, was bound to

(1) [1961] 1 S.C.R. 474.

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enforce the final order of the superior Tribunal and could not refuse to do so because it considered the order of the Tribunal to be wrong. This Court pointed out that when the order which the Tribunal had jurisdiction to pass became final, it bound all parties to it and its correctness could not be challenged collaterally in proceedings for enforcing that order. The attempt of learned Counsel for the appellants was to bring this case within the scope of the above ruling.

The ratio of this decision is to be found in this passage:

"By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal."

To attract the principle thus enunciated, it is necessary that there should be an order of a superior tribunal clear, certain and definite in its terms, and without any ambiguity, to which the subordinate authority or officer to whom it is addressed, could give effect. We are clearly of the opinion that the decision referred to cannot apply to the situation in the present case.

Taking the earlier order of the Board first—it is to put it at the mildest ambiguous. The Board referred to the *Bengal Timber case* which had been followed by the lower authorities in disallowing the appellants' claim to exemption to both the (a) and (b) type sales, involving out of State delivery. A reference was then

made to the decision of this Court in the *State of Bombay* v. *United Motors (India) Ltd. and others* (1) as superseding the previous decision of the Board, adding that according to the decision of this Court no tax could be levied on despatches outside the State after the 26th January, 1950, and on that point the petitions were allowed. It will be noticed that the member did not set out the precise extent to which the ruling of this Court superseded the previous decision of the Board, and this was left in a state of uncertainty. It was suggested by learned Counsel for the appellants that Mr. Bakshi, the member of the Board, drew no distinction between sales of type (a) or (b), and had included both of them as falling within a single category of sales in which delivery had taken place outside the State for consumption in other States, and for that reason we should hold that the member had rightly or wrongly treated the decision in the *United Motors' case* as applicable to all such sales. We find ourselves unable to agree in this construction of the order. We cannot presume that Mr. Bakshi did not peruse the judgment in the *United Motors' case* when he referred to it in his order, nor that he did not acquaint himself with the terms of the Explanation to Art. 286(1)(a) of the Constitution, the scope and significance of which was analysed and elaborated in that decision. We are rather inclined to agree with the construction which the member himself put on this order in April, 1955, that he left it to the Sales-tax Officer to decide for himself the relief to which the appellants were entitled on that officer's interpretation of the judgment of this Court. It may be that this was not a satisfactory method of disposing of the revision petition—leaving the point which arose for decision by the member of the Board of Revenue, to be decided by the Sales-tax Officer, but we are now only concerned with the simple question whether Mr. Bakshi had or had not determined the true scope and effect of the judgment of this Court and decided it as meaning that all sales as a result of which goods were delivered outside the State

(1) [1953] S.C.R. 1069.

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of Bihar were within the Explanation and so were exempt from the tax liability. Notwithstanding the cryptic language used by the Member of the Board, we are clearly of the opinion that he did not intend to decide this point in favour of the appellants in the manner contended for by them.

It is now common ground that when the Board of Revenue was approached by the State Government to review or clarify this order, Mr. Bakshi, by his order dated April 25, 1955, expressed himself as having decided earlier that he had directed the sales-tax officer to give effect to the judgment of this Court in the *United Motors case* and had done nothing further. Learned Counsel for the appellants strongly pressed before us that the member of the Board having accepted the preliminary objection that there was no provision in the Bihar Sales-tax Act by which a party concerned might move the Board to clarify or explain the order, he had no jurisdiction to effect any clarification of his previous order and that whatever was said by the Board on the second occasion could not be held to modify the earlier order or deny the appellants such benefits as were granted to them by the earlier order of August 28, 1953. But as against this, it has to be noted that before the Board both the parties, i.e., the State Government as well as the appellants—agreed that clarification was not needed because " of the specific reference to the judgment of the Supreme Court in the United Motors case ". As this observation was embodied in the later order with the consent of both the parties, we consider that it is too late now for the appellants to raise any technical objection to this sentence being given effect to. In view, however, of the conclusion that we have reached as to the construction of the earlier order of August, 1953, it is unnecessary to pursue the matter any further.

If, therefore, as a result of the order or orders passed by the Board, the sales-tax officer was directed to give effect to the judgment of this Court in the *United Motors case*, it followed that the interpretation of the judgment was left to that officer. We have already pointed out that to such a situation the principle of

the decision of this Court in *Bhopal Sugar Mills* v. *Commissioner of Income Tax* (1) is inapplicable. We might also point out that even if the decision applied and the High Court issued an order in the nature of *mandamus* to the sales-tax officer, it could only take the form of a direction to effect the reassessment in the light of the decision in the *United Motors case* (2)—an order which would leave the appellants in the same position in which they now find themselves without such an order by the High Court.

The next question for consideration is whether on a proper construction of the decision in the *United Motors case* (2) the exclusion of type (b) sales from those exempted under Art. 286(1) was erroneous. Mr. Chatterjee, learned Counsel for the appellants sought to establish that this Court had decided in the *United Motors case* three points: (1) that sales as a result of which goods were delivered in a State for consumption in such State, i.e., the sales falling within the Explanation to Art. 286(1) were fictionally inside that State for all purposes and so within the taxing power of the State in which such delivery took place, (2) that sales which by the fiction created by the Explanation were inside a particular State, were "outside" all other States, and so exempt from tax levy by all such other States, (3) that further and beyond this, all sales which did not satisfy the terms of the Explanation but in which goods were delivered outside the State in which title passed were "outside sales" over which no State would have power to levy a tax. In other words, the argument was that this Court had laid down that every sale which was not "an Explanation sale" and therefore not an "inside sale" within a particular State was an "outside sale" for all States and therefore exempt from the levy of sales-tax by every State in India. In support of this submission learned Counsel relied on a passage in the judgment of the learned Chief Justice at page 1081 of the Report which ran:

"..... The authors of the Constitution had to devise a formula of restrictions to be imposed on the State-power of taxing sales or purchases involving

(1) [1961] 1 S.C.R. 474. (2) [1953] S.C.R. 1069.

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inter-State elements which would avoid the doubts and difficulties arising out of the imposition of sales-tax on the same transaction by several Provincial Legislatures in the country before the commencement of the Constitution. This they did by enacting clause (1)(a) with the Explanation and clause (2) of Article 286. Clause (1)(a) prohibits the taxation of all sales or purchases which take place outside the State but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places.....To solve the difficulty an easily applicable test for determining what is an outside sale had to be formulated, and that is what, in our opinion, the Explanation was intended to do. It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State.....An "outside" sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test: Are the goods actually delivered in the taxing State as a direct result of a sale or a purchase, for the purpose of consumption therein? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

In our opinion, this passage explains the scope of the Explanation and deals with what might be termed "Explanation sales". If there is a sale falling within the terms of the Explanation, it is "inside" the State of delivery-cum-consumption and that State alone can levy the tax. Such a sale is outside all other

States, which are prohibited from taxing such a sale by reason of any territorial nexus however close or cogent. The passage extracted, however, does not deal with cases where the sale in question does not satisfy the requirements of the Explanation leading to the fixation of the fictional situs of the sale determining the State by which the tax might be levied. Whether any and, if so, which is the State which can levy a tax on a sale not covered by the Explanation, is not dealt with by this decision at all.

From this it would follow that sales of type (a) would be exempt from the levy of tax under the Bihar Sales-Tax Act by reason or their being "inside" sales within the State of delivery-cum-consumption and therefore being "outside" sales quoad the State of Bihar. Sales of type (b), however, not having been dealt with by the decision in the *United Motors case*, it would follow that on the orders of the Board of Revenue, the previous decision of the Board in the *Bengal Timber case* would have still held the field and the transactions would be liable to the levy of tax and the tax levied on those sales would continue to be valid. Learned Counsel for the appellants was certainly right in his submission that as the orders of the Board of Revenue had became final as between the parties, the liability to tax must be determined on the basis of these orders—be they right or wrong. It is therefore unnecessary to consider whether, apart from the decision of this Court in the *United Motors case*, the appellants would be entitled to any further relief on the basis of any other decision of this Court interpreting Art. 286(1) & (2).

As already stated, the appellants have already been granted a refund in regard to the tax collected in respect of the sales falling within type (a). As, in our opinion, the appellants were not on the orders of the Board of Revenue entitled to a refund of the tax on transactions falling within type (b), the judgment of the High Court dismissing their petitions is clearly right. The appeals fail and are dismissed, but in the circumstances of the case there will be no order as to costs.

Appeals dismissed.

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October 27.

MAKHAN LAL MALHOTRA AND OTHERS

v.

THE UNION OF INDIA

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Evacuee Property—Rural building—Claim for compensation—Classification — Validity of rules—Displaced Persons (Claims) Supplementary Act, 1954 (12 of 1954), r. 5—Displaced Persons (Compensation and Rehabilitation) Act, 1954 (44 of 1954), r. 65—Constitution of India, Arts. 14, 31(5)(b)(iii).

The petitioners who were displaced persons from West Pakistan put forward certain claims in regard to village houses which they had left there, but which were rejected by the Rehabilitation authorities. The claims were for amounts above Rs. 20,000 in the case of some of the petitioners and above Rs. 10,000 in the case of the others. By r. 5 framed under the Displaced Persons (Claims) Supplementary Act, 1954, claims could be verified provided, inter alia, that where a claimant had been allotted any agricultural land in India and such land so allotted exceeded four acres, the value of the building in respect of which the claim was made shall not be less than Rs. 20,000 and where it did not exceed four acres the claim made was not less than Rs. 10,000. Rule 65 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, provided that any person to whom more than four acres of agricultural land had been allotted shall not be entitled to receive compensation separately in respect of his verified claim for any rural building the assessed value of which was less than Rs. 20,000, and any person allotted four acres or less was not entitled to receive compensation where the value was less than Rs. 10,000. The petitioners challenged the validity of the aforesaid rules as being discriminatory and thereby contravening Art. 14 of the Constitution of India on the grounds that the object of the various Acts and the rules made thereunder was to rehabilitate displaced persons but by the rules, classifications had been made with reference to houses in rural areas which were discriminatory as neither the classes were based on intelligible differentia nor was there a rational nexus between that differentia and the object sought to be achieved. It was found that the impugned rules were made in pursuance of an Inter-Dominion Agreement between the two Governments with regard to evaluation of evacuee property, which had received recognition in Art. 31(5)(b)(iii) of the Constitution.

Held, that the impugned rules afforded a reasonable justification for the classification and did not contravene Art. 14 of the Constitution.

ORIGINAL JURISDICTION: Petition No. 44 of 1958.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

Naunit Lal and *Gopal Singh*, for the petitioners.

H. N. Sanyal, Additional Solicitor-General of India, N. S. Bindra, K. R. Choudhri and *R. H. Dhebar*, for the respondent.

1960. October 27. The Judgment of the Court was delivered by

KAPUR J.—The petitioners have moved this Court under Art. 32 of the Constitution for a writ of *mandamus* against the respondent to verify the claims put forward by the petitioners and to grant compensation in respect thereof; but there is little merit to commend the acceptance of the petition.

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The petitioners are displaced persons from West Punjab which is now known as West Pakistan and have taken up their residences in different parts of India. They put forward certain claims in regard to village houses which they had left in West Pakistan and which were situate in different villages. The petitioners have in their petition set out their respective claims which were rejected by the Rehabilitation authorities. It is unnecessary to give details of the properties in the various villages in regard to which claims were made. It is sufficient to say that the claims were put forward and they were for amounts above Rs. 20,000 in the case of petitioners Nos. 1 and 2 and above Rs. 10,000 in the case of petitioners Nos. 3 to 6.

The petitioners challenge the vires of two rules—Rule 5 under the Displaced Persons (Claims) Supplementary Act, 1954, (Act 12 of 1954) and r. 65 of the Rules made under the Displaced Persons (Compensation and Rehabilitation Act), Act 44 of 1954. The challenge is on the ground of violation of Art. 14 of the Constitution. It is necessary at this stage to set out the various Acts and regulations which were passed in regard to displaced persons dealing with

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verification of their claims and the giving of compensation to them.

On April 1, 1948, the East Punjab Refugees (Registration of Claims) Act, 1948, East Punjab Act 8 of 1948, was passed and this was followed by the East Punjab Refugees (Registration of Land Claims) Act 12 of 1948. In the latter Act "land" was defined in s. 2(b) to mean

"land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes—

(i) the sites of buildings and other structures on such land;".

Under s. 2(a) "claim" was defined as

"a statement of loss or damage suffered by a refugee since the first day of March 1947, in respect of his land within the territory now comprised in the Province of (Punjab in Pakistan), North West Frontier Province, Sind or Baluchistan, or in any State adjacent to the aforesaid Provinces and acceding to Pakistan".

Section 4(1) of that Act made provision for submission for registration of claims in respect of land abandoned by a refugee.

On November 19, 1949, East Punjab Displaced Persons (Land Settlement Act) 1949, East Punjab Act 36 of 1949, was passed. By s. 2(b) of this Act the word "allottee" was defined and by s. 2(d) "land" was defined. This definition which was slightly different from the definition in the East Punjab Act (Act 12 of 1948) was as follows:—

S. 2(d). "'Land' means land which is not urban land and is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes—

(i) the sites of buildings and other structures on such land;".

On May 18, 1950, another Act, the Displaced Persons (Claims) Act 44 of 1950, was passed by the Central Legislature. In this Act "claim" was defined in

s. 2(a) as "the assertion of a right to the ownership of, or to any interest in—

(i) .....

(ii) such class of property in any part of West Pakistan other than in any urban area as may be notified by the Central Government in this behalf in the Official Gazette;".

This Act was in force for two years and then lapsed. Under s. 2(a)(ii) the Central Government issued a notification on May 27, 1950, specifying the property in respect of which claims might be submitted. The properties were:—

(1) Any immoveable property in West Pakistan which forms part of the assets of an industrial undertaking and is situate in an area other than an urban area.

(2) Any other immoveable property in West Pakistan comprising of a building situated in an area, other than an urban area, the estimated cost of construction of which at present prevailing rates is not less than Rs. 20,000.

(3) Any agricultural land in any part of West Punjab".

This shows that claims could only be submitted in regard to building in a rural area which was valued at not less than Rs. 20,000 and there was no such restriction in regard to urban area. This notification was amended by a notification dated September 13, 1950. Clause (2) of the previous notification was substituted by a new clause:

"(2) Any other immoveable property in West Pakistan comprising of a building situated in an area other than an urban area;

provided that where the person making the claim has been allotted any agricultural land in India—

(a) where the agricultural land so allotted exceeds 4 acres the value of the building in respect of which the claim is made shall not, according to the present estimated cost of construction, be less than Rs. 20,000.

(b) where the agricultural land so allotted is 4 acres or less, the value of the building in respect of which the claim is made shall not, according to the

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present estimated cost of construction, be less than Rs. 10,000.

Explanation I. .....

Explanation II. For the purpose of this clause a person shall be deemed to have been allotted agricultural land in India if he is allotted such land in any manner whatsoever whether on temporary or quasi-permanent basis."

On March 23, 1954, the Displaced Persons (Claims) Supplementary Act, 1954, Act 12 of 1954, was passed and s. 12 provided for the making of rules. Rule 5 was made in the following terms:—

"R. 5. The classes of property in respect of which claims may be verified under these rules shall be the same as under the principal Act and the rules made thereunder, that is to say—

(1) any immoveable property situated within an urban area in West Pakistan;

(2) any immoveable property in West Pakistan, which forms part of the assets of an industrial undertaking and is situated in any area other than an urban area;

(3) any other immoveable property in West Pakistan comprising of a building situated in any area other than an urban area;

Provided that where a claimant has been allotted any agricultural land in India and that

(a) where the agricultural land so allotted exceeds four acres, the value of the building in respect of which the claim is made shall not, according to the present estimated cost of construction, be less than Rs. 20,000,

(b) where the agricultural land so allotted does not exceed four acres, the value of building in respect of which the claim is made, shall not, according to the present estimated cost of construction, be less than Rs. 10,000."

Explanation II is in the same terms as in the notification of September 13, 1950.

On October 9, 1954, the Displaced Persons (Compensation and Rehabilitation) Act 44 of 1954 (to be hereinafter termed Act 44 of 1954) was enacted by Parliament. Section 2(a) defines compensation pool

which is constituted under s. 14. Section 2(e) defines " verified claim " as follows :

" " Verified claim " means any claim registered under the Displaced Persons (Claims) Act, 1950 (44 of 1950) in respect of which a final order has been passed under that Act or under the Displaced Persons (Claims) Supplementary Act, 1954, but does not include..... ".

Section 4 provided for application for payment of compensation. Section 7 for the determination of the amount of compensation and s. 40 for the making of rules.

Rules were made under this Act by a notification No. S. R. O. 1363, dated May 21, 1955. Rule 2(h) defines " urban area " and s. 2(f) " rural area " which means area which is not an urban area. Rule 16 provides for the scale of compensation which is set out in appendix 8 or 9. Under r. 18 compensation was to be determined on the total value of all claims which included all kinds of properties other than agricultural land left by claimants in West Pakistan. Rule 44 deals with allotment of acquired evacuee houses in rural areas in lieu of compensation. Under sub-r. (3) of this rule houses in rural areas were graded and under r. 47 payment of compensation was to be made subject to r. 65. Rule 57 provided for allotment of houses in addition to agricultural land. This rule provided :

R. 57. " A displaced person having a verified claim in respect of agricultural land who has settled in a rural area and to whom agricultural land has been allotted a house in addition to such land in accordance with the following scale—

(1) Claimants allotted land up to Ten Standard acres.....Grade (H),

(2) Claimants allotted and exceeding Ten Standard acres but not exceeding fifty standard acres .....Grade (G)

Provided that if such person holds a verified claim in respect of any rural building and that claim has been satisfied wholly or partially before the allotment of such land, the provisions of rule 65 shall not be

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applicable in his case but he shall not be entitled to the allotment of a house or a site and building grant in lieu thereof.

Explanation I—Where no house is available in the same village, an allottee may be granted:

(a) if he has been allotted agricultural land not exceeding ten standard acres, a site measuring 400 square yards and a building grant of Rs. 400; and

(b) if he has been allotted agricultural land exceeding ten standard acres but not exceeding fifty standard acres a site measuring 600 square yards and a building grant of Rs. 600.

Explanation II—The reference to grades in this rule is to the grades of houses specified in rule 44."

Rule 61 deals with refusal of acceptance of allotment and is as under:—

Rule 61. "Where any person refuses to accept the allotment of any agricultural land offered to him the claim for compensation of the allottee shall be deemed to have been satisfied to the extent of the value of the allotted land and such land shall be available for allotment to any other claimant."

The impugned rule 65 provided:—

"(1) Any person to whom more than four acres of agricultural land have been allotted shall not be entitled to receive compensation separately in respect of his verified claim for any rural building the assessed value of which is less than Rs. 20,000.

(2) Any person to whom four acres or less of agricultural land have been allotted shall not be entitled to receive compensation separately in respect of his verified claim for any rural building the assessed value of which is less than Rs. 10,000".

It was argued on behalf of the petitioners that the object of the various Acts and the rules made thereunder was to rehabilitate displaced persons but by the rules a classification had been made which was discriminatory as neither the classes were based on any intelligible differentia nor was there a rational nexus between that differentia and the object sought to be achieved. The classification, according to the argument was: (1) between urban population and rural

population; (2) between refugees from rural areas who owned lands and those who owned only rural houses and (3) between those who had quasi-permanent and permanent allotments.

In order to determine the question raised it is necessary to trace in chronological order the various steps taken to rehabilitate the millions of persons who were forced to migrate into India leaving behind properties worth varyingly large amounts. When displaced persons came from West Punjab and other provinces of India which became Pakistan, the authorities allotted to every agricultural family certain area of agricultural land the object being (1) to give temporary shelter to the displaced persons and (2) to preserve whatever crops had been left by persons who went away to Pakistan.

At an Inter-Dominion Conference between the Governments of India and Pakistan held at Karachi between January 10 and 13, 1949, a permanent Inter-Dominion Commission was set up to consider the question of administration, sale and transfer of evacuee property in both the dominions. In pursuance of this decision the question in respect of shops and houses in rural areas was considered by the Commission at New Delhi on March 11 and 13, 1949. It was recommended at this meeting that buildings in rural areas of the value of Rs. 20,000 or more should be considered to be substantial buildings and the buildings which were of lesser value than that were to be treated as appendages of agricultural land and as such were to be treated as "agricultural properties": vide the minutes of that meeting at p. 242 of a compilation known as "Documents concerning Evacuee Property" of the years 1947-51. Chapter IX of the Land Resettlement Manual for Displaced Persons by Mr. Tarlok Singh, a book of undoubted authenticity and value, deals with allotment of rural houses and sites. Rule 3 shows how the equitable distribution of houses was to be effected. In order to ensure fairness the size of the land allotment made to a displaced person and the type of house abandoned by him were considered to be major factors. For each standard acre allotted

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one mark was to be given and subject to a maximum of 20 marks houses abandoned in West Punjab were valued at the rate of one mark for each one thousand of the value of the house and houses above the value of Rs. 20,000 were excluded for allotment as they were to be dealt with according to the terms of an earlier agreement between India and Pakistan. In each village after their relative rights had been valued, the allottees could choose houses according to the village list. In appendix 11 of that book is set out the summary of principles of allotment of rural evacuee houses. Evacuee houses of kamins (menial servants), artisans, etc. were to be given to displaced artisans and evacuee shops to evacuee shopkeepers. Rule 3 provided that temporary allotment did not create any rights of allotment on quasi-permanent basis but subject to this, allottees were not to be disturbed if they are otherwise qualified for similar accommodation in the villages. Elaborate rules are given in that Chapter as to how these allotments were to be made including partition of houses where two or more families could be accommodated. Rule 20 is important and may be quoted :—

Rule 20. "Where necessary, evacuee abadi sites should be extended to suit the layouts of model villages. The Additional Deputy Commissioner should endeavour to persuade the allottees to surrender a part of their holdings in exchange for land out of the common pool or out of areas excluded from allotment ".

Rule 21 gave effect to another Inter-Dominion agreement and therefore houses of the value of Rs. 20,000 or more which were liable to exchange or sale were excluded from allotment.

Thus according to these instructions contained in that book every effort was made to allot houses to persons who were allotted lands and in this manner compensation was sought to be given to displaced persons.

By rule 97 made under Central Act 44 of 1954, rehabilitation grants to allottees of agricultural land of less than 4 acres were to be given as follows:—

R. 97. "Any person who has been allotted four acres or less of agricultural land and whose claim in respect of rural buildings left in West Pakistan has, by virtue of such allotment, been totally rejected may be given a rehabilitation grant:

Provided that—

(a) he has not accepted such allotment of the agricultural land or such allotment has been cancelled;

(b) he does not hold a verified claim in respect of any other kind of property, that is to say, for any substantial rural building and

Provided further that where any such person is given a rehabilitation grant under rule 97-A, he shall not be given a rehabilitation grant under this rule". Rule 97-A provided:—

"Any person who has been allotted two standard acres or less of agricultural land in the State of Punjab or Patiala and East Punjab States Union under any notification specified in Section 10 of the Act may be given a rehabilitation grant at the rate of Rs. 450 per standard acre of the area allotted to him.

Provided that—

(a) he has not accepted such allotment of the agricultural land or such allotment has been cancelled;

(b) he does not hold a verified claim in respect of any other kind of property, that is to say, for any urban property or for any substantial rural building". By Rule 57 which has already been quoted, houses of all grades were allotted to persons who were allotted certain areas of land and provision was made for building sites and payment of building grants where no houses were available in the villages. These rules made under Act 44 of 1954 and those set out in Land Resettlement Manual by Mr. Tarlok Singh show that every one was allotted or was given building sites and money for the purpose of houses in rural areas.

The rule in regard to filing of claims for houses valued at Rs. 10,000 or more where allotment of land was up to 4 acres and Rs. 20,000 or more where allotment of land was in excess of 4 acres was also in pursuance of an Inter-Dominion Agreement between the

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two Governments which has received recognition in Art. 31(5)(b)(iii). Thus it appears that rules made in regard to fixing of the value of the houses for claim of Rs. 10,000 in one case and Rs. 20,000 in the other was a policy decision arising out of an agreement at a meeting of the Inter-Dominion Commission with regard to evaluation of evacuee property. Rules which have been framed are only restatement of what was contained in the notifications of May 27, 1950, and September 13, 1950, which themselves were the result of decisions arrived at the meetings of the Inter-Dominion Commission.

Under Art. 14 of the Constitution the State shall not deny to any person equality before the law or the equal protection of the laws within the territories of India. By judicial decisions the doctrine of classification has been incorporated in the equality clause, but the classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of the purpose for which it is made. There must be a reasonable nexus between the classification and the object sought to be achieved. The object of the impugned provisions, read with the relevant Acts, is to rehabilitate the evacuees on an equitable basis. To implement the scheme of rehabilitation the evacuee law has classified evacuees under different categories. Broadly speaking, the main division is between persons who were residing in Pakistan in rural areas with agriculture as their avocation and those persons who were residing in urban areas in Pakistan. Persons from rural areas have been divided into two categories, namely, persons who owned agricultural land with a building as part of the holding and persons who held agricultural land with an independent building which cannot be described as part of the holding. Separate treatment is given to rural areas and urban areas. In the rural areas, land with a building is treated as one unit, but when the building is of a substantial value it is put in a different category and separately compensated for. This classification has certainly a reasonable relation to the object of rehabilitation, for it cannot be denied that the three categories require separate treatments for the purpose of

resettlement on new lands and for the payment of compensation.

It cannot be seriously disputed that a house in a rural area and that in an urban area cannot be treated alike, but the real grievance of the petitioners is in respect of the distinction between houses in rural areas. As to what is a substantial building has to be ascertained and a line must be drawn somewhere. Here the question arises whether the classification has been made arbitrarily and without any sound basis. It may perhaps appear odd to say that a property worth Rs. 9,999 in one case or a property worth Rs. 19,999 in another would be a building of unsubstantial character or that the extent of the land, namely, four acres in one case and above four acres in another have any relevant bearing on the substantiality of the building. This perhaps may lend support to the plea of discrimination but an unprecedented situation had to be faced and provision made for the rehabilitation of such a vast multitude of humanity who had been uprooted from their homes. This necessitated an equitable treatment for them all and an equal distribution of the available evacuee properties left in India. In order to lighten the heavy burden undertaken an Inter-Dominion adjustment became necessary and the two Dominions entered into an agreement presumably based upon the relevant circumstances in regard to the treatment of rural house property. The reasonableness of the classification must therefore be judged after taking these surrounding circumstances and the conditions then prevailing into consideration. The basis of the classification must be judged by the fact that compensation is given in every case. Rules 57 and 97-A framed under Act 44 of 1954 afford a reasonable justification for the classification.

Under the Rules every displaced person who has settled in a rural area is allotted a house in addition to such land; if no house is available in the same village the allottee is given a site and a building grant. But where his claim for a house is rejected he is given

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a rehabilitation grant. But under the impugned provisions separate compensation is given for a rural house of value above a prescribed limit. It will, therefore, be seen that the classification is not arbitrary but is based upon sound principles and on equitable considerations. A distinction between a rural house which is part of a holding and one which is not a part of a holding but an independent unit is made and different principles of rehabilitation are applied to meet different situations. The hardship which the division into two categories must cause is diluted by providing to the claimant falling on the wrong side of the line a rural house or a rehabilitation grant.

The attack on the ground of want of intelligible differentia must fail. Appendix XI of Land Resettlement Manual by Mr. Tarlok Singh illustrates the principles of allotment of rural evacuee houses and the elaborate system of marking which was done in order to either give houses to allottees of land or to give them building sites with subsidy to build houses and finally in r. 97 and r. 97-A of the rules made under Act 44 of 1954 detailed provisions were made for rehabilitation grants including grants to those allottees of agricultural land whose claim for rural property had been rejected or who had refused to take land allotted to them. Similarly r. 57 which has been quoted above shows that a provision has been made for giving sites as well as subsidy for building houses. It cannot be said therefore that the rules suffer from any infirmity on the ground of discrimination.

In the result this petition fails and is dismissed with costs of.

Petition dismissed.

SARAT CHANDRA RABHA AND OTHERS

v.

KHAGENDRANATH NATH AND OTHERS.

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October 27.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Election Dispute—Disqualification—Conviction by Court—Rejection of nomination paper—Remission of sentence by Government, if operates as reduction of sentence by Court—Inference of consent to corrupt practice from proved facts, if a mixed question of fact and law—Representation of the People Act, 1951 (43 of 1951), ss. 7(b), 100(1)(b)—Code of Criminal Proeedure (Act V of 1898), s. 401.

The appellant's nomination paper for election to the Assam Legislative Assembly was rejected by the Returning Officer on the ground of disqualification under s. 7(b) of the Representation of the People Act, 1951, in that he had been convicted and sentenced to three years' rigorous imprisonment under s. 4(b) of the Explosive Substances Act (VI of 1908) and five years had not expired after his release. The appellant had applied to the Election Commission for removing the said disqualification but it had refused to do so. The appellant's sentence was, however, remitted by the Government of Assam under s. 401 of the Code of Criminal Procedure and the period for which he was actually in jail was less than two years. The Election Tribunal held that the nomination paper had been improperly rejected and set aside the election but the High Court taking a contrary view, dismissed the election petition.

Held, that the High Court was right in holding that the appellant was disqualified under s. 7(b) of the Representation of the People Act and that his nomination paper had been rightly rejected. That section speaks of a conviction and sentence by a Court and an order of remission of the sentence under s. 401 of the Code of Criminal Procedure, unlike the grant of a free pardon, cannot wipe out either the conviction or the sentence. Such order is an executive order that merely affects the execution of the sentence and does not stand on the same footing as an order of Court, either in appeal or in revision, reducing the sentence passed by the Trial Court.

Venkatesh Yeshwant Deshpande v. *Emperor,* A.I.R. 1938 Nag. 513, distinguished.

Ganda Singh v. *Sampuran Singh,* (1953) 3 E.L.R. 17, overruled.

Held, further, that an inference as to whether a successful candidate was a consenting party to the corrupt practice under

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s. 100(1)(b) of the Act from facts found on evidence was a question of fact and not a mixed question of fact and law.

Meenakshi Mills, Madurai v. *The Commissioner of Income-tax, Madras*, [1956] S.C.R. 691, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 375 of 1959.

Appeal from the Judgment and Order dated the 12th August, 1958, of the Assam High Court in First Appeal No. 11 of 1958.

L. K. Jha and *Sukumar Ghose*, for appellants Nos. 1 to 3.

G. S. Pathak and *Naunit Lal*, for respondents Nos. 1 and 2.

1960. October 27. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—This is an appeal on a certificate granted by the Assam High Court in an election matter. An election was held in the double-member constituency of Goalpara to the Assam Legislative Assembly. Nomination papers were filed on the 19th January, 1957, by a number of persons including Aniram Basumatari (hereinafter called the appellant). He was a candidate for the seat reserved for scheduled tribes. The nomination paper of the appellant was rejected by the returning officer on the ground that he was disqualified under s. 7(b) of the Representation of the People Act, No. XLIII of 1951, (hereinafter called the Act). The polling took place on February 25, 1957, and Khagendranath and Hakim Chandra Rabha were elected, the latter being a member of a scheduled tribe. Thereupon an election petition was filed by an elector challenging the election of the two successful candidates on a number of grounds. Of these grounds, however, only two are now material, namely, (1) that the nomination paper of the appellant was wrongly rejected, and (2) that a corrupt practice was committed by the successful candidates inasmuch as voters were carried on mechanically propelled vehicles to the polling booths. The election tribunal held on the first point that the nomination

paper of the appellant had been improperly rejected. On the second point it held that the corrupt practice alleged had not been proved. In the result, the election was set aside. Thereupon there was an appeal by the two successful candidates to the High Court. The High Court was of the view that the nomination paper of the appellant was properly rejected; further on the question of corrupt practice the High Court agreed with the conclusion of the tribunal. In the result the appeal was allowed and the election petition was ordered to be dismissed. There was then an application to the High Court for a certificate to appeal to this Court which was granted; and that is how the matter has come up before us.

The main contention on behalf of the appellant is that the High Court was wrong in coming to the conclusion that the nomination paper of the appellant was properly rejected under s. 7(b) of the Act. That provision lays down that a person shall be disqualified for being chosen as a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State if he is convicted by a court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. The appellant in this case was convicted under s. 4(b) of the Explosive Substances Act No. VI of 1908, and sentenced to three years' rigorous imprisonment on July 10, 1953. The nomination paper in this case was filed in January 1957 and the election was held in February 1957 and therefore five years had not elapsed since his release. But though the appellant was sentenced to three years' rigorous imprisonment, his sentence was remitted by the Government of Assam on November 8, 1954, under s. 401 of the Code of Criminal Procedure and he was released on November 14, 1954. The contention of the appellant before the election tribunal was that in view of this remission his sentence in effect was reduced to a period of less than two years and therefore he could not be said to have incurred disqualification within the meaning of s. 7(b). This contention

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was accepted by the tribunal and that is why it held that the nomination paper of the appellant was improperly rejected. When the case came to be argued in the High Court on behalf of the successful candidates, two arguments were addressed in support of the plea that the nomination paper of the appellant was properly rejected. In the first place, it was urged that in view of the provisions of Articles 72, 73, 161 and 162 of the Constitution read with s. 401 of the Code of Criminal Procedure, the State Government had no authority to remit the sentence of the appellant; and secondly even if the remission was properly granted it would not affect the sentence imposed by the Court, though the appellant might not have had to undergo part of the sentence after the date of the remission order. The High Court did not decide the question as to the power of the State Government to grant remission in this case as it had not full materials before it because the matter was not raised before the tribunal, though it was inclined to the view that the State Government might not have such power. But the High Court was of the opinion that a remission of sentence did not have the same effect as a free pardon and did not have the effect of reducing the sentence passed on the appellant from three years to less than two years, even though the appellant might have remained in jail for less than two years because of the order of remission.

What s. 7(b) lays down is that there should be a conviction by a court in India for any offence and a sentence of imprisonment for not less than two years in order that a person may be disqualified for being chosen as a member of either House of Parliament or of Legislative Assembly or of Legislative Council of a State. In terms, therefore, the provision applies to the case of the appellant for he was convicted by a court in India and sentenced to imprisonment for more than two years. Further the period of five years had not expired after his release. The appellant had applied to the Election Commission for removing the disqualification but it had refused to do so. The main question therefore that falls for consideration is

whether the order of remission has the effect of reducing the sentence in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by the trial court to the extent indicated in the order of the appellate or revisional court.

Now it is not disputed that in England and India the effect of a pardon or what is sometimes called a free pardon is to clear the person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man: (See Halsbury's Laws of England, Vol. VII, Third Edition, p. 244, para 529). But the same effect does not follow on a mere remission which stands on a different footing altogether. In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's "Constitutional Law" on the effect of reprieves and pardons *vis-a-vis* the judgment passed by the court imposing punishment, at p. 176, para 134:—

"A reprieve is a temporary suspension of the

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punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. 'The judicial power and the executive power over sentences are readily distinguishable,' observed Justice Sutherland, 'To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it *qua* judgment'."

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was. Therefore the terms of s. 7(b) would be satisfied in the present case and the appellant being a person convicted and sentenced to three years' rigorous imprisonment would be disqualified, as five years had not passed since his release and as the Election Commission had not removed his disqualification.

We may now refer to a number of cases on which reliance has been placed on behalf of the appellant. In *Venkatesh Yeshwant Deshpande* v. *Emperor* (1), Bose, J. (as he then was), observed as follows at p. 530:—

"The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension

(1) A I R 1938 Nag. 513.

is separately provided for. In fact, in the case of a pardon in England statutory and other disqualification following upon conviction are removed and the pardoned man is enabled to maintain an action against any person who afterwards defames him in respect of the offence for which he was convicted. That may not apply in full here but the effect of an order of remission is certainly to entitle the prisoner to his freedom on a certain date."

It is urged that if the effect of an order of remission is to wipe out the remitted portion of the sentence altogether it means that the sentence is reduced to the period already undergone and the order of remission has the same effect as an order of an appellate or revisional court reducing the sentence to the period already undergone. That case, however, dealt with a different point altogether, namely, whether a remission having been granted and having taken effect it could be cancelled thereafter. It was in that context that these observations were made. Even so, the learned judge was careful to point out that there was a difference between a pardon and a remission and the effect of an order of remission is to entitle the prisoner to his freedom on a certain date. That case is no authority for the view that the order of remission amounts to changing the sentence passed by a competent court and substituting therefor the sentence of imprisonment already undergone up to the date of release following the order of remission.

Reference was also made to a number of election cases in which the view which has been urged on behalf of the appellant seems to have been taken. We may refer to only one of them, namely, *Ganda Singh* v. *Sampuran Singh* (1), which has specifically dealt with this point. In that case an order was passed by the Maharaja of Nabha granting amnesty to all political prisoners detained or convicted under the Punjab Public Safety Act, 1947, as applied to Nabha State, and releasing them unconditionally. The same order also provided for grant of remission to persons convicted for offences other than political offences on

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a certain scale. The successful candidate in that case was sentenced to more than two years' rigorous imprisonment under the Punjab Public Safety Act, as applied to Nabha State, and was thus a political prisoner. He was therefore released before he had served two years imprisonment. The main plank of the election petition in that case was that the successful candidate was disqualified under s. 7(b) of the Act in view of his conviction and sentence and the election tribunal held that remission by government (executive authority) has the same effect as an order passed by a court of law in appeal or on revision and that under s. 7 of the Act the court has to look to the amount of sentence imposed on a person and it made no difference whether the sentence was reduced by a court of law on appeal or by revision or by the powers of the government reserved for it under s. 401 of the Code of Criminal Procedure, as the effect in both cases was the same. We are of opinion that this view is incorrect, though perhaps on the facts of that case the order of the tribunal was right for it seems that political prisoners had been granted a pardon by the Ruler of Nabha and not a mere remission under s. 401 of the Code of Criminal Procedure. We cannot agree that remission by government has the same effect as an order passed by a court of law in appeal or on revision. It is true that under s. 7(b) of the Act one has to look at the sentence imposed; but it must be a sentence imposed by a court. Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by a court; but where a sentence imposed by a court is remitted in part under s. 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission. It is also well to remember that

s. 7(b) speaks of the conviction and sentence passed by a court of law; it does not speak of the period of imprisonment actually suffered by the convicted person. The other election cases to which our attention was drawn by the learned counsel for the appellant are similar and they are all in our opinion wrongly decided. We are therefore of opinion that the High Court was right in the view that the nomination paper of the appellant was properly rejected.

The next contention on behalf of the appellant is that both the High Court and the tribunal were wrong in holding that a corrupt practice within the meaning of s. 100(1)(b) read with s. 123(5) had not been proved in this case. The case of the appellant was that voters were carried by mechanically propelled vehicles to the polling booths by Birendra Kumar Nath who was in-charge of the electioneering campaign on behalf of the Congress Party and Bholaram Sarkar who was president of the Primary Congress Committee of Dhupdhara. The successful candidates were both contesting the election as nominees of the Congress Party and therefore these two persons who carried electors in mechanically propelled vehicles to the polling booths did so as agents of the successful candidates and with their consent. The High Court as well as the election tribunal held that though Birendra Kumar Nath and Bholaram Sarkar might be deemed to be the agents of the successful candidates for purposes of the election and though the hiring of mechanically propelled vehicles by the agents for conveyance of electors to polling booths had been proved, there was no proof that this was done with the consent, express or implied, of the successful candidates. The High Court pointed out that consent, express or implied, of the candidates was necessary for purposes of s. 100(1)(b) and was of the view that on the facts proved in this case such consent could not be inferred and the circumstances did not convincingly lead to an inference that the corrupt practice in question was committed with the knowledge and consent of the successful candidates. In view of this concurrent finding of the High Court and the

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tribunal on this question, namely, whether there was consent, express or implied, of the successful candidates to the commission of this corrupt practice, it is in our opinion idle for the appellant now to contend that there was consent express or implied, as required by s. 100(1)(b). The inference whether there was consent or not from the facts and circumstances proved is still an inference of fact from other facts and circumstances and cannot be a question of law as urged by learned counsel for the appellant. Reference in this connection may be made to *Meenakshi Mills, Madurai* v. *The Commissioner of Income-tax, Madras*(1), where it was held that a finding of fact, even when it is an inference from other facts found on evidence, is not a question of law and that such an inference can be a question of law only when the point for determination is a mixed question of law and fact. In the present case the only question is whether the corrupt practice was committed with the consent of the candidates, whether express or implied, and the question whether such consent was given in the circumstances of this case is a question of fact and not a mixed question of law and fact and therefore the fiinding of the High Court as well as the tribunal that there was no consent, either express or implied, in our opinion, concludes the matter. There is no force in this point either.

The appeal therefore fails and is hereby dismissed with costs.

Appeal dismissed.

(1) [1956] S.C.R. 691.

R. P. KAPUR AND OTHERS

v.

SARDAR PRATAP SINGH KAIRON AND OTHERS.

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October 28.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Criminal Procedure—Investigation of offences—Investigation by Deputy Superintendent of Police under orders of Inspector-General of Police — Validity — Allegations against Chief Minister— Necessity of affidavit by Chief Minister—Code of Criminal Procedure, 1898 (V of 1898), ss. 154, 156, 157 and 551—Constitution of India, Art. 14.

One S sent a complaint against the first petitioner to the Chief Minister who sent it to the Additional Inspector-General of Police who in his turn sent it to the Deputy Superintendent of Police, C.I.D., with the endorsement "Register a case and investigate personally". The Deputy Superintendent of Police drew up a first information report. There were also three other cases instituted against the petitioners or some of them, which were being investigated into by the C.I.D. Police officers. The petitioners contended that the respondents had violated the provisions of ss. 154, 156 and 157 of the Code of Criminal Procedure and had adopted a procedure unknown to law and had thus singled out the petitioners for unequal treatment in violation of Art. 14 of the Constitution.

Held, that the procedure adopted was authorised by s. 551 of the Code and in the first case the Inspector-General had power to deal with the complaint and to direct investigation of the same by the Deputy Superintendent of Police. Even if the reason given for the Inspector-General making over the investigation to the Deputy Superintendent of Police that the case was of a technical nature was not correct, it was open to him to make over the investigation to the Deputy Superintendent of Police in view of the status of the petitioners. The procedure adopted in the other three cases was also not illegal, and there was no unequal treatment of the petitioners in the matter of the institution or investigation of the cases so as to entitle them to invoke in aid Art. 14 of the Constitution.

H. N. Rishbud and Inder Singh v. *The State of Delhi*, [1955] 1 S.C.R. 1150, *King Emperor* v. *Nilkantha*, I.L.R. 35 Mad. 247, *Pulin Bihari Ghosh* v. *The King*, I.L.R. [1950] 1 Cal. 124 and *Textile Traders Syndicate Ltd.* v. *The State of U. P.*, A.I.R. 1959 All. 337, referred to.

Since allegations were made against the Chief Minister by the petitioners, he owed a duty to the Court to file an affidavit stating what the correct position was so far as he remembered it.

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R. P. Kapur & Others v. Sardar Pratap Singh Kairon & Others

ORIGINAL JURISDICTION: Petition No. 59 of 1960.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A. S. R. Chari, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra,* for the Petitioners.

S. M. Sikri, Advocate-General for the State of Punjab, *H. S. Doabia,* Additional Advocate-General for the State of Punjab, *M. S. Punnu,* Deputy Advocate-General for the State of Punjab and *D. Gupta,* for the Respondents.

1960. October 28. The Judgment of the Court was delivered by

S. K. Das J.

S. K. DAS J.—This is a writ petition. The three petitioners before us are (1) R. P. Kapur, a member of the Indian Civil Service, who before his suspension was serving as a Commissioner in the State of Punjab, (2) Sheila Kapur, his wife, and (3) Kaushalya Devi, his mother-in-law. They have moved this Court under Art. 32 of the Constitution for the enforcement of their rights under Arts. 14 and 21 of the Constitution, which rights they say have been violated by the respondents who are the State of Punjab, Sardar Pratap Singh Kairon, Chief Minister thereof, and certain officials, police, administrative and magisterial who have been conducting, or are connected with, the investigation or inquiry into a number of criminal cases instituted against the petitioners. We shall refer to some of these officials later in this judgment in relation to the part which they have played or are playing in those criminal cases.

Briefly stated the case of the petitioners is that petitioner no. 1 had the misfortune to incur the wrath of the Chief Minister of the State. It is alleged that the Chief Minister was annoyed with petitioner no. 1, because the latter did not show his readiness to give evidence for the prosecution in a case known as the Karnal Murder Case (later referred to as the Grewal case) in which one D. S. Grewal, then Superintendent of Police, Karnal, and some other police officials were, along with others, accused of some serious offences. That case was transferred by this Court to a Special

Judge, at Delhi, who commenced the trial sometime in May/June 1959. Petitioner no. 1 was at the time Commissioner of Ambala, and he alleges that he was told by the Chief Minister that it was proposed to cite the Deputy Commissioner and the Deputy Inspector-General of Police as prosecution witnesses in the said case and it would be in the fitness of things that petitioner no. 1 should also figure as a prosecution witness; to this suggestion petitioner no. 1 gave a somewhat dubious reply to the effect that his appearance as a prosecution witness might or might not help the prosecution. Another reason for the displeasure of the Chief Minister, as alleged in the petition, related to certain orders which petitioner no. 1 had passed as Commissioner, Patiala Division, in a revenue case known as the Sangrur case. We shall presently give more details of that case, but it is enough to state here that the allegation is that in that case petitioner no. 1 passed certain orders, involving the disposal of properties worth about Rs. 9 lacs, which were adverse to one Surinder Kairon, son of the Chief Minister. It is stated that as a result of the displeasure which petitioner no. 1 had incurred for the two reasons mentioned above, a special procedure was adopted in the investigation of the criminal cases instituted against the petitioners; and some new cases were started through the instrumentality of the C. I. D. Police with a view to subject the petitioners to harassment and persecution. The substantial allegation, to quote the language of the petition, is that "a special procedure or rather a technique has been devised for circumventing the mandatory provisions of the law (meaning the Code of Criminal Procedure) as regards the petitioners, two of whom are ladies and who are being dragged about unnecessarily because they happen to be releted to petitioner no. 1". It is stated that there has been a deliberate departure from the normal and legal procedure in the matter of institution and investigation of criminal cases against the petitioners—a departure said to be the result of "an evil eye and unequal hand" which the petitioners allege constitutes

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a denial of the right of equal protection of the laws guaranteed to them under Art. 14 of the Constitution. The special procedure or technique of which the petitioners complain is said to consist of several items, such as (1) entertainment of a criminal complaint personally by the Chief Minister; (2) institution of complaints by the C. I. D. police; (3) registration of first informations after such complaints; (4) investigations in advance of the complaints; (5) investigation by specially chosen (hand-picked as learned Counsel for the petitioners has suggested) C.I.D. officials, not necessarily of high rank, who have no power to investigate; (6) the arrangement of a special C.I.D. squad to "unearth something" against the petitioners, etc. In the petition four criminal cases were referred to as illustrative of the special procedure, said to be unwarranted by law, adopted against the petitioners, and in a supplementary petition filed on June 9, 1960, some more cases were referred to. After we had conveyed to learned Counsel for the petitioners that we could not consider the supplementary petition which the respondent had no opportunity of meeting, the supplementary petition was withdrawn. Therefore, we do not propose to say anything about the cases which are referred to in the supplementary petition. The four cases mentioned in the original petition are:—

(1) F.I.R. no. 304 of 1958, given by one M. L. Sethi, referred to hereinafter for brevity as Sethi's case;

(2) F.I.R. no. 39 of 1959, instituted on the complaint of one M. L. Dhingra, called hereinafter as Dhingra's case;

(3) F.I.R. no. 135 of 1959, instituted on the complaint of the Civil Supply Officer, Karnal, the accused in this case being the State Orphanage Advisory Board of which petitioner no. 1 was Vice-President at the relevant time and Kartar Singh, farm manager of Kaushalya Devi, called the Orphanage case; and

(4) F.I.R. no. 26 of 1960, instituted on the complaint of Daryao Sing, D.S.P., C.I.D., Karnal, (one of the respondent police officials) in which there are three

accused persons including petitioner no. 1, called for brevity the Ayurvedic Fund case.

We may say at once that we are not concerned with the merits of any of the aforesaid cases: that is a question which will fall for consideration if and when the cases are tried in Court. Therefore, nothing said in this judgment shall be construed as affecting the merits of the cases. Two questions have been posed before us in relation to these cases: one is if in the matter of institution and investigation of these cases a special procedure unknown to law has been adopted; and the other is if the petitioners have been singled out for unequal treatment in administering the law relating to the institution and investigation of criminal cases in the State. The two questions are in one sense connected, for if a special procedure unknown to law has been adopted against the petitioners, that by itself will be a denial of the right of the equal protection of the laws. Learned Counsel for the petitioners has, however, argued the second question somewhat independently of the first question, and he has submitted that even if the procedure adopted against the petitioners is warranted by law, it is a departure from the normal procedure and has been adopted with "an evil eye and unequal hand" so as to put the petitioners to harassment and persecution. We shall consider both these questions in relation to the procedure adopted in the four cases referred to above.

It is necessary to state that the petition has been contested by the respondents. The Chief Minister has himself made no affidavit in respect of the allegations made against him; but affidavits in reply have been made by the Chief Secretary and the Home Secretary to the Punjab Government and some of the respondent officials. To these affidavits we shall advert later in somewhat greater detail. We shall also have something to say about the failure of the Chief Minister to make an affidavit. It is enough to state here that the respondents have seriously contested both the allegations made on behalf of the petitioners, namely, (1) that a special procedure unknown to law was

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adopted against them or (2) that the procedure adopted was motivated by "an evil eye and unequal hand" so as to persecute and harass the petitioners. The respondents have said that the procedure adopted was warranted by law and the employment of the C. I. D. officials in the investigation of the cases against the petitioners was due to the special nature of the cases. The respondents have also contested the correctness of the allegation that petitioner no. 1 had incurred the displeasure of the Chief Minister on account of the two reasons stated in the petition. In brief, the claim of the respondents is that there has been no violation of the rights of the petitioners guaranteed under Arts. 14 and 21, and there are no grounds for interference by this Court under Art. 32 of the Constitution. It has been stated on behalf of the respondents that in the two cases called Sethi's case and Dhingra's case, the petitioners had moved the High Court without success for quashing the proceedings and in Sethi's case, an appeal to this Court against the order of the High Court also proved unsuccessful. It is also pointed out that a petition made by petitioner no. 1 in the High Court for proceeding by way of contempt of court against the Chief Minister on some of the allegations now raised or allegations similar in nature, was dismissed *in limine* and the learned Advocate-General of the Punjab has taken us through the order of the High Court in respect of some of the allegations made.

Having stated the respective cases of the parties before us, we shall proceed now to a more detailed examination of the procedure adopted in the four cases instituted against the petitioners. But before we do so, it is necessary to say a few words about Grewal's case and Sangrur case which are stated to furnish the reasons why petitioner no. 1 incurred the displeasure of the Chief Minister. It is alleged that in Grewal's case petitioner no. 1 was asked to give evidence for the prosecution, but he gave a dubious reply which displeased the Chief Minister. It is worthy of note, however, that the trial in Grewal's case began in May-June, 1959; Sethi's complaint was made in

December, 1958 and Dhingra's in February, 1959. Obviously, those two cases could not be the result of any refusal by petitioner no. 1 to give evidence in Grewal's case. On May 28, 1959, petitioner no. 1 wrote to the Chief Secretary about Sethi's case and Dhingra's case, but no allegation was made therein against the Chief Minister. What the petitioner wanted then was that an opportunity should be given to him to explain his position. On June 9, 1959, petitioner no. 1 again wrote to the Chief Secretary about the complaints of Sethi and Dhingra—again there was no allegation against the Chief Minister. On June 29, 1959, petitioner no. 1 filed two petitions in the Punjab High Court for quashing the proceedings in Sethi's case and Dhingra's case; in this petition an allegation was made that powerful influences were operating against the petitioner "to harm him and debar him officially" and Sethi's case and Dhingra's case were the result of such influences, but there was no specific mention of Grewal's case and of any request to the petitioner to give evidence in that case. It was for the first time on July 20, 1959, when the petition for contempt proceedings was filed that a specific allegation against the Chief Minister was made in paragraphs 35 to 37 thereof (this is annexure I to the present petition). This petition was dismissed *in limine*, the High Court saying that it was not *prima facie* satisfied that the allegation was made out. We do not think that petitioner no. 1 has been able to advance his case any further in spite of the fact that the Chief Minister has made no affidavit, a matter to which we shall advert later.

As to the Sangrur case, that was also referred to in the petition of July 20, 1959, and the High Court did not accept the allegation of petitioner no. 1. What happened in that case was this. The late Sardar Mukan Sing of Sangrur left two widows, Sardarni Pritam Kuar and Sardarni Pavitar Kaur. Sardarni Pavitar Kaur had three daughters one of whom was married to Surinder Singh Kairon, son of the Chief Minister. The Sangrur estate was in charge of the Court of Wards, that is, the Financial Commissioner, Punjab. On June

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19, 1958, the Court of Wards decided to release the estate after partitioning the immovable property between the two widows. At one time a question arose as to whether the immovable properties should be partitioned into five equal shares for the two widows and three daughters or into two shares only for the two widows. Sometime before May 6, 1959, it was decided that the partition would be of two shares only and thereafter a detailed mode of partition was agreed to between the parties. This is clear from the note of petitioner no. 1 dated May 6, 1959. Thereafter there was no more dispute left, and the case of petitioner no. 1 that he was arrested on July 18, 1959, because he dictated an adverse order some days previously which had been typed but not yet signed does not *prima facie* appear to be correct, apart altogether from the question whether petitioner no. 1 was acting merely as the channel between the Deputy Commissioner, and the Financial Commissioner, the latter being the only authority competent to pass final orders in the matter.

We have, therefore, come to the conclusion that the petitioners have not established what they have alleged, namely, that R. P. Kapur, one of the petitioners, had incurred the displeasure of the Chief Minister by reason of what happened in the Grewal case and the Sangrur case. Whether there were other reasons, administrative or otherwise, for the displeasure of the Chief Minister is a matter which is not germane to the present case. In the affidavits filed before us some reference has been made to the past record of R. P. Kapur. We consider it unnecessary to refer to that record; firstly, because it is not relevant to the case before us, and secondly because we think that it is not fair to refer to the confidential record of an officer unless the circumstances in which certain adverse remarks were made are known.

We proceed now to consider the four criminal cases pending against the petitioners or some of them, in relation to the two points urged: (1) whether in the institution and investigation of these cases a special procedure unknown to law has been adopted and (2)

if the petitioners have been singled out for unequal treatment in administering the law relating to the institution and investigation of criminal cases in the State.

The first two cases, namely, Sethi's case and Dhingra's case need be dealt with at some length. Sethi's case started on a complaint which it was said was sent direct to the Chief Minister. Four material allegations about fraudulent misrepresentation were made in that complaint. It was alleged that R. P. Kapur had fraudulently misrepresented to Sethi that a particular piece of land which he had sold to Sethi had been purchased by him at Rs. 10 per square yard; that he had fraudulently concealed from Sethi the pendency of certain proceedings before the Land Acquisition Collector, Delhi, and of the acquisition of the said land under s. 17 of the relevant Act; that he had made a fraudulent misrepresentation as regards the scheme of housing with regard to the area in which the land lay. Though the complaint was dated December 10, 1958, it appears to have been made over to the Additional Inspector General of Police on December 23, 1958. The Additional Inspector General of Police then appears to have passed an order to the following effect: "Register a case and investigate personally". This was addressed to Sardar Hardayal Singh, D. S. P. Thereupon Sardar Hardayal Singh, Deputy Superintendent of Police, C.I.D., Amritsar, appears to have drawn up a first information report. The original complaint which Sethi filed has not been produced before us. What was produced before us was a carbon copy and on that carbon copy was the order of the Additional Inspector General of Police to which we have already made a reference. The allegation of the petitioners was that the original complaint had been sent to the Chief Minister and the Chief Minister had passed certain orders thereon. On behalf of the petitioners it was suggested that the original was not produced in order to conceal from the Court the orders which the Chief Minister had passed thereon. We have stated earlier that the Chief Minister had filed no affidavit in respect of these allegations. An affidavit has been filed by A. N. Kashyap, Home Secretary

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to the Government but obviously he was not in a position to say anything about the allegations made against the Chief Minister. We, therefore, proceed on the basis that so far as Sethi's case is concerned, a complaint was made or sent to the Chief Minister who thereupon sent it to the Additional Inspector General of Police who in his turn sent it to Sardar Hardayal Singh, Deputy Superintendent of Police, C. I. D., at Amritsar. The short question before us is—does this amount to adopting a procedure unknown to law or even to unequal treatment so as to attract Art. 14 of the Constitution ? Learned Counsel for the petitioners has taken us through the relevant provisions in Part V, Chapter XIV, of the Code of Criminal Procedure and has submitted that under s. 154 of the Code every information relating to the commission of a cognizable offence should be given to an officer in charge of a police station and under s. 156 any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial. He has also referred to s. 157 under which the officer in charge of a police station, shall forthwith send a report of the first information to a Magistrate empowered to take cognizance of the offence and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed to the spot to investigate the facts and circumstances of the case, and if necessary to take measures for the discovery and arrest of the offender. It is contended that the provisions of ss. 154, 156 and 157 of the Code have been violated in the case against the petitioners; and thus the petitioners have been subjected to a special procedure unknown to law or, at any rate, to unequal treatment, treatment different from that of other persons against whom informations of a cognizable offence are made.

We are unable to accept these contentions as

correct. First of all, s. 154, Code of Criminal Procedure, does not say that an information of a cognizable offence *can only be made* to an officer in charge of a police station. That section merely lays down, inter alia, that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. Section 156 gives power to an officer in charge of a police station to investigate without the order of a Magistrate any cognizable case which a Court, having jurisdiction in the local area etc. would have power to inquire into or try; sub-s. (2) of s. 156 lays down that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. There has been some argument before us as to the meaning of the expression "any such case" occurring in sub-s. (2) of s. 156. As we are not resting our decision on sub-s. (2) of s. 156, Code of Criminal Procedure, we consider it unnecessary to embark upon a discussion as to the true scope and effect of sub-s. (2) of s. 156. Section 157 of the Criminal Procedure Code lays down the procedure which an officer in charge of a police station must follow where information of a cognizable offence is made. Now, there is another important provision in the Code which is of great relevance in this case and must be read. That provision is contained in s. 551 which is in these terms:

"S. 551. Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station."

The Additional Inspector General of Police to whom

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Sethi's complaint was sent was, without doubt, a police officer superior in rank to an officer in charge of a police station. Sardar Hardayal Singh, Deputy Superintendent of Police, C.I.D., Amritsar, was also an officer superior in rank to an officer in charge of a police station. Both these officers could, therefore, exercise the powers, throughout the local area to which they were appointed, as might be exercised by an officer in charge of a police station within the limits of his police station. It is not disputed that the jurisdictional area of the Additional Inspector General of Police was the whole of the State. As to the jurisdictional area of the Deputy Superintendent of Police, C.I.D., the contention on behalf of the respondent State is that though he was posted at Amritsar, his jurisdictional area extended over the whole State. The learned Advocate-General for the respondent State has drawn our attention to Police Rule 21.28 in the Punjab Police Rules, 1934, Vol. III, issued by and with the authority of the State Government under ss. 7 and 12 of the Police Act (V of 1861). That rule lays down that the Criminal Investigation Department has no separate jurisdiction and the Deputy Inspector General of Police, Criminal Investigation Department, may decide to take over the control of any particular investigation himself or depute one or more of his officers to work directly under the control of the Superintendent of Police of the district. Police Rule 21.32 enumerates some of the cases in which the assistance of the Criminal Investigation Department may be sought. Police Rule 25.14 says that the Criminal Investigation Department is able to obtain expert technical assistance, and in cases where such assistance is required the assistance of the Criminal Investigation Department may be obtained. In the affidavit made by Sardar Hardayal Singh, he has stated that he was entrusted with the investigation of Sethi's case because of its technical nature and also because his sphere of duty as a Gazetted Officer attached to the Criminal Investigation Department was the whole of the State in view of the memorandum no. 9581-H-51/7912 dated October

26, 1951. That memorandum shows that the Deputy Inspector General, C.I.D. and all gazetted officers of the Criminal Investigation Department have jurisdiction extending over the whole of the Punjab State. This is also supported by the affidavit made by Shamshere Singh, Additional Inspector General of Police. Learned Counsel for the petitioners has pointed out that Sethi's case involved no technical questions and the ground stated in the affidavits of Shamshere Singh and Sardar Hardayal Singh is not, therefore, correct. The question before us is not whether the reason for which the investigation was made over to Sardar Hardayal Singh is correct or not. The question before us is, whether in making over the investigation to Sardar Hardayal Singh a special procedure unknown to law was adopted or the law as to the investigation of cases was administered with an evil eye or unequal hand. If the police officer concerned thought that the case should be investigated by the C. I. D. — even though for a reason which does not appeal to us—it cannot be said that the procedure adopted was illegal. We are unable to agree with learned Counsel for the petitioners that any of these two contentions has been made out in the present case. We are satisfied that the Inspector General of Police, C.I.D. had power to deal with Sethi's complaint and had further power to direct investigation of the same by Sardar Hardayal Singh who as a police officer superior in rank to an officer incharge of a police station could exercise powers of an officer in charge of a police station in respect of the same. It cannot, therefore, be said that the procedure adopted was unknown to law. Nor are we satisfied that the procedure adopted was motivated by any evil purpose, though we are not quite impressed by the reason given by Shamshere Singh or Sardar Hardayal Singh that Sethi's case was of a technical nature and, therefore, required the assistance of the C.I.D. Even if it was not of a technical nature, it was open to the Additional Inspector General of Police to make over the investigation to a Deputy Superintendent of Police in view of the status of the petitioners. In paragraph 31 of his affidavit

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A. N. Kashyap, Home Secretary, has said that the Inspector General of Police on receiving the complaint from Sethi ordered on his own the registration of the case without any order or direction from the Chief Minister. The correctness of this statement has been very seriously commented on. In the absence of any affidavit from the Chief Minister and of the original complaint, we have preferred to proceed in this case on the footing that the Additional Inspector General of Police got the complaint from the Chief Minister and then passed necessary orders thereon. Even on that footing we are unable to hold that there has been any violation of legal procedure or that an unfair discrimination has been made against the petitioners.

Learned Counsel for the petitioners has relied on certain observations made by this Court in *H. N. Rishbud and Inder Singh* v. *The State of Delhi* (1). The observations occur at page 1160 of the report and are to the effect that it is of considerable importance to an accused person that the evidence collected against him during investigation is collected under the responsibility of an authorised and competent investigating officer. These observations were made in a case where the question that fell for decision was whether the provisions in s. 5(4) and the proviso to s. 3 of the Prevention of Corruption Act, 1947 (Act II of 1947) and the corresponding s. 5A of the Prevention of Corruption (Second Amendent) Act, 1952 (Act LIX of 1952), were mandatory or not. It was held that they were mandatory and an investigation conducted in violation thereof was illegal. It was also held that an illegality committed in the course of an investigation did not affect the competence and jurisdiction of the Court for trial; but if any breach of the mandatory provisions relating to investigation were brought to the notice of the Court at an early stage of the trial, the Court would have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as might be called for. We do not think that the observations made and the decision are of any

(1) [1955] (1) S.C.R. 1150.

assistance to the petitioners. We have held that there has been no violation of any mandatory provisions as to investigation in Sethi's case against the petitioners and the investigation procedure followed is legal. Our attention has been drawn to *King Emperor* v. *Nilkantha* (1). On a certificate by the Advocate-General, the case was considered by a Full Bench of the Madras High Court and one of the questions for decision was—"Is an Inspector of the Criminal Investigation Department an authority legally competent to investigate the facts within the meaning of s. 157, Evidence Act?" The question was answered in the affirmative by the majority of judges, Abdur Rahim, J. and Sundara Ayyar, J., dissenting. In the course of the arguments before their Lordships, one of the questions mooted was whether Inspectors of the Criminal Investigation Department were appointed to any local area within the purview of s. 551, Code of Criminal Procedure. Some of the Judges held that the whole Presidency was their local area; some held that that was not so. On the materials before us, we have no hesitation in holding that the Deputy Superintendent of Police entrusted with the investigation of Sethi's case had the necessary authority to hold the investigation. The decision in *Pulin Bihari Ghosh* v. *The King* (2) on which also some reliance has been placed does not appear to us to be in point: that was a case in which the Magistrate purported to act both under s. 202 and s. 156(3), Code of Criminal Procedure, and it was held that proceedings under s. 202 and investigation under s. 156(3) could not proceed simultaneously; it was further held that a direction under s. 156(3) could only be made to an officer in charge of a police station. No question arose there of the exercise of powers under s. 551, Code of Criminal Procedure, and the decision does not establish what the petitioners are seeking to establish in the present case. More in point is the decision in *Textile Traders Syndicate Ltd.* v. *State of U. P.* (3) where it was held that an Inspector of Police in the Criminal Investigation Department was superior in rank to that of an

(1) I.L.R. 35 Mad. 247. (2) I.L.R. [1950] 1 Cal. 124.
(3) A.I.R. 1959 All. 337.

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officer in charge of a police station and under s. 551, Code of Criminal Procedure, he could exercise the powers of an officer in charge of a police station throughout the State.

Turning now to Dhingra's case, the position is this. Admittedly, a complaint dated February 27, 1959, was sent to the Chief Minister with a covering letter in which it was stated that " R. P. Kapur had already started tampering with the evidence and I, therefore, request that orders be passed that the Police should take in hand investigation immediately and collect all material evidence ". The Chief Minister wrote on this : " Inspector General, Police, is sick. Will Addl. Inspector General please take immediate action in taking over papers from Government departments concerned and the papers with Sri Dhingra. Please give a prima facie report." The Additional Inspector General then made the following endorsement : " Please take immediate necessary action. Depute one of your officers to contact Sri Dhingra and get the necessary records from him. Immediate action may be taken to take over the record from the various departments. A case may be registered. I have informed Chief Secretary and he agrees with this." This was addressed to the Deputy Inspector General, C.I.D., and the latter wrote—" Case should be registered and investigated by Bir Singh, D.S.P., under your supervision. Immediate steps should be taken to get the salient records of Sri Dhingra." This was addressed to Ujager Singh, Superintendent of Police, C.I.D. The case was then registered by Sardar Sampuran Singh, Inspector of Police, Police Station Chandigarh, and the investigation was in charge of Sardar Bir Singh, Deputy Superintendent of Police, C.I.D.

The legal position as to the institution of Dhingra's case and its investigation is the same as in Sethi's case. The legal sanction for both is s. 551, Code of Criminal Procedure, and the reasons which we have given for holding that the procedure followed in instituting and investigating Sethi's case is legally valid apply to Dhingra's case also. On behalf of the

petitioners it has been submitted that the hand of the Chief Minister is no longer concealed in respect of Dhingra's case. It is pointed out that in 1959, a complaint is made in respect of offences alleged to have been committed about five years ago in 1954 and the Chief Minister, without any enquiry whatsoever, says "Please give a prima facie report," and the same C.I.D. machinery is again set in rapid motion as in Sethi's case, and this at a time when Sethi's case was kept "hanging as a sword" over the petitioners. It has been further submitted that the direction as to the seizure of papers was not justified in law, as the Chief Minister had no legal power to give such a direction. We do not think that these submissions establish what the petitioners have to establish in order to succeed on their writ petition, namely, that in the institution of Dhingra's case and its investigation, a procedure unknown to law has been followed or that the petitioners have been singled out for an unfair and discriminating treatment. We do not know what reasons led the Chief Minister to make the endorsement on the complaint of Dhingra as he did and why instead of referring the complaint to the officer in charge of the police station concerned, a reference was made to the Additional Inspector General or the Criminal Investigation Department. These are matters within his special knowledge, and he has chosen to throw no light on them. Shamshere Singh has said in his affidavit that he dealt with Dhingra's case in exercise of his powers under s. 551, Code of Criminal Procedure. Sardar Bir Singh has said in his affidavit that this case was also of a technical nature and so the investigation was entrusted to him. As we have said in Sethi's case this reason does not appear to us to be a convincing reason, but the Police officers concerned may honestly have thought that the case should be investigated by the Criminal Investigation Department. We are not called upon to express any opinion on the merits of Dhingra's case, and all that we say now is that the petitioners have failed to establish either of their two contentions—(1) that the procedure adopted was illegal, or (2) that the petitioners were unfairly discriminated against.

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We go now to the remaining two cases, the Orphanage Case and the Ayurvedic Fund case. One was instituted on the complaint of the Civil Supply Officer, Karnal, and the other on the statement of Daryao Sing, Deputy Superintendent of Police, C. I. D., Karnal. The Orphanage case is against the Orphanage Advisory Board of which R. P. Kapur was the Vice President at the relevant time, and Kartar Sing, farm manager of Kaushalya Devi. It related to the alleged violation of certain Control Orders in the matter of a brick kiln. The Ayurvedic Fund case is against R. P. Kapur and certain other persons, who are not petitioners before us. It alleged criminal breach of trust etc. in respect of certain funds in the hands of the persons accused therein. As we are not deciding these cases on merits, it is unnecessary to give further details of the allegations made in those cases.

No specific illegality has been brought to our notice with regard to the institution of the Orphanage case except some allegations of high-handedness in the matter of seizure of records of the Orphanage in spite of the protest of the General Manager of the Orphanage and some allegations against Choudhuri Ram Singh, who was then Deputy Inspector General, Ambala Range. These allegations, be they true or not, do not establish any such illegality as would lead us to quash the investigation.

As to the Ayurvedic Fund case, Daryao Sing said in his affidavit:

"I say that the Audit Report contained details of meddling with Orphanage funds and of having made payments to one Kartar Sing, an employee of the petitioner no. 1 and the attorney of Shrimati Kaushalya Devi. It appears that there was excess and double payment of funds. There were purchases of timber and wood without calling for any quotations. It disclosed the issue of Orphanage funds to Madhuban Co-operative Society and that the materials like cement, iron and steel which were under control were also used in the construction of private building of Shri Kapur and his family and the use of such materials went up to 20,000 rupees."

Here again we do not express any opinion as to the correctness or otherwise of the allegations made. All that need be said at this stage is that the institution of the case is not illegal, nor is its investigation vitiated by discrimination.

It is indeed true that the investigation of these cases has been entrusted to certain officers of the Criminal Investigation Department, whether for good reason or not we cannot say. But that circumstance does not by itself make the investigation bad in law. The officers can exercise their powers of investigation under s. 551, Code of Criminal Procedure. Daryao Singh, it may be stated, was an Inspector of the Criminal Investigation Department at Karnal and became a Deputy Superintendent of Police, C. I. D., in December, 1959. He also could exercise the powers under s. 551, Code of Criminal Procedure.

For the reasons given above, we have come to the conclusion that the petitioners are not entitled to succeed and the writ petition must be dismissed, in the circumstances of this case there will be no order for costs.

Before parting with this case we consider it necessary to make some observations with regard to a matter which has caused us some anxiety and concern. Serious allegations have been made against the Chief Minister in this case. He is a party respondent and had notice of the allegations made. In Sethi's complaint it was alleged that he had passed certain orders on the original complaint, which was sent to the Additional Inspector General of Police with those orders. The original complaint was not made available to us on the ground that it could not be traced. The Additional Inspector General of Police said in his affidavit that on receiving the complaint from Sri M. L. Sethi, he ordered the investigation of the case without any order or direction from the Chief Minister. He did not specifically say if he received the complaint direct from Sethi or through the Chief Minister. In Dhingra's case the Chief Minister passed an order which might either mean that he ordered the

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submission of a *prima facie* report or merely directed that a report should be submitted if a *prima facie* case was made out. It is not clear why he ordered the seizure of papers before even a *prima facie* report was given, in respect of an offence said to have been committed five years ago. These are all matters on which the Chief Minister alone was in a position to enlighten us. In view of the allegations made against him, we consider that the Chief Minister owed a duty to this Court to file an affidavit stating what the correct position was so far as he remembered it. We recognise that it may not be possible for a Chief Minister to remember the circumstances in which a document passes through his hands; there must be many papers which a Chief Minister has to deal with in the day to day business of administration. If the Chief Minister did not remember the circumstances, it would have been easy for him to say so. If he remembered the circumstances, he could have refuted the allegations with equal ease. This is not a case where the refutation should have been left to Secretaries and other officers, who could only speak from the records and were not in a position to say why the Chief Minister passed certain orders. The petitioners are obviously suffering from a sense of grievance that they have not had a fair deal. We have held that there is no legal justification for that grievance; but in an executive as well as judicial administration justice must not only be done but it must appear that justice is being done. An affidavit from the Chief Minister would have cleared much of the doubt which in the absence of such an affidavit arose in this case.

Petition dismissed.

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October 28.

SHRIMANT APPASAHEB TULJARAM DESAI AND OTHERS

v.

BHALCHANDRA VITHALRAO THUBE

(JAFER IMAM, A. K. SARKAR and RAGHUBAR DAYAL, JJ.)

Watan Property—Building on watan land—Construction subsequent to creation of watan—Building, whether watan property—Building belonging to an agriculturist—Liability for attachment and sale—"Agriculturist", meaning of—Bombay Hereditary Offices Act, 1874 (Bom. 3 of 1874), s. 4—Code of Civil Procedure, 1908 (Act 5 of 1908), s. 60(1), proviso (b) (c).

In respect of a decree passed against T, who was the owner of certain watan properties, a building standing on watan land comprised in the said properties, was sought to be attached and sold in execution of the decree. The appellant, who was the legal representative of T, claimed that the building was not liable for attachment and sale because (1) the building, being part of watan property within the meaning of s. 4 of the Bombay Hereditary Offices Act, 1874, was not saleable property under sub-s. (1) of s. 60 of the Code of Civil Procedure, 1908, and (2) in any case, he was an agriculturist and the building belonging to and occupied by him was protected from attachment and sale by cl. (c) of the proviso to sub-s. (1) of s. 60 of the Code. The facts showed that the building was not in existence when the watan was first created but had been built subsequently by one of the watandars and there was no indication on the record that the building was constructed for the purpose of providing remuneration for the performance of the duty appertaining to a hereditary office. The evidence also showed that the appellant was not entirely dependent for his livelihood upon the income from the home farm, that he had substantial income from other lands and that there was nothing to show that this income derived from his other lands was the result of cultivation by him.

Held, that the building in question was not an accession to the land so as to partake of the character of the land on which it was constructed and did not come within the definition of watan property in s. 4 of the Bombay Hereditary Offices Act, 1874.

Held, further (*per* Jafer Imam and Raghubar Dayal, JJ., Sarkar, J., *dissenting*), that the word "agriculturist" in cl. (c) of the proviso to sub-s. (1) of s. 60 of the Code of Civil Procedure, 1908, must carry the same meaning as the word in cl. (b) and that in order that a person might come within the meaning of the word in those clauses it must be shown that, he was really dependent for his living on tilling the soil and was unable to

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maintain himself otherwise, though it was not necessary that he must till the land with his own hands.

That on the facts the appellant was not an agriculturist within the meaning of the word in s. 60 of the Code.

Case law reviewed.

Per Sarkar, J.—(1) On the plain meaning of the word "agriculturist" in cls. (b) and (c) of the proviso to sub-s. (1) of s. 60 of the Code an agriculturist is any person who occupies himself with agriculture. There is nothing in cl. (c) to indicate that the agriculturist there mentioned must be one who depends for his living on agriculture. A person occupying himself with agriculture would be an agriculturist though he did not cultivate with his own hands and carried on agriculture in a very large scale. He would still be an agriculturist even if he had other means of livelihood besides agriculture.

(2) Under cl. (c) in order that houses and buildings belonging to an agriculturist might be protected from attachment and sale they must be occupied by him for the purpose of agriculture.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 716 of 1957.

Appeal from the judgment and decree dated July 29, 1955, of the former Bombay High Court in Appeal No. 50 of 1953 under the Letters Patent against the judgment and decree dated September 3, 1953, of the said High Court in First Appeal No. 547 of 1952.

H. N. Sanyal, Additional Solicitor-General of India, T. V. R. Tatachari and *M. S. K. Sastri*, for the appellants.

Purshottam Trikamdas, H. R. Gokhale and *R. Gopalakrishnan*, for the respondent.

1960. October 28. The Judgment of Jafer Imam and Raghubar Dayal, JJ., was delivered by Jafer Imam, J. A. K. Sarkar, J., delivered a separate judgment.

Imam J.

IMAM J.—This is an appeal against the judgment of a Division Bench of the Bombay High Court in Letters Patent Appeal No. 50 of 1953, reversing the decision of Shah, J. and restoring the order passed by the executing court which had been set aside by him.

Two questions arise for decision in this appeal (1) whether the Wada (house) ordered to be attached by the executing court is Watan property, and if so, can

it be attached in execution of a decree? (2) If the Wada is not Watan property, is it exempted from attachment by virtue of the provisions of s. 60 of the Code of Civil Procedure?

It is necessary now to state a few facts. One Rao Ba. Vithalrao Laxmanrao Thube, hereinafter referred to as Laxmanrao, brought Civil Suit No. 313 of 1943 against Tuljaramarao Narainrao Desai, hereinafter referred to as Tuljaramarao, to recover Rs. 80,000 which had been borrowed by him from the plaintiff. Laxmanrao's suit was decreed on December 20, 1943. Tuljaramarao having died his legal representatives, the present appellants, were brought on the record on September 21, 1944. In April, 1949, Laxmanrao filed an application for the execution of the decree. He sought the attachment, with a view to their subsequent sale, of certain properties including the Wada which is the subject-matter of this appeal. The appellants objected to the proposed attachment on various grounds. The executing court on December 17, 1951, issued a warrant of attachment only against the Wada in question. The appellants appealed to the Bombay High Court. Their appeal was heard by Shah, J., who by his order dated September 23, 1953, set aside the order of attachment relying on the decision of Chagla, J., in second Appeal No. 760 of 1942. He, however, gave no decision on the question whether s. 60 of the Code of Civil Procedure gave protection to the Wada from attachment. Against the decision of Shah, J., there was an appeal under the Letters Patent of the High Court which was heard by a Division Bench. The Division Bench, as already stated, reversed the decision of Shah, J. and restored the order made by the executing court. Subsequently, the High Court gave a certificate that the case was a fit one for appeal to this Court.

It is undisputed that the whole of village Nandi had been granted as inam to the ancestor of Tuljaramarao and his descendants as per Sanad, Ext. 54, and the Inam Patrak, Ext. 57. In that Sanad there is no mention of any Wada existing on the Inam land. According to the executing court the Wada

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appears to have been built after the grant. It appears that the opinion of the Division Bench of the High Court was also to the same effect. There is no finding of Shah, J., to the contrary. We must, therefore, proceed on the basis that the Wada in question was not the subject of the original grant. This Wada came to be constructed on the land in the inam village of Nandi sometime subsequent to the grant.

What has to be decided is, do the attributes of " Watan Property " accrue to the Wada which was constructed after the grant on land which was admittedly " Watan Property " as defined by the Bombay Hereditary Offices Act, 1874 (Bombay Act No. III of 1874), hereinafter referred to as the Act. In appeal No. 760 of 1942, Chagla, J., took the view that the house in that case was an accession to the site on which it stood. Accordingly, it must partake of the character of the land on which it stood. The learned Judge stated that the question which he had to determine was whether the house was immovable property held for the performance of the duty appertaining to an hereditary office within the meaning of s. 4 of the Act. Having regard to the definition of " immoveable property " in the Bombay General Clauses Act he was of the opinion that the house certainly formed part of the immoveable property which was held for the performance of the duty appertaining to the hereditary office of the Watan and that the only answer to the question " what is the immoveable property which is held for the performance of the duty under section 4?" can be both the land and the house. If the house forms part of the immoveable property it is not possible to sever the two and to say that it is only the land which is Watan property and not the house which is permanently fastened to it. Shah, J., relied upon the decision of Chagla, J., and held that the land on which the Wada in the present case stood, being Watan property, the Wada must also be deemed to have acquired that character. The Division Bench which heard the appeal against the decision of Shah, J., was of the opinion that although a house

built on land must be regarded as immoveable property it did not follow that like the land on which it was built the house became Watan property. The fact that a house subsequently built became immoveable property would have no material bearing on the question whether it was Watan property or not. In order that the house may be regarded as Watan property it must satisfy the test laid down by the definition of the word " Watan Property " in s. 4 of the Act and that if the word " held " was construed in the way in which the learned Judges of the Division Bench thought it should be, it would be difficult to accept the view that a house subsequently built by a watandar on a part of the Watan land could be said to be held by him for the performance of his duties of a hereditary office. The learned Judges of the Division Bench accordingly were of the opinion that Shah, J., erred in so holding.

" Watan property " has been defined in the Act to mean :

"The moveable or immoveable property held, acquired, or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office. It includes a right to levy customary fees or perquisites, in money or in kind, whether at fixed times or otherwise.

It includes cash payments in addition to the original watan property made voluntarily by the State Government and subject periodically to modification or withdrawal."

The inam lands of Nandi were undoubtedly held as remuneration for the performance of the duty appertaining to an hereditary office and therefore were Watan properties. On the findings of the courts below the Wada in question was not the subject of the grant. In our opinion, therefore, at no time was it held for providing remuneration for the performance of the duty appertaining to a hereditary office. Nor could it be said to have been acquired for performance of any such duty. It had been constructed some time subsequent to the grant either by the grantee or his descendants and there is no indication on the record

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that it was constructed for the purpose of providing remuneration for the performance of the duty appertaining to a hereditary office. To that extent at least it appears to be clear that the Wada in question does not come within the definition of Watan property as defined in the Act. The only question is whether having been constructed on land which is Watan property and being immovable property within the meaning of the Bombay General Clauses Act, does it partake of the character of the land on which it stood? On behalf of the appellants it was argued that the Wada is an accession to the Watan property, namely, the land of village Nandi. It seems to us, however, that construction of a Wada on land which is Watan property is not an accession to it, as accession to the land would suggest that over a course of years imperceptible accretion to the land has taken place and it was impossible to distinguish the original land from the accreted land. In such a case the accreted land may possibly partake of the character of the original land. Adjacent lands to the original land which have been acquired and can be distinguished cannot partake of the character of the original land.

On behalf of the appellants it was argued that the right, title and interest of the grantor had to be looked at first in construing a grant and if it appeared from the terms thereof that it did not contain any reservation or exception then all the rights, title and interest of the grantor which he was capable of granting would pass to the grantee. The grantor in this case was the Government which could have built a construction on the land granted or dug tube wells on it. The grantee, therefore, could also build a house or any other structure on the land. On the other hand, it was contended on behalf of the respondent that the position of a watandar was not that of an absolute owner of the land. He held the land on certain conditions. The land was liable to forfeiture if he was guilty of certain acts mentioned in s. 60 and Schedule II of the Act. We will assume, there being nothing to the contrary in the Sanad, that the grantee was not restricted from constructing a building on the land. From that,

however, it does not necessarily follow that the building so constructed became Watan property within the meaning of the Act. If the Government could have built a construction on the land it could also have dismantled it and removed the material with which it was made. Similarly, the grantee could do so, there being no restriction in that regard in the terms of the Sanad. It seems to us that on a proper construction of the Sanad there was no impediment in the way of the grantee from dismantling the house which he had built and removing the materials with which it had been constructed and selling the same. Indeed, unless it is held that a house constructed on the land partakes of the character of the land, it is difficult to see how the grantee is prevented from selling or mortgaging it but not the land on which it stood. It seems to us, therefore, that the Wada in the present case although immovable property did not partake of the character of the land on which it was constructed because it was severable from the land and was capable of being dismantled and the materials of which could be removed and sold without violating any of the provisions of the Act. In our opinion, the decision of the Division Bench of the High Court that the Wada was not Watan property appears to be correct.

The next question for consideration is whether the Wada is one belonging to an agriculturist and occupied by him within the meaning of cl. (c) of the proviso to s. 60(1) of the Code of Civil Procedure. If it is, then it is exempted from attachment by the provisions of the proviso. It was urged that as the word "agriculturist" has not been defined in the Code, the word must be construed according to its ordinary meaning. According to Shorter Oxford English Dictionary this word can also mean a farmer. Neither the extent of the land farmed by him nor the amount of income derived by him from cultivating the land was a relevant consideration in construing the word "agriculturist". Nor would it be right to restrict the meaning of the word "agriculturist" to mean that an agriculturist must be a person who himself or by the aid

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of the members of his family tills the land and not with the aid of employed labour. On behalf of the respondent, however, it was contended that the word "agriculturist" in cl. (c) of the proviso must bear the same meaning as the word "agriculturist" in cl. (b) of the proviso. It was necessary, therefore, to construe the provisions of cl. (b) as well in order to understand what the Code intended the word "agriculturist" to mean in cl. (c). On a proper construction of cl. (b) not only an agriculturist must be the tiller of the land but he must also be a small agriculturist. Clause (b) was not intended to refer to a person who cultivated a large area of land and derived from it a large income. It was pointed out that in the present case the appellant Appasaheb was cultivating a very large area of land with the aid of employed labour and derived an income somewhere between Rs. 30,000 to 35,000 a year. Section 60(1) of the Code states in detail what property of a judgment debtor is liable to attachment and sale in the execution of a decree. It was urged that but for the proviso all the properties of Tuljaramarao other than Watan property were liable to attachment and sale in execution of Laxmanrao's decree. The proviso no doubt exempted from attachment and sale certain properties mentioned therein but cl. (b) of the proviso clearly indicated that the object of the Code was to save in the case of a judgment debtor his tools as an artisan and, where he was an agriculturist, his implements of husbandry and such cattle and seed-grains as may, in the opinion of the court, be necessary to earn his livelihood. It did not even exempt his agricultural produce unless there was a notification under s. 61 of the Code specifying by a general or special order how much of the agricultural produce was, in the opinion of the State Government, necessary for the purpose of providing, until the next harvest, for due cultivation and the support of the judgment debtor and his family. It was suggested, therefore, that the Code intended to exempt from attachment and sale, in the case of an agriculturist, only that much which was necessary to enable him to earn his livelihood as such.

The meaning of the word "agriculturist" has been interpreted by various High Courts in India. Reference to only some of these cases need be made. In the case of *Hanmantrao Annarao* v. *Dhruvaraj Pandurangrao* (1) it was held by the Bombay High Court that the word "agriculturist" in cls. (b) and (c) of the proviso to s. 60(1) of the Code of Civil Procedure denotes persons who are personally engaged in tilling and cultivating the land and whose livelihood depends upon the proceeds of such tillage and cultivation of the soil. It does not include large landed proprietors even though they may be tilling the land and cultivating it through their servants. In the case of *Parvataneni Lakshmayya* v. *The Official Receiver of Kistna* (2) a Full Bench of the Madras High Court arrived at the following conclusion after considering various decisions of some of the High Courts in India:—

"We think that, having regard to the scheme of the section exempting from attachment, as it does, tools of artisans, and, where the judgment debtor is an "agriculturist" his implements of husbandry and such cattle and seed-grain as may in the opinion of the Court be necessary to enable him to earn his livelihood, and his houses and other buildings occupied by him, protection is intended to be given to those who are *real* tillers of the land, and that an "agriculturist" in the section is a person who is *really* dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief, or principal sources of income are not, in our view, the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not seem to us to make him an "agriculturist" within the meaning of the section. At the same time we see no reason for depriving an "agriculturist" of the exemption under the section because he may have invested money in a business or businesses as alleged in the present case and may

(1) (1946) 49 B.L.R. 867. (2) I.L.R. [1937] Mad. 777.

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derive some income therefrom or do coolie work and add to his earnings in bad times. The test of sole source of income if applied would deprive him of the benefit of the section and we prefer the tests which we have already laid down, viz., that he must be a tiller of the soil *really* dependent for his living on tilling the soil and unable to maintain himself otherwise."

In the case of *Tirloki Prasad* v. *Kunj Behari Lal* (1) the Allahabad High Court held that the test to be applied in deciding whether a person is an agriculturist is whether his main source of income is derived from cultivation or not. In the case of *Dwarka Prasad* v. *Municipal Board, Meerut* (2) the same High Court held that there was no reason for holding that cl. (b) of the proviso to s. 60(1) applied only to the case of very small farmers and not to the case of large farmers. Clause (b) aimed at protecting the implements of every farmer so as to enable him to continue to earn his livelihood in the same way as he had been doing previously. There was nothing to indicate that the clause was limited to small farmers. In the case of *Gowardhandas* v. *Mohanlal* (3) the conclusions of the Nagpur High Court were :

"(i) Whether a person is an agriculturist or not is not a question turning on source of income but on nature of occupation.

(ii) A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed.

(iii) A person who owns land and lets it reserving either money or produce is not an agriculturist but a landlord.

(iv) A person who cultivates the land as a labourer, though neither a landowner nor a tenant, is an agriculturist.

(v) If a man cultivates the land with his own hands or by means of labourers whose activities he directs he is an agriculturist whether he operates on a large or a small scale. *If he has no connection with*

(1) A.I.R. 1935 All. 448. (2) A.I.R. 1958 All. 561.
(3) I.L.R. [1938] Nag. 461.

the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances."

In the case of *Nihal Singh* v. *Siri Ram* (1) the Lahore High Court held that the word "agriculturist" means a person who personally engages in the occupation of tilling the soil and derives his livelihood from that occupation and cannot (or does not) maintain himself from other sources. On the facts of the case that Court held that a man who merely received rent from tenants or the income of the produce derived by the employment of servants or partners could not be said to depend for his livelihood upon the proceeds derived from so engaging himself in the tillage of the soil. In the case of *Anantalal* v. *Bibhuti* (2) the Patna High Court held that an agriculturist was one who tilled the soil and thereby earned his livelihood and was expected to have implements of husbandry, cattle and seed-grain. This, however, did not mean that he must till the land with his own hands or that he must necessarily have his own implements of husbandry. In any event, cultivation must be his main source of income though this would not be the sole test. The question whether a person was an agriculturist or not would have to be decided with reference to the facts of each particular case.

In the present case the evidence of the appellant's own witness, Balaji, shows that Tuljaramarao had reserved some lands for a home farm about 8 years before his death. The area reserved was about 35 acres and that he maintained about 12 bullocks and 8 servants. He was getting an income of Rs. 20,000 to Rs. 25,000 a year from these lands. He used to keep his cattle in the Wada where his servants also stayed and his agricultural implements were kept. The produce of the lands was also stored in the Wada. Tuljaramarao used to supervise the agricultural operations and his servants. After his death his son appellant Appasaheb became the owner. Appasaheb increased the acreage of the cultivation of the home farm to about 60 acres. He has 14 bullocks and 10

(1) (1939) I.L.R. 21 Lah. 23. (2) (1944) I.L.R. 23 Pat. 348.

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or 12 servants and the income is Rs. 30,000 to Rs. 35,000 a year. The cattle and the produce are kept in the Wada where he also resides. This witness also stated that the appellant Appasaheb had inams in 4 villages. Furthermore, in 10 or 12 villages he owns lands and he gets about Rs. 35,000 to Rs. 40,000 from his lands. The said Appasaheb and his brother sometimes worked personally in the fields. It is clear, from this evidence, that Appasaheb is by no means entirely dependent for his livelihood upon the income from the home farm. Apart from the income of the home farm he has a substantial income from other lands and there is nothing to show that this income derived from his other lands is the result of cultivation by him.

It was contended on behalf of the appellants that the Bombay High Court had taken an extreme view in the case of *Hanmantrao Annarao* v. *Dhruvaraj Pandurangrao* (1). Reliance was placed on the decision of the Allahabad High Court in *Dwarka Prasad* v. *Meerut Municipality* (2) where it was held that a tractor was an implement of husbandry and it was not subject to attachment although it was used for cultivating an area of about 1,200 bighas of a farm. The decisions of the Madras High Court in the case of *Parvataneni Lakshmayya* v. *The Official Receiver of Kistna* (3), of the Lahore High Court in the case of *Nihar Singh* v. *Siri Ram and Others* (4) and of the Nagpur High Court in the case of *Gowardhandas* v. *Mohanlal* (5) were also relied upon on behalf of the appellants in order to show that to be an agriculturist a person did not have to personally cultivate the land and that it was immaterial whether the area cultivated or the income derived therefrom was large or small. The real test was, was the cultivation his main source of livelihood ? It was submitted, on the facts of the present case, that the appellant Appasaheb depended for his livelihood on the income derived from the land cultivated by him and that the Wada

(1) (1946) 49 B.L.R. 867.
(2) A.I.R. 1958 All. 561.
(3) I.L.R. [1937] Mad. 777.
(4) (1939) I.L.R. 21 Lah. 23.
(5) I.L.R. [1938] Nag. 461.

on the land was occupied by him as an agriculturist for the purpose of his cultivation. Such being the position the Wada was occupied by him as an agriculturist and was therefore exempted from attachment under cl. (c) of the proviso to s. 60(1) of the Code of Civil Procedure.

Sub-section (1) of s. 60 of the Code of Civil Procedure makes all saleable property, movable and immovable, belonging to the judgment debtor and over which he has a disposing power liable to attachment and sale in execution of a decree against him. In this sub-section unless the terms of the proviso came to the rescue of the judgment debtor, all lands and houses or other buildings, goods and money, amongst other things, belonging to him would be liable to be attached. The Legislature, however, recognized that it would not be expedient to leave the matter at that. Hence the proviso. The relevant clauses in order to determine what the word "agriculturist" means are clauses (b) and (c) of the proviso. Under cl. (b) the tools of an artisan are exempted from attachment. According to the Shorter Oxford English Dictionary the word "artisan" means a mechanic, handicraftsman or an artificer. The object of the Legislature in exempting from attachment tools of an artisan was obviously to leave him his tools in order to enable him to make a living. Without his tools the artisan would be destitute, a situation which the Legislature intended to avoid. In the case of a judgment debtor who was an agriculturist, the Legislature intended that his implements of husbandry and such cattle and seed-grain as, in the opinion of the court, were necessary to enable him to earn his livelihood as an agriculturist should be exempted from attachment. Here again, the intention of the Legislature was to leave in the hands of an agriculturist sufficient means whereby he could earn his livelihood as an agriculturist. According to Shorter Oxford Dictionary one of the meanings of the word "husbandry" is the business of husbandry, that is to say, a person who tills and cultivates the soil or a farmer. The same dictionary states that one of the meanings of the word

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"livelihood" is means of living, maintenance. It can also mean income, revenue, stipend. In the case of an agriculturist his implements of husbandry must therefore mean implements with which he tills the soil. These are saved from attachment. So far as his cattle and seed-grain are concerned, only that much is exempted which, in the opinion of the court, would be necessary to enable him to earn his livelihood and by which he could earn his maintenance. It is to be noticed that under cl. (b) the land which an agriculturist tills is not exempted from attachment. The agricultural produce of the land is exempted to the extent as notified in the Official Gazette issued under s. 61 of the Code. On a fair reading of the provisions of cl. (b), that which is saved to an agriculturist are his implements with which he tills the soil and such cattle and seed-grain which, in the opinion of the court, are necessary for him to use in order to enable him to maintain himself. The provisions of cl. (b) in the case of an agriculturist, therefore, suggest a person who tills the soil in order to maintain himself.

Under cl. (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him are exempted from attachment. The word "agriculturist" in this clause must carry the same meaning as the word "agriculturist" in cl. (b) and the house must be occupied by him as such. The object of the exemption in cl. (c) apparently is that an agriculturist should not be left without a roof over his head. In other words, the Legislature intended by cls. (b) and (c) to prevent an agriculturist becoming destitute and homeless. It was, however, argued on behalf of the appellants that there are no restrictive words in cl. (c). So long as it was a house belonging to an agriculturist and occupied by him, it was exempted from attachment no matter what other income than agriculture was earned by him. The Wada in question was clearly occupied by the appellants for the purpose of tilling the land of the home farm and for storing the produce thereof, the implements of

husbandry and tethering of cattle employed in cultivating the land. It seems to us, on the evidence of the appellants' own witness, that they do not themselves till the land of the home farm which is done by a large number of labourers employed by them. Tuljaramarao did not himself cultivate the land. He merely supervised the work of cultivation by the labourers. The witness, however, did state that sometimes Appasaheb and his brother worked personally in the fields. This is a vague statement which does not necessarily mean that they did any act of cultivation themselves. The Wada in question is a big structure where the appellants reside but if they are not agriculturists within the meaning of that word in s. 60, the Wada cannot be exempted from attachment. It seems to us that even if it is not necessary that a person must till the land with his own hands to come within the meaning of the word "agriculturist" he must at least show that he was really dependent for his living on tilling the soil and was unable to maintain himself otherwise. In the present case it is quite obvious that even if the appellants can be described as agriculturists in the widest sense of that term, they are not agriculturists who are really dependent for their maintenance on tilling the soil and that they are unable to maintain themselves otherwise. The evidence shows that Tuljaramarao was getting an income of nearly 20,000 to 25,000 rupees from lands cultivated in the home farm and that the appellant Appasaheb by extending the acreage of that farm was receiving an income of Rs. 30,000 to Rs. 35,000. In addition he had lands in 10 or 12 other villages and his income from the lands was Rs. 35,000 to Rs. 40,000. Assuming that these figures include the income from the lands of the home farm, they would show that in addition to that income he had an additional income of at least Rs. 5,000 from lands in villages other than Nandi. Furthermore, the appellant Appasaheb is receiving a cash allowance of Rs. 700 to Rs. 800 per annum and Rs. 4,000 to Rs. 5,000 from the village officers of the four inam villages. In these circumstances, it can hardly be said that the appellant

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Appasaheb is really dependent for his maintenance by tilling the soil and unable to maintain himself otherwise. From this point of view it seems to us that he cannot be regarded as an agriculturist within the meaning of that word in s. 60 of the Code.

In our opinion, the decision of the High Court that the Wada in question was not Watan property and that it was not exempted from attachment by virtue of the provisions of s. 60(1) of the Code is correct. The appeal is accordingly dismissed with costs.

Sarkar J.

SARKAR J.—The appellants are the legal representatives of one Tuljaram Desai. Tuljaram was the owner of certain watan properties. On his death, his son the appellant Appasaheb became entitled to them. The other appellants are the widow and younger son of Tuljaram.

Sometime in 1943 one Vithalrao Thube obtained a decree for Rs. 80,000 against Tuljaram. By 1949 both Tuljaram and Vithalrao had died. The respondent is the successor in interest of Vithalrao.

The present appeal arises out of the proceedings for the execution of the decree started by the respondent against the appellants. In this appeal we are concerned only with a wada (building) belonging to the appellant Appasaheb, standing on watan land which the respondent seeks to have attached and sold in execution. It is not now in dispute that watan properties are not saleable properties and cannot therefore be attached and sold in execution. The wada stands on watan land and the respondent seeks to proceed against the structure apart from the land.

The appellant Appasaheb contends that he is an agriculturist and that wada belonging to and occupied by him is protected from attachment and sale by cl. (c) of the proviso to sub-s. (1) of s. 60 of the Code of Civil Procedure. He also contends that the wada itself is watan property and is not in view of sub-s. (1) of s. 60 liable to attachment and sale as it is not a saleable property.

Now sub-s. (1) of s. 60 makes all saleable property liable to attachment and sale in execution. The proviso to it so far as material runs thus :

"Provided that the following particulars shall not be liable to such attachment or sale, namely:—

.....

.....

(b) tools of artisans and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the court be necessary to enable him to earn his livelihood as such...

(c) houses and other buildings (with materials and the sites thereof and land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him."

I propose now to consider the question whether the wada is saved from execution under cl. (c) of the proviso to sub-s. (1) of s. 60. In order that the clause may apply two conditions have to be fulfilled. First, the person claiming benefit under it must be an agriculturist and secondly the wada must belong to and be occupied by him.

First, then, was the appellant Appasaheb an agriculturist within the meaning of the clause? Now the plain meaning of the word "agriculturist" in the present context, is a person who occupies himself with agriculture, that is, cultivation of land for raising crops. Anybody who is engaged in cultivating land for raising crops would be an agriculturist. So far there is no difficulty. It appears however from the reported decisions that the High Courts have expressed sharply divergent opinions on the question as to who is an agriculturist within the meaning of the clause. The difference however is not on the point that an agriculturist must be one who cultivates but as to whether the agriculturist contemplated in cls. (b) and (c) is one who cultivates with his own hands and whether all persons who carry on agricultural operations are agriculturists within the clauses. These differences have arisen not because any difficulty was felt as to the meaning of the word "agriculturist", but from the intention of the legislature to be gathered from the other words used in the clauses. In this appeal these authorities have been relied on by the

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parties as it suited the contention of each. It is necessary therefore to consider the views expressed in these cases and decide whether the word "agriculturist" is to be given its plain meaning or has to be qualified in some way. It is of some significance to state that by and large, the view of one High Court has been discarded by another.

One view is that an agriculturist is a person whose main source of livelihood is agriculture: see *Tirloki Prasad* v. *Kunj Behari Lal* (1). It is said that this is the right view for an agriculturist must be one who is so by profession. Now the main source of livelihood of a person may vary from time to time: therefore at one period of time a person might be an agriculturist but not at another. It is not reasonable to hold that such a result was intended. Again it would often be difficult to decide which is the main source of livelihood of a person. Indeed it is not quite clear as to what is meant by main source of livelihood unless it means the livelihood producing the largest income. I find nothing in the clauses to warrant this view: they do not say anything about agriculture being a person's main source of livelihood in any sense of the word "main". Furthermore if this view is accepted, a rich farmer who has income from other sources, which income is smaller than his income from agriculture, would be protected by these clauses while a poor peasant who makes a slightly bigger income, say as a day labourer, than he does from agriculture, would be deprived of the protection. I am unable to accept a view which produces such a result. I find no reason why a person who has a profession besides agriculture, should be protected if agriculture is his main profession and not otherwise, particularly when what is protected is agricultural implements, cattle, seed-grain and house used for agricultural purposes.

Another view taken is that the agriculturist must be one whose sole means of livelihood is cultivation of land but excluding persons carrying on farming in a large way: *Muthuvenkatarama Reddiar* v. *The Official*

(1) A.I.R. 1935 All. 448.

Receiver of South Arcot (1). This view has been discarded in a later full bench decision of the same High Court in *Parvataneni Lakshmayya* v. *The Official Receiver of Kistna* (2) to which reference will be made later. For myself, I find nothing in the clauses to justify this view. Take the case of a small cultivator who, in order to maintain himself, takes up the other work and so supplements his income. There is nothing in the clauses to indicate that such a cultivator should be deprived of the protection. It is well known that agricultural operations do not occupy a person for the whole year and as the income from agriculture is for quite a large number not enough to meet their needs, many small cultivators have to supplement their income by other work when they are not engaged in the fields. There is nothing in the clauses to lead to the view that these persons were not intended to get the protection. It seems to me manifest that there is no reason to deprive these persons of the benefit of the protection. Neither do I find any words in the clauses to support the view that big farmers are not intended to get the protection. This aspect of the matter will be discussed further later. The view taken in *Muthuvenkatarama Reddiar's case* (1) does not therefore appear to me to be well founded.

In *Nihal Singh* v. *Siri Ram* (3) a full bench of the Lahore High Court held that an agriculturist must be one who personally tills and not through servants and does not maintain himself from other sources of income. The reason given to support this view appears to be as follows: The word agriculturist must mean the same thing in cls. (b) and (c). In cl. (b) it is in juxtaposition with the word artisan. An artisan is one who himself practices a handicraft and furthermore he must practice the handicraft not as a hobby but as a living. So in cl. (b) an agriculturist must be one who personally tills and not through servants and maintains himself by agriculture alone.

I am not convinced by this reasoning. If the word agriculturist means one who must till with his own

(1) (1925) I.L.R. 49 Mad. 227. (2) I.L.R. [1937] Mad. 777.
(3) (1939) I.L.R. 21 Lah. 23.

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hands, then it is wholly unnecessary to rely on the juxtaposition of the words artisan and agriculturist in cl. (b) for reaching the conclusion that the Lahore High Court did. It is only if the word "agriculturist" as ordinarily understood includes one who carries on agricultural operations through persons employed by him that it becomes necessary to rely on the reasoning based on the juxtaposition of the two words in the clause. But I am wholly unable to appreciate the logic of this reasoning. Assume that an artisan must be one who works with his own hands. It does not follow that an agriculturist if it does not mean exclusively one who tills with his own hands, must be one who tills only with his own hands when that word is used in juxtaposition with the word artisan. Such juxtaposition would afford no reason for departing from the normal meaning of the word agriculturist.

In *Hanmantrao* v. *Dhruvraj* (1) also it was said that an agriculturist within the meaning of the clauses is one who tills with his own hands. The reason there put is that since in cl. (b) reference is made to implements of husbandry, cattle and seed-grain necessary for earning a livelihood as a cultivator, therefore *prima facie*, only an agriculturist who cultivates with his own hands is meant. Again I am unable to follow the reasoning for a person who lives on cultivation carried on by hired labour would also require implements of husbandry, cattle and seed-grain.

An agriculturist, as I have said, is one who carries on cultivation. Now one may carry on cultivation himself or through hired labour. In the latter case also he would be an agriculturist within the plain meaning of that word. Then it seems to me that if we exclude from the clause an agriculturist who does not till with his own hands, a most unreasonable situation would ensue. Old and incapacitated small farmers and most women would have to be denied the protection of the clauses. Again, it may so happen that a person carrying on agricultural operations himself becomes unable to do so through ill health for two or three years when he gets the cultivation done

(1) I.L.R. [1947] Bom. 687.

by employing labour and resumes cultivation when he regains his health. If the view now under discussion is correct, then such a person would cease to be an agriculturist during the period of ill health though before and after that period he would be an agriculturist. It does not seem to me that such results could have been intended.

I come now to the view taken in *Parvataneni Lakshmayya* v. *The Official Receiver of Kistna* (1) earlier referred to. It was there said, "We think that, having regard to the scheme of the section exempting from attachment, as it does, tools of artisans, and, where the judgment-debtor is an "agriculturist", his implements of husbandry and such cattle and seed-grain as may in the opinion of the court be necessary to enable him to earn his livelihood and his houses and other buildings occupied by him, protection is intended to be given to those who are real tillers of the land, and that an "agriculturist" in the section is a person who is really dependent for his living on tilling the soil and unable to maintain him otherwise."

I am unable to agree with this view. It leads to obvious anomalies. Take the case of a person whose sole means of living is agriculture. Suppose he carries on agriculture on a large scale and makes a big income out of it. He would still be dependent on agriculture for his living and unable to maintain himself otherwise. He would be an agriculturist for the purpose of the clauses within the meaning of *Parvataneni's case* (1), for that case does not say that a large scale farmer is not an agriculturist. Such a person would be entitled to protection under the clauses even though his income from agriculture is, say Rs. 25,000 a year. Now take the case of a small farmer whose income from agriculture is Rs. 1,000 a year but who also makes Rs. 1,500 from other sources and is able to maintain himself from the latter income. According to *Parvataneni's case* (1) such a person would not be an agriculturist for the purpose of the clauses and would not be entitled to any protection under them. I find

(1) I.L.R. [1937] Mad. 777.

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it impossible that the legislature could have intended such a result.

Then again I find nothing in the language of the clauses clearly leading to the view accepted in *Parvataneni's case* (1) however. The only reference to a living is in cl. (b) and it is to be found in the words "such cattle and seed-grain as may.....be necessary to enable him to earn his living as such", that is, as an agriculturist. I do not think that these words lead to the conclusion that the agriculturist contemplated must depend for his living on agriculture. They are intended to define the limit of the protection which an agriculturist is entitled to for his cattle and seed-grain. These words must therefore mean such cattle and seed-grain as are necessary for the agriculturist to earn his livelihood from agriculture if that was his sole means of livelihood. If that were not so we would have to hold that this part of the clause contemplated an agriculturist whose livelihood depended on agriculture alone and who had no other source of income. Obviously where a person earned his livelihood from agriculture and another source, it could not be decided what cattle and seed-grain he would require to earn his living as an agriculturist for the simple reason that he did not earn his living as an agriculturist only. *Parvataneni's case* (1) however accepts the view that a person may be an agriculturist within the meaning of the clauses though he may have besides agriculture another source of income. And with that view, for the reasons earlier stated, I entirely agree.

There seems to me to be other reasons also why the view taken in *Parvataneni's case* (1) is not the correct one. So far as the tools of an artisan are concerned, cl. (b) does not limit the protection to such of them as are necessary to enable him to earn his living as an artisan. Therefore, there is no reason to think that an artisan is one who must be dependent for his living on the handicraft practised by him. Likewise all implements of husbandry of an agriculturist are exempt from attachment and sale. The word "such" occurring before the words 'cattle and seed-grain' in cl. (b)

(1) I.L.R. [1937] Mad. 777.

shows that these are protected only to the extent indicated and that there is no limit to the protection afforded to the implements of husbandry of an agriculturist. If this is the correct reading of the clause, as I think it is, then it seems to me impossible to say that an agriculturist whose implements of husbandry are intended to be protected must be one who could not maintain himself apart from agriculture. Likewise, there is nothing in cl. (c) to indicate that the agriculturist there mentioned must be one who depends for his living on agriculture.

There remains one other view to consider. It has been said that the agriculturist must be a very small farmer; *Muthuvenkatarama Reddiar* v. *The Official Receiver of South Arcot* (1). For this qualification for an agriculturist again, I find no warrant in the clauses or indeed anywhere else in s. 60. The various clauses in the proviso to s. 60, sub-sec. (1) exempting diverse things from attachment and sale are no doubt based on public policy, but the consideration of public policy in each case appears to me to be different. I find it impossible to say that the central idea was to protect the poor or to prevent a person being left destitute. Thus cl. (a) protects the necessary wearing apparel, cooking vessels beds and bedding of the judgment-debtor. Even a very rich judgment debtor is entitled to protection under this clause. Clause (d) protects books of account. Here again it is not a poor man alone that is contemplated nor would deprivation of books of account leave one destitute in all cases. Clause (g) protects political pensions which may be and often are of substantial amounts. Clause (h) protects wages of labourers and domestic servants. This clause of course deals with a poor man and is intended to relieve against poverty. Since however, there is no one specific central idea running through all the clauses, each clause has to be construed by itself. Coming then to cls. (b) and (c), I find no justification for the view that they deal only with poor people or are intended to protect against destitution. Thus there

(1) (1925) I.L.R. 49 Mad. 227.

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is nothing in cl. (b) to indicate that the tools of only poor artisans are to be protected. The same thing can be said of an agriculturist. The fact that his cattle and seed-grain are protected to the extent necessary to enable him to earn his livelihood does not lead to the view that he must be a poor agriculturist. On the contrary, the clause contemplates an agriculturist who has more cattle and seed-grain than he needs for his livelihood. It clearly contemplates a rich and large scale agriculturist.

Therefore it seems to me that there is no warrant for imposing any qualification on the plain meaning of the word 'agriculturist' in cls. (b) and (c). In my view, an agriculturist contemplated by the clauses is any person who occupies himself with agriculture. This is the view taken in *Gowardhandas* v. *Mohan Lal* (1) and with it I agree. A person occupying himself with agriculture would be an agriculturist though he does not cultivate with his own hands and carries on agriculture in a very large scale. He would still be an agriculturist though he has other means of livelihood besides agriculture.

I come now to the facts of this case. The question is, is Appasaheb such an agriculturist as I have indicated? The evidence clearly shows that he is. It can be said to have been established beyond doubt and not questioned in the Courts below, that Appasaheb was carrying on agricultural operations under his supervision through labour employed by him and with his own cattle and agricultural implements on fifty to sixty acres of land. The evidence also establishes that Appasaheb's income from agriculture came to Rs. 30,000 to Rs. 35,000 per year. It appears that he was in receipt of cash allowances of Rs. 700 to Rs. 800 per year in respect of the watan and Rs. 4,000 to Rs. 5,000 per year from village officers of the watan villages, neither of which was income from agriculture. These facts in my view make Appasaheb an agriculturist for the purpose of cls. (b) and (c) though it may be that he was not dependent for his living upon agriculture and was a large scale farmer who did not

(1) I.L.R. [1938] Nag. 461.

till with his own hands. I wish however to state that there is uncontradicted testimony that Appasaheb personally took part in the agricultural operations.

Now cl. (c) protects from attachment and sale houses and other buildings with the sites thereof and land immediately appurtenant thereto and necessary for their enjoyment, belonging to an agriculturist and occupied by him. I think it is a fair reading of this clause to say that the houses, buildings and lands must be occupied by the agriculturist for the purpose of agriculture for the object of these clauses is to protect an agriculturist only so far as is necessary for his agricultural operations. If an agriculturist occupied a house, say as a holiday resort, there would be no reason to protect that house from attachment and sale.

The question then arises whether Appasaheb occupied the wada for the purposes of his agricultural operations. I think the evidence makes it perfectly clear that he did so. It shows that the larger part of the wada was used for storing crops, keeping agricultural implements, residence of the farm servants and tethering cattle used for agriculture. Appasaheb and his family lived in a part of the wada but that also was clearly occupation for purposes of agriculture, for it is from there that he supervised the agricultural operations.

I have therefore come to the conclusion that the wada is saved from attachment and sale in execution by cl. (c) of the proviso to sub-s. (1) of s. 60 of the Code of Civil Procedure.

The other contention of the appellants does not seem to me to be sustainable. It is said that the maxim *accessio cedit principali* applies and the wada standing on watan land has acquired the character of watan as an accession to it. It is not in dispute now that the wada was not in existence when the watan was first created but had been built subsequently by one of the watandars. It is also said that the grant of the watan carried full right of ownership in the subject of the grant; that the grantee had the right to make such use of the land granted as any owner of it could have

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done. So it was said that the wada had been put up rightfully by the watandar and became part of the watan as an accession to it.

There is no doubt that the wada was rightfully constructed. It may be that it became on such construction a part of the land on which it stands and assumed the character of immovable property. But I am unable to agree that it thereupon assumed the inalienable character of watan property and was therefore not liable to attachment and sale in execution. I do not think that the maxim *accessio cedit principali* applies in giving the wada put up on watan the character of a watan. Watan is a creation by government grant. It is inalienable under a special Act. The inalienable character attaches under the Act only to the property granted by the government. This peculiar character cannot be extended to other property by the application of the maxim. Therefore it seems to me that the wada is not inalienable though it stands on land which is inalienable as a government grant under a special Act. I would for this reason reject this contention of the appellant.

As however in my view, the wada is protected from attachment and sale in execution under cl. (c) to the proviso to sub-s. (1) of s. 60 of the Code of Civil Procedure, I would allow the appeal.

BY COURT: In view of the majority Judgment, the appeal is dismissed with costs.

Appeal dismissed.

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October 31.

COMMISSIONER OF SALES TAX, UTTAR PRADESH

v.

THE MODI SUGAR MILLS LTD.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax — Previous year turnover opted for assessment— Change of law and tax rates during assessment year—If applicable to previous year turnover—Modification in the tax levied—If permissible—United Provinces Sales Tax Act, 1948 (XV of 1948), ss. 3, 3A, 7, 10 and 22—U. P. Sales Tax Rules, rule 39—U. P. Government Notification dated June 8, 1948.

The respondent company was a manufacturer of edible and non-edible oils and was registered as a "dealer" under the United Provinces Sales Tax Act, 1948. Its year of account commenced on June 1, and ended on May 31 of the next year. Under s. 7(1) of the Act read with rule 39 of the rules framed thereunder the respondent exercised the option of being assessed on the turnover of the previous year and submitted its return for the assessment year 1948-49 on its taxable turnover of the previous year ending May 31, 1947. The Sales Tax Officer assessed the turnover in respect of edible oil at 3 pies per rupee under s. 3, but in respect of non-edible oil he held that since a notification dated June 8, 1948, issued under s. 3(A) had come into force from June 9, of the assessment year providing for the levy of tax at 6 pies per rupee, the assessee was liable to be assessed at 3 pies per rupee on the turnover during the first 69 days of the year and at 6 pies per rupee for the remaining days of the year. On appeal by the assessee the appellate authority modified the order and directed that the tax be levied at a flat rate of 3 pies on both edible and non-edible oils. This order was set aside by the revising authority and the order of the Sales Tax Officer was restored. On a direction made by the High Court the revising authority submitted a question for opinion. The High Court held that the assessee was liable to pay the tax at a flat rate of 3 pies per rupee. On appeal by the Commissioner of Sales Tax by special leave,

Held, (*per* Hidayatullah, Das Gupta and Shah, JJ.), affirming the view of the High Court, that the assessee who elected to submit his return on the turnover of the previous year, is liable to be assessed to sales-tax at the rate in force on the first day of the year of assessment because the liability arises on that date, and any subsequent enhancement of the rate by virtue of a notification under s. 3(A) does not alter that liability.

A taxing statute must be interpreted in the light of what

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is clearly expressed therein and nothing can be implied nor can provisions be imported into them so as to supply an assumed deficiency.

Per S. K. Das and Ayyangar, JJ.—The rate of tax as applied by the sales tax officer was in accordance with law.

Having regard to the scheme underlying the option to elect for a previous year turnover conferred by s. 7(1) of the Act the change in the law and in the rate of tax effected during the assessment year must apply to the turnover of the previous year which is deemed to be the turnover of the assessment year and sales effected during that period have to be assessed at the rate prevailing in that year.

Although the notification was prospective and was made with the object of changing the rate of taxation during the assessment year, the date mentioned therein did not prevent the application of the assessment year rate to the opted previous year turnover.

It is not correct to say that there is absence of machinery for reassessment and refund of tax to justify the conclusion that the basis of the tax liablity for an assessment year is that which prevailed on the first day of that year since there are provisions in the Act such as for instance ss. 10 and 22 which provide for reductions, refunds and rectification of errors regarding taxation and even for enhancement of the tax already levied.

There was no ambiguity in the notification and the principle of resolving ambiguities in favour of the assessee could not be applied in this case.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 443 of 1957.

Appeal by special leave from the judgment and order dated April 25, 1955, of the Allahabad High Court in Civil Misc. Case No. 26/1951.

C. B. Aggarwala, C. P. Lal for *G. N. Dikshit,* for the appellant.

S. K. Kapur and *Mohan Behari Lal,* for the respondent.

1960. October 31. The Judgment of Hidayatullah, Das Gupta and Shah, JJ., was delivered by Shah, J., and the judgment of Das and Ayyangar, JJ., was delivered by Ayyangar, J.

Shah J.

SHAH J.—Judge (Revisions) exercising authority under s. 11 of the United Provinces Sales Tax Act XV of 1948 drew up a statement of case and referred to

the High Court of Judicature at Allahabad the following question:

"Whether the assessee, who is a manufacturer and a dealer of non-edible oils and who elected the previous year as the basis of his assessment in the assessment year 1948-49, is liable to be assessed at the flat rate of 3 pies per rupee on the whole of the turnover of the previous year, or whether he is liable to be assessed at the rates of 3 pies per rupee and 6 pies per rupee on the turnover of the previous year in proportion to the two periods from 1st April to 8th June, 1948, and from 9th June, 1948 to the 31st March, 1949?"

The High Court answered the question as follows:

"The applicant company is liable to pay tax for the assessment year 1948-49 on the turnover of the previous year in respect of sales of non-edible oils at the flat rate of 3 pies per rupee."

Against the order of the High Court recording its answer, this appeal with special leave is preferred.

The facts which give rise to the appeal are briefly these:

The Modi Food Products Co., Ltd.—hereinafter referred to as "the assessee", manufactures oils edible and non-edible in its factory at Modinagar, District Meerut, State of Uttar Pradesh. The assessee is registered as a "dealer" under the United Provinces Sales Tax Act XV of 1948. The assessee's year of account commences on June 1, and ends on May 31, next year. For the year of account 1946-47, the assessee's sales of edible and non-edible oils amounted to Rs. 63,02,849-7-7. The U. P. Legislature enacted with effect from April 1, 1948, the United Provinces Sales Tax Act XV of 1948 providing for the levy of a tax on sales of certain commodities. This act was amended by Act XXV of 1948 with retrospective operation from April 1, 1948. By the Act, "assessment year" was defined as meaning the twelve months ending on March 31 and "previous year" was defined as meaning the twelve months ending on the 31st March next preceding the assessment year, or, if the accounts of the dealer had been

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made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st March then, at the option of the dealer, the year ending on the day to which his accounts had so been made up. "Turnover" was defined as meaning the aggregate of the proceeds of sale by a dealer. By s. 3, a tax at the rate of 3 pies per rupee of turnover was, subject to certain exceptions, made payable by every dealer in each assessment year whose turnover in the previous year exceeded Rs. 12,000 or such larger amount as may be prescribed; the Provincial Government was however authorised to reduce the rate of tax on any dealer or class of dealers on the turnover in respect of any goods or class of goods. By s. 3-A, the Government of U. P. was authorised to introduce instead of the multiple point scheme of taxation provided by s. 3 a single point system of taxation and by notification to declare that the proceeds of sale of any goods or class of goods shall not be included in the turnover of any dealer except to such single point in the series of sales by successive dealers as may be prescribed; and if the Government made such a declaration, the turnover of the dealer in whose turnover the sale of such goods was included was in respect of such sale to be taxed at such rate as may be specified not exceeding one anna per rupee. By s. 7, every dealer whose turnover in the previous year was Rs. 12,000 or more was directed to submit such return or returns of his turnover of the previous year within sixty days of the commencement of the assessment year in such form and verified in such manner as may be prescribed. By the proviso, the Government was authorised to prescribe that any dealer or class of dealers may submit in lieu of the return or returns specified in that section, a return or returns of his turnover of the assessment year at such intervals as may be prescribed. Provision was made by the Act for appeals against the order of assessment and revision against the order of the appellate authority. By s. 11, the High Court of Judicature at Allahabad was authorised to decide questions of law raised in any case in the course of assessment and

referred to it on a statement of the case drawn up by the Revising Authority. By s. 24, the Provincial Government was invested with power to make rules to carry out the purposes of the Act and in particular in respect of certain specified matters.

In exercise of the powers conferred by s. 24 of the Act, the Government of U. P. framed rules. Rule 39 of the U. P. Sales Tax Rules gave to every dealer an option to submit his return of the turnover of the assessment year in lieu of the return of the turnover of the previous year. A dealer who did not carry on business during the whole of the previous year had no option, but was bound to submit his return of the turnover of the assessment year. By r. 40, it was provided that every dealer who elected to submit a return of the turnover of his previous year shall within sixty days of the commencement of the assessment year, submit to the Sales Tax Officer a return showing his turnover of the previous year. By r. 41, it was provided that every dealer whose estimated turnover during the assessment year was not less than Rs. 15,000 and who elected to submit his return of such year shall before the last day of July, October, January and April submit to the Sales Tax Officer, a return of his gross turnover for the quarters ending June 30, September 30, December 31 and March 31.

In exercise of the authority conferred by s. 3-A which was incorporated in the Act by Act XXV of 1948, the Government of U. P. issed the following notification:

"In exercise of the powers conferred by s. 3-A of the United Provinces Sales Tax Act, 1941, as amended by the United Provinces Sales Tax (Amendment) Act, 1948, the Governor is hereby pleased to declare that with effect from June 9, 1948, the proceeds of sale of goods entered in column 2 of the schedule hereto shall not be included in the turnover of any dealer except at the point in the series of sales by successive dealers mentioned in column 4 thereof under the circumstances shown in column 3 thereof.

(2) The Governor is further pleased to order that

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as from June 9, 1948, the rate of tax in respect of the turnover of the aforesaid goods shall be as entered in column 5 of the schedule hereto.

(3) Every dealer by or on whose behalf goods mentioned in the schedule aforesaid are held at the close of the 8th day of June, 1948, shall submit a statement showing the quantity and price of such stock and of the stock of such goods held on the 24th day of May, 1948, to the appropriate assessing authority by the 30th day of June, 1948."

To this notification was appended a schedule which set out the descriptions of diverse commodities, the "circumstances under which the turnover was to be calculated" the point of tax and the rate of tax. Item 14 of the schedule was "oils of all kinds excluding edible oils but including Vanaspati" and sales thereof by manufacturers in the U. P. were liable to tax at the rate of 6 pies per rupee. By virtue of this notification, non-edible oils became liable to a single point tax as from June 9, 1948, at the time of sale by an importer or manufacturer in the United Provinces.

The assessee submitted its return for the assessment year 1948-49 on its taxable turnover of the previous year ending on May 31, 1947, to the Sales Tax Officer, Meerut Range. On the assessee's return, the Sales Tax Officer assessed the tax at Rs. 1,16,238-12-0, holding that sales of non-edible oils for the first 69 days out of the year of the turnover were to be taxed at the rate of 3 pies, and sales for the remaining 296 days were to be taxed at the rate of 6 pies per rupee. Against the order passed by the Sales Tax Officer, Meerut Range, an appeal was preferred to the Judge (Appeals), Sales Tax, under s. 9 of the Act. The appellate authority modified the order and directed the assessee to pay tax on non-edible oils on the turnover of the previous year at the flat rate of 3 pies per rupee and reduced the tax liability to Rs. 1,08,477-0-3. This order of the Judge (Appeals) was set aside by the revising authority and the order of the Sales Tax Officer was restored. On a direction made by the High Court, the revising authority drew up a statement of the case and submitted for opinion a question

which in his opinion arose out of the assessment. The High Couurt re-framed the question as set out hereinbefore, and answered it in favour of the assessee.

By s. 3 and s. 3-A, which are the charging sections, the liability to pay sales tax in each assessment year is charged on the total turnover of a dealer. By s. 7, read with r. 39, the assessee has the option to adopt the turnover of the previous year as the taxable turnover for the year of assessment: and if he does so, he has to submit within sixty days of the commencement of the assessment year returns showing his turnover for that previous year. If, however, the assessee adopts the turnover in the year of assessment as his taxable turnover, he has to submit returns before the last day of July, October, January and April his gross turnover for each of the four quarters ending 30th June, 30th September, 31st December and 31st March. The tax is evidently levied in respect of the year of assessment: it is not levied in respect of the business carried on in the previous year. Again, the rate applicable in assessing the tax is the rate in force in the year of assessment. That is clear from the terms of ss. 3 and 3-A. But the taxable turnover for the year of assessment may, except in certain cases not material for the purpose of this appeal, at the option of the tax payer be either the turnover of the previous year or of the year of assessment. If the assessee adopts the turnover of the previous year, by the provisions contained in s. 3 and s. 7 and rr. 39 and 40, the liability to pay tax arises on the 1st of April and the rate applicable is the rate in force on that date. The liability of the assessee adopting the turnover of the year of assessment arises by virtue of ss. 3 and 7 and r. 41 at the end of each quarter. When the taxable turnover is based on the turnover of the previous year, the tax is assessed on an artificial turnover not related to the actual sales of the year of assessment: whereas the levy of tax on a return made on the turnover of the year of assessment is made on actual sales of that year. The tax paid on the turnover of the previous year is not related to the actual sales of the year of assessment, and there is, in the Act, no

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provision for making adjustments in the liability to tax on ascertainment of the actual turnover at the end of the year of assessment.

The Government of the United Provinces had by notification dated June 8, 1948, altered the rate of tax in the matter of various commodities including non-edible oils with effect from June 9, 1948. The Sales Tax Officer was right in his view that the levy of tax at the altered rate was not to operate on sales effected before June 9, 1948. Initially, when the liability of the assessee to pay tax on edible oils for the assessment year arose, the rate was undoubtedly 3 pies per rupee on the turnover, and the question which falls to be determined is whether by reason of the alteration of the rate and its incidence in the course of the year, the assessee became liable to pay tax at the higher rate on a part of the turnover of the previous year and if so, on what basis. A tax payer who adopted the previous year's turnover had under s. 7 and r. 40 to submit his return within sixty days of the commencement of the assessment year, and no provision for submission of any supplementary returns in the case of alteration of rates in the course of the year was made in the Act or the Rules: nor was any method provided for retrospective modification of an assessment once made. There were under the Act and the Rules two distinct and clear-cut schemes to assess sales tax, (1) where the tax payer elected to submit his return based on the turnover of the previous year and (2) where he elected to or was bound by law to submit his return on the turnover of the year of assessment. Under these two schemes the points of time at which liability arose and the turnover on which liability was to be assessed were in their nature not identical. The tax payers paying tax under the first scheme paid it on the turnover of the previous year and at the rate in force after the end of the period and applicable to it. The tax payer paying tax under the second scheme paid tax in quarterly instalments based on the previous quarter's actual turnover and at the rate or rates prevalent in the quarter or applicable to it. Was it intended, when alteration was made in the rate of tax

or its incidence during the course of the year, to assimilate these two schemes of taxation so as to permit of a departure from the one to the other? There is no express provision in the Act or in the Rules in that behalf. Nor does the notification suggest that it was so intended. In the case of a dealer who adopts the turnover of the year of assessment for purposes of taxation, the application of the notification altering the rate of tax and the incidence of tax does not present any difficulty. The notification enjoins levy of the tax at the altered rate only in respect of sales taking place after the fixed date, and all sales which preceded that date are to be taxed at the original rate. In the face of the language employed sales anterior to the date specified could not be affected. The question next arises: Is any machinery provided in the Act or the Rules for projecting this division of the year of assessment into the previous year, and for apportioning the turnover of that year? Express provision in that behalf there is none: and it is difficult to imply such a provision in the Act. The dates of commencement and closure of the previous year of a tax payer may vary according to the system of accounting adopted by the assessee. The year may commence from any day of any recognised calendar year, and the year may not consist of 365 days. The method of antedating by one year the date on which the alteration is made in the rate or incidence will be manifestly inappropriate. The method of division of the turnover proportionate to the period of the assessment year before the alteration of the rate and after such alteration though prospective, must be deemed to have been made retrospectively in the previous year, and on a day which is removed from the commencement of the year of account by the number of days by which the date of alteration of rate is removed from the commencement of the year of assessment. But the adoption of the turnover of the previous year as the taxable turnover for the year of assessment is itself based on a fiction and in the absence of any express provision either in the Act or the Rules or even in the notification setting out machinery for such

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a division of the year, we are unable to hold that this scheme of a fictional division may be projected into the previous year to make an artificial division of the turnover for imprinting thereon the altered rate of assessment as from the date of the division. Counsel for the State of Uttar Pradesh submitted several hypothetical cases suggesting that by refusing to adopt this method of division of the previous year of assessment for the application of the altered rate, several anomalies may arise in working out the liability to tax. He submitted that a person who was not a manufacturer or an importer of goods included in the schedule to the notification under s. 3-A may, if he has adopted the turnover of the previous year as his taxable turnover be liable even though it was the intention of the Government to absolve him from liability to pay tax. But a tax payer adopting the turnover of the previous year for payment of tax makes his choice voluntarily and subject to the advantages and disadvantages which that step involves. The fact that he may have to pay tax from which persons choosing the alternative method of submitting of return may partially be exempted, because of an exemption granted in the course of the year, may not, in our judgment, be a ground for not giving full effect to the provisions of the Act as they stand. In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.

Section 18 cl. (c) of the Act which provides for proportionate reduction of tax when in the case of a change or discontinuance taking place in the course of the assessment year of a firm which has been assessed for such year on the turnover of the previous year does not support the contention that an artificial division of the turnover of the previous year is intended

in cases of alteration of circumstances during the course of the assessment year. It may be noticed that the provision is limited to changes in or discontinuance of the business of a firm, in terms it does not apply to individuals. It is not for us to consider why the Legislature has not chosen to make a similar provision in respect of individuals. But the fact that the Legislature has made an express provision dealing with changes or discontinuance of business of firms in the course of the assessment year enabling a reduction proportionately to the tax already paid would be a ground indicating that in cases not governed by that provision, no alteration in the liability was permissible when the taxable turnover was based on the previous year's turnover.

It is not provided that in giving effect to the alteration of the rate during the course of the year of assessment an artificial division of the turnover of the previous year should, in applying the altered rate be made. The Legislature having failed to provide machinery for working out the liability, the attempted projection becomes unworkable. A legal fiction must be limited to the purposes for which it has been created and cannot be extended beyond its legitimate field. The turnover of the previous year is fictionally made the turnover of the year of assessment: it is not the actual or the real turnover of the year of assessment. By the imposition of a different tariff in the course of the year, the incidence of tax liability may competently be altered by the Legislature, but for effectuating that alteration, the Legislature must devise machinery for enforcing it against the tax payer and if the Legislature has failed to do so, the court cannot resort to a fiction which is not prescribed by the Legislature and seek to effectuate that alteration by devising machinery not found in the statute.

We are therefore of the view that the conclusion of the High Court is correct. The appeal therefore fails and is dismissed with costs.

AYYANGAR J.—We regret we are unable to agree with the judgment just now pronounced. *Ayyangar J.*

The facts giving rise to this appeal are briefly

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these: A company called 'The Modi Food Products Ltd.' (amalgamated with the respondent) which will be referred to hereinafter as the assessee, was during the years 1946 & 1947 a manufacturer of and dealer in vegetable oils—both edible and non-edible. During that year there was no legislation imposing any tax on sales. The U. P. legislature enacted the U. P. Sales Tax Act in 1948 and the statute received the assent of the Governor and was published in the official Gazette on June 5, 1948. Section 1 (2) of the Act enacted that it shall be deemed to have come into force on April 1, 1948. The appeal is concerned with the liability to sales-tax under the Act of the assessee-company in respect of the sale of oil effected by the assessee during the period June 1, 1946 to May 31, 1947, which was the account-year of the assessee previous to the first assessment year under the Act—1948-49. Section 3 of the Act, to quote only the relevant words, as it stood at the material time, enacted:

"*Section 3. Liability to tax under the Act.* Subject to the provisions of this Act, every dealer shall pay on turnover in each assessment year a tax at the rate of 3 pies a rupee:

Provided that—

(i) the Provincial Government may, by notification in the official Gazette, reduce the rate of tax on the turnover of any dealer or class of dealers or on the turnover in respect of any goods or class of goods;

(ii) a dealer whose turnover in the previous year is less than Rs. 12,000 or such larger amount as may be prescribed shall not be liable to pay the tax under this Act for the assessment year."

By the U. P. Sales Tax Amendment Act, 1948 (Act XXV of 1948) this proviso was slightly modified and s. 3(A) was inserted in the Act reading as follows:

"*Section 3-A. Single point taxation.* (1) Notwithstanding anything contained in Section 3, the Provincial Government may, by notification in the official Gazette, declare that the proceeds of sale of any goods or class of goods shall not be included in the turnover of any dealer except at such single point

in the series of sales by successive dealers as may be prescribed.

(2) If the Provincial Government makes a declaration under sub-section (1) of this Section, it may further declare that the turnover of the dealer, in whose turnover the sale of such goods is included, shall, in respect of such sale, be taxed at such rate as may be specified not exceeding one anna per rupee if the sale relates to goods specified below. (A list of goods was then set out)

and nine pies per rupee if it relates to any other goods."

Non-edible oil which is the commodity with the sale of which the assessment in the present appeal is concerned is not in the list of goods set out in s. 3(A) and would therefore be covered by the residuary clause of the section. The U. P. Government issued the following notification dated June 8, 1948, under s. 3(A) of the Act:

"In exercise of the powers conferred by Section 3-A of the United Provinces Sales-Tax Act, 1948, as amended by the United Provinces Sales-Tax (Amendment) Act, 1948, the Governor is hereby pleased to declare that with effect from June 9, 1948, the proceeds of sale of goods entered in column 2 of the Schedule hereto shall not be included in the turnover of any dealer except at the point in the series of sales by successive dealers mentioned in column 4 thereof under the circumstances shown in column 3 thereof.

2. The Governor is further pleased to order that as from June 9, 1948, the rate of tax in respect of the turnover of the aforesaid goods shall be as entered in column 3 of the Schedule hereto.

3. Every dealer, by or on whose behalf goods mentioned in the schedule aforesaid are held at the close of the 8th day of June, 1948, shall submit a statement showing the quantity and price of such stock and of the stock of such goods held on the 24th day of May, 1948, to the appropriate assessing authority by the 30th day of June, 1948".

In the Schedule annexed to this notification, non-edible oil of the type dealt with by the assessee was

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subject to a tax @ 6 pies per rupee if the same was manufactured in U. P.

Section 7 of the Act, as it stood at the date relevant to this appeal, enacted :

"Section 7. *Determination of turnover and assessment of tax.*—(1) Subject to the provisions of Section 18, every dealer whose turnover in the previous year is Rs. 12,000 or more in a year shall submit such return or returns of his turnover of the previous year within sixty days of the commencement of the assessment year in such form and verified in such manner as may be prescribed :

Provided that the Provincial Government may prescribe that any dealer or class of dealers may submit, in lieu of the return or returns specified in this section, a return or returns of his turnover of the assessment year at such intervals, in such form and verified in such manner as may be prescribed, and thereupon all the provisions of this Act shall apply as if such return or returns had been duly submitted under this section.

Provided further that the assessing authority may in his discretion extend the date for the submission of the return by any person or class of persons ".

Rules were framed by Government *inter alia* under the power conferred by the 1st proviso just now set out and by rule 39 of the said rules an option was given to dealers to submit returns of their turnover of the assessment year in lieu of the turnover of the previous year.

The assessee exercised the option of being assessed on the basis of the turnover of the previous year under s. 7(1) of the Act and in respect of first assessment year after the Act came to force—assessment year 1948-49, it filed a return in respect of the turnover of its previous year June 1, 1946 to May 31, 1947. The total turnover of the assessee during this period was Rs. 63,02,849-7-7. The Sales Tax Officer by his order dated March 12, 1949, assessed the turnover in respect of edible oil at 3 pies per rupee. As regards the sale of non-edible oil, the sales-tax officer held that since the notification set out above under

s. 3(A) had come into force as and from June 9 of the assessment year, the assessee was liable to be assessed @ 3 pies per rupee on the turnover during the first 69 days of the year and @ 6 pies per rupee in respect of the remaining days of the year and he computed the tax accordingly. The assessee preferred an appeal to the Judge (Appeals), Meerut Range, Meerut, against the order of the Sales-Tax Officer. This officer allowed the appeal of the assessee and held that the entire turnover was liable to be taxed only at a flat rate of 3 pies per rupee under s. 3(1) of the Act on all oil sold by the assessee—edible or non-edible. The reason assigned for the order was that on the terms of the notification the new rate of tax could not be applied to sales effected in the previous year which had been opted for the purposes of assessment by the assessee and that so to apply it would be tantamount to giving retrospective effect to the notification which was contraindicated by the terms of the notification itself. The department thereupon moved the Judge (Revision) who accepted its contention and restored the order of the Sales-tax Officer applying the provisions of the notification to the turnover of the assessee. Thereafter the assessee made an application to the Judge (Revision) to state a case for the opinion of the High Court under s. 11 of the Act as to whether the rate of tax fixed by the notification could be applied to the sales of the commodity which factually took place on or before June 8, 1948. This petition having been dismissed, an application was filed before the High Court for directing the reference and on this being ordered the following question (as reframed by the High Court) was referred to it for determination :

"Whether the assessee who is a manufacturer and a dealer of non-edible oils and who elected the previous year as the basis of his assessment in the assessment-year 1948-49 is liable to be assessed at the flat rate of 3 pies per rupee on the whole of the turnover of the previous year or whether he is liable to be assessed at the rates of 3 pies per rupee and 6 pies per rupee on the turnover of the previous year in proportion to the two periods from April 1 to June 8, 1948 and from June 9, 1948 to March 31, 1949."

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The learned Judges answered the question in favour of the assessee and held that the notification under s. 3(A) could not apply to determine the rate of tax payable by the assessee on his turnover of the previous year. The present appeal is against this answer by the High Court.

As the arguments before us proceeded on practically the same lines as before the High Court, it will be convenient if we set out the reasoning by which the learned Judges upheld the assessee's contention that the notification under s. 3(A) was inapplicable to determine the rate of tax payable by it. The grounds were mainly five: (1) The assessee could not be charged at the rates prescribed by the notification unless the new rates operated retrospectively; (2) that s. 3(A) which was introduced into the parent Act (Act XV of 1948) by the Amending Act XXV of 1948 was not enacted with retrospective effect. Though the charge imposed by s. 3(1) of the Act read with s. 7(1) imposed tax retrospectively as and from April 1, 1948, s. 3(A) dit not on its terms so operate as and from that date. Hence the liability of the assessee which had become fixed under Act XV of 1948, as it originally stood, could not be and was not varied by s. 3(A) and would not therefore be affected by any notification issued under the last mentioned provision; (3) that a notification under s. 3(A) could not have retrospective effect since s. 3(A) itself did not operate of its own force and merely empowered the Government, by a notification, to effect changes in the law and hence such changes when notified could not operate as from any date prior to the date of the notification; (4) Section 3(A) which used the words "in respect of such sales" contemplated particular sales taking place after the notification issued under it and hence the notification issued under that section could not alter the rate of levy in respect of sales anterior to the date of the notification; (5) that the terms of the notification carried out the general scheme of the Act and negatived retrospective operation and that as on its language it applied only to sales which took place on or after June 9, 1948 and as the sales of the assessee were

admittedly effected long prior thereto in the previous year the same could not be affected by the enhanced rate of duty.

Before proceeding further it must be pointed out that the learned Judges of the High Court were not right in thinking that s. 3(A) was not enacted to operate retrospectively from the commencement of the parent Act. Section 1(2) of the Sales-tax Amending Act XXV of 1948 which introduced s. 3(A) enacted:

"It (this Act) shall be deemed to have come into force on the 1st April, 1948."

and as s. 3(A) was one of the sections of this enactment, it would have effect from the earlier date. This inadvertent error, however, would not affect the central point of the reasoning of the learned Judges.

Besides elaborating the other points in the judgment of the High Court, learned Counsel for the respondent further pressed upon us that there was no specific provision in the Act for refund or reassessment which would have been present if the levy of a rate with retrospective effect were contemplated by the Act as applicable to the assessees who had opted for the "previous-year-turnover" basis of assessment. He pointed out that in the case of those assessees who opted for their being assessed in respect of their turnover during the assessment year, quarterly returns were submitted along with the payment provisionally of the tax due on the basis of that return, the final assessment being completed only after the close of the year when the amount due for the year was ascertained and a demand made for the balance due after adjustment of the amounts already paid during the course of the year (Rule 41). Obviously in their case no difficulty could arise by reason of any change in the law either in the rate or basis of taxation effected during the year, as these would automatically be given effect to in the final assessment. If, however, changes made in the rate of tax payable during the year were held applicable to those assessees who had opted for the previous-year-turnover basis, necessary adjustments could not be made in their assessment for lack of specific machinery to achieve the same. From this

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he argued that the scheme of the Act was that in the case of the previous-year-turnover assessees, to use a convenient phrase, the tax liability had to be determined on the state of the law as it prevailed on the 1st day of the assessment year and that it got fixed and crystallised on that date and remained unaffected by any changes in the law effected during the course of the assessment year.

In view of these additional submissions, we consider that it would be convenient to examine the entire argument of learned Counsel for the respondent under three heads into which they naturally fall:

(1) Does the Act, read in conjunction with the Rules framed to give effect to its provisions, contemplate any difference being drawn between the basis of the tax liability (as distinct from the quantum of the turnover) of those assessees who have opted for the previous year turnover and "the assessment-year-turnover" assessees.

(2) Is there any sound basis for the contention that the tax liability of the "previous-year-turnover" assessees gets crystallised on the 1st of April of the assessment year, with the result that such assessees are unaffected by any changes of the law which operate from beyond that date.

(3) If the above two questions are answered in the affirmative the construction of the notification dated June 8, 1948, would not fall for consideration, for even if on its language it can apply to the turnover of a period anterior to its issue, the notification cannot be given such effect since the same would be against the basic scheme of the Act. If, however, the answer to the above two questions were in the negative, a further point would arise as to whether on the terms of the notification now under consideration the same could on its language apply so as to affect the tax-liability of the "previous-year-turnover" assessees.

We shall now proceed to examine these submissions. On the scheme of U. P. Sales-tax Act, as of every other sales-tax legislation in the other Indian States, the total tax liability of an assessee is the resultant

product of two factors: (1) the total of the proceeds of sales effected during a given period, universally a year, from which are deducted the turnover of the sales of commodities which are exempt from tax; for instance under s. 4 of the Act whose provisions will be referred to later; (2) multiplied by the rate of tax applicable either to the entire turnover or where different rates are prescribed on sales of different articles, such rates in respect of such turnover. The best way to appreciate the scheme underlying the Act would be to ascertain the position at the time the Act was enacted. It received the assent of the Governor and was published in the Gazette on June 5, 1948. Section 1(2) of the Act further enacted that "It shall be deemed to have come into force on April 1, 1948". Except to that limited extent, the Act is prospective. The tax is on the "turnover", i.e., on the total of the sales proceeds of taxable sales and therefore unless there were a taxable sale, its proceeds would not enter the pool which goes by the name of "turnover". As the Act is not retrospective, the taxable turnover would normally be the total of the sales effected after the enactment became operative, i. e., from and after April 1, 1948, but for the sake of convenience of assessment, it enacts by s. 7(1), we have extracted earlier, a provision providing an option to dealers who have been in business in the year previous to the taxing enactment, to be assessed either on the turnover of the previous year, when owing to the absence of the Act their sales were not subject to tax or on the turnover of the current year. But whichever be the turnover adopted, the rate of tax or the determination of the particular sale proceeds whose total constitutes the taxable turnover, i.e., after the exclusion of the sale proceeds of the commodities listed in s. 4, does not vary. In other words, though the figure of turnover might vary between those who have opted for the one or the other mode of assessment due to the volume of the sales, no difference is maintained in the Act as regards the incidence of the tax, i.e., either in the principle underlying the computation of the total turnover or in

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the rate or rates applicable to the sales of particular goods or on the total turnover. This can only be on the premise or implicit assumption that the sales of the previous year are treated by the Act for the purpose of computing tax-liability as the sales of the current year—a projection forward in point of time. In other words, the entire basis underlying the charging provision s. 3(1) read with the option provided by s. 7(1) is that the sales of the previous year are fictionally treated as the sales of the current year for the purpose of the computation of the tax liability. It has to be remembered that in cases like the present, during the time when the sales were effected, the Act was not in operation and hence the sales were not taxable. But for the purpose of the imposition of the tax-liability, it is assumed that the sales are taxable and the goods whose sales become taxable are determined on the basis of the provisions of the Act. Thus, if in the current year commodities A, B and C are exempt from tax, they are not to be included in the turnover of the dealer in respect of the previous year in the case of those who have opted for the "previous-year-turnover" under s. 7(1), and the turnover thus computed is charged at the same rate of tax applicable to transactions of the current year.

So far, therefore, as the express provisions of the Act go, no difference is made between the basis of the tax liability of the "previous-year-turnover" and the "assessment-year-turnover" assessees; and though by reason of the terms of s. 7(1) the quantum of the turnover varies no other variation in the law applicable to the two types of assessees is contemplated. We must therefore start from the premise that the Act does not contemplate any difference in the incidence of the tax and the quantum of tax liability flowing from the choice of either the "previous-year" or the "assessment-year" as the basis of the determination of the turnover. We should add that learned Counsel for the respondent has not been able to point out any provision in the Act or in the Rules pointing to any such differentiation.

It was, however, submitted that though the statute

might not say so in express terms, still by reason of the provisions of the Act and the Rules under which the "previous-year-turnover" assessee had to or could submit his return within sixty days from the commencement of the assessment year and have his assessment completed immediately thereafter—as compared to the "assessment-year-assessee" whose assessment was completed after the end of the year, coupled with the absence of any machinery for re-assessment or refunds in the event of any change in the law effected after the commencement of the financial year, it had necessarily to be held that the liability of the "previous year turnover" assessee got crystallised as on the 1st of April of the assessment year and that the Act did not contemplate this being disturbed by any subsequent changes in the substantive law relating to assessment during the assessment year. It was said that the tax liability of the dealer who had opted for the "previous-year" basis had to be determined on foot of two factors and only two: (1) the turnover of the sales of the previous year which is a definite and known figure by the 31st of March of the previous year and (2) the rate of tax on the turnover as it prevailed on the 1st of April of the assessment year when it was said that there was a "crystallisation" of the liability to tax. It was pointed out that it was possible for an assessee to submit his return on the basis of the "previous-year-turnover" even on the 1st of April of the assessment year and there being no legal impediment in the way of the figures returned by the dealer being accepted the assessment might conceivably be completed and the tax due demanded and even paid on the 1st of April, itself. If this were done, it was urged, there being no machinery for reassessment or refunds such completed assessment would become final for the year and could not be disturbed thereafter. If this were possible or were actually done in the case of one dealer who had so opted, it was urged that it would obviously be anomalous if another dealer who happened to submit his return later and whose assessment was in

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consequence delayed, should be subjected to a different law or a different rate of levy.

In our opinion, this argument breaks on critical examination. Learned Counsel for the respondent, to start with, asserted that the crystallisation of the tax-liability as on the 1st of April of the assessment year was with reference to the law as it factually was on that date and that changes made subsequently even if with retrospective effect to date from the commencement of the year, would not affect that liability. This was obviously an untenable contention because if the later enactment or rule was retrospective it must be deemed in the eye of the law to have been in existence and in operation on the earlier date. Though learned Counsel withdrew this extreme argument, still the concession that changes effected with retrospective effect to date from the commencement of the assessment year would apply to determine the tax-liability even of the "previous-year-turnover" assessee serves to emphasize that little importance could be attached to the two bases on which "the crystallisation" argument was rested, viz.: (1) the obligation or freedom of the previous-year-turnover assessee to submit his return and have his assessment completed within sixty days of the commencement of the assessment year and (2) the absence of a specific provision for reassessment and refund.

Under the proviso (1) to s. 3 which reads:

"the Provincial Government may, by notification in the official Gazette, reduce the rate of tax on the turnover of any dealer or class of dealers or on the turnover in respect of any goods or class of goods."

the State Government could reduce the rate of tax on the turnover of dealers from the standard rate of 3 pies in the rupee under the main part of s. 3. It is also not denied that there is nothing in the terms of the proviso to confine the power to effect reductions only prospectively as distinguished from reductions having retrospective effect. If a reduction were effected say in January or February of the year, having effect as and from the 1st April preceding, on the very argument advanced, Counsel for the respondent would

have to concede, that the reduced rate would govern the liability of even those dealers who were assessed on the basis of their turnover of the previous year.

Let us first take a case where such a reduction in the rate is notified to be effective before an assessee submits his return. In such a case, the benefit in the reduction of the rate could not be withheld from the previous-year-turnover dealers even on the theory of "crystallisation" just now referred to. Let us next take the case of a dealer who has submitted his return of the turnover of the previous year on a date anterior to the notification regarding the alteration of the rate. It might be mentioned that in the return submitted by dealers which has to be in Form IV of Appendix F to the rules, only the total of the sale proceeds of the sales of the classified items of goods have to be set out, but the return does not concern itself with the rate of the tax levied. This latter is a matter with which the assessing authority is concerned when determining the amount of tax payable. If the rates are altered subsequent to the submission of the return but before the assessment is completed, on the terms of the charging section which draws no distinction in the incidence of the tax as between the "previous-year-turnover" group and the "assessment-year-turnover" dealers, the Sales-Tax Officer would have to afford every assessee, whatever be the basis of this turnover—the benefit of the tax reduction. The position reached therefore is that if the change in the rate —(we have assumed it to be by way of reduction, but the argument would equally apply to variation in any kind), were effected before the actual assessment, it should be given effect to in the case of every assessee for not merely is there no procedural complication in the shape of a need for refund—but it would be in accordance with the law and in fact one might go further and say that any other mode of proceeding would not be countenanced by the Act, because the statute homologises the basis of the tax—whether the turnover is computed on the previous year's or the current year's sales.

Next in regard to cases where the change in the law

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is effected after the completion of the assessment we consider that the submission regarding the absence of machinery for reassessment and refund is not well-founded. It is true that there are no provisions specially so designated to meet this contingency here referred to, but that is not the same thing as saying that there is a complete absence of machinery. In the first place, s. 22 of the Act empowers authorities including the assessing officer to rectify any mistake apparent on the face of the record and by such rectification even to enhance the tax liability. If on the premises assumed, the variation in the rate of tax would on a proper construction of the Act be applicable to the turnover of the dealer who has opted for the "previous-year rule" but the assessment order does not give effect to it, it would certainly be a case of an error apparent on the face of the record, which would bring the case within the power of rectification. On the analogy of the cases under s. 35 of the Income Tax Act, 1922, the assessment officer could order rectification in such cases.

Even apart from this, under s. 10(2) of the Act the dealer or the department as the case may be may apply to the Revising authority for revision of the assessment on the ground that the same is not legal, proper or regular. This section enacts:

"The Revising Authority may in its discretion at any time *suo motu* or on being moved by the Commissioner of Sales Tax or on the application of any person aggrieved, call for and examine the record of any order or proceedings recorded by any appellate or assessing authority under this Act for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such proceedings and may pass such order as he thinks fit."

The orders which the Revising Authority could pass might either be by way of enhancement or reduction, and the subsequent sub-sections provide:

"10 (4). The Revising Authority shall not pass any order under sub-section (3) adversely affecting any person unless an opportunity has been given to such person to be heard.

(5) If the amount of assessment is reduced by the Revising Authority under sub-section (3) it shall order the excess amount of tax if already realised to be refunded."

It is, therefore, not correct to say that there is no machinery for rectifying errors and for making consequential orders for payment of further tax, or for directing refunds, and this argument cannot therefore justify the construction contended for by the respondent.

In the entire discussion up to now we have proceeded on the assumption that the turnover of "the previous-year" of the dealer was a fixed quantity which was finally determined once and for ever on the 31st March of that year and that the problem was merely to find the rate of tax to be applied to this predetermined factor. It will be seen from an examination of the Act that even the factor of the turnover is subject to variation. For instance, the first part of s. 4 enacts:

"The provisions of section 3 of this Act shall not apply to (1) the sale of water, salt, foodgrains, milk, gur, electrical energy for industrial purposes, books, magazines, newspapers and motor spirit as defined in the United Provinces Sales of Motor Spirit Act, 1939, and any other goods which the Provincial Government may, by a notification in the official Gazette exempt from time to time."

Under this power besides the specified goods, the State Government might from time to time exempt other goods from among those whose sale proceeds have to be included in the turnover. If an exemption of that type were granted say in 1948-49, it cannot be contended that the turnover of the dealer who had opted for the "previous year" has to include these sales in the return which he submits in Form IV. If by the date of the submission of the return, the exemption has been notified, and has effect for the entire year—of course he need not include these sale proceeds in his return. The computation, therefore, of the quantum of turnover of the previous year on which tax has to be levied is one which is subject to the law

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in relation to it in the assessment year, and any change in that law presents the same problems, as the variation in the rate of tax.

Up to now the discussion has proceeded on the basis that a change in the law made in the assessment year whether as regards the computation of the turnover or as to the rate of levy, is effective throughout that year, i.e., from the 1st April to the 31st March, and it is found that the fact that the returns of the previous-year turnover dealers are required to or are submitted within the early part of the year, or the contention based on the absence of specific machinery for re-assessment or refund are an insufficient basis for holding that a change in the law affecting the basis of tax-liability would not affect the previous-year turnover assessees and that the machinery provided by ss. 10 and 22 are adequate to meet the contingencies arising out of the changes being retrospectively effected after the assessments were completed.

We shall next proceed to consider whether the change in the law either as regards the computation of the taxable turnover or as regards the rate of tax becoming operative sometime after the year has commenced makes any difference. In the case of the "assessment-year-turnover" dealers, there is no problem because the sales effected during the course of the year would be governed by the law applicable from time to time. The entire basis or theory of the tax being levied on foot of the previous year's turnover is that notwithstanding that factually the sales took place in the previous year they are to be deemed by fiction to have taken place in the year of assessment. If that theory be discarded there could be no legal foundation for the tax being levied by the Act even as originally enacted on a sale which factually took place before it was operative. The only question therefore is the precise scope of that fiction and its logical implication. If the sale in the previous year is treated by the Act as a sale in the present year, then no principle is contravened, if it were held that sales during a portion of the previous year are held to be sales during a corresponding portion of the current

year. If we reject the argument that it is only the law as prevailed on the 1st April of a year that forms the basis for the computation of the turnover and for the ascertainment of the tax-liability—as not flowing from the provisions of the Act, and indeed as contrary to the very scheme underlying the enactment, the changes in the law effected during the course of the assessment year must operate even in respect of the turnover of the previous year, which are deemed to be the turnover of the assessment year.

It now remains to deal with the question as to whether the language employed in the notification by which only sales effected after a date specified in the assessment year are to be governed by the new levy, precludes the application of the notified change to those dealers whose sales were actually effected in the previous year, but who had opted for the " previous-year-turnover " basis of assessment.

The argument of learned Counsel, which found favour with the learned Judges of the High Court was briefly this. The notification expressly states that only sales effected from and after June 9, 1948, were to be charged with the new rates. In terms therefore, the change in the law is wholly prospective. If so, one cannot by any line of reasoning reach the conclusion that the new rates of levy applied to sales, as by the present respondent, more than a year earlier. So stated the reasoning appears impressive and it is true that a taxing enactment cannot be construed as levying a charge unless the words clearly do so. But the words have always to be understood and more than that applied with reference to the underlying basis of the scheme of taxation. So applied, it does not appear to us to support the contention of the respondent. The change in the rate of tax, was no doubt prospective. The phraseology employed merely means that in the case of the " assessment-year-turnover " dealers only the sale proceeds of sales effected after the specified date would be governed by the new rates. In the case of the " previous-year-turnover " dealers, the change operates to determine the amount of tax during *their* assessment year—just in the same manner as

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the original charge under the Act, of a flat rate of three pies determined the tax payable notwithstanding that none of the sales whose proceeds were included in their turnover were effected during the assessment year. We have already pointed out that the basic idea underlying the provision contained in s. 7(1) of the Act is that it projects the turnover of the previous year into the assessment year. Admittedly the Act itself is not retrospective, or designed to levy the charge under s. 3(1), on sales effected before April 1, 1948. If sales of the previous year are brought within the taxing provision, it is not because the sales when they took place were subject to tax, but because either (a) the previous year's sales are deemed in law—when the assessee so opts—as the sales of the current year or (b) the previous year's turnover being opted, the provisions of the charging sections operate on that turnover. Whichever of these be the more accurate method of expressing the result, the fact is that there is no element of retrospectivity at all involved in the application of the tax law which prevails in the year of assessment to the turnover of the previous year—when due to the choice of the assessee of being assessed under s. 7(1), the previous years' turnover basis is rendered applicable. Possibly the matter may be tested in this manner. Section 3(1) of the Act—the charging section—imposes in effect a tax of three pies per rupee on all sales effected after the commencement of the Act, i.e., after April 1, 1948. Suppose that section itself, had by a proviso imposed a tax @ six pies per rupee on all sales of edible oil effected on and after June 9, 1948. Could it then be open to argument, that in respect of the previous year's sales, only a three pies tax was payable and that the result of the charging provision could be ignored. If, therefore, we are right so far, the respondent derives no advantage from the notification specifying the dates of sales effected from and after which they would be subject to the varied rate. The notification had necessarily to be worded as it was, in order to fulfil its primary purpose of effecting a change in the rate during the assessment year. The date

mentioned in the notification as the date from and after which sales would be charged at the new rates would therefore not militate against the new rates being applied to the turnover of the previous year, since the turnover of the previous year has to be assessed on the rates prevailing in the assessment year.

The next question is how on the terms of the notification which came into operation after the commencement of the assessment year and during the course of it, the proportion of the turnover on the basis of which the tax-liability of a previous-year's turnover dealer could be computed. Learned Counsel for the respondent urged that no intelligible basis could be suggested for distinguishing the two periods in the previous year when the original rates and the altered notified rates would operate. Learned Counsel urged that it would be impossible to distinguish these two periods either on any theory of retrospectivity of the notification or on any theory regarding the sales of the previous year being attributed to the corresponding dates of the current year. There is no doubt that this mode of computing the proportion, viz., to treat the sales which were effected on various dates of the previous year, as if they were sales on the corresponding dates of the current year and thus to compute the two totals of turnover which would be subject to different rates of duty would not be proper. The impropriety would arise from the fact that the fiction enacted by s. 7(1) is not that each day's sale in the previous year is deemed to be a sale on the corresponding date in the current year, but only that the total taxable turnover of the previous year is deemed to be that of the current year. The method to which objection is taken is however not the manner in which the Sales-tax Officer computed the proportion which was affirmed by the Judge (Revision). If the total of the sale proceeds of the previous year is deemed to be the total of the current year, there is no illogicality or impropriety in dividing that total in accordance with the number of days in the year in which the different rates prevailed and that is precisely what the Sales-tax Officer did.

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If as we hold both the computation of the turnover of the previous year, as well as the incidence of the tax leviable on it, are to be determined not merely by the law as it stood on the first day of the assessment year, but by the law applicable to assessments during the entire assessment year, the method by which the tax-liability of the respondent was computed by the Sales-tax Officer is not open to any objection.

In connection with the interpretation of the notification a minor point was suggested to which brief reference might be made. It was submitted that as the notification in effect levied a tax, if it was ambiguous, it should be resolved in favour of the subject—the tax-payer. We see no ambiguity in the notification to justify an appeal to this rule. Besides the notification in effect frees dealers other than importers and manufacturers of all tax-liability in respect of the sale-turnover of oil, though in the case of two specified classes of dealers a single point tax at an enhanced rate is levied. In such a situation, the rule of construction invoked could hardly be applied, even if the condition as to ambiguity were present.

We, therefore, hold that the assessment to sales-tax of the respondent company by applying to its turnover of the year 1947-48, the rate of tax specified in the notification of June 8, 1948, as determined by the Sales-tax Officer was in accordance with the law. We would accordingly allow the appeal, set aside the decree of the High Court and restore the assessment order of the Sales-tax Officer with costs here and in the High Court.

BY COURT.—In accordance with the opinion of the majority, the appeal is dismissed with costs.

THE STATE OF KERALA AND OTHERS

v.

THE COCHIN COAL COMPANY LTD.

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October 31.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax—Explanation Sales—Sale and delivery of coal to Steamship—Whether in the course of export—Constitution of India, Art. 286—United States of Travancore and Cochin General Sales Tax Act, 1125, s. 6—Notification dated February 5, 1954.

The respondent stocked 'bunker coal' at Candle Island in the State of Madras. They sold the coal to steamers calling at the port of Cochin in the State of Travancore-Cochin and delivered it there. The respondent was assessed to sales tax on such sales for the year 1951-52 and 1952-53. The respondent contended that no sales tax could be levied on these sales since they were either sales 'in the course of export' or in 'the course of inter-State trade' exempt from sales tax under sub-cl. (1) (b) or cl. (2) of Art. 286 of the Constitution and in the alternative that they were exempt from tax under a notification dated February 5, 1954, issued by the appellant State under which sales falling within the Explanation to Art. 286(1)(a) made during the period 4-1-1951 to 31-3-1953 were exempted from liability to pay tax.

Held that the sales were exempt from tax under the Government Notification. The coal was delivered to the actual consumer, i. e., the steamships in Travancore-Cochin and they were at liberty to consume it wherever they desired, either within the State or outside the choice depending on its convenience and necessity. The delivery was for consumption within the State and the sales fell within the Explanation to Art. 286(1)(a).

Though the sales were in the course of inter-State trade which were covered by the ban on taxation imposed by Art. 286(2) the levy was validated by the Sales Tax Validation Act, 1956.

M. P. V. Sundararamier & Co. v. *The State of Andhra Pradesh*, [1958] S.C.R. 1422, relied on.

The sales were not made 'in the course of export' and were not covered by the ban imposed by Art. 286(1)(b). For Art. 286(1)(b) to apply it was not sufficient that the goods merely moved out of the territory of India, but it was further necessary that the goods should be intended to be transported to a destination beyond India. The concept of 'export' in Art. 286 postulated the existence of two termini between which the goods were intended to be transported.

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Burmah Shell Oil Storage & Distributing Co. of India Ltd. v. *The Commercial Tax Officer*, C.A. 751 of 1957 & C.A. 10 of 1958 (Unreported) followed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 287 of 1958.

Appeal from the Judgment and Order dated the 10th September, 1956, of the former Travancore-Cochin in Original Petition No. 191 of 1955.

Sardar Bahadur, for the Appellants.

K. P. Abraham, P. George and *M.R. Krishna Pillai*, for the Respondent.

1960. October 31. The Judgment of the Court was delivered by

Ayyangar J.

AYYANGAR J.—This is an appeal from the judgment of the High Court of Travancore-Cochin on a certificate of fitness granted by it under Art. 133(1) of the Constitution and raises for consideration the liability of the respondent—The Cochin Coal Company Ltd.—to sales-tax under the United State of Travancore and Cochin General Sales Tax Act, 1125 (1950).

The following are briefly the facts which it is necessary to state in order to appreciate the points in controversy in the appeal. The Cochin Coal Company Ltd. which will be referred to as the respondent-Company are, as their name indicates, dealers in coal. The commodity, the sales of which have given rise to the dispute in this appeal is what is known as 'Bunker coal'. The company have their offices at a place called Fort Cochin which was formerly within the State of Madras. They import and keep stocks of "bunker coal" stacked at a place called Candle Island which at the date relevant to these proceedings was also within the State of Madras. Part of the activities of the respondent-company consist in the supply of "bunker coal" from their depots in Candle Island to steamers arriving in or calling at, the port of Cochin (in the State of Travancore-Cochin) for the outward voyage of the steamers from the said port. The usual procedure by which "bunker coal" was thus supplied by the respondent-company was briefly

this: Before the arrival of the steamers, the steamer agents would enter into contracts with the respondent-company for trimming coal into the bunker of the steamer. As soon as a steamer arrived in Cochin port, the steamer-agents would inform the respondent-company and these agents after securing the necessary papers from the customs and the port authorities for the loading of the coal into the steamer, would take these papers to the respondent-company's office in Fort Cochin for enabling the latter to perform their part of the contract. The respondent-company would thereupon send the goods ordered to the steamer through their transport contractor. Delivery orders would be issued to the transport contractor on the strength of which goods would be released from their stock in Candle Island. Coal would then be taken to the steamer berthed in the port in Travancore-Cochin State waters. The Chief Engineer of the steamer would inspect the coal and when the same was to his satisfaction as regards quality, the coal would be permitted to be trimmed into the bunkers of the ships. The price of the coal would thereafter be paid to the respondent-company on bills drawn on the steamer-agent. The above being the nature of the transactions conducted by the respondent-company, sales-tax was claimed on the sales of bunker coal by the Travancore-Cochin State. The assessment years with which this appeal is concerned are 1951-52 and 1952-53, and the assessment therefor was completed on February 2, 1954, by the sales-tax officer, I Circle, Mattancherry. The respondent-company's contention that no sales-tax could be levied on the value of the "bunker coal" supplied, since the sale was either "in the course of export", or "in the course of inter-State trade" and therefore exempted from taxation by the State under sub-cl. (1)(b) or (2) of Art. 286 was rejected by the assessing officer for the reason that the sales in question fell within the Explanation to Art. 286 (1)(a) and were therefore "inside" the State of Travancore-Cochin, since the delivery in pursuance of the sale took place within the State and the goods were delivered for the purpose of consumption within

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the State and that notwithstanding that there was an inter-State element involved in the sale, by the goods being moved from Candle Island, the same did not affect the power of the delivery State to levy the tax. The point urged by the company, that the same sales had been assessed to tax in Madras State as sales actually taking place there, was also rejected as irrelevant. The respondent-company thereafter filed an appeal to the Appellate Assistant Commissioner who allowed the appeal of the company holding that the sales were "in the course of export" within Art. 286(1)(b), and that even if they were not such but were "inside" sales falling within the Explanation to Art. 286(1)(a) of the Constitution, still a notification by the State Government dated February 5, 1954, exempting such sales from tax, operated for the benefit of the assessee. Thereafter the Deputy Commissioner of sales-tax who was the Revisional authority took up the matter *suo motu*, called upon the assessee to show cause why the appellate order should not be set aside and the entire turnover assessed to sales-tax as the sales had taken place inside the State only. After hearing the assessee-company the order of the appellate Assistant Commissioner was set aside and that of the Sales Tax Officer restored. The respondent-company then moved the High Court of Travancore-Cochin under Arts. 226 and 227 of the Constitution to set aside the order in revision and the learned Judges of the High Court ordered accordingly. They, however, granted a certificate under Art. 133(1) of the Constitution to enable the State Government to file an appeal to this Court and that is how the matter is now before us.

Though the respondent-company appear to have presented before the High Court several lines of argument in support of their contention that they were entitled to exemption from sales-tax in respect of "bunker coal" trimmed by them into steamers in the waters of Travancore-Cochin, the learned Judges rested their decision in favour of the respondent-company on practically a single ground. Their reasoning was briefly as follows: Following the *Bengal Immunity case* (1), the learned Judges held that, the bans

(1) [1955] 2 S.C.R. 603.

imposed by cls. 1(a) and 2 of Art. 286 were independent and that the sale of the coal by the respondent-company which was in the course of inter-State trade was covered by the ban contained in Art. 286(2) of the Constitution notwithstanding that the sale might satisfy the terms of the Explanation to sub-cl. 1(a). The learned Government Pleader, however, had submitted that if the exemption was derived from Art. 286(2), the same would not assist the assessee, since the validity of the tax was saved by the Sales-tax Law Validation Act, 1956. The learned Judges however held that the validation Act could not avail the State because on their construction of s. 26 of the Travancore-Cochin General Sales Tax Act, 1125 (corresponding to s. 22 of the Madras Sales Tax Act, 1939) no tax had been levied or was leviable on sales in the course of inter-State trade or commerce and that the Validation Act having validated only taxes already levied could not enable the State to levy a tax which had not been imposed by the State's Sales-tax Act.

There is no doubt that the transaction of sale in the present case was in the course of inter-State trade and would be covered by the ban on taxation imposed by Art. 286(2). But the view of the learned Judges of the High Court regarding the construction of s. 26 of the Travancore-Cochin General Sales Tax Act must now be held to be incorrect in view of the decision of this Court in *M. P. V. Sundararamier & Co.* v. *The State of Andhra Pradesh* (1). If therefore the assessee-company could rely only on Art. 286(2) for claiming relief, it must be held to be not available to them since the Sales Tax Validation Act, 1956, would have validated the levy.

Before us, however, learned Counsel for the respondent-company urged two grounds to sustain the decree of the High Court in its favour. The first was that as the coal trimmed into the steam-ships were meant to be carried outside the territory of India, the sale was "in the course of export" within Art. 286 (1)(b) of the Constitution and was therefore exempt from the levy of sales-tax by the State. This contention however has to be rejected in view of the decision

(1) [1958] S.C.R. 1422.

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of this Court in *Burmah Shell Oil Storage & Distributing Co., of India, Ltd.* v. *The Commercial Tax Officer* (1) in which it was held that in the context and setting in which the expression "export out of the territory of India" occurs in Part XIII of the Constitution, it was not sufficient that goods were merely moved out of the territory of India but that it was further necessary that the goods should be intended to be transported to a destination beyond India, so that they were in the course of "import" into some other locality outside India and accordingly that aviation spirit sold to an aircraft for enabling it to fly out of the country was not "exported" out of the country. The reason was that there was no destination at which it could be said that the spirit was imported and that a mere movement of the goods out of the country following a sale would not render the sale one "in the course of export" within Art. 286 (1)(b) of the Constitution. In other words, the concept of export in Art. 286 postulates just as the word import, the existence of two termini as those between which the goods are intended to move or between which they are intended to be transported, and not a mere movement of goods out of the country without any intention of their being landed in specie in some foreign port.

The other point urged by learned Counsel was that, in any event, the sale fell within the Explanation to Art. 286(1)(a) inasmuch as the delivery of the coal was effected in the State of Travancore-Cochin for the purpose of consumption in that State. There is no doubt that the goods having originally been located in Candle Island in Madras State were moved out of that State by reason of the contract of sale into the territory of Travancore-Cochin. It had therefore an inter-State element which rendered the Explanation applicable. The delivery was admittedly effected in the State of Travancore-Cochin as a direct result of that sale and was trimmed into the steam-ships in the Cochin waters. If the purpose of the delivery was

(1) C.A. 751 of 1957 & C.A. 10 of 1958 (Unreported).

not export as we have held earlier, it must follow that in the circumstances of this case it was for the purpose of consumption in the State since the delivery was to the ultimate consumer who was to use the goods for his own purposes and not for the purpose of re-export or with a view to other transactions of a commercial character in the goods. It would be noticed that the ultimate buyer—the steam-ship company could, if it desired, consume the goods in the sense of exhaust the goods by consumption within the State or it could take it outside the State and consume it there, but that was a matter of its choice, dependent on its will and pleasure. This would not therefore detract from the delivery to it being for consumption within the State. Goods might be consumed either by destruction or by way of use depending on the nature of the goods. Thus edible articles are generally consumed in a literal sense while other articles like clothing or furniture etc. are consumed by being used, though they are not destroyed by such use. If edible articles are sold and delivered to an ultimate consumer within a State, it is delivered for the purpose of consumption within the State, notwithstanding, that the buyer may not choose to consume the whole of his purchase within the State but takes part of it outside the State and consumes it there. If, for instance, a vehicle is sold to the actual user and the sale is not in the course of export or with a view to further commercial transactions in it by the purchaser by way of resale etc., the delivery to the user is for the purpose of his consumption within the State. The fact that such a purchaser might in the exercise of the enjoyment of his property—by way of use or "consumption"—drive the vehicle to other States does not detract from the original delivery to him falling within the Explanation to Art. 286(1)(a). In the present case, the coal having been delivered into the ship for being consumed by it, it was open to the master of the vessel to use the coal while the ship was in the waters of Travancore-Cochin, or if he so chose take it outside those limits. The position might be

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different if the buyer were obliged by contract or by law not to use or consume the goods sold within the State of delivery, i.e., where he has no choice to consume it there. In the case on hand, part of the coal delivered could and would certainly have been used by the ship during the period of her stay in the harbour for loading and if such stay were prolonged owing to unforeseen causes even the entire coal might have been exhausted and of course it would have to be used till the ship left the limits of the port and the limits of State territory. The crucial fact therefore was that the coal was delivered to the actual consumer who was at liberty to consume it wherever he desired—the choice depending on his convenience and necessity.

In the circumstances, therefore, learned Counsel for the respondent was right in his submission that the sale of the "bunker coal" by the assessee-company fell within the Explanation to Art. 286(1)(a). If there were nothing more and the liability of the assessee had to be judged with reference to the charge imposed by the Sales-tax Act of the State, read in the light of the Constitution, the tax liability of the respondent-company would not have been open to doubt or dispute. But the submission of learned Counsel was that the State Government had power to exempt sales of any particular designated type from tax liability under s. 6 of the Sales-Tax Act, and that the Government had by a notification dated February 5, 1954, and published in the official Gazette, exempted sales such as by the respondent-company in the present case from the levy of sales-tax during the assessment years now in question. The exemption under this notification was no doubt not referred to by the learned Judges of the High Court but had been one of the grounds on which the sales-tax appellate authority had set aside the tax imposition by the Sales-tax Officer and the point had been specifically urged in the petition filed in the High Court under Art. 226, and the respondent cannot, therefore, be denied the benefit of the notification if it applied.

Section 6 of the Travancore-Cochin Sales-tax Act enacts:

"The Government may, by notification in the Gazette, make an exemption.....in respect of any tax payable under this Act :—

(i) on the sale of any specified class of goods at all points or at any specified point or points in the series of sales by successive dealers ; or

(ii) of any specified class of persons in regard to the whole or any part of their turnover ".

It is not necessary to set out the rest of the section. In the Travancore-Cochin Gazette dated February 16, 1954, the following notification dated February 5, 1954, appeared :

"According to the interpretation given by the Supreme Court to Art. 286(1) of the Constitution in their judgment in the State of Bombay v. United Motors India Ltd. certain categories of inter-State transactions come within the taxing powers of the State Government. While the judgment enables the Government of Travancore-Cochin to levy sales-tax on certain categories of non-resident dealers selling goods for delivery and consumption in Travancore-Cochin State from the 1st April 1951, the Government have, after due consideration, decided to levy sales-tax on such transactions only from the 1st April 1953—the date immediately following that on which the Supreme Court delivered its judgment and to forego the levy prior to that date ".

Then followed provisions detailing the interim arrangements for submission of returns, of declarations to be filed and the manner in which the tax should be assessed and paid. Though the learned counsel for the appellant-State urged that the notification could not have the statutory effect of granting exemption, we are clearly of the opinion that this was and must be deemed to be one issued in exercise of the power conferred on the State Government by s. 6(1) whose relevant terms we have already extracted. Besides, this is rather a curious submission to make in view of what had transpired earlier. The appellate Assistant Commissioner who set aside the assessment of the respondent-company stated in his order "Even if it is considered that the sale is for

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consumption in this State, the company need not pay tax on the turnover since Government have exempted from payment of tax on the sales which took place before April 1, 1953". When this appellate order was set aside by the Deputy Commissioner acting *suo motu* in revision, there is no reference made to the notification in the order and it was not stated that it had no statutory effect. In its petition to the High Court under Art. 226, the respondent-company claimed the benefit of the exemption granted by the notification dated February 5, 1954, and published in the Gazette of February 16, 1954, relating to the assessment for the period April 1, 1951 to April 1, 1953 and it added that the assessment in question came within the exemption contained in the Gazette notification. In answer to this a counter-affidavit was filed by the sales-tax officer who said: "The notification referred to in the petitioner's affidavit has no application to the case as the sales in question did not come within their orbit". In other words, the objection was not that the notification was not a statutory exercise of the power under s. 6(1) and effective to grant an exemption to the cases covered by it, but that the transactions of the respondent-company were not covered by the notification. The extract we have quoted from the notification shows that it is specially designed to afford relief to cases of non-resident dealers engaged in inter-State transactions which were held to be intra-State transactions by reason of the application of the Explanation to Art. 286(1)(a) to such sales by the decision of this Court in the *United Motors case*. As the respondent company's transactions in question clearly fall within the notification by reason of their nature as well as the assessment years concerned, the respondent-company would be entitled to the benefit of the tax exemption conferred by the notification.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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November 1.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CIRCLE II

v.

THE NATIONAL SYNDICATE, BOMBAY.

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-Tax—Business carried out for a part of the year—Computation—If must be for the whole year—Indian Income-Tax Act, 1922 (11 of 1922) s. 10(2)(vii).

The National Syndicate, a Bombay firm, acquired on January 11, 1945, a tailoring business as a going concern for Rs. 89,321 which included the consideration paid for sewing machines and a motor lorry. Soon after the purchase the respondent found it difficult to continue the business, therefore it closed its business in August, 1945. Between August 16, 1945, and February 14, 1946, sewing machines and the motor lorry were sold at a loss. The respondent closed its account books on February 28, 1946, showing the two losses and writing them off.

For the assessment year 1946-47, the respondent claimed a deduction under s. 10(2)(vii) of the Indian Income Tax Act. The Appellate Tribunal held that the sales of machines and the motor lorry were made in the course of the winding up of the assessee's business after the business had been stopped and that, therefore, the deduction could not be claimed under s. 10(2)(vii). Respondent moved the High Court and obtained an order under s. 66(2) of the Income-Tax Act, and the following two questions were referred :—

"(1) Whether the Tribunal was justified in law in holding that the petitioner had carried on its business only till twenty-eigth day of August, One Thousand Nine Hundred and Forty Five?

(2) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was justified in law in not allowing the sum of Rs. 41,998 (Rupees forty-one thousand nine hundred and ninety eight) on sale of machines and Rs. 3,700 (Rupees three thousand and seven hundred) on the sale of lorry as a deduction from the total income of the applicant?"

The High Court answered the first question in the affirmative, and the second question in the negative.

The Commissioner of Income-tax questioned the finding of the High Court and came up in appeal by special leave and contended that an allowance could only be claimed if sale of machines, etc. took place when the business was being continued and not if the business had come to a close. The respondent on the other hand submitted that s. 10(2)(vii) would be applicable

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in a case where the business continued for a part of the account year, even though the sale of machinery, plant, etc. took place after the closure of the business during the course of the account year.

Held, that if the profits or gains of a business for a particular year are to be taxed, they must be computed for the whole year taking into account losses incurred during the same year, provided that the business had been "carried on by the assessee"; the building, machinery or plant had been "used for the purpose of the business"; the sale etc. had taken place during the year of account, and the loss had been brought into the books of the assessee and written off. There is no other condition to be found expressly in the section or in the Act. It is nowhere stated that the business of the assessee should have been carried on for the whole year, or that the machinery or plant should have been used for the whole of the accounting period. There are no words which would show that, if the assessee worked only for a part of the year and then sold out, the loss that he incurred was not a business loss, or that he must pay tax on the small profit that he might have made, and bear the loss in addition.

The Liquidators of Pursa Limited v. *Commissioner of Income-Tax, Bihar*, [1954] S.C.R. 767, *Commissioner of Income-tax* v. *Express Newspapers Ltd.* (1960) 40 I.T.R. 38, distinguished.

Indian Iron & Steel Co., Ltd. v. *Commissioner of Income-tax, Bengal*, (1943) 11 I.T.R. 328, *Commissioner of Income-tax* v. *Shaw Wallace & Co., Ltd.*, (1932) L.R. 59 I.A. 206, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 280 of 1959.

Appeal by special leave from the judgment and order dated the 22nd August, 1956, of the former Bombay High Court in Income-tax Reference No. 17 of 1956.

R. Ganapathy Iyer and *D. Gupta*, for the Appellant.

Sanat P. Mehta, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the Respondent.

1960. November 1. The Judgment of the Court was delivered by

Hidayatullah J.

HIDAYATULLAH J.—The Commissioner of Income-tax, Bombay Circle II, has filed this appeal after obtaining special leave, against the judgment of the High Court of Bombay in an Income-tax reference

under s. 66(2) of the Income-tax Act. The National Syndicate, Bombay (referred to in this judgment as the respondent) was a firm consisting of three partners. This firm acquired on January 11, 1945, a tailoring business as a going concern from one Chambal Singh for Rs. 89,321/-. Included in this amount was the consideration paid for sewing machines (Rs. 72,000) and a motor lorry (Rs. 8,000). The assessment concerns the year of account of the respondent, January 11, 1945 to February 28, 1946. The business of the respondent was to prepare garments for Government departments, and during the war years, this appears to have been a profitable business. Immediately after the respondent acquired this business, the last war came to an end, and the respondent found it difficult to continue the business. It, therefore, closed its business in August, 1945. Between August 16, 1945 and February 14, 1946, sewing machines were sold at a loss of Rs. 41,998. The motor lorry was also sold on February 14, 1946, at a loss of Rs. 3,700. The respondent closed its account books on February 28, 1946, showing the two losses and writing them off.

For the assessment year, 1946-47, the respondent claimed a deduction of Rs. 45,698 under s. 10(2)(vii) of the Indian Income-tax Act. The Income-tax Officer disallowed this deduction, holding that the loss was of a capital nature, and that inasmuch as the business of the respondent was not carried on after August 1945 s. 10(2)(vii) was not applicable. This order of assessment was confirmed by the Appellate Assistant Commissioner, who also held that the loss represented capital loss, as the machines and the motor lorry were sold after the closure of the business. On appeal, the Appellate Tribunal, Bombay, also confirmed the order, holding that the sales of machines and the motor lorry were made in the course of the winding up of the assessee's business after the business had been stopped, and that, therefore, the deduction could not be claimed under s. 10(2)(vii).

The respondent asked the Tribunal to refer the questions of law arising from its order, but the request was refused. It then moved the High Court, and

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obtained an order under s. 66(2) of the Income-tax Act, and the following two questions were referred:

"(1) Whether the Tribunal was justified in law in holding that the Petitioner had carried on its business only till twenty-eighth day of August one thousand nine hundred and forty-five?

(2) Whether on the facts and circumstances of the case, the Income-tax Appellate Tribunal was justified in law in not allowing the sum of Rs. 41,998 (Rupees forty-one thousand nine hundred and ninety eight) on sale of machines and Rs, 3,700 (Rupees three thousand and seven hundred) on the sale of lorry as a deduction from the total income of the applicant?"

The High Court answered the first question in the affirmative, holding that there was evidence on which the Tribunal could reach the conclusion that the business had, in fact, been continued only till August 28, 1945. On the second question, the High Court was of the opinion that the business having been carried on for at least a part of the account year, s. 10(2)(vii) was applicable, and that, therefore, this allowance had to be made under that clause. The High Court, therefore, answered the question in the negative. The High Court refused to grant a certificate to appeal to this Court, but the Commissioner of Income-tax applied for, and obtained special leave, and this appeal has been filed.

Before we deal with the question whether s. 10(2)(vii) of the Indian Income-tax Act is applicable to the facts of this case, we may mention that during the course of the argument Mr. S. P. Mehta, counsel for the respondent, sought to re-open the first question. According to him, there was no evidence on which the Tribunal or the High Court could reach the conclusion that the business of the respondent had come to a close in August 1945. We, however, did not permit him to raise this contention, partly because, in our opinion, such a contention could not be allowed to be raised at this stage in an appeal by the Department and partly because, in our opinion, there were adequate materials for the High Court to have based its conclusion. Inasmuch as we were in agreement

with the High Court on the question of the applicability of s. 10(2)(vii), we also felt that no useful purpose would be served in examining the matter to find out whether the business had, in fact, closed on August 28, 1945 or had continued till the end of the account year.

We are really concerned in this appeal with the interpretation of s. 10(2)(vii) and its applicability to the facts of the case. It may be assumed for the purposes of this case that the business did, in fact, close down on August 28, 1945, even though some incomings and outgoings were taking place for the rest of the year and the books of account were not finally closed till February 28, 1946. The Commissioner contends that an allowance could only be claimed if the sale of machines etc., took place when the business was being continued and not if the business had come to a close. The respondent, on the other hand, submits that s. 10(2)(vii) would be applicable in a case where the business continued for a part of the account year, even though the sale of the machinery, plant etc., took place after the closure of the business during the course of the account year.

Section 10(2)(vii) reads as follows:

"10(2). Such profits or gains shall be computed after making the following allowances, namely:—

.....

(vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value:

Provided that such amount is actually written off in the books of the assessee:".

The Commissioner emphasises the word "such" in the clause, and states that this takes us back to cl. (iv) where the words "used for the purposes of the business" occur. It is, therefore, contended that if the business itself comes to an end before the sale takes place, the sale is not during the continuance of the

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business but is during the course of the winding up of the business, and the condition precedent to the application of s. 10 is that the business must be "carried on" by the person claiming the benefit of sub-s. (2). Reference in this context is made to the first sub-section of s. 10, where it is provided that the tax shall be payable by an assessee under the head "Profits and gains of business....." in respect of the profits or gains of any business, etc., '*carried on by him*'." The Department relies upon a decision of this Court reported in *The Liquidators of Pursa Limited* v. *Commissioner of Income-tax, Bihar* (1). The respondent also relies upon the same ruling, and contends that it supports the case set up by it. The respondent also relies on a recent decision of the Madras High Court in *Commissioner of Income-tax* v. *Express Newspapers Ltd.* (2).

These two cases were decided under the second proviso to s. 10(2)(vii) before its amendment in 1949. The second proviso reads:

"Provided further that where the amount for which any such building, machinery or plant is sold *whether during the continuance of the business or after the cessation thereof*, exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place."

The words underlined above were inserted by s. 11 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949.

In both the cases, the business had admittedly closed down before the sales took place, and it was held, applying the proviso as it was before the amendment of 1949, that such receipts were not taxable. The amendment now renders these cases obsolete. Reliance is, however, placed on certain observations in these cases, and it is contended that the same reasoning must be applied to a case of loss as to a case of profits. We shall, therefore, refer briefly to them.

In *The Liquidators of Pursa Limited* v. *Commissioner of Income-tax, Bihar* (1), the year of assessment

(1) [1954] S.C.R. 767. (2) (1960) 40 I.T.R. 38.

was 1945-46, which corresponded to the accounting year, October 1, 1943 to September 30, 1944. Pursa Limited were manufacturers of sugar, and sold the business on August 9, 1943, including buildings, machinery and plant but *excluding* manufactured sugar worth about Rs. 6,00,000. This sugar was sold till June, 1944; but throughout the accounting period, the machinery, plant or buildings were not used. Pursa Limited went into voluntary liquidation on June 20, 1945. In the sale of the buildings, machinery and plant there was an excess, such as is described in the second proviso, and that amount of excess was sought to be taxed. This was negatived by this Court on two grounds. They were (a): "If the machinery and plant have not at all been used at any time during the accounting year no allowance can be claimed under clause (vii) in respect of them and the second proviso also does not come into operation"; and (b) "that the intention of the company was to discontinue its business and the sale of the machinery and plant was a step in the process of winding up of its business. The sale of the machinery and plant was not an operation in furtherance of the business carried on by the Company but was a realisation of its assets in the process of gradual winding up of its business which eventually culminated in the voluntary liquidation of the Company".

Counsel differ as to the ratio of the case. The Commissioner contends that the ratio is that no sale, whether at a loss, or at a profit can be said to fall within, respectively, cl. (vii) or the second proviso, if it takes place after the closure of business and during the process of winding up, while the respondent contends that the real ratio was that during the account year the machinery and plant were not at all used. No doubt, this Court did give two reasons for its decision, but the primary consideration was the second ratio quoted above. This is clear from the following passage towards the end of the judgment:

"Even if the sale of the stock of sugar be regarded as carrying on of business by the Company and not a realisation of its assets with a view to winding up, the

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machinery or plant not being used during the accounting period at all and in any event not having had any connection with the carrying on of that limited business during the accounting year, section 10(2)(vii) can have no application to the sale of any machinery or plant."

Learned counsel for the respondent relies upon the passage last quoted, and urges that where the buildings, machinery or plant have been used for a part of the accounting period, the ruling cannot apply, and draws attention to the words "at all" used twice in the judgment. He argues that if the machinery or plant had been used for a part of the accounting year, the result would have been different. It is not possible to say how the case would have been decided in the changed circumstances, but it is obvious that the case is distinguishable on more than one ground. The proviso is in a language different from cl. (vii), as a fiction is introduced and such 'profits' are taxed to take back what had been given away for depreciation which did not really take place. But more of it later.

Express Newspapers Ltd. case (1) is also distinguishable. In that case, the Free Press of India (Madras) Ltd. resolved on August 31, 1946, to transfer the right of printing and publishing its daily newspapers to Express Newspapers Ltd. They rented out their machinery, etc., to the new Company, which took possession on September 1, 1946. The year of account ended on December 31, 1946. The Free Press went into voluntary liquidation on October 31, 1946 and on November 1, 1946, its building, machinery and plant were sold to the new Company at a price which exceeded the written down value by Rs. 6,08,666 made up of Rs. 2,14,090 being the excess of the original cost price over the written down value, and Rs. 3,94,576 being the excess over the original cost price. One question, among others, was whether the second proviso to s. 10 (2)(vii) applied. The Madras High Court observed:

(1) (1960) 40 I.T.R. 38.

"……in the present case the sale of the machinery took place during the year of account, and it was used by Free Press Company for at least a part of the year. This would be sufficient to attract liability. The learned counsel for the assessee is on a firmer ground when he contended that the sale being made in the process of winding up of the company section 10(2)(vii) will not apply. The second proviso to section 10(2)(vii) would be invoked only where the sale was one made in the course of business carried on by the predecessor. Where the sale is a closing down sale, that profit could not be brought to tax. In *Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax* (1), the Supreme Court held that where in a case the sale of machinery and plant was a step in the process of winding up of its business, the intention of the company having been to discontinue the business, such sale was not an operation in furtherance of the business carried on by the company, but was only a realisation of its assets in the process of gradual winding up of its business which eventually terminated in the voluntary liquidation of the company, and provision of section 10(2)(vii) would not apply. In the present case, the formation of the new company was to take over the business of the old company. The lease of the machinery, the transfer of the right to carry on the business of publishing newspapers, and the ultimate sale of the machinery were part of the same scheme for winding up the Free Press Company. The sale of machinery was undoubtedly a closing down sale and the profit earned therein could not come in for assessment under section 10(2)(vii)."

These two cases deal with the second proviso to s. 10(2)(vii). Clause (vii) deals with loss and the second proviso, with profits; but the proviso is not an exact counterpart of the clause. The proviso enacts a fiction which the main clause does not enact. The reason for the introduction of the fiction in the proviso appears to be this: Loss in business may take place in various ways. If the business requires more to run it than it produces, there is loss. Loss in

(1) [1954] S.C.R. 767.

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business may also take place if the equipment with which business is done is lost, destroyed, or depreciates or suffers in value. The law takes note of the loss, and, provided it has been computed and brought into the books of the business and written off, it can be claimed as a deduction. Profit in business, on the other hand, primarily, means profit earned in the business. But if an allowance had been claimed as depreciation and had been allowed, and if the sale of the building, machinery or plant on which depreciation allowance was claimed in the past, shows that there was, in fact, no depreciation but an accretion in value, the law deems that a profit has been made. The fiction thus converts that which may not be strictly profit of the business in a narrow sense, into a profit for purposes of assessment. Formerly, it was a matter of doubt whether even this accretion could be deemed a profit when the business had closed down; but now, the legislature has amended the law by saying that this fictional profit must be brought to tax irrespective of the fact that the sale took place "during the continuance of the business or after the cessation thereof." But it is to be noticed that no such amendment was made in cl. (vii) to exclude loss over buildings, machinery or plant after the closure of the business. It is thus clear that the principles which govern the proviso cannot be used to govern the main clause, because profit or loss arise in different ways in business. The two rulings do not, therefore, apply to the facts here.

We must thus restrict ourselves to the scheme of the Indian Income-tax Act and the clause in question. The scheme of the Income-tax Act, as was pointed out by Lord Porter in *Indian Iron & Steel Co. Ltd.* v. *Commissioner of Income-tax, Bengal* (1), is that income-tax is assessed and paid in the next succeeding year upon the results of the year before. It is the income of the previous year which is brought to tax in the succeeding year, which is called the year of assessment. For the purpose of assessment, the Indian Income Tax Act divides the sources of income, profits

(1) [1943] 11 I.T.R. 328, 336.

and gains into six heads in s. 6. The fourth head is "Profits and gains of business, profession or vocation". Sections 7, 8, 9, 10, 12, 12A and 12B lay down the rules of computation under the different heads. Profits and gains of business are dealt with in s. 10. The first sub-section of that section provides:

"The tax shall be payable by an assessee under the head 'Profits and gains of business....' in respect of the profit or gains of any business.....carried on by him."

In *Commissioner of Income-tax* v. *Shaw Wallace & Co., Ltd.* (1), it was pointed out by the Judicial Committee that the words "carried on by him" were "an essential constituent of that which is to produce the taxable income; it is to be the profit earned by a process of production". It was further pointed out that "business" had been defined in the Income-tax Act to "include any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture", and that it involved "a fundamental idea of the continuous exercise of an activity." It was, however, pointed out that the source was not necessarily one which was expected to be continuously productive, but one whose object was the production of a definite return, excluding anything in the nature of a mere windfall, and that 'capital' in most cases was hardly more than an element in the process of production.

We agree with this analysis of the Income-tax Act, and indeed, these observations were also applied in the *Pursa Limited case* (2), to which we have already referred. It thus follows that capital may, in the process of production, depreciate, get used up or lost. The Income-tax Act, while taxing income, profits or gains, takes note of, and makes allowance for such eventualities.

If the profits or gains of a business for a particular year are to be taxed, they must be computed for the whole year taking into account losses incurred during the same year. Now, the first condition precedent appears to be that the business must have been

(1) (1932) L.R. 59 I.A. 206. (2) [1954] S.C.R. 767.

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"carried on by the assessee". This is to be found in the first sub-section of s. 10. The second condition is that the building, machinery or plant must have been "used for the purposes of the business". This is to be found in cl. (iv) of the second sub-section of s. 10. The third condition is that the sale etc., should have taken place during the year of account. This follows from the nature of the tax which is assessed and levied on the profits of the working of the previous year. The fourth condition is that the loss should have been brought into the books of the assessee and written off. This is provided by the first proviso. There is no other condition to be found expressly in the section or in the Act. It is nowhere stated that the business of the assessee should have been carried on for the whole year, or that the machinery or plant should have been used for the whole of the accounting period. There are no words which would show that, if the assessee works only for a part of the year and then sells out, the loss that he incurs is not a business loss, or that he must pay tax on the small profit that he might have made, and bear the loss in addition. We have shown above that the case of profit referred to in the second proviso stands on a different footing altogether, since profit and loss arise in different ways. The law has thus treated the two subjects differently, and the legislature has amended the proviso but not the clause.

In view of what we have said above, we are of opinion that the judgment of the High Court was correct in all the circumstances of this case, and this appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA DISCOUNT COMPANY LIMITED

v.

INCOME-TAX OFFICER, COMPANIES DISTRICT, I AND ANOTHER.

1960

November 1.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Income-tax—Income escaping assessment—Non-disclosure of material facts by assessee—"Material facts", meaning of—Indian Income Tax Act, 1922 (11 of 1922), as amended in 1948, s. 34(1)(a), Explanation—Constitution of India, Art. 226.

The appellant, a private limited company, was assessed to income tax for the assessment years 1942-43, 1943-44 and 1944-45 by three separate orders dated January 26, 1944, February 12, 1944, and February 15, 1945, under s. 23(3) of the Indian Income Tax Act on returns filed by it with statements of account. On March 28, 1951, three notices under s. 34 of the Act were issued calling upon it to submit fresh returns for the said assessment years. The appellant filed the returns but thereafter applied to the High Court under Art. 226 of the Constitution for writs restraining the Income-tax Officer from initiating assessment proceedings on the basis of the said notices on the ground, inter alia, that he had no jurisdiction to issue the said notices. In his report to the Commissioner of Income-tax for obtaining sanction to initiate the said proceedings the Income-tax Officer had stated as follows :—

"Profit of Rs. 5,46,002 on sale of shares and securities escaped assessment altogether. At the time of the original assessment the then I. T. O. merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such the company had failed to disclose the true intention behind the sale of the shares as such s. 34(1)(a) may be attracted".

The question for determination was whether in the circumstance the Income-tax Officer was right in issuing notices on the assessee under s. 34(1)(a) of the Act.

Held, (per S. K. Das, K. C. Das Gupta and N. R. Ayyangar, JJ.), that before the Income-tax Officer could issue a notice under s. 34(1)(a) of the Indian Income-tax Act, two conditions precedent must co-exist, namely, that he must have reason to believe (1) that income, profits or gains had been under-assessed and (2) that such under-assessment was due to non-disclosure of material facts by the assessee.

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Although what facts would be necessary and material for the assessment in a particular case must depend on the facts of that case, there could be no doubt that the burden of disclosing all the primary facts must invariably be on the assessee.

The Explanation to s. 34(1) made it clear that that burden could not be fully discharged by simply producing the account books and other documents, but the assessee must also disclose such specific items or portions thereof as are relevant to the assessment. But once he has done so, it is for the Income-tax Officer to draw the proper inferences of fact and law therefrom and the assessee cannot further be called upon to do so for him. The Explanation does not enlarge the scope of the section so as to include " the disclosure " of such inferences.

The question whether by the sale of shares the assessee in the instant case intended to change the form of investment or to make a business profit was one of an inferential fact and the failure to disclose such intention could not by itself amount to a failure or omission to disclose a material fact within the meaning of s. 34(1)(a) of the Act.

Where, however, the Income-tax Officer has *prima facie* reasonable grounds for believing that there has been a non-disclosure of a primary material fact, that by itself gives him the jurisdiction to issue a notice under s. 34 of the Act, and the adequacy or otherwise of the grounds of such belief is not open to investigation by the Court. It is for the assessee who wants to challenge such jurisdiction to establish that the Income-tax Officer had no material for such belief.

Since, in the instant case, there was no non-disclosure of a primary material fact which the assessee was bound to disclose under s. 34(1)(a) of the Act, the Income-tax Officer had no jurisdiction to issue the notices in question.

It is incorrect to say that the question of under-assessment by reason of non-disclosure of a material fact was relevant only for the purpose of applying either the longer or the shorter period of limitation prescribed by the section and not for jurisdiction and, therefore, not a proper matter for investigation under Art. 226 of the Constitution.

The High Courts have ample powers under Art. 226 of the Constitution, and are in duty bound thereunder, to issue such appropriate orders or directions as are necessary in order to prevent persons from being subjected to lengthy proceedings and unnecessary harassments by an executive authority acting without jurisdiction. Alternative remedies such as are provided by the Income-tax Act cannot always be a sufficient reason for refusing quick relief in a fit and proper case.

Per Hidayatullah, J.—The Explanation to s. 24(1) of the Indian Income-tax Act clearly indicates that the duty of the assessee thereunder does not end by merely producing evidence or disclosing the primary facts, but also extends to the disclosure

of such other facts relating to status, agency, benami nature of the transaction, the nature of the trading and the like, which he knows but do not appear from the evidence, and which may be necessary for interpreting the evidence. If the evidence produced hides nothing and discloses everything, the assessee cannot be subjected to s. 34 merely because the Income-tax Officer misinterprets such evidence. But it is otherwise if the assessee raises a contention that is contrary to fact and requires the Income-tax Officer to discover the truth for himself for that would be to suppress a material fact that would attract the section.

Since, in the present case, an investment company dealing in stocks and shares, not only knowingly suppressed that fact but contended otherwise, there was non-disclosure of a material fact necessary for its assessment, and sufficient to attract s. 34(1)(a) of the Act.

Per Shah, J.—The expression "has reason to believe" in s. 34(1)(a) of the Indian Income-tax Act does not mean a purely subjective satisfaction of the Income-tax Officer but predicates the existence of reasons on which such belief has to be founded. That belief, therefore, cannot be founded on mere suspicion and must be based on evidence and any question as to the adequacy of such evidence is wholly immaterial at that stage.

Whether all the material facts necessary for the assessment had or had not been fully and truly disclosed in a particular case has to be examined, in the light of the Explanation to s. 34(1)(a).

If there is disclosure of some facts but not all, a tax payer cannot resist reassessment on the plea that such non-disclosure was due to the negligence or inadvertence on the part of the Income-tax Officer to scrutinise the materials before him.

Where the existence of reasonable belief that there had been under-assessment due to non-disclosure by the assessee, which is a condition precedent to exercise of the power under s. 34(1)(a) is asserted by the assessing authority and the record *prima facie* supports its existence, any enquiry as to whether the authority could reasonably hold the belief that the under-assessment was due to non-disclosure by the assessee of material facts necessary for the assesment must, be barred.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 197 of 1954.

Appeal from the Judgment and Order dated the 25th March, 1953, of the Calcutta High Court in Appeal from Original Order No. 54 of 1953.

Sachin Chaudhury, Sukumar Mitter, S. N. Mukherjee and *D. N. Ghosh*, for the appellant.

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K. N. Rajagopal Sastri and *D. Gupta*, for the respondents.

1960. November 1. The Judgment of S. K. Das, K. C. Das Gupta and N. Rajagopala Ayyangar, JJ., was delivered by K. C. Das Gupta, J. M. Hidayatullah, J. and J. C. Shah, J., delivered separate Judgments.

DAS GUPTA J.—This appeal is against an appellate decision of a Bench of the Calcutta High Court by which in reversal of the order made by the Trial Judge the Bench rejected the present appellant's application under Art. 226 of the Constitution. The appellant is a private limited company incorporated under the Indian Company's Act and has its registered office in Calcutta. It was assessed to income-tax for the assessment years, 1942-43, 1943-44 and 1944-45 by three separate orders dated January 26, 1944, February 12, 1944, and February 15, 1945, respectively. These assessments were made under s. 23(3) of the Indian Income-tax Act upon returns filed by it accompanied by statements of account. The first two assessments were made by Mr. L. D. Rozario the then Income-tax Officer and the last one by Mr. K. D. Banerjee. The taxes assessed were duly paid up. On March 28, 1951, three notices purporting to be under s. 34 of the Indian Income-tax Act, 1922, were issued by the Income-tax Officer calling upon the company to submit fresh returns of its total income and the total world income assessable for the three accounting years relating to the three assessment years, 1942-43 1943-44 and 1944-45. The appellant company furnished returns in compliance with the notices but on September 18, 1951, applied to the High Court of Calcutta for issue under Art. 226 of the Constitution of appropriate writs or orders directing the Income-tax Officer not to proceed to assess it on the basis of these notices. The first ground on which this prayer was based was mentioned in the petition in these terms :—" The said pretended notice was issued without the existence of the necessary conditions precedent which confers jurisdiction under section 34 aforementioned, whether

before or after the amendment in 1948". The other ground urged was that the amendment to s. 34 of the Income-tax Act in 1948 was not retrospective and that the assessment for the years 1942-43, 1943-44 and 1944-45 became barred long before March 1951.

The Trial Judge held that the first ground was not made out but being of opinion that the amending Act of 1948 was not retrospective, he held that the notices issued were without jurisdiction. Accordingly he made an order prohibiting the Income-tax Officer from continuing the assessment proceedings on the basis of the impugned notices.

The learned Judges who heard the appeal agreed with the Trial Judge that the first ground had not been made out. They held however that in consequence of the amendment of s. 34 in 1948 the objection on the ground of limitation must also fail. A point of constitutional law which appears to have been raised before the appeal court was also rejected. The appeal was allowed and the company's application under Art. 226 was dismissed with costs.

The Company has preferred the present appeal on the strength of a certificate issued by the High Court under Art. 133(1)(a) of the Constitution.

The only point raised before us is that the courts below were wrong in holding that the first ground that the notices were issued without the existence of the necessary conditions precedent which confers jurisdiction under s. 34 had not been made out. As it is no longer disputed that s. 34 as amended in 1948 applies to the present case we have to consider the section as it stood after the amendment in 1948, in deciding this question of jurisdiction. The relevant portion of the section was in these words:—

"34. *Income escaping assessment.*—(1) If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under s. 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gain chargeable to income-tax have escaped assessment for that year, or have been

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under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed.

He may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :—

Provided that—

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation—Production before the Income-tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such "under assessment" has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under s. 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years, from the end of the year in question.

No dispute appears to have been raised at any stage in this case as regards the first condition not having been satisfied and we proceed on the basis that the Income-tax Officer had in fact reason to believe that there had been an under-assessment in each of the assessment years, 1942-43, 1943-44 and 1944-45. The appellant's case has all along been that the second condition was not satisfied. As admittedly the appellant had filed its return of income under s. 22, the Income-tax Officer could have no reason to believe that under-assessment had resulted from the failure to make a return of income. The only question is whether the Income-tax Officer had reason to believe that "there had been some omission or failure to disclose fully and truly all material facts necessary

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for the assessment" for any of these years in consequence of which the under-assessment took place.

Before we proceed to consider the materials on record to see whether the appellant has succeeded in showing that the Income-tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assesment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise—the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax

Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example—"I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them—including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else—far less the assessee—to tell the assessing authority what inferences—whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose

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what inferences—whether of facts or law—he would draw from the primary facts.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?

It may be pointed out that the Explanation to the sub-section has nothing to do with " inferences " and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose " inferences "—to draw the proper inferences being the duty imposed on the Income-tax Officer.

We have therefore come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

The position therefore is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under assessment" that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notices under s. 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax Officer had when he assumed jurisdiction some *prima facie* grounds for thinking that there had been some non-disclosure of material facts.

Clearly it is the duty of the assessee who wants the court to hold that jurisdiction was lacking, to establish that the Income-tax Officer had no material at all before him for believing that there had been such

non-disclosure. To establish this the company has relied on the statements in the assessment orders for the three years in question and on the statement of Kanakendra Narayan Banerjee in the report made by him to the Commissioner of Income-tax for the purpose of obtaining sanction to initiate proceedings under s. 34 and also on his statement in the affidavit on oath in reply to the writ petition. The report is in these words:—

"Profit of Rs. 5,48,002 on sale of shares and securities escaped assessment altogether.

At the time of the original assessment the then I.T.O. merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such the company had failed to disclose the true intention behind the sale of the shares and as such s. 34(1)(a) may be attracted."

The only non-disclosure mentioned in the report is that the company had failed to disclose "the true intention behind the sale of the shares". Mr. Choudhury contends that this is not an omission to disclose a material fact within the meaning of s. 34. The question whether sales of certain shares were by way of changing the investments or by way of trading in shares has to be decided on a consideration of different circumstances, including the frequency of the sales, the nature of the shares sold, the price received as compared with the cost price, and several other relevant facts. It is the duty of the assessee to disclose all the facts which have a bearing on the question; but whether the assessee had the intention to make a business profit as distinguished from the intention to change the form of the investments is really an inference to be drawn by the assessing authority from the material facts taken in conjunction with the surrounding circumstances. The law does not require the assessee to state the conclusion that could reasonably be drawn from the primary facts. The

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question of the assessee's intention is an inferential fact and so the assessee's omission to state his "true intentions behind the sale of shares" cannot by itself be considered to be a failure or omission to disclose any material fact within the meaning of s. 34. Indeed, an assessee whose contention is that the shares were sold to change the form of investment and not with the intention of making a business profit cannot be expected to say that his true intention was other than what he contended it to be. Dealing with this question the learned Chief Justice has said:—

"The expression that the Respondent had failed to disclose "the true intention behind the sale of shares" may lack directness, but that deficiency of language is not sufficient to enable the Respondent to contend, in view of the circumstances alleged, that no failure to disclose facts was being complained of. On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the Respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the Respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit, and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was taking notice of a new fact."

The learned Chief Justice seems to have proceeded on the basis that when from certain facts inferences are to be drawn there is a duty on the assessee to state what the correct inference should be and if he has made a wrong statement as regards the inferences to be drawn that also is an "omission or failure to disclose a material fact". For the reasons given earlier we do not think that this is the correct position in law.

It is clear therefore that if one looked at this report

only it would not be possible to say that the Income-tax Officer had any non-disclosure of material facts by the assessee in mind when he assumed jurisdiction. It has to be remembered however that in sending a report to the Commissioner the Income-tax Officer might not fully set out what he thought amounted to a non-disclosure, because it is conceivable that the report may not be drawn up carefully and may not contain a reference to all the non-disclosures that operated on his mind. We have however on the record an affidavit sworn by the same Income-tax Officer who started the s. 34 proceedings. It is reasonable to expect that in this affidavit which was his opportunity to tell the court what non-disclosure he took into consideration he would state as clearly as possible the material facts in respect of which there had not been in his view a full and true disclosure. Mr. Banerjee's statements in this matter are contained in paras. 5, 6 and 7 of his affidavit. They are in these words:—

"5. With reference to paragraphs 2 and 3 of the said petition, I crave reference to the assessment orders therein mentioned. The assessment order dated the 15th February 1945, was made by Sri Kali Das Banerjee now Income-tax Officer Companies District II and the other two assessment orders were made by L. D. Rozario who is now in the employment of M/s. Lovelock & Lewes. I find from the notes made by me in the order sheet of the assessment year 1944-45 and my order dated the 7th July 1944 that Mr. Smith of M/s. Lovelock & Lewes attended before me and stated that the profits of the company arising out of dealings in shares were not taxable as the company was not a dealer in shares and securities. Subsequently on the 18th August 1944, M/s. Lovelock & Lewes wrote a letter to me setting out the contentions of their clients and inter alia stated that throughout the whole history the company bought no shares whatsoever. Sri K. D. Banerjee was accordingly led to believe that the dealings in shares were casual transactions and were in the nature of mere change in investments and the profits resulting therefrom were

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not taxable. The assessment orders were made on the basis that the petitioner did not carry on any business dealings in shares. A copy of the said letter dated the 18th August, 1944, as also the relevant portion of the note sheet are included in the schedule hereto annexed and marked "A".

6. In the assessments for 1945-46 and 1946-47, which were completed in April 1950, the profits on sale of shares were included in the total assessable income of the company it having been then discovered that the petitioner was in fact carrying on business in shares contrary to its representation that it was not. The company filed appeals before the Appellate Assistant Commissioner, which were rejected in September 1950, and the assessments were confirmed. The company thereafter filed a second appeal before the Income-tax Tribunal which appeals are now pending.

7. With reference to para. 5 of the said petition, I deny that I pretended to act under s. 34 of the Income-tax Act as alleged. I have reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for its assessments, the income, profits and gains chargeable to income-tax had been under assessed. I recorded my reasons and made three reports (one for each year) in the prescribed form and submitted them before the Commissioner of Income-tax and the latter was satisfied that it was a fit case for issue of a notice under s. 34 of the Income-tax Act. Thereafter I issued the prescribed notices under s. 34 of the Income-tax Act. The said reports were made and notices issued in respect of all the three years mentioned in the petition and copies of the report and notice for one of such years are included in the schedule hereto annexed and marked "A". The report and notices for the two other years are exactly similar."

It appears from this that the statements made by or on behalf of the company which the assessing authority considered to amount to non-disclosure of material facts were these:—(i) the company was not a dealer in shares and securities and (ii) throught the

whole of its history the company bought no shares whatsoever. It has not been suggested before us that in fact at any time up to the conclusion of the assessment proceedings for the years 1942-43, 1943-44 and 1944-45 the company did in fact make a single purchase of shares. Clearly therefore the Income-tax Officer had no reasonable ground for thinking that anything as regards the purchase of shares had not been disclosed. The company does not dispute that the statement was made on its behalf that it was not a "dealer" in shares and securities. It appears clear that the Income-tax Officers who made the assessments for the years 1942-43, 1943-44 and 1944-45 proceeded on the basis that this was an investment company and considered the question whether in spite of its being an investment company certain sales of shares wherefrom the company made a profit were by way of trading in shares and not by way of changing the form of investment. Whether these sales by an investment company should in law be treated as trading transactions, and the profits made from the sales trading profits liable to tax, was the matter which it was the Income-tax Officer's task to decide. No duty lay on the company to admit that these transactions were by way of trade. The fact that on behalf of the company Mr. Smith of Lovelock & Lewes stated that the company was not a dealer in shares and securities does not therefore amount to an omission to disclose fully and truly any material fact.

To ascertain whether the Income-tax Officer could have had in mind any non-disclosure as a ground for thinking that by reason of such non-disclosure an under assessment had occurred—apart from what was mentioned in the affidavit—we enquired from respondent's counsel whether he could suggest any other non-disclosure that might have taken place. Mr. Sastri suggested two. One is that the sales had not been disclosed; the other that the memorandum and articles of association of the company had not been shown. This suggestion is against the record and we have no hesitation in repelling it. Not only is it not the ground set out by the Income-tax Officer at any

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stage—not even in the affidavit in court, but the matters mentioned by the officer that the assessee had claimed that the profits realised were of a casual nature obviously indicate that the assessee disclosed that a surplus resulted from the sales which were also disclosed.

The assessment orders it is true do not mention the details of the sales. They state however that the audited accounts of the company were furnished. The sales of shares were expressly mentioned in the report. In these circumstances it is reasonable to believe that as regards sale of shares full details were in fact disclosed.

Nor can we believe that the two Income-tax Officers L. D. Rozario and K. D. Banerjee concluded the proceedings without referring to the memorandum and articles of association of the company. These officers known well that the company was claiming to be an investment company only. They had to consider the question whether sales were of the nature of trade or of the nature of change of investment. It is unthinkable that they would not examine the memorandum of association. Besides, it is pertinent to note that in para. 4 of his affidavit Kanakendra Narayan Banerjee refers to the Memorandum and articles of Association and states that "by its memorandum of association the company has been authorised to carry on the various kinds of business which have been specified in sub-section (1) and (2) of cl. 3 of the said memorandum of association." He does not say that the articles or the memorandum of association were not shown during the assessment proceedings for the years 1942-43, 1943-44 and 1944-45. If he had any reason to believe that these were not shown he would have certainly mentioned that fact. For that would undoubtedly amount to non-disclosure of a material fact.

It must therefore be held that the Income-tax Officer who issued the notices had not before him any non-disclosure of a material fact and so he could have no material before him for believing that there had been any material non-disclosure by reason of which an under-assessment had taken place.

We are therefore bound to hold that the conditions precedent to the exercise of jurisdiction under s. 34 of the Income-tax Act did not exist and the Income-tax Officer had therefore no jurisdiction to issue the impugned notices under s. 34 in respect of the years 1942-43, 1943-44 and 1944-45 after the expiry of four years.

Mr. Sastri argued that the question whether the Income-tax Officer had reason to believe that under assessment had occurred " by reason of non-disclosure of material facts " should not be investigated by the courts in an application under Art. 226. Learned Counsel seems to suggest that as soon as the Income-tax Officer has reason to believe that there has been under assessment in any year he has jurisdiction to start proceedings under s. 34 by issuing a notice provided 8 years have not elapsed from the end of the year in question, but whether the notices should have been issued within a period of 4 years or not is only a question of limitation which could and should properly be raised in assessment proceedings. It is wholly incorrect however to suppose that this is a question of limitation only not touching the question of jurisdiction. The scheme of the law clearly is that where the Income-tax Officer has reason to believe that an under assessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for re-assessment within a period of 8 years; and where he has reason to believe that an under assessment has resulted from other causes he shall have jurisdiction to start proceedings for re-assessment within 4 years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been under assessment and (ii) his having reason to believe that such under-assessment has resulted from non-disclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the Court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under assessment has resulted from

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non-disclosure of material facts cannot therefore be accepted.

Mr. Sastri next pointed out that at the stage when the Income-tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorary will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz., whether the Income-tax Officer had reason to believe that under assessment had resulted from non-disclosure of material facts, before the Income-tax Officer himself in the assessment proceedings and, if unsuccessful there, before the appellate officer or the appellate tribunal or in the High Court under section 66(2) of the Indian Income-tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

In the present case the company contends that the conditions precedent for the assumption of jurisdiction under s. 34 were not satisfied and come to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Art. 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.

We have therefore come to the conclusion that the company was entitled to an order directing the Income-tax Officer not to take any action on the basis of the three impugned notices.

We are informed that assessment orders were in fact made on March 25, 1952, by the Income-tax Officer in the proceedings started on the basis of these impugned notices. This was done with the permission of the learned Judge before whom the petition under Art. 226 was pending, on the distinct understanding that these orders would be without prejudice to the contentions of the parties on the several questions raised in the petition and without prejudice to the orders that may ultimately be passed by the Court. The fact that the assessment orders have already been made does not therefore affect the company's right to obtain relief under Art. 226. In view however of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the Income-tax Officer not to take any action on the basis of the impugned notices a further order quashing the assessment made be also issued.

In the result, we allow the appeal, set aside the order made by the appellate Bench of the Calcutta High Court and restore the order made by the Trial Judge, Bose, J. The assessment orders made in the proceedings started under s. 34 of the Income Tax Act are also quashed. The appellant will get its costs here and below.

HIDAYATULLAH J.—I have had the advantage of reading the judgments prepared by my brethren, Das Gupta and Shah, JJ. The point involved in the case is a very short one, and the answer, as it appears to me, equally so. The appellant Company's income, profits and gains for the assessment years, 1942-43, 1943-44 and 1944-45, were duly assessed and taxed. The orders were respectively passed on January 26, 1944, February 12, 1944, and February 15, 1945.

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On March 28, 1951, three notices under s. 34 of the Indian Income-tax Act were issued calling upon the appellant Company to submit fresh returns in respect

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of the previous years relative to each of the assessment years above mentioned. Since this action was taken after more than four years, the matter fell to be governed by s. 34(1)(a) of the Indian Income-tax Act, as amended in 1948. The clause provided an extended period for sending a notice calling for a return for the purpose of assessing or reassessing income, profits and gains which had escaped assessment or had been under-assessed for any year within eight years, if the Income-tax Officer "has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year", the income, profits or gains chargeable to income-tax have escaped assessment etc.

In the present case, the appellant Company, which is an investment Company, had produced in the back years a list of the shares sold by it, the statements of profit and loss account, and, I am prepared to assume, also the Memorandum and Articles of Association. But the appellant Company gave out that the sales of shares were casual transactions of change of investments. This statement was accepted, though it was found that in later years the Company was dealing in stocks and shares as a business venture, and its statement which was accepted, was not perhaps true.

The Income-tax Officer reported the matter to the Commissioner, and stated as follows:

"Profits of Rs. 5,48,002/- on sale of shares and securities escaped assessment altogether.

At the time of the original assessment the then I.T.O. merely accepted the company's version that the sales of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such, the company has failed to disclose the true intention behind the sale of the shares and as such section 34(1)(a) may be attracted."

The appellant Company applied to the Calcutta

High Court for a writ under Art. 226 which was granted by a learned single Judge; but the order was reversed on appeal in the High Court. The appellant Company has now appealed on a certificate under Art. 133(1)(c) of the Constitution.

The contention of the appellant Company is that all the facts necessary to be disclosed were, in fact, disclosed, that it was not required further to concede that it was trading in shares, which was a matter of inference, from the proved facts, for the Income-tax Officer to draw, and that there was thus no question of any non-disclosure. This argument overlooks the addition of the Explanation to the section, which explains cl. (a) of the first sub-section. It reads:

"*Explanation.*—Production before the Income-tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

This means quite clearly that the mere production of evidence is not enough, and that there may be an omission or failure to make a *full and true disclosure*, if some material fact necessary for the assessment lies embedded in that evidence which the assessee can uncover but does not. If there is such a fact, it is the duty of the assessee to disclose it. The evidence which is produced by the assessee discloses only primary facts, but to interpret the evidence, certain other facts may be necessary. Thus, questions of status, agency, *benami* nature of transactions, the nature of trading and like matters may not appear from the evidence produced, unless disclosed. If it be merely a question of interpretation of evidence by an Income-tax Officer from whom nothing has been hidden and to whom everything has been fully disclosed, then the assessee cannot be subjected to s. 34, merely because the Income-tax Officer miscarried in his interpretation of evidence. But it is otherwise, if a contention which is *contrary to fact*, is raised and the Income-tax Officer is set to discover the hidden truth for himself. In the latter case, there is suppression of material fact, or, in

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other words, that lack of full and true disclosure which would entitle action under s. 34 of the Act.

The following example explains the meaning. Taking the present case, I set below two statements, one involving full disclosure and a contention, and the other, only a contention with a material fact suppressed :

"(1). We are a trading company and our business is according to our memorandum of association 'to acquire, hold, exchange, sell and deal in shares, stocks, etc.'. These sales, however, were not business sales but only change of investments into trustee securities as decided by the trustees.

(2) We changed industrial shares into trustee securities because 'in or about 1934, the trustees decided to convert the Indian Industrial Shares held by the appellant into trustee securities'."

If the first is decided in favour of the assessee, there is an inference or decision by the Income-tax Officer from a full and true disclosure. If the second is decided in favour of the assessee, the question would arise if there was full and true disclosure.

In the present case, the question whether the transactions were casual transactions of changing investments or regular trading in stocks and shares involves not merely an inference, because the inference depends upon the fact that the appellant Company was formed to trade in stocks and shares. It was open to the appellant Company to contend that in spite of its business, a particular transaction was this and not that. But, if the appellant Company was an investment Company dealing in stocks and shares, and knowing this for a fact, did not disclose the fact, the statement was neither full nor true, as it involved a suppression of a material fact necessary for the assessment. The Explanation is quite obviously meant to reach an identical situation. The appellant Company might have placed the evidence before the Income-tax Officer, but the Income-tax Officer had reason to believe that the disclosure was neither full nor true, because the fact that the Company was an investment Company trading in stocks and shares

was not disclosed. The Income-tax Officer in his report meant no more than this. He, therefore, felt that, *prima facie*, there was not only concealment of a fact but, on the contrary, maintaining of a falsehood, and this was sufficient to bring this matter within the extended period. Every contention contrary to the Income-tax Officer's opinion is not necessarily concealment of a material fact, but some contentions made with a mental reservation as to the true state of affairs may amount to such concealment, if they involve non-disclosure of facts related to other facts and known to the assessee.

The Company still persists that the sales of shares were casual transactions, and this contention will, no doubt, be decided hereafter. But the question will be decided after taking into consideration the nature of the business of the Company, and till that is done, the Income-tax Officer believes that the contention raised before and persisted in is not a mere contention but maintenance of a falsehood about the nature of the transactions and the business of the Company. The existence of such a belief is sufficiently established by the report of the Income-tax Officer and the satisfaction of the Commissioner, and this has not been gainsaid.

In my opinion, the Divisional Bench of the High Court rightly refused a writ in the circumstances, and I would dismiss this appeal with costs.

Shah J.

SHAH J.—I regret inability to agree with the judgment delivered by my learned brother Mr. Justice Das Gupta.

The facts which give rise to this appeal have been fully set out by my learned brother and it is not necessary to reiterate the same.

Sub-section (1) of s. 34 of the Indian Income Tax Act, 1922 (in so far it is material) stood at the relevant date when the proceedings were commenced, as follows:

S. 34:—(1) If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under s. 22

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for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in cl. (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under cl. (a) at any time within eight years and in cases falling under cl. (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of s. 22 and may proceed to assess or re-assess such income, profits or gains or re-compute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that—

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is

an assessment made or to be made on a person deemed to be the agent of a non-resident person under s. 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation:—Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

This section provides machinery for assessment or reassessment if it be found that income, profits or gains "have escaped assessment or have been under-assessed or assessed at too low a rate or have been made subject to excessive relief under the Act or excessive loss or depreciation allowance has been computed", which expression may for convenience of reference be compendiously referred to as are or have been under-assessed. Notice under s. 34(1)(a) may be issued if the Income Tax Officer has reason to believe that income in any year has been underassessed by reason of the failure on the part of the assessee to make a return of his income, or to disclose fully and truly all material facts necessary for assessment for the year in question. The authority of the Income Tax Officer is manifestly circumscribed by certain conditions, and may be exercised only if those conditions exist and not otherwise.

In the case in hand, we are concerned with the operation of cl. (1)(a) of s. 34. If that clause does not apply, notices of reassessment having been served more than four years after the end of the relevant year of assessment, must fail. On an analysis of the relevant provisions, the material conditions prescribed for the exercise of the power to commence proceedings for reassessment under s. 34(1)(a) are these:

(1) The Income Tax Officer has reason to believe,

(a) that income, profits or gains have been under-assessed,

(b) that this under-assessment is by reason of

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omission or failure to make a return under s. 22 or by reason of failure to disclose fully and truly all material facts necessary for assessment for any year;

(2) that a notice containing all or any of the requirements of s. 22(2) is served on the assessee within eight years from the end of the year of assessment;

(3) that the Income Tax Officer has recorded his reasons for issuing the notice and the Commissioner is satisfied on such reasons recorded that it is a fit case for issue of such notice.

The notices issued by the Income Tax Officer in the case before us undoubtedly fulfil conditions (2) and (3). Notices of reassessment were served before the expiry of eight years of the end of the relevant years of assessment. The Income Tax Officer also recorded his reasons in the reports submitted by him to the Commissioner and the Commissioner was satisfied that they were fit cases for the issue of such notices. The dispute in the appeal relates merely to the fulfilment of the two branches of the first condition and that immediately raises the question about the true import of the expression "has reason to believe" in s. 34(1)(a). The expression "reason to believe" postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income Tax Officer: the forum of decision as to the existence of reasons and the belief is not in the mind of the Income Tax Officer. If it be asserted that the Income Tax Officer had reason to believe that income had been underassessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the Income Tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief; in other words, the Income Tax Officer must on information at his disposal believe that

income has been underassessed by reason of failure fully and truly to disclose all material facts necessary for assessment. Such a belief, be it said, may not be based on mere suspicion: it must be founded upon information.

That the Income Tax Officer has reason to believe that there was underassessment in the material years was not challenged by the appellant and in our opinion rightly. There are on the record the reports of the Income Tax Officer in which the belief is expressly set out. It also appears from the assessment orders for the years 1945-46 and 1946-47 that tax has been assessed on the profits made by sale of shares by the company in those years.

Had the Income Tax Officer reason to believe that by reason of failure to disclose fully and truly all material facts necessary for assessment for the three years in question, there had resulted underassessment? The learned Trial judge, after setting out the evidence, held that the Income Tax Officer had materials before him showing that the company's trading from year to year disclosed that it had been systematically carrying on a trade in the sale of shares and securities. He observed:

"Whether the materials were sufficient or not or whether the belief or opinion is erroneous or not, cannot.....be enquired into by the court.....If the Income Tax Officer has made a wrong decision as to the existence of the conditions precedent, the remedy is by way of appeals as provided by the Income Tax Act and by stating a case under s. 66 of the Act."

In appeal, the High Court confirmed the order. The High Court observed that "the use of the expression "the true intention behind the sale of shares" used in the report made by the Income Tax Officer under s. 34 to the Commissioner may lack directness, but that deficiency of language was not sufficient to enable the company to contend in view of the circumstances alleged that there was no failure to disclose facts being complained of". The High Court also observed:

"On the facts as stated by the Income Tax Officer, it is clear that there had been a failure to

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disclose the fact that the respondent was a dealer in shares and what the Income Tax Officer meant by the language used by him was that the respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income Tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was taking notice of a new fact."

Prima facie, the finding recorded by the Court of First Instance and confirmed by the Court of Appeal is one on a question of fact and this court would not be justified in entering upon a reappraisal of the evidence. But it is contended on behalf of the company that the finding is based on no materials, and to that plea I may advert. By s. 22 of the Income Tax Act, a duty is imposed upon every tax payer whose total income exceeds the maximum which is not chargeable to income-tax to make a return in the prescribed form and verified in the prescribed manner, setting forth his total income during that year. If the tax payer making the return fails to disclose fully and truly all material facts necessary for the assessment of the year in question, the jurisdiction of the Income Tax Officer to reassess is invited. The company in its petition for the issue of a writ contended by paragraph 7 that the notices were *ultra vires* and illegal and that the Income Tax Officer was not invested with jurisdiction to proceed thereunder, inter alia, for the reason that the " pretended notice was issued without the existence of the necessary conditions precedent which confers jurisdiction under s. 34 aforementioned, whether before or after amendment in 1948."

The Income Tax Officer, by his affidavit, submitted :

Para 4:—" The statements made in paragraph 1 of the said petition are substantially correct. By its Memorandum of Association, the company has been authorised to carry on the various kinds of business which have been specified in sub-cls. (1) to (32) of cl. (3) of the said Memorandum of Association.

Para 5 :—" With reference to paragraphs 2 and 3 of the said petition, I crave reference to the assessment orders therein mentioned. The assessment order dated the 15th February, 1945, was made by Shri Kali Das Banerjee now Income Tax Officer Companies District II and the other two assessment orders were made by Mr. L. D. Razario who is now in the employment of M/s. Lovelock & Lewis. I find from the notes made by me in the order sheet of the assessment year 1944-45 and my order dated the 7th July, 1944, that Mr. Smith of Messrs. Lovelock & Lewis attended before me and stated that the profits of the company arising out of dealings in shares were not taxable as the company was not a dealer in shares and securities. Subsequently on the 18th August, 1944, Messrs. Lovelock & Lewis wrote a letter to me setting out the contentions of their clients and inter alia stated that throughout the whole of its history the company bought no shares whatsoever. Shri K. D. Banerjee was accordingly led to believe that the dealings in shares were casual transactions and were in the nature of mere change in investments and the profits resulting therefrom were not taxable. The assessment orders were made on the basis that the petitioner did not carry on any business dealing in shares. A copy of the said letter dated the 18th August, 1944, as also the relevant portion of the note sheet are included in the schedule hereto annexed and marked " A "."

Para 6 :— " In the assessments for 1945-46, and 1946-47 which were completed in April, 1950, the profits on sale of shares were included in the total assessable income of the company it having been then discovered that the petitioner was in fact carrying on business in shares contrary to its representation that it was not. The company filed appeals before the Appellate Assistant Commissioner which were rejected in September, 1950, and the assessments were confirmed. The company thereafter filed a second appeal before this Income-tax Tribunal which appeals are now pending."

Para 7 :— " With reference to paragraph 5 of the said petition, I deny that I pretended to act under

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s. 34 of the Income Tax Act as alleged. I have reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for its assessments, the income, profits and gains chargeable to income-tax had been under-assessed. I recorded my reasons and made 3 reports (one for each year) in the prescribed form and submitted them before the Commissioner of Income Tax and the latter was satisfied that it was a fit case for issue of a notice under s. 34 of the Income Tax Act. Thereafter I issued prescribed notices under s. 34 of the Income Tax Act. The said reports were made and notices issued in respect of all the three years mentioned in the petition and copies of the report and notice for one of such years are included in the schedule hereto annexed and marked "A". The report and notices for the two other years are exactly similar.

By these averments, the Income Tax Officer asserted (a) that he had reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for the assessment, income chargeable to income tax has been underassessed and that he had recorded his reasons in that behalf in the three reports submitted by him to the Commissioner; (b) that in the course of the assessment proceeding for the year 1944-45, it was represented on behalf of the company that the sales of shares in that year were casual transactions and were in the nature of "mere change in investments"; (c) that in the orders of assessment for the years 1945-46 and 1946-47 passed in April, 1950, profits earned by sale of shares held by the company were included in the total assessable income of the company, it having been discovered that the company was in fact carrying on the business of selling shares contrary to its earlier representations; and (d) that by its Memorandum and Articles of Association, the company was authorised to carry on the business of diverse kinds specified in sub-cls. (1) to (32) of cl. (3) thereof.

Whereas by a mere bald assertion made by the company in its petition it was averred that the conditions precedent to the exercise of jurisdiction to

reassess did not exist, the Income Tax Officer stated in his rejoinder that he had reasons to believe that income had been underassessed and he also set out the grounds on which that belief was founded. The existence of the reasons to believe that income was underassessed has, as already observed, not been challenged; nor is the court concerned with the question whether the materials may be regarded by a court before which a dispute is raised, sufficient to sustain the belief entertained by the Income Tax Officer. It is clear that the Income Tax Officer asserted on oath that when he issued the notice for reassessment, he had reasons to believe that income of the company had been underassessed and he set out the reasons in support of the belief.

Counsel for the company submitted that all the material facts necessary for the assessment were fully and truly disclosed in the course of the assessment for the years in question, and if the Income Tax Officer did not draw the correct inference, the jurisdiction to reassess could not be invoked. He urged that it was for the Income Tax Officer, on the preliminary facts disclosed to him, to raise his inference of fact and to base his conclusions on the preliminary as well as the inferential facts, and if, in arriving at his conclusion on the preliminary and the inferential facts, the Income Tax Officer committed an error, he could not seek to commence proceedings for reassessment on being apprised of the error. It was said that the Income Tax Officer knew that the company was an investment corporation, that the shares held by the company were sold from time to time, and that profits were earned by the sale of those shares, and that on these materials the Income Tax Officer might have held that the company was a dealer in shares, but if he did not draw that inference, the underassessment, if any, was not by reason of failure to disclose fully and truly all material facts. Counsel submitted that the condition of the exercise of jurisdiction under s. 34 is failure to disclose fully and truly all material facts necessary for assessment and not failure to

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instruct the Income Tax Officer about the legal inference to be drawn from the facts disclosed.

The duty imposed by the Act upon the tax payer is to make a full and true disclosure of all material facts necessary for the assessment; he is not required to inform the Income Tax Officer as to what legal inference should be drawn from the facts disclosed by him nor to advise him on questions of law. Whether on the facts found or disclosed, the company was a dealer in shares, may be regarded as a conclusion on a mixed question of law and fact and from the failure on the part of the company to disclose to the Income Tax Officer this legal inference, no fault may be found with the company. But on the evidence in the case, the plea raised by the company that all material facts were disclosed cannot be accepted. The Income Tax Officer has in para. 6 of his affidavit referred to the assessment of the years 1945-46 and 1946-47: he has also referred to the Memorandum and Articles of Association of the company therein. In the assessment order for the year 1945-46, the Income Tax Officer has set out cls. (1) and (2) of the Memorandum and Articles of Association of the company. They are:

(1) "To acquire, hold, exchange, sell and deal in shares, stocks, debenture-stock, bonds, obligations and securities issued or guaranteed by any company, Government or public body constituted or carrying on business in British India or elsewhere;"

(2) "Generally to carry on business as financiers and to undertake and carry out all such operations and transactions (except the issuing of policies of assurances on human life) as an individual capitalist may lawfully undertake or carry out;".

The Income Tax Officer in his order of assessment for that year observed that those clauses indicated the purposes for which the company was formed, and also that "whenever the shares were first acquired, these became the commodities which could either be held or sold according to the best interests of the company, that whenever such a commodity is sold, it comes within the activities or properly speaking the profit making scheme as enumerated in the object

clauses stated above. These shares sold in course of ten or twelve years whenever opportunities occurred for earning profits on making the sales. ..... This company was not an ordinary trader investing its surplus funds in shares and securities quite unconnected with its regular course of business so that the profit or loss also on sale of such shares or securities may be treated as not arising out of its regular business carried on. On the other hand, it is an Investment company of which the very first object clause is to hold and deal in shares. Profit on sale of such shares therefore arises out of its regular course of business and it must be taxable."

From that order of assessment, it is manifest that the Assessing Officer held that the company was formed with the object of acquiring, holding, exchanging, selling and dealing in shares, that the shares acquired became the trading assets of the company to be disposed of when opportunities occurred for earning profits; and that the activities of selling shares in which surplus assets of the company were invested were a part of the regular business carried on by the company.

There is no evidence that the Memorandum and Articles of Association referred to in para 4 of the affidavit were produced in the course of the assessment of the relevant years; nor is there evidence to show that it was disclosed that the acquisition of shares was incidental to the business activities and out of the surplus assets of the company and that the same were sold at profit as opportunities arose. There is also no ground for assuming that these facts must have been known to the Income Tax Officer. Counsel for the company suggested somewhat casually that under the Income Tax Rules and the practice prevailing with the Income Tax Officer, the Memorandum and Articles of Association of every company which was being assessed to tax are to be filed with the Income Tax Officer. But our attention has not been invited to any rule or any material to support the existence of a practice requiring a private limited company to file with the Income Tax Officer the Memorandum and Articles of Association.

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The plea raised by counsel for the company must be examined in the light of the Explanation to sub-s. (1) of s. 34. The Explanation provides that "Production before the Income Tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure within the meaning of the section." If production of documents or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure, it would be difficult to hold that a presumption about the production of a document at sometime in the past and its possible existence in the files of the Income Tax Officer relating to earlier years may be regarded as sufficient disclosure. Disclosure of some facts, but not all, though the facts not disclosed may have come to the knowledge of the Income Tax Officer, if he had carefully prosecuted an enquiry on the facts and materials disclosed, will not amount to a full and true disclosure of all material facts necessary for the purpose of assessment. A tax payer cannot resist reassessment on the plea that non-disclosure of the true state of affairs was due to the negligence or inadvertence on the part of the Income Tax Officer, and but for such negligence or inadvertence, a full and true disclosure of all material facts necessary for the assessment would have been resulted.

There is no evidence on the record that the Memorandum and Articles of Association were ever produced before the Income Tax Officer in the course of proceedings for assessment. Again, the report of the Income Tax Officer discloses that his predecessor in office was told that the sales of shares effected by the company were casual transactions and were in the nature of a mere "change of investments". This was not strictly accurate. The record therefore clearly shows that the company had failed to disclose fully and truly all material facts in relation to assessment in two respects, (1) that it failed to produce the Memorandum and Articles of Association showing the purposes for which the company was incorporated, and

(2) that the shares were acquired as part of the business of financiers. The company also made a statement which is partially untrue when it stated that sales were mere casual transactions. There were materials before the Income Tax Officer on which he had reason to believe that by reason of the failure of the company to fully and truly disclose material facts, its income was underassessed. Whether on these facts, a conclusion that in fact the company was carrying on the business of trading in shares could be founded, is at this stage entirely immaterial. If there was reason to believe, the alleged inadequacy of the materials on which the belief could be founded is of no moment. The Income Tax Officer has commenced proceedings for reassessment by issuing notices against the company and he has placed all the materials before the court on which it could be said that he had reason to believe that income of the company had been underassessed by reason of failure on the part of the company to disclose fully and truly all material facts relating to the assessment and if, on those materials, the Income Tax Officer could hold the belief which he says he did, the court in seeking to hold an enquiry into the question whether the Income Tax Officer, notwithstanding his affidavit and materials placed in support thereof, had reason to hold the requisite belief, would be arrogating to itself jurisdiction which it does not possess. If the conditions precedent do not exist, the jurisdiction of the High Court to issue high prerogative writs under Art. 226 of the Constitution to prohibit action under the notice may be exercised. But if the existence of the conditions is asserted by the authority entrusted with the power and the materials on the record *prima facie* support the existence of such conditions, an enquiry whether the authority could not have reasonably held the belief which he says he had reason to hold and he did hold, is, in my judgment, barred.

In that view, the proper order to pass in this appeal would be one of dismissal with costs.

BY COURT.—In view of the majority opinion, the appeal is allowed with costs here and below.

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November 7.

INDIAN COPPER CORPORATION LTD.

v.

THE STATE OF BIHAR AND OTHERS.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax—"Explanation Sales"—Sale in one State but delivery outside—Consumption not in State of first destination—Whether "outside" sale—Constitution of India, Art. 286(1)(a)—Bihar Sales Tax Act, 1947 (Bihar XIX of 1947), ss. 2(g) and 33.

The appellant effected sales during the period 26-1-1950 to 31-3-1950, whereunder the property in the goods passed in the State of Bihar but delivery was effected outside Bihar for consumption outside Bihar. In some of these sales the goods were delivered in the State of first destination for consumption therein whilst in other cases the goods were not for consumption in the State of first delivery of destination. The appellant contended that both these categories of sale were exempt from tax under Art. 286(1)(a) as they were outside sales.

Held (*per* Hidayatullah, Das Gupta and Rajagopala Ayyangar, JJ.) that the sales where delivery in the State of first destination was for consumption therein, were outside the State of Bihar within the Explanation to Art. 286(1)(a) and Bihar could not tax them, but the sales where delivery in the State of first destination was not for consumption therein were not "Explanation Sales" and were not "outside" sales and Bihar could tax them. Where the property in the goods passed within the State as a direct result of the sale the sale was not an "outside" sale for the purpose of Art. 286(1)(a) unless it fell within the Explanation. In the first category of sales the appellant was entitled to the exemption and it was not necessary for it to prove that the goods delivered for consumption in the State of first destination were actually consumed therein.

The State of Bombay v. *United Motors (India) Ltd.*, [1953] S.C.R. 1069 and *Bengal Immunity Company Ltd.* v. *The State of Bihar*, [1955] 2 S.C.R. 603, referred to.

Burmah Shell Oil Storage & Distributing Co. of India Ltd. v. *The Commercial Tax Officer*, C. A. No. 751 of 57 and C. A. No. 10 of 1958 (Unreported), relied on.

Per S. K. Das and Shah, JJ.—Section 33 introduced in the Bihar Sales Tax Act by the Adaptation of Laws Order, 1951, engrafted the same restrictions on the taxing power of the State on the pre-Constitution statutes as were imposed by Art. 286 upon post-Constitution statutes. Section 33(1)(a)(i) of the Act took away only the power to tax "Explanation Sales" but not the power to tax "non-Explanation Sales". A sale in which goods had been delivered outside Bihar, but not as a direct result of

the sale or not for the purpose of consumption in the State of first delivery was not covered by the Explanation, and the right to tax the sale, if it arose otherwise under the Act, was not impaired by s. 33(1)(a)(i).

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 210 of 1959.

Appeal by special leave from the judgment and order dated January 16, 1958, of the Patna High Court in Mis. Judicial case No. 156 of 1957.

B. C. Ghose and *P. K. Chatterjee*, for the Appellant.

S. P. Varma, for Respondents Nos. 1 to 5.

R. C. Dutta, for Respondents Nos. 6 to 20.

1960. November 7. The Judgment of Hidayatullah, Das Gupta and Ayyangar, JJ., was delivered by Ayyangar, J., and that of S. K. Das and Shah, JJ., was delivered by Shah, J.

AYYANGAR J.—The sole question which arises in this appeal, which comes by way of special leave is as to whether sales under which goods were delivered outside the State of Bihar for the purpose of consumption but not within the State of first delivery or first destination, are exempt from the levy of sales-tax by the Bihar State by virtue of Art. 286(1)(a) of the Constitution as it stood before the recent amendment.

Ayyangar J.

The India Copper Corporation Ltd. (referred to hereafter as the assessee-company) carries on business in copper and various other materials and mineral products and the office of its General Manager is in the district of Singhbhum in Bihar. The period covered by the assessment now in dispute is January 26, 1950 to March 31, 1950. The normal practice of the assessee-company was to deposit sums of money from time to time provisionally towards payment of sales-tax in advance and have the amount finally adjusted after the completion of the assessment of each year. The assessee-company followed this practice in respect of the amount of sales-tax due by it for the year 1949-50. For the financial year April 1, 1949 to March 31, 1950, the Superintendent of Sales-tax, Singhbhum,

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computed the tax liability of the company in the sum of Rs. 3,60,703-4-0 by an order of assessment dated November 13, 1950, and the company made payment of the amount due by it beyond the sums already paid. It would be noticed that this financial year comprised two periods—(1) before the Constitution, viz., April 1, 1949 to January 25, 1950, and (2) the post-Constitution period from January 26, 1950 to March 31, 1950. There is now no controversy as regards the sales-tax payable in respect of sales effected during the pre-Constitution period. The assessee-company however raised a dispute that in respect of the post-Constitution period, it was not liable to pay any sales-tax in respect of sales to buyers, under which though the property in the goods passed within the State, delivery of the goods was effected outside the State of Bihar for consumption outside that State on the ground that such sales were exempted from tax by Art. 286(1)(a) of the Constitution as it originally stood. It addressed a formal letter to the Commissioner of Commercial Taxes, Bihar, on December 30, 1952, making this demand enclosing a statement showing full particulars of the goods sold, the bill numbers, the date and the amount etc., to enable the refund claimed to be calculated. The assessee-company followed it up by a formal petition for review of the assessment order by filing a revised return under s. 12(2) of the Bihar Sales-tax Act together with an application for refund. The departmental authorities rejected these applications by order dated July 20, 1953. Further proceedings before the department by way of revision etc. failed to secure to the assessee-company the relief which it claimed and thereafter it filed an application under Arts. 226 and 227 of the Constitution before the High Court of Patna praying for the issue of a writ to quash the order of assessment dated November 30, 1950, and the orders rejecting the prayers for review, reassessment and refund and for a direction to the departmental authorities to refund the sum realised by them in so far as the tax related to sales as a result of which goods were delivered outside the State of Bihar for consumption outside the State of Bihar.

The learned Judges of the High Court held that the order of the Superintendent of Sales-tax, Singhbhum, dated November 13, 1950, should be set aside and that the matter should go back to the Superintendent to make a reassessment according to law for the post-Constitution period. A further direction was added requiring the respondent to refund to the assessee so much of the tax as had been paid in excess of the amount of reassessment to be made by the Superintendent in accordance with the law as laid down by the Court. In formulating the law applicable, the learned Judges drew a distinction between sales as a direct result of which goods were delivered in a State outside the State of Bihar and consumed in that State and those cases in which the goods thus delivered, were not consumed in the State of first destination but were re-exported from the State of first destination to other States. They held that the first category of sales were covered by the Explanation to Art. 286 (1)(a) of the Constitution and were " inside " the State of first delivery and consequently " outside " the State of Bihar within the meaning of the Article and therefore exempt from tax by the Bihar State. In regard, however, to the second category of sales, it was held that they were not within the Explanation and were therefore outside the constitutional exemption under Art. 286(1)(a).

The assessee-company not being satisfied, filed an application to the High Court for a Certificate of fitness under Arts. 132 and 133 of the Constitution, but this having been rejected, they applied to and obtained special leave from this Court under Art. 136 of the Constitution and that is how the appeal is now before us.

Three points were urged before us by Mr. B. C. Ghose, learned Counsel for the appellants: (1) that on a proper construction of Art. 286(1)(a) and the Explanation thereto (as it stood before the Article was amended by the Constitution Sixth Amendment Act, 1956) every sale as a direct result of which goods were delivered for consumption outside the State, was not within the taxing power of the State in which the

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goods were at the time of the sale, and in which property passed as a result thereof, and that it was immaterial whether the delivery was for the purpose of consumption in the State of first destination or whether the delivery in such State was not for the purpose of consumption therein but, for re-export to other States, (2) that even if Art. 286(1)(a) exempted only sales in which as a direct result of the sale the goods were delivered for the purpose of consumption in the State of first destination, on the pleadings and the evidence before the Court the assessee-company must be taken to have established that all the sales effected by it and in regard to which exemption from payment of tax was claimed, conformed to this requirement, (3) a narrower submission, that even it be that to fall within the Explanation the delivery has to be *for the purpose of consumption* in the State of first destination, the learned Judges of the High Court erred in requiring the assessee-company to prove not merely that the goods were delivered for the purpose of consumption but further that the goods so delivered were actually consumed within that State.

We shall now deal with these points in that order. Article 286(1)(a) together with the Explanation on whose construction the first point depends ran in these terms:

"*Article 286(1).* No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b).....

Explanation.—For the purposes of sub-clause (a) a sale or puchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

The scope and the purpose of this Explanation was

discussed and explained by this Court in *The State of Bombay* v. *United Motors (India) Ltd.* (1) and it is the passage in this judgment extracted below on which reliance was placed by the learned Counsel in support of his submission :

".....The authors of the Constitution had to devise a formula of restrictions to be imposed on the State-power of taxing sales or purchases involving inter-State elements which would avoid the doubts and difficulties arising out of the imposition of sales-tax on the same transaction by several Provincial Legislatures in the country before the commencement of the Constitution. This they did by enacting clause (1) (a) with the Explanation and clause (2) of Article 286. Clause (1)(a) prohibits the taxation of all sales or purchases which take place outside the State but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places. .....To solve the difficulty an easily applicable test for determining what is an outside sale had to be formulated, and that is what, in our opinion, the Explanation was intended to do. It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State .....An "outside" sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test : Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein ? Then, such sale or purchase shall be deemed to have taken place

(1) [1953] S.C.R. 1069, 1081.

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in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

It might be mentioned that this portion of the judgment is unaffected by the dissent expressed in the later decision in *The Bengal Immunity Company Ltd.* v. *The State of Bihar* (1). The argument based upon this passage was broadly on these lines: Article 286 (1)(a) imposes a ban on the legislative power to levy a tax on sales which are "outside" the taxing State. What sales are "outside" is not easy to decide because that depends upon "*the situs*" *of a sale*, which cannot, in most cases, be located in any one place with certainty—being dependent on a variety of factors which might or might not converge. The Constitution makers did not directly define what was meant by a sale that was "outside the State" but achieved the same purpose by explaining an "inside" sale with the result that what was *not* an "inside" sale should be held to be an "outside" sale. It must however be pointed out that it was not disputed that the terms of the "Explanation" would not be satisfied unless the delivery was for the purpose of consumption *therein*, i.e. in the State of first destination. If the terms of the Explanation were satisfied, the State of "delivery-cum-consumption", (to coin a convenient expression to designate the State in which goods are delivered as a direct result of the sale for the purpose of consumption therein), used in the Explanation, would have power to tax the sale as being one fictionally "inside" it. In such an event all the other States in India, barring that State would be prevented from taxing that sale because the sale would be "outside" those States. This however, it was urged, would not exhaust the operation of the Explanation, but further that the Explanation was exhaustive of what the Constitution makers conceived to be a sale which alone may be the subject of tax by a State. The deduction learned Counsel made from these premises was twofold (1) that

(1) [1955] 2 S.C.R. 603.

in cases where goods were as a direct result of the sale delivered outside the State of Bihar for the purpose of consumption in the State of first destination, the conditions of the Explanation were satisfied and the sales being "outside" the State of Bihar could not be taxed by that State. So far there is no dispute and indeed the learned Judges of the High Court have, subject to a matter of detail to which reference will be made later, accepted the contention of the assessee. (2) a further consequence, that in cases where goods were delivered as a result of the sale outside the State of Bihar, but not for the purpose of consumption in such State of first destination, the terms of the Explanation were no doubt not satisfied and consequently the sale was not inside such State of delivery and indeed not "inside" any State in India within the Explanation, but that such sales also must be held to be "outside" every State in India within Art. 286 (1)(a).

The learned Judges of the High Court repelled this contention and, in our opinion, correctly. The passage in the judgment of the United Motors case extracted earlier dealt with Explanation sales and with none else. When the terms of the Explanation were satisfied such sales were by a fiction deemed to be "inside" the State of delivery-cum-consumption and therefore "outside" all other States. In such cases therefore, only the State "inside" which the sale is *deemed* to take place by virtue of the Explanation, is exempt from the ban imposed by Art. 286(1)(a). All other States would be subject to that ban in respect of such sales.

The learned Chief Justice however did not, in the passage extracted, deal with the case of sales which did not satisfy the terms of the Explanation. The situs of what might be termed 'non-Explanation' sales has therefore to be determined independently of the terms of the Explanation. Such sales would be exempt from tax only if the sale took place "outside" the State but not otherwise.

The next question is, does a sale take place "outside" the State, where as a result of the contract of

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sale, the property in the goods passes to the purchaser within the State; in other words, is a sale completed by the passing of property within the State not "inside" a State, for the mere reason that as a direct result of the sale the goods are delivered outside the State. The answer depends on the meaning to be attributed to the words "a sale or purchase which has taken place" outside the State occurring in the body of Art. 286 (1). The expression "outside the State" is capable of being understood in more senses than one. It could be understood as comprehending cases where no element or ingredient which constitutes a sale takes place within the State; in other words as applying solely to those cases where there exists no territorial nexus between the State imposing the tax and the sale. Obviously, this could not have been intended to be incorporated in Art. 286(1) because the tax in such cases would be beyond the legislative power of the State under Entry 54 of the State List read with Art. 246 of the Constitution. The expression "outside" has therefore to be understood not as a sale so "outside" as not to have any territorial connection between the State in question and the sale, but in a somewhat narrower sense. The real difficulty arises in ascertaining the precise content of the narrower sense in which the word is used as meaning a sale in substance "outside" the State, though there might be some elements of the sale which if the exemption under Art. 286(1)(a) were not enacted, would enable a State to levy a tax on the sale on the ground that it was within the legislative power of the State under Art. 246 read with Entry 54.

As already pointed out, the situs of a sale is not easy to determine and several factors which constitute a completed transaction of sale including the delivery of the goods, lay claim to be considered as in themselves constituting sufficient nexi to justify their being treated as determining the locus of a sale. Thus, merely by way of illustration, the place where the goods are at the time of the contract of sale, the place where the contract of sale is concluded, the place where the property in the goods passes and that

in which the delivery takes place compete for recognition as constituting the locus of a sale. Before the Constitution, these and other similar factors were treated as affording sufficient territorial connection to endow the State in which any of the events occurred with legislative competence to tax the sale. This led to a multiplicity of the taxation of the same transaction of sale by a plurality of States, with the result that the consumer was hard hit and trade itself, and national economy suffered in the process. It has been pointed out that Art. 286(1)(a) was designed to counteract that state of affairs.

If a single State was designed to have the power to tax any particular transaction of sale, the question that next falls to be considered is the determination of that State in regard to which it could be predicated that the sale in question was not "outside" that State or in other words, the determination of the particular State in regard to which it could be said that the sale was "inside" that State. The key to the problem is afforded by two indications in the Article itself: (1) the opening words of Article 286(1) which speak of a sale or purchase *taking place* and (2) the non-obstante clause in the Explanation which refers to the general law relating to "sale of goods under which *property in the goods has, by reason of such sale or purchase, passed* in another State." These two together indicate that it is the passing of property within the State that is intended to be fastened on, for the purpose of determining, whether the sale in question is "inside" or "outside" the State, and therefore, subject to the operation of the "Explanation" that State in which property passes would be the *only* State which would have the power to levy a tax on the sale. As was explained in the recent decision of this Court in *Burmah Shell Oil Storage & Distributing Co., of India, Ltd.* v. *The Commercial Tax Officer* (1):

"By sale here (Art. 286(1)(a)) is meant a completed transaction by which property in the goods passes. Before the property in the goods passes, 'the contract

(1) C.A. 751 of 1957 & C.A. 10 of 1958 (Unreported).

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of sale is only executory, and the buyer has only a chose in action.'.....The Constitution thinks in terms of a completed sale by the passing of property and not in terms of an executory contract for the sale of goods."

Notwithstanding that is not an "outside" sale, the power of the State to tax might be negatived by the operation of the Explanation which by its non-obstante clause—shifts the situs of the sale and renders the sale transaction one within the delivery-cum-consumption State, i.e. as the State in which the sale transaction must be *deemed* to take place. Where the terms of the Explanation are satisfied, the sale transaction will, by a legal fiction created by it, be deemed to take place "inside" the State of delivery and therefore "outside" the State in which the property passes. The conclusion reached therefore is that where the property in the goods passes within a State as a direct result of the sale, the sale transaction is not outside the State for the purpose of Art. 286(1)(a), unless the Explanation operates. We need also add that the power of the State to impose the tax might still not be available unless the transaction in question is unaffected by the other bans imposed under sub-cl. (1)(b), (2) and (3) of Art. 286. The submission therefore of learned Counsel for the appellants, that in respect of non-Explanation sales the State of Bihar has no power to levy a tax by reason of such sales being "outside" the State within Art. 286(1)(a) must be rejected.

The second contention urged by the learned Counsel for the appellant was that even assuming he was wrong on the first point, all the sales by the assessee-company fell within the terms of the Explanation to Art. 286(1)(a) being sales as a direct result of which the goods were delivered for consumption in the State of first destination, and that the learned Judges of the High Court were in error in considering, that some of the sales did not conform to this requirement. In support of this submission learned counsel drew our attention to two matters. He first referred us to the application dated December 30, 1952 made on behalf

of the assessee-company to the Commissioner of Commercial Taxes, Bihar, Patna in which the claim for refund of the tax paid was rested on the following ground:

After setting out that the tax on sales effected between the period January 26, 1950 to March 31, 1950 was not assessable by virtue of Art. 286 of the Constitution, the application stated: "Total sales of raw materials of copper and brass sheet and circles sold by us and despatched *under railway receipts for buyers' consumption* are as follows". Then followed the sales effected and the tax paid in respect of the sales. The claim in this form was annexed to and made part of the petition to the High Court under Art. 226 and 227 of the Constitution and in paragraph 9 of the petition, this letter was referred to and a copy thereof was incorporated and marked as 'A'. In this paragraph which was the other matter relied on the claim for refund was said to be "on sales made to buyers outside Bihar State for consumption". Learned Counsel strongly pressed upon us that paragraph 9 and the annexure had clearly asserted that the sales which were the subject of the claim for refund involved a delivery of the goods outside the State of Bihar for consumption in the State of first destination and the State of Bihar not having filed any counter-affidavit challenging the correctness of these allegations, the High Court should have held that the terms of the Explanation were satisfied and should have ordered the refund claimed. We however consider that this submission is without force. Neither in the claim put forward in Exh. 'A' nor in paragraph 9 of the petition was any distinction drawn between sales under which deliveries were effected outside the State of Bihar for the purpose of consumption in the State of first destination and those in which the deliveries outside the State were effected for the purpose of consumption not in the State of first destination but in other States. In fact, this was made clear in the later paragraphs of the petition to the High Court from which it is apparent that the assessee-company made a claim for tax exemption in

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respect of sales in which the delivery took place outside the State of Bihar, whether the delivery was for the purpose of consumption in the State of first destination or otherwise. In paragraph 17(i) of the petition to the High Court the assessee stated: "(the petitioner was not liable to pay tax on goods delivered outside the State of Bihar which was also for consumption outside the State of Bihar", and again in clause (iii) of the same paragraph this was repeated: "the goods being outside the State of Bihar, delivered outside the State of Bihar and consumed outside the State of Bihar were not liable to sales-tax by the State of Bihar" and similarly in cl. (v) of the same paragraph a reference was made to "goods delivered outside the State of Bihar for consumption outside the State of Bihar". The same idea is emphasized in paragraph 19 also which contained the prayer of the petition. On these averments it is clear that the claim made by the assessee was that to invoke the exemption contained in Art. 286(1)(a) it was sufficient that the goods were delivered outside the State of Bihar and that it was immaterial whether the delivery was for the purpose of consumption in the State of first destination or otherwise. This involved the same argument which was raised by the learned Counsel that we have dealt with earlier. The learned Judges of the High Court were therefore right in drawing a distinction between the two types of sales which we have already indicated.

The last point that was urged by the learned Counsel was that the learned Judges of the High Court erred in requiring the assessee to prove that the goods delivered outside the State of Bihar were *actually consumed* in the State of first distination before the exemption from tax could be availed of. In their judgment now under appeal the learned Judges have stated:

"The petitioner would not be entitled to exemption if the goods were not consumed in the State of first distination but were re-exported from the State of first destination to other States".

Learned Counsel for the appellant complained that

under the Explanation to Art. 286(1)(a) there need be no proof of actual consumption of the goods delivered in the State of first destination but that the Explanation was satisfied if the purpose of the delivery under the sale was for consumption in that State. If after a sale that satisfied that requirement, viz., *for the purpose of consumption* in the State of first destination, the buyer under such a sale for his own purposes re-exported the goods that was not a matter with which the seller was concerned and would not affect the character of the sale as one falling within the Explanation to Art. 286(1)(a). Learned Counsel therefore urged that the learned Judges of the High Court went wrong in requiring proof on the part of the assessee that the goods were actually consumed within the State of first delivery outside Bihar and that this was an unwarranted addition to the requirements of the Explanation. We consider this submission well-founded and indeed the learned Counsel for the respondent did not dispute that the actual order of the High Court went beyond the terms of the Explanation to Art. 286(1)(a). The order of the High Court will, therefore, be modified by making it clear that if the goods were as a direct result of the sale delivered outside the State of Bihar *for the purpose* of consumption in the State of first delivery the assessee would be entitled to exemption of the sales-tax imposed and that it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

Subject to this modification, the appeal fails, but in the circumstances of the case there will be no order as to costs.

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SHAH J.—We agree with the conclusion of Mr. Justice Rajagopala Ayyangar, J., but because our approach to the question is somewhat different, we propose to record our reasons separately.

The Bihar Sales Tax Act, 1947, was enacted in exercise of legislative authority conferred upon the Provincial Legislatures by entry 42 in List II read

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with s. 100(3) of the Government of India Act, 1935. By s. 2(g) of the Act, "sale" was defined (in so far as it is material) as meaning any "transfer of property in goods for cash or deferred payment or other valuable consideration ... ... provided ... ... provided further that notwithstanding anything to the contrary in the Indian Sales of Goods Act, 1930, the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in s. 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof,

shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar."

Under entry 42 of List II of the Government of India Act, 1935, the Provincial Legislatures could tax sales by selecting some fact or circumstance which provided a territorial nexus with the taxing power of the State even if the property in the goods sold passed outside the Province or the delivery under the contract of sale took place outside the Province. Legislation taxing sales depending solely upon the existence of a nexus, such as production or manufacture of the goods, or presence of the goods in the Province at the date of the contract of sale, between the sale and the Legislating Province could competently be enacted under the Government of India Act, 1935—see the *Tata Iron and Steel Co., Ltd.* v. *The State of Bihar* (1) and *Poppatlal Shah* v. *The State of Madras* (2).

By Art. 286 of the Constitution, certain fetters were placed upon the legislative powers of the States as follows:

Art. 286:—"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(1) [1958] S.C.R. 1355. (2) [1953] S.C.R. 677.

Explanation : For the purposes of sub-cl. (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

With a view to impose restrictions on the taxing power of the States under the pre-Constitution statutes, amendments were made in these statutes by the Adaptation of Laws Order. By the Adaptation of Laws Order, 1951, in the Bihar Sales Tax Act was incorporated with retrospective operation from January 26, 1950, s. 33, which provided :

"(1) Notwithstanding anything contained in this Act,—

(a) a tax on the sale or purchase of goods shall not be imposed under this Act—

(i) where such sale or purchase takes place outside the State of Bihar ; or

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(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India;

(b) a tax on the sale or puchase of any goods shall not, after the 31st day of March, 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide;

(2) The Explanation to cl. (1) of Art. 286 of the Constitution shall apply for the interpretation of sub-cl. (1) of cl. (a) of sub-s. (1)."

By this amendment, on the taxing power of the Bihar State the same restrictions were engrafted on the pre-Constitution statute as were imposed by Art. 286 of the Constitution upon post-Constitution statutes.

This court has held in the *Bengal Immunity Co., Ltd.* v. *The State of Bihar* (1) that the operative provisions of the several parts of Art. 286 namely cl. (1) (a), (1)(b) and (2) and cl. (3) were intended to deal with different topics and one could not be projected or read into another. Therefore, by the incorporation of s. 33 in the Bihar Sales Tax Act read with Art. 286, notwithstanding the amplitude of the power otherwise granted by the charging section read with the definition of "sale", a cumulative fetter of triple dimension was imposed upon the taxing power of the State. The Legislature of the Bihar State could not since January 26, 1950, levy a tax on sale of goods taking place outside the State or in the course of import of the goods into, or export of the goods out of the territory of India, or on sale of any goods where such sale took place in the course of inter-State trade or commerce. By the Explanation to Art. 286(1)(a) which is incorporated by sub-s. (2) s. 33 of the Bihar Sales Tax Act, a sale is deemed to take place in the State in which the goods are actually delivered as a direct result of such sale for the purpose of consumption in that State even though under the law relating to sale of goods the property in the goods has by reason of such sale passed in another State. In *the State of Bombay* v. *The United Motors (India) Ltd.* (2), it was held that

(1) [1955] 2 S.C.R. 603. (2) [1953] S.C.R. 1069.

since the enactment of Art. 286(1)(a), a sale described in the Explanation which may for convenience be called an "Explanation sale" is taxable by that State alone in which the goods sold are actually delivered as a direct result of sale for the purpose of consumption in that State. The right to tax arises because the sale is deemed to take place in that State and outside all other States and the latter States are prohibited from taxing the sale; the former alone is left free to do so.

The Bihar Sales Tax Act enacted in exercise of the power conferred by entry 42 of List II of the Government of India Act, 1935, upon the Provincial Legislatures is saved by Art. 372 of the Constitution as existing law, but by the combined operation of subss. (1) and (2) of s. 33, the Bihar State is incompetent to tax sales of goods in the course of imports into and exports out of the territory of India, and after March 31, 1951, sales of goods in the course of inter-State trade or commerce. In view of the exposition of the content of the Explanation to Art. 286(1)(a) by this court in the *United Motors case* (1), the Bihar State is also incompetent to tax "Explanation sales" where the goods are delivered in another State as a direct result of the sale for consumption in that State. By this last ban, to the extent provided by sub-s. (1)(a)(i) and sub-s. (2) of s. 33, the State of Bihar is deprived of its power to tax sales; but the ban does not wholly extinguish the power of the State to tax sales relying upon a real territorial nexus between the sale and the State. In other words, by enacting that a tax shall not be imposed under the Act when the sale takes place outside the State of Bihar in s. 33(1)(a)(i), only the power to tax "Explanation sales" which do not take place within the State of Bihar in taken away, but not the power to tax "non-Explanation sales" in which though under the general law of sale of goods the property passes outside the State, there exists between the taxing power of the State and the sale a nexus as contemplated by the definition of sale in s. 2(g). If the sale is one in which the goods have been delivered outside the State of

(1) [1953] S.C.R. 1069.

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Bihar, but not as a direct result of the sale or not for the purpose of consumption in the State of first delivery, the sale will not be covered by the Explanation, and the right to tax the sale, if arising otherwise under the Act relying upon the territorial nexus, will not be impaired by the prohibition imposed by cl. (1)(a)(i) of s. 33. The right of the State of Bihar to tax a sale relying upon a real territorial nexus not being impaired by s. 33 of the Act, all sales as defined by s. 2(g) of the Bihar Sales Tax Act are liable to be taxed, except those falling within s. 33(1)(a)(ii), s. 33(2) and "Explanation sales" outside the State of Bihar.

The appellant company carries on the business of manufacturing copper and other mineral products in the State of Bihar. It has its registered office and its place of business in the District of Singhbhum in the State of Bihar and is registered as a "dealer" under the Bihar Sales Tax Act, 1947. The appellant company sent out its products to various places in India in the year of assessment ending on March 31, 1950 and has paid the tax assessed by the Sales Tax Officer. The appellant is now seeking to obtain a refund of the tax paid for the period between January 26 and March 31, 1950, on the plea that the tax was paid under a misapprehension of the law. The High Court in an application under Art. 226 of the Constitution directed the Sales Tax authorities to refund so much of the tax as was not proved to have been paid in respect of sales of goods delivered and consumed in the State of first destination. On the goods delivered and consumed in the State of first destination outside Bihar, the appellant could not be called upon to pay sales tax. That is undisputed. The appellant also claimed that on the goods delivered for consumption in the State of first delivery outside Bihar, it was not liable to pay sales tax, even if there was no evidence to prove that the goods were in fact consumed in such State. In our judgment, the High Court was in error in directing that the exemption provided by Art. 286(1)(a) read with the Explanation which was at the material time incorporated by s. 33 in the Bihar Sales Tax Act by the Adaptation of

Laws Order, 1951, only applied to all sales of goods delivered and consumed in the State of first destination. If the goods were delivered for consumption, it is immaterial whether they were in fact consumed in the State where they were delivered. The power of the State to levy sales tax relying upon the territorial nexus between the taxing power of the State and the sale, is impaired for reasons already set out to the extent to which it is restricted by the incorporation of Art. 286(1)(a)(i) and the Explanation thereto, in that Act. Therefore, sales effected on or after January 26, 1950, where goods are as a direct result of the sale delivered in another State for consumption in that other State, are not liable to be taxed.

The directions issued by the High Court will therefore be modified as follows:

The order of the Superintendent of Taxes is set aside. He is directed to grant refund of tax paid in the light of this judgment. The appellant will be entitled to exemption from payment of tax if the goods are, as a direct result of the sale, delivered in another State for the purpose of consumption in that State.

Appeal dismissed subject to modification.

M. PENTIAH AND OTHERS

v.

MUDDALA VEERAMALLAPPA AND OTHERS.

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November 7.

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Municipality—Committee constituted under old Act continued by repealing Act—Term of office—Power—If can effect sale of municipal land — Interpretation of statute — Power of Court— Hyderabad District Municipalities Act, 1956 (Hyd. XVIII of 1956), ss. 16, 17, 18, 20, 32, 34, 35, 76, 77 and 320.

The respondents were the elected members of the Vicarabad

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Municipal Committee, constituted in 1953, under the Hyderabad Municipal and Town Committees Act, 1951. That Act was repealed by s. 320 of the Hyderabad District Municipalities Act, 1956, which came into force in 1956. That section provided that the committee constituted under the repealed enactment was to be deemed to have been constituted under the Act and the members thereof should hold office till the first meeting of the committee was called under s. 35 of the Act. No election was held under the new Act; the old committee, which continued to function, after duly passing a resolution and obtaining the necessary sanction from the Government, sold certain municipal lands to third parties. The appellants, who were rate-payers of the said Municipality, moved the High Court for the issue of a writ of *quo warranto* challenging the said sales under Art. 226 of the Constitution. The High Court dismissed the petition. The contention of the appellants in this Court was that the members of the said committee were *functus officio* on expiry of three years from the commencement of the Act for s. 34 of the Act prescribed a term of three years and s. 320 of the Act did not provide any definite term for them. But if s. 34 was held to be inapplicable, neither could the first general election under the Act, for which s. 16 of the Act was the only provision, be held, nor could the first meeting of the committee called under s. 35 of the Act and the result would be that the old committee would continue indefinitely.

Held, that the contention must be negatived.

The word 'committee' in s. 320 of the Hyderabad District Municipalities Act, 1956, did not mean a committee elected under the Act and the term of three years prescribed by s. 34 of the Act could not, therefore, apply to it.

Construed in the light of well-recognised principles of interpretation of statutes and the scheme as envisaged by ss. 16, 17, 18, 20, 32, 34, and 320 of the Act, s. 320 of the Act could be no more than a transitory provision and it would be unreasonable to suggest that the Legislature which repealed the earlier Act with the express intention of constituting committees on broad-based democratic principles, intended to perpetuate old committees constituted under the repealed Act.

Section 16(1) of the Act, properly construed, was clearly inapplicable to the first general election under the Act and could apply only to subsequent elections. So far as the first general election under the Act was concerned, ss. 17 and 20 of the Act provided a self-contained and integrated machinery therefor independent of s. 16(1) of the Act.

Canada Sugar Refining Co. v. *R.*, [1898] A.C. 735, referred to.

The Legislature in enacting the new Act assumed and expected that the Government would, within a reasonable time, issue notifications for holding the first general election under s. 17 of the Act and its failure to do so and thus implement the

Act, and not any inherent inconsistency in the Act itself, prolonged the life of the old committee.

Since s. 77 of the Act expressly authorised the Municipal Committee to sell municipal property subject to the conditions specified therein, no prohibition could be implied from the provisions of s 76 of the Act and the impugned sales, effected in conformity with the conditions precedent laid down by s. 77 of the Act, could not be said to be *ultra vires* the powers of the committee.

Elizabeth Dowager Baroness Wenlock v. *The River Dee Company*, (1885) 10 A.C. 354 and *Attorney-General* v. *Fulhan Corporation*, (1921) 1 Ch. D. 440, considered.

Per Sarkar, J.—It is well settled that where the language of a statute leads to manifest contradiction of the apparent purpose of the enactment, as the language of s. 16(1) does in the present case, the Court has the power so to read it as to carry out the obvious intention of the Legislature.

The intention of the Legislature in enacting the new Act clearly was that elections should be held and committees constituted under it.

Seaford Court Estates Ltd. v. *Asher*, [1949] 2 All E.R. 155, referred to.

Section 16(1) is the only section of the Act which authorises the holding of a general election but, since the requirements as to time in s. 16(1) of the Act could not apply to the first general election, that section must be read to carry out the obvious intention of the Legislature as if there was no such requirement in the case of the first general election under the Act. Although this would not indicate when that election was to be held, the obvious implication would be that it must be held within a reasonable time of the commencement of the Act. Section 20 of the Act does not authorise the holding of a general election.

Salmon v. *Duncombe*, (1886) 11 App. Cas. 627, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 387 of 1960.

Appeal by special leave from the judgment and order dated February 12, 1960, of the Andhra Pradesh High Court, in Writ Petition No. 5 of 1960.

P. A. Choudhuri and *K. R. Choudhuri*, for the appellants.

P. Ram Reddy, for respondents Nos. 1, 2 and 6 to 11.

1960. November 7. The Judgment of Gajendragadkar, Subba Rao, Wanchoo and Mudholkar, JJ.,

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was delivered by Subba Rao, J. Sarkar, J., delivered a separate judgment.

SUBBA RAO J.—This appeal by special leave is directed against the judgment of the High Court of Judicature at Hyderabad dismissing the petition filed by the appellants under Art. 226 of the Constitution to issue a writ of *quo warranto* against respondents 1 to 10 directing them to exhibit an information as to the authority under which they are functioning as members of the Vicarabad Municipal Committee and to restrain them from selling certain plots of land belonging to the Municipality to third parties. Vicarabad was originally situate in the Part B State of Hyderabad and is now in the State of Andhra Pradesh. The Municipal Committee of Vicarabad was constituted under the Hyderabad Municipal and Town Committees Act (XXVII of 1951). In the year 1953 respondents 1 to 10 were elected, and five others, who are not parties before us, were nominated, to that Committee. On November 27, 1953, the Rajpramukh of the State of Hyderabad published a notification under the relevant Acts in the Hyderabad Government Gazette Extraordinary notifying the above persons as members of the said Committee. Presumably with a view to democratize the local institutions in that part of the country and to bring them on a par with those prevailing in the neighbouring States, the Hyderabad District Municipalities Act, 1956 (XVIII of 1956), (hereinafter referred to as the Act), was passed by the Hyderabad Legislature and it received the assent of the President on August 9, 1956. Under s. 320 of the Act the Hyderabad Municipal and Town Committees Act, 1951 (XXVII of 1951) and other connected Acts were repealed. As a transitory measure, under the same section any Committee constituted under the enactment so repealed was deemed to have been constituted under the Act and the members of the said Committee were to continue to hold office till the first meeting of the Committee was called under s. 35 of the Act. Under that provision respondents 1 to 10 and the five nominated members continued to function as members

of the Municipal Committee. In or about the year 1958 the said Committee acquired land measuring acres 15-7 guntas described as "Varad Raja Omar Bagh" for Rs. 18,000 for the purpose of establishing a grain market (gunj). For one reason or other, the Municipal Committee was not in a position to construct the grain market and run it departmentally. The Committee, therefore, after taking the permission of the Government, resolved by a requisite majority to sell the said land to third parties with a condition that the vendee or vendees should construct a building or buildings for running a grain market. Thereafter the Committee sold the land in different plots to third parties; but the sale deeds were not executed in view of the interim order made in the writ petition by the High Court and subsequently in the appeal by this Court.

In the writ petition the appellants contended, *inter alia*, that the respondents ceased to be members of the Municipal Committee on the expiry of three years from the date the new Act came into force and that, therefore, they had no right to sell the land, and that, in any view, the sale made by the Committee of the property acquired for the purpose of constructing a market was *ultra vires* the provisions of the Act. The respondents contested the petition on various grounds. The learned Judges of the High Court dismissed the petition with costs for the following reasons:

1. The old Committee will continue to function till a new Committee comes into existence.

2. "Section 76 contemplates that property vested in it under s. 72(f), 73 and 74 should be transferred only to Government. Here, the transfer is not in favour of the Government. That apart we are told that in this case sanction of the Government was obtained at every stage. It cannot be predicated that the purpose for which the properties are being disposed of is not for a public purpose. It is not disputed that the properties are being sold only to persons who are required to build grain market".

3. The act now opposed is not in any way in conflict with the provisions of ss. 244, 245 and 247.

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4. "It looks to us that the petitioners lack in *bona fides* and that this petition is not conceived in the interests of the public".

The present appeal, as aforesaid, was filed by special leave granted by this Court.

Mr. P. A. Chowdury, learned counsel for the appellants, convassed the correctness of the findings of the High Court. His first argument may be summarized thus: Under s. 320 of the Act any Committee constituted under the repealed enactment shall be deemed to have been constituted under the Act and the members of the said Committee shall continue to hold office till the first meeting of the Committee is called under s. 35 of the Act. Under s. 35 of the Act, the first meeting of the Committee shall not be held on a date prior to the date on which the term of the outgoing members expires under s. 34. Section 34 of the Act provides that the members shall hold office for a term of three years. Therefore, the term of the members of the Committee deemed to have been constituted under s. 320 is three years from the date on which the Act came into force. If the term fixed under s. 34 does not apply to the members of the said Committee, the result will be that the said members will continue to hold office indefinitely, for the first meeting of the Committee could not be legally convened under the Act as s. 16 which enables the Collector to do so imposes a duty on him to hold a general election within three months before the expiry of the term of office of the members of the Committee as specified in s. 34, and, as no definite term has been prescribed for the members of the Committee under s. 320, the election machinery fails, with the result that the members of the "deemed" Committee would continue to be members of the said Committee indefinitely. On this interpretation learned counsel contends that the section would be void for the following reasons: (1) s. 320(1)(a) of the Act would be *ultra vires* the powers of the State Legislature under Art. 246 of the Constitution, read with entry 5, List II, VII Schedule; (2) the said section deprives the appellants of the right to equality and equal protection of the laws guaranteed under Art. 14

of the Constitution; (3) s. 320 would be void also as inconsistent with the entire scheme of the provisions of the Act.

Let us first test the validity of the construction of s. 320 of the Act suggested by the learned counsel. The material part of s. 320 reads:

"(1) The Hyderabad Municipal and Town Committees Act, 1951, (XXVII of 1951)..... (is) hereby repealed; provided that:—

(a) any Committee constituted under the enactment so repealed (hereinafter referred to in this section as the said Committee) shall be deemed to have been constituted under this Act, and Members of the said Committee shall continue to hold office till the first meeting of the Committee is called under section 35;".

The terms of the section are clear and do not lend any scope for argument. The section makes a distinction between the "said" Committee and the Committee elected under the Act and says, "Members of the said Committee shall continue to hold office till the first meeting of the Committee is called under s. 35". Though the word "Committee" is defined in s. 2(5) to mean a Municipal or Town Committee established or deemed to be established under the Act, that definition must give way if there is anything repugnant in the subject or context. As the section makes a clear distinction between the "said" Committee and the Committee elected under the Act, in the context, the Committee in s. 320 cannot mean the Committee elected under the Act. The term fixed for the members of the Committee constituted under the Act cannot apply to the members of the Committee deemed to have been constituted under the Act. Section 32 which provides for the culminating stage of the process of election under the Act says that the names of all members finally elected to any Committee shall be forthwith published in the official Gazette. Section 34 prescribes the term of office of the members so elected. Under it, "except as is otherwise provided in this Act, members shall hold office for a term of three years." Section 320(1)(a) provides a different term for the

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members of the Committee deemed to have been constituted under the Act. Thereunder, the term is fixed not by any number of years but by the happening of an event. The Committee constituted under s. 320 clearly falls under the exception. But it is suggested that the exception refers only to s. 28 whereunder a member of a Committee ceases to be one by a supervening disqualification. Firstly, this section does not fix a term but only imposes a disqualification on the basis of a term fixed under s. 34; secondly, assuming that the said section also fixes a term, the exception may as well cover both the deviations from the normal rule. That apart, sub-s. (2) of s. 34 dispels any doubt that may arise on the construction of sub-section (1) of the section. Under sub-s. (2), the term of office of such members shall be deemed to commence on the date of the first meeting called by the Collector under s. 35. Section 35 directs the Collector to call a meeting after giving at least five clear days notice within thirty days from the date of the publication of the names of members under s. 32. This provision clearly indicates that the members of the Committee mentioned in s. 34 are only the members elected under the Act and not members of the Committee deemed to have been elected under the Act, for, in the case of the latter Committee, no publication under s. 32 is provided for and therefore the provisions of s. 35 cannot apply to them. It is, therefore, manifest that the term prescribed in s. 34 cannot apply to a member of the "deemed" Committee.

Let us now see whether this interpretation would necessarily lead us to hold that the members of the "deemed" Committee under s. 320(1)(a) would have an indefinite duration. This result, it is suggested, would flow from a correct interpretation of the relevant provisions of s. 16 of the Act. The judgment of the High Court does not disclose that any argument was addressed before that Court on the basis of s. 16 of the Act. But we allowed the learned counsel to raise the point as in effect it is only a link in the chain of his argument to persuade us to hold in his favour on the construction of s. 320.

Before we consider this argument in some detail, it will be convenient at this stage to notice some of the well established rules of construction which would help us to steer clear of the complications created by the Act. Maxwell "On the Interpretation of Statutes", 10th Edn., says at p. 7 thus:

"..... if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

It is said in Craies on Statute Law, 5th Edn., at p. 82—

"Manifest absurdity or futility, palpable injustice, or absurd inconvenience or anomaly to be avoided."

Lord Davey in *Canada Sugar Refining Co.* v. *R.* (1) provides another useful guide of correct perspective to such a problem in the following words:

"Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

To appreciate the problem presented and to give an adequate answer to the same, it would be necessary and convenient to notice the scheme of the Act as reflected in the relevant sections, namely, ss. 16, 17, 18, 20, 32, 34 and 320. The said scheme of the Act may be stated thus: Under the Act, there are general elections and elections to casual vacancies. The general elections may be in regard to the first election after the Act came into force or to the subsequent elections under the Act. Section 5 imposes a duty on the Government to constitute a Municipal Committee for each town and notify the date when it shall come into existence. Section 17 enjoins on the Government to issue a notification calling upon all the constituencies to elect members in accordance

(1) [1898] A.C. 735.

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with the provisions of the Act on or before such date or dates as may be specified in the said notification. Section 16 imposes a duty upon the Collector to hold a general election in the manner prescribed within three months before the expiry of the term of office of the members of the Committee as specified in s. 34 of the Act. Sub-section (2) of s. 16 provides for a bye-election for filling up of a casual vacancy. Section 18 enables the Collector with the approval of the Government to designate or nominate a Returning Officer. Section 19 imposes a duty upon such an officer to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by the Act and the rules made there under. Section 20 authorizes the Collector to issue a notification in the Official Gazette appointing the dates for making nominations, for the scrutiny of nominations, for the withdrawal of candidatures and for the holding of the poll. After the elections are held in the manner prescribed, the names of all the members finally elected to any Committee shall be published in the Official Gazette. Except as otherwise provided in the Act, s. 34 prescribes the term of three years for a member so elected. As a transitory provision till such an election is held, s. 320 says that the members of the previous Committee constituted under the earlier Act shall be deemed to be constituted under the Act and the members thereof shall hold office till the first meeting of the Committee is called under s. 35 of the Act.

It is clear from the aforesaid provisions that the Government notifies the dates calling upon all the constituencies to elect the members before such date or dates prescribed; the Collector holds the election and fixes the dates for the various stages of the process of election; the Returning Officer appointed by the Collector does all acts and things necessary for effectually conducting the election.

On the general scheme of the Act we do not see any legal objection to the Collector holding the first elections under the Act. The legal obstacle for such a course is sought to be raised on the wording of s. 16(1). Section 16(1) reads :

"Every general election requisite for the purpose of this Act shall be held by the Collector in the manner prescribed within three months before the expiry of the term of office of the members of the Committee as specified in section 34."

The argument is that the Collector's power to hold a general election is confined to s. 16(1) and, as in the case of the members of the Committee deemed to have been constituted under the Act the second limb of the section cannot apply and as the Collector's power is limited by the second limb of the section, the Collector has no power to hold the first general election under the Act. If this interpretation be accepted, the Act would become a dead-letter and the obvious intention of the Legislature would be defeated. Such a construction cannot be accepted except in cases of absolute intractability of the language used.

While the Legislature repealed the earlier Act with an express intention to constitute new Committees on broad based democratic principles, by this interpretation the Committee under the old Act perpetuates itself indefinitely. In our view, s. 16(1) does not have any such effect. Section 16(1) may be read along with the aforesaid other relevant provisions of the Act. If so read, it would be clear that it could not apply to the first election after the Act came into force, but should be confined to subsequent elections. So far as the first general election is concerned, there is a self-contained and integrated machinery for holding the election without in any way calling in aid the provisions of s. 16(1). Section 17 applies to all elections, that is, general as well as bye-elections. It applies to the first general election as well as subsequent general elections. The proviso to that section says that for the purpose of holding elections under sub-s. (1) of s. 16 no such notification shall be issued at any time earlier than four months before the expiry of the term of office of the members of the Committee as specified in s. 34. The proviso can be given full meaning, for it provides only for a case covered by s. 16(1) and, as the first general election is outside the scope of s. 16(1),

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it also falls outside the scope of the proviso to s. 17. Under s. 17, therefore, the Government, in respect of the first general election, calls upon all the constituencies to elect members before the date or dates fixed by it. Under s. 20, the Collector fixes the dates for the various stages of the election. The Returning Officer does all the acts and things necessary for conducting the election and when the election process is completed, the names of the members elected are published. All these can be done without reference to s. 16(1), for the Collector is also empowered under s. 20 to hold the elections. In this view, there cannot be any legal difficulty for conducting the first election, after the Act came into force. If so, the term of the members of the Committee deemed to have been elected would come to an end when the first meeting of the Committee was called under s. 35. The Legislature in enacting the law not only assumed but also expected that the Government would issue the requisite notification under s. 17 of the Act within a reasonable time from the date when the Act came into force. The scheme of the Act should be judged on that basis; if so judged, the sections disclose an integrated scheme giving s. 320 a transitory character.

It is conceded by learned counsel that if s. 320(1)(a) is constructed in the manner we do, the other points particularised above do not arise for consideration.

Before leaving this part of the case we must observe that the difficulty is created not by the provisions of the Act but by the fact of the Government not proceeding under s. 17 of the Act within a reasonable time from the date on which the Act came into force. This is a typical case of the legislative intention being obstructed or deflected by the inaction of the executive.

Mr. Ram Reddy, learned counsel for the respondents, states that there are many good reasons why the Government did not implement the Act. There may be many such reasons, but when the Legislature made an Act in 1956, with a view to democratize municipal administration in that part of the country so as to bring it on a par with that obtaining in other

States, it is no answer to say that the Government had good reasons for not implementing the Act. If the Government had any such reasons, that might be an occasion for moving the Legislature to repeal the Act or to amend it. If the affected parties had filed a writ of *mandamus* in time, this situation could have been avoided; but it was not done. We hope and trust that the Government would take immediate steps to hold elections to the Municipal Committee so that the body constituted as early as 1953, under a different Act could be replaced by an elected body under the Act.

Even so, learned counsel for the appellants contends that the Municipal Committee had no power to sell the land acquired by it for constructing a market. To appreciate this contention it would be convenient to notice the relevant provisions of the Act. Under s. 72(f) all land or other property transferred to the Committee by the Government or the District Board or acquired by gift, purchase, or otherwise for local purposes shall vest in and be under the control of the Committee. Section 73 enables the Government, in consultation with the Committee, to direct that any property, movable or immovable, which is vested in it, shall vest in such Committee. Section 74 empowers the Government on the request of the Committee to acquire any land for the purposes of the Act. Under s. 76, the Committee may, with the sanction of the Government, transfer to the Government any property vested in the Committee under ss. 72(f), 73 and 74, but not so as to affect any trust or public right subject to which the property is held. Learned counsel contends that, as the land was acquired by the Committee for the construction of a market, the Committee has power to transfer the same to the Government only subject to the conditions laid down in s. 76, and that it has no power to sell the land to third parties. This argument ignores the express intention of s. 77 of the Act. Section 77 says:

"Subject to such exceptions as the Government may by general or special order direct, no Committee shall transfer any immovable property except in pursuance of a resolution passed at a meeting by a

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majority of not less than two-third of the whole number of members and in accordance with rules made under this Act, and no Committee shall transfer any property which has been vested in it by the Government except with the sanction of the Government:

Provided that nothing in this section shall apply to leases of immovable property for a term not exceeding three years".

This section confers on the Committee an express power couched in a negative form. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative. If the section is recast in an affirmative form, it reads to the effect that the Committee shall have power to transfer any immovable property, if the conditions laid down under the section are complied with. The conditions laid down are: (1) there shall be a resolution passed at a meeting by a majority of not less than two-third of the whole number of members of the Committee; (2) it shall be in accordance with the rules made under the Act; (3) in the case of a property vested in it by the Government, the transfer can be made only with the sanction of the Government; and (4) the sale is not exempted by the Government, by general or special order, from the operation of s. 77 of the Act. It is not disputed that the relevant conditions have been complied with in the present case. If so, the power of the Committee to alienate the property cannot be questioned.

Learned counsel contends that the provisions of s. 76 govern the situation and that s. 77 may apply only to a property vested in the Committee under provisions other than those of ss. 72(f), 73 and 74, and that further, if a wider interpretation was given to s. 77, while under s. 76 the transfer in favour of the Government would be subject to a trust or public right, under s. 77 it would be free from it if it was transferred to a private party. The first objection has no force, as there are no sections other than ss. 72, 73 and 74 whereunder the Government vests property in a Committee. The second objection also has no merits, for the trust or public right mentioned in s. 76

does not appear to relate to the purpose for which the property is purchased but to the trust or public right existing over the property so alienated by the Committee. Further the proviso to s. 77, which says, "nothing in this section shall apply to leases of immovable property for a term not exceeding three years", indicates that the main section applies also to the property vested in the Committee under the previous section, for it exempts from the operation of the operative part of s. 77 leases for a term not exceeding three years in respect of properties covered by the preceding section and other sections. This interpretation need not cause any apprehension that a Committee may squander away the municipal property, for s. 77 is hedged in by four conditions and the conditions afford sufficient guarantee against improper and improvident alienations.

In this context learned counsel for the appellants invoked the doctrine of law that an action of a statutory corporation may be *ultra vires* its powers without being illegal and also the principle that when a statute confers an express power, a power inconsistent with that expressly given cannot be implied. It is not necessary to consider all the decisions cited, as learned counsel for the respondents does not canvass the correctness of the said principles. It would, therefore, be sufficient to notice two of the decisions cited at the Bar. The decision in *Elizabeth Dowager Baroness Wenlock* v. *The River Dee Company* (1) is relied upon in support of the proposition that when a corporation is authorised to do an act subject to certain conditions, it must be deemed to have been prohibited to do the said act except in accordance with the provisions of that Act which confers the authority on it. Where by Act 14 & 15 Vict. a company was empowered to borrow at interest for the purposes of the concerned Acts, subject to certain conditions, it was held that the company was prohibited by the said Act from borrowing except in accordance with the provisions of that Act. Strong reliance is placed on the decision in *Attorney-General* v. *Fulham Corporation* (2).

(1) (1885) 10 A.C. 354. (2) (1921) 1 Ch.D. 440.

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There, in exercise of the powers conferred under the Baths and Wash-houses Acts, the Metropolitan Borough of Fulham propounded a scheme in substitution of an earlier one whereunder it installed a wash-house to which persons resorted for washing their clothes bringing their own wash materials and utilised the facilities offered by the municipality on payment of the prescribed charges. Sarjant, J., held that the object of the legislation was to provide for persons who became customers facilities for doing their own washing, but the scheme provided for washing by the municipality itself and that, therefore, it was *ultra vires* the statute. In coming to that conclusion the learned Judge, after considering an earlier decision on the subject, applied the following principle to the facts of the case before him :

"That recognises that in every case it is for a corporation of this kind to show that it has affirmatively an authority to do particular acts; but that in applying that principle, the rule is not to be applied too narrowly, and the corporation is entitled to do not only that which is expressly authorised but that which is reasonably incidental to or consequential upon that which is in terms authorized."

The principle so stated is unobjectionable.

The correctness of these principles also need not be canvassed, for the construction we have placed on the provisions of the Act does not run counter to any of these principles. We have held that s. 77 confers an express power on the Municipal Committee to sell property subject to the conditions mentioned therein. Therefore, the impugned sales are not *ultra vires* the powers of the Committee. In view of the said express power, no prohibition can be implied from the provisions of s. 76.

Learned counsel further contends that the statutory power can be exercised only for the purposes sanctioned by the statute, that the sales of the acquired land to private persons were not for one of such purposes, and that, therefore, they were void. The principle that a statutory body can only function within the four corners of the statute is unexceptionable; but the

Legislature can confer a power on a statutory corporation to sell its land is equally uncontestable. In this case we have held that the statute conferred such a power on the Municipal Committee, subject to stringgent limitations. Many situations can be visualized when such a sale would be necessary and would be to the benefit of the corporation. Of course the price fetched by such sales can only be utilised for the purposes sanctioned by the Act.

The last point raised is that the learned Judges of the High Court were not justified in holding on the materials placed before them that the appellants lacked *bona fides* and that the petition filed by them was not conceived in the interests of the public. We do not find any material on the record to sustain this finding. Indeed, but for the petitioner-appellants the extraordinary situation created by the inaction of the Government in the matter of implementing the Act, affecting thereby the municipal administration of all the districts in Telangana area, might not have been brought to light. We cannot describe the action of the appellants either *mala fide* or frivolous.

In the result, the appeal fails and is dismissed but, in the circumstances, without costs.

SARKAR, J.—The first question is whether the first ten respondents are still members of the Municipal Committee of Vicarabad. These persons had been elected to the Committee in the elections held in 1953 under the Hyderabad Municipal and Town Committees Act, 1951 (Hyderabad Act XXVII of 1951), hereafter called the repealed Act. That Act was repealed by the Hyderabad District Municipalities Act (Hyderabad Act XVIII of 1956), hereafter called the new Act, which came into force in August 1956. The appellants, who are rate-payers of the Municipality, contend that on a proper reading of the new Act, it must be held that these ten respondents have ceased to be members of the Committee, and they seek a writ of *quo warranto* against the respondents.

Section 320 of the new Act provides that any Committee constituted under the repealed Act shall be deemed to have been constituted under the new Act

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and its members shall continue to hold office till the first meeting of the Committee is called under s. 35 of the new Act. The ten respondents contend that as admittedly the meeting under s. 35 has not been called, their term of office has not yet expired.

Now s. 35, so far as is material, provides that the first meeting of the Committee shall be called by the Collector within thirty days of the date of publication of the names of members under s. 32. Section 32 states that the names of members finally elected to any Committee shall be forthwith published in the official Gazette. It is quite clear, therefore, that the Committee mentioned in this section, is a Committee constituted by an election held under the new Act. It would follow that the meeting contemplated in s. 35 is a meeting of a Committee constituted by an election held under the new Act. The provisions of that section put this beyond doubt.

In order, therefore, that a meeting of the Committee contemplated in s. 35 may be held, there has first to be an election under the new Act to constitute the Committee. No such election has yet been held. It is the provision concerning election in the new Act that has given rise to the difficulty that arises in this case. Section 16, sub-s. (1), gives the power to hold the general elections. It is in these words:

"Every general election requisite for the purpose of this Act shall be held by the Collector in the manner prescribed within three months before the expiry of the term of office of the members of the Committee as specified in section 34".

Section 34 in substance states that except as otherwise provided members of the Committee shall hold office for a term of three years and that term of office shall be deemed to commence on the date of the first meeting called under s. 35. It would therefore appear that the members whose term of office is sought to be specified by s. 34 are members elected under the new Act, for their term is to commence on the date that they first meet under s. 35 and as earlier stated, the meeting under s. 35 is a meeting of members elected under the new Act.

The contention for the appellants is that if s. 34 is construed in the way mentioned above, the first general election under the new Act cannot be held under s. 16, for an election can be held under that section only within three months before the expiry of the term of office of members elected under the new Act and in the case of first election there are ex hypothesi, no such members. It is said that as there is no other provision in the new Act for holding a general election, the Act would then become unworkable, for if the first general election cannot be held no subsequent election can be held either. The result, it is contended, is that the Committee elected under the repealed Act would continue for ever by virtue of s. 320. Such a situation, it is said, could not have been intended by the new Act. It is therefore suggested that s. 34 should be construed as specifying a term of office of three years from the commencement of the new Act for members elected under the repealed Act who are under s. 320, to be deemed to form a Committee constituted under the new Act. If s. 34 is so construed, then the first general election under the new Act can properly be held under s. 16. It is on this basis that the appellants contend that the ten respondents' term of office expired in August, 1959, and they are in possession of the office now without any warrant.

There is no doubt that the Act raises some difficulty. It was certainly not intended that the members elected to the Committee under the repealed Act should be given a permanent tenure of office nor that there would be no elections under the new Act. Yet such a result would appear to follow if the language used in the new Act is strictly and literally interpreted. It is however well established that "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.....

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Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a Statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense.": see Maxwell on Statutes (10th ed.) p. 229. In *Seaford Court Estates Ltd.* v. *Asher* (1), Denning, L. J., said,

"when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament.....and then he must supplement the written word so as to give "force and life" to the intention of the legislature.....A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

I conceive it my duty, therefore, so to read the new Act, unless I am prevented by the intractability of the language used, as to make it carry out the obvious intention of the legislature. Now there does not seem to be the slightest doubt that the intention of the makers of the new Act was that there should be elections held under it and that the Municipal Committees should be constituted by such elections to run the administration of the municipalities. The sections to which I have so far referred and the other provisions of the new Act make this perfectly plain. Thus s. 5 provides for the establishment of municipal committees and s. 8 states that the committees shall consist of a certain number of elected members. The other sections show that the Committees shall have charge of the administration of the municipalities for the benefit of the dwellers within them. It is plain

(1) [1949] 2 All E.R. 155, 164.

that the entire object of the new Act would fail if no general election could be held under it.

The question then is, How should the Act be read so as to make it possible to hold general elections under it? I agree with the learned advocate for the appellants that the only section in the new Act providing for general elections being held, is s. 16(1). In my view, s. 20 does not authorise the holding of any general election; it only provides for a notification of the date on which the poll shall, if necessary, be taken. There is no doubt that under s. 16(1) the second and all subsequent general elections can be held; in regard to such general elections, no difficulty is created by the language of the section. It would be curious if s. 20 also provided for general elections, for then there would be two provisions in the Act authorising general elections other than the first. Then I find that all the sections referring to general elections refer to such elections being held under s. 16(1) and not under s. 20. Thus s. 31 provides that if at a general election held under s. 16, no member is elected, a fresh election shall be held. It would follow that if in an election under s. 20, assuming that that section authorises an election, no member is elected, no fresh election can be held. There would be no reason to make this distinction between elections held under s. 16 and under s. 20. Again the proviso to s. 17 requires a certain notification to be issued within a prescribed time for holding elections under s. 16(1). If an election can be held under s. 20, no such notification need be issued for there is no provision requiring it. This could not have been intended. For all these reasons it seems to me that s. 20 does not confer any power to hold any election.

I have earlier said that the suggestion for the appellants is that the best way out of the difficulty is to read s. 34 as specifying a term of office of three years commencing from the coming into force of the new Act, for the members elected under the repealed Act who are to be deemed under s. 320 to be a committee constituted under the new Act. It seems to me that this is not a correct solution of the problem. First,

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the object of continuing the members elected under the repealed Act in office is clearly to have, what may be called a caretaker committee to do the work of the Municipality till a committee is constituted by election under the new Act. It could not have been intended that the committee of the members elected under the repealed Act would function for three years after the new Act has come into operation nor that such members would have the same term of office as members elected under the new Act. Secondly, I do not find the language used in s. 34 sufficiently tractable to cover by any alteration, a member elected under the repealed Act. To meet the suggestion of the appellants, a new provision would have really to to be enacted and added to s. 34 and this I do not think is permissible. It would be necessary to add to the section a provision that in the case of members elected under the old Act the term of office of three years would start running from the commencement of the new Act, a provision which is wholly absent in the section as it stands. Lastly, so read, s. 34 would come into conflict with s. 320 which expressly provides that the term of office of the members elected under the repealed Act would continue till the first meeting of the committee constituted under the new Act is held under s. 35. This portion of s. 320 would have to be completely struck out.

It seems to me that the real solution of the difficulty lies in construing s. 16(1) so as to authorise the holding of the first general election under it and remove the absurdity of there being no provision directing the first general election to be held. Now that section applies to "every general election requisite for the purpose of this Act." It therefore applies to the first and all other general elections. The clear intention hence is that the first general election will also be held under this provision. But such election cannot be held within the time mentioned therein for that time has to be calculated from the expiry of the term of office of the Committee elected under the Act and in the case of the first general election under the new Act, there is no such Committee. The requirement

as to time cannot apply to the first general election. The section has therefore to be read as if there was no such requirement in the case of the first general election. It will have to be read with the addition of the words " provided that every general election excepting the first general election shall be held " between the words " prescribed " and " within ". That would carry out the intention of the legislature and do the least violence to the language used. So read, there would be clear power under the Act to hold the first general meeting. There would of course then be no indication as to when this election is to be held but that would only mean that it has to be held within a reasonable time of the commencement of the new Act.

The course suggested by me is not without the support of precedents. Thus in *Salmon* v. *Duncombe* (1), the Judicial Committee in construing a statute omitted from it the words " as if such natural-born subject resided in England " because the retention of those words would have prevented the person contemplated getting full power to dispose of his immovable property by his will which it was held, the object of the statute was, he should get.

With regard to the other point argued in this appeal, namely, whether the Municipal Committee even if properly constituted, has power to sell the land mentioned in the petition, I agree, for the reasons mentioned in the judgment delivered by the majority of the members of the bench, that it has such power and have nothing to add.

The appeal therefore fails.

Appeal dismissed.

(1) (1886) 11 App. Cas. 627.

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November 8.

THE COMMISSIONER OF INCOME-TAX, HYDERABAD

v.

DEWAN BAHADUR RAMGOPAL MILLS LTD.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Income Tax—Depreciation allowance—Written down value—Hyderabad Income-tax law—Repeal and extension of Indian Income-tax law—Central Government's notification providing for removal of difficulties in such extended law—Validity—Retrospective effect—Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, para 2, Explanation—Finance Act, 1950 (25 of 1950), ss. 3, 12, 13—Constitution of India, Art. 14.

Prior to January 26, 1950, when the erstwhile State of Hyderabad merged in the Union of India and became a Part B State, the respondent company was assessed to income-tax under the Hyderabad Income-tax Act, by which depreciation allowance was given to it on the basis of the written down value of its assets, such as buildings, machinery, plants, etc., in accordance with cl. (c) of s. 12(5) of that Act, which provided that in the case of assets acquired before the previous year and before the commencement of the Act, the written down value would be the actual cost to the assessee less (i) depreciation at the rates applicable to the assets calculated on the actual costs for the first year since acquisition and for the next year on the actual cost diminished by the depreciation allowance for one year and so on, for each year upto the commencement of that Act, and (ii) depreciation actually allowed to the assessee on such assets for each financial year after the commencement of the Act. After the merger of Hyderabad with the Union of India, by ss. 3 and 13 of the Finance Act, 1950, the taxation laws in force in the State were repealed and the Indian Income-tax Act, 1922, was extended to that area; and in exercise of the powers conferred by s. 12 of the Finance Act, 1950, the Central Government issued a notification dated December 2, 1950, called the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950. Paragraph 2 of the Order provided that "in making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a Part B State..... shall be taken into account in computing the aggregate depreciation allowance referred to in proviso (c) to s. 10(2)(vi) and the written down value under s. 10(5)(b) of the said Act".

For the assessment year 1951-52 the respondent was assessed for the first time under the Indian Income-tax Act, and basing its claim on para. 2 of the aforesaid Order it asked for depreciation allowance in respect of its assets by working out

the value thereof at their inception and deducting therefrom such depreciation as was allowed for the three assessment years in which it was assessed under the Hyderabad Income-tax Act. By order dated November 30, 1951, the Income-tax Officer disallowed the respondent's claim on the ground that it was against the principle inherent in granting depreciation allowance which must decrease from year to year. The matter was taken up to the Supreme Court and while it was pending there, on May 8, 1956, the Central Government issued a notification in exercise of its powers conferred on it by s. 12 of the Finance Act, 1950, whereby an explanation was added to the aforesaid para. 2 as follows: "For the purpose of this paragraph, the expression "all depreciation actually allowed under any laws or rules of a Part B State" means and shall be deemed to have always meant the aggregate allowance for depreciation taken into account in computing the written down value under any laws or rules of a Part B State or carried forward under the said laws or rules." The respondent challenged the validity of the notification of 1956 and also its applicability to the present case on the grounds (1) that it was *ultra vires* the powers conferred on the Central Government by s. 12 of the Finance Act, 1950, (2) that it contravened Art. 14 of the Constitution, and (3) that, in any case, it could have no retrospective effect.

Held: (1) that the true scope and effect of s. 12 was that it was for the Central Government to determine if any difficulty of the nature indicated in the section had arisen and then to make such order, or give such direction, as appeared to it to be necessary to remove the difficulty, the legislature having left the matter to the executive.

Pandit Banarsi Das Bhanot v. *The State of Madhya Pradesh and Others*, [1959] S.C.R. 427, relied on.

In the present case, a difficulty had arisen, because if depreciation actually allowed under the Hyderabad Income-tax Act was taken into account in computing the aggregate depreciation allowance and the written down value, an anomalous result would follow, namely, depreciation allowance to be allowed to the assessee in the accounting year under the Indian Income-tax Act would be more than what was allowed in previous years under the Hyderabad Income-tax Act. Consequently, the Central Government was within its power under s. 12 in making the notification dated May 8, 1956.

(2) that the notification of 1956 applied to all those to whom para. 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, was applicable and created no unequal treatment of persons in the like situation. Accordingly, the notification did not contravene Art. 14 of the Constitution.

(3) that the Central Government had the power under s. 12 of the Finance Act, 1950, to make an order or give a direction so as to remove difficulties which arose in the very beginning

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and, therefore, the notification, though added in 1956, was valid and was applicable to the assessment of 1951-52.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5 of 1959.

Appeal from the judgment and order dated February 16, 1954, of the former Hyderabad High Court in Reference No. 347/B-5/2 of 1953-54.

C. K. Daphtary, Solicitor-General of India, K. N. Rajagopala Sastri and *D. Gupta*, for the appellant.

Sanat P. Mehta and *J. B. Dadachanji*, for the respondent.

1960. November 8. The Judgment of the Court was delivered by

S. K. Das J.

S. K. DAS J.—This is an appeal on a certificate of fitness granted by the High Court of Judicature at Hyderabad under s. 66-A (2) of the Indian Income-tax Act, 1922. The Commissioner of Income-tax, Hyderabad, is the appellant before us. The respondent is Dewan Bahadur Ramgopal Mills Ltd., a public limited company incorporated in the erstwhile State of Hyderabad.

The respondent company was assessed under the Hyderabad Income-tax Act in respect of the assessment years 1357-F, 1358-F and 1359-F. In the assessment for those years depreciation allowance was given to it on the basis of the written down value of its assets, such as buildings, machinery, plant, etc., in accordance with the provisions of cl. (c) of s. 12(5) of the Hyderabad Income-tax Act. That clause provided that in the case of assets acquired before the previous year and before the commencement of the Act, the written down value would be the actual cost to the assessee less (i) depreciation at the rates applicable to the assets calculated on the actual cost for the first year since acquisition and for the next year on the actual cost diminished by the depreciation allowance for one year and so on, for each year upto the commencement of the Act, and (ii) depreciation actually allowed to the assessee on such assets for each financial year after the commencement of the

Act. The erstwhile State of Hyderabad merged in the Union of India on January 26, 1950, and became a Part B State. The Finance Act, 1950, by s. 13 thereof repealed the taxation laws in force in Part B States except for certain purposes not relevant to this case, and by s. 3 extended the Indian Income-tax Act, 1922, to the whole of India except the State of Jammu and Kashmir. In exercise of the powers conferred by s. 12 of the Finance Act, 1950, the Central Government was pleased to make the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950 (hereinafter referred to as the Removal of Difficulties Order, 1950), by a notification dated December 2, 1950. Paragraph 2 of the said Order, in so far as it is relevant to this case, was in these terms:

"*Computation of aggregate depreciation allowance and written down value*:

In making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a Part B State relating to Income-tax and Super-tax, or any law relating to tax on profits of business, shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the proviso to clause (vi) of sub-section (2) and the written down value under clause (b) of sub-section (5) of sec. 10 of the said Act ".

For the assessment year 1951-52 which was in respect of the account year ending June 30, 1950, the respondent was assessed for the first time under the Indian Income-tax Act, 1922, read with paragraph 5 of the Part B States (Taxation Concessions) Order, 1950. Basing its claim on paragraph 2 of the Removal of Difficulties Order, 1950, the respondent asked for depreciation allowance in respect of its assets such as buildings, machinery, plant, etc., to the tune of Rs. 8,12,244. It worked out the value of the assets at their inception and deducted therefrom such depreciation as was allowed for the three assessment years in which the respondent was assessed under the Hyderabad Income-tax Act and calculating the written down

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value in that manner, it claimed depreciation according to the prescribed rates. By his order dated November 30, 1951, the Income-tax Officer disallowed this claim. He held that the claim of the respondent was against the principle inherent in granting depreciation allowance which must decrease from year to year, and further held that the word "allowed" in paragraph 2 of the Removal of Difficulties Order, 1950, should be construed as meaning "considered" only. Accordingly, he took the figures of the written down value from the income-tax proceedings of 1359-F and allowed depreciation at the prescribed rate on those figures. Against the order of the Income-tax Officer, the respondent went in appeal to the Appellate Assistant Commissioner, Hyderabad Division. That Officer by an order dated May 23, 1952, upheld the view of the Income-tax Officer and dismissed the appeal. Then there was an appeal to the Income-tax Appellate Tribunal which was heard by the Bombay Bench of the said Tribunal. By its order dated December 12, 1952, the Appellate Tribunal held that in view of the provisions in paragraph 2 of the Removal of Difficulties Order, 1950, the contention of the respondent must prevail, and it pointed out that the words used in paragraph 2 were "depreciation actually allowed under any laws or rules of a Part B State", and those words did not mean the aggregate allowance for depreciation taken into account in computing the written down value under the Hyderabad Act; therefore, the respondent was entitled to the depreciation allowance which it claimed. It directed the Income-tax Officer to compute the written down value on the basis of the actual cost to the assessee of the assets in question minus the depreciation allowance actually allowed to the assessee under the Hyderabad Income-tax Act. The appellant herein then moved the Appellate Tribunal for a reference to the High Court under s. 66(1) of the Indian Income-tax Act. In the meantime, that is, on March 9, 1953, the Central Government purporting to exercise its powers conferred by s. 60-A of the Indian Income-tax Act, 1922, added an Explanation

to paragraph 2 of the Removal of Difficulties Order, 1950. That Explanation said:

"Explanation:—For the purpose of this paragraph, the expression "all depreciation actually allowed under any laws or rules of a Part B State" means and shall be deemed to have always meant the aggregate allowance for depreciation taken into account in computing the written down value under any laws or rules of a Part B State or carried forward under the said laws or rules".

The Explanation in terms gave effect to the contention urged on behalf of the Department and said that what has to be allowed is the aggregate allowance for depreciation taken into account in computing the written down value under any law or rules of a Part B State. In support of the application for a reference, the appellant relied on the aforesaid Explanation and contended that in view of the Explanation the respondent could not claim depreciation allowance on the basis of actual cost minus the depreciation allowances actually allowed under the Hyderabad Income-tax Act. On this application the Tribunal expressed the view that if the Explanation applied to the case on hand, then the contention of the Department was correct and must be upheld. It said, however, that it had no power to review its own order and, therefore, considered it unnecessary to express any opinion whether the Explanation was valid and affected the case before it. It said finally that the following question of law did arise out of its order and accordingly stated a case thereon:

"Whether in making the assessment for the year 1951-52 under the Indian Income-tax Act is the assessee company entitled to claim depreciation allowance on the basis of the written down value computed at the time of the assessment for the year 1359-F, or is to be computed on the basis of the actual cost minus the depreciation allowances granted under the Hyderabad Income-tax Act".

The reference was then heard by the High Court of Judicature at Hyderabad which by its order dated February 16, 1954, held that the Explanation added

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to paragraph 2 of the Removal of Difficulties Order, 1950, by the notification dated March 9, 1953, was void on certain grounds one of which was that the Explanation was *ultra vires* the powers of the Central Government under s. 60-A of the Indian Income-tax Act. Therefore, it answered the question in favour of the respondent. The appellant then obtained the necessary certificate of fitness and preferred the present appeal.

In the meantime, there was a further change of law. On May 8, 1956, the Central Government made a notification (No. S. R. O. 1139) in exercise of the powers conferred on it by s. 12 of the Finance Act, 1950, whereby an Explanation in identical terms as the earlier Explanation made under s. 60-A of the Indian Income-tax Act, was added to paragraph 2 of the Removal of Difficulties Order, 1950. The arguments before us have proceeded on the basis of the Explanation added by the notification aforesaid and it is not disputed that if the Explanation is valid and applies to the present case, then the appeal must be allowed and the question of law answered in favour of the appellant. If, on the contrary, the Explanation is not valid or it does not apply to the present case, then the appeal must be dismissed.

We proceed now to a consideration in detail of the different contentions urged before us on behalf of the appellant and the respondent. We may first read s. 12 of the Finance Act, 1950, under which notification No. S. R. O. 1139 dated May 8, 1956, was made. Section 12 reads:

"If any difficulty arises in giving effect to the provisions of any of the Acts, rules or orders extended by section 3 or section 11 to any State or merged territory, the Central Government may by order, make such provision, or give such direction, as appears to it to be necessary for removing the difficulty".

On behalf of the appellant it has been argued that the notification was validly made in exercise of the powers conferred on the Central Government under s. 12 aforesaid; that it does not suffer from any of the defects pointed out by the High Court in regard

to the earlier notification of 1953 made under s. 60-A of the Income-tax Act; and that it adds an Explanation which in terms gives effect to the contention of the appellant and this Court must consider the change in law made thereby and give effect to it in answering the question of law arising out of the Tribunal's order. On the other hand, the validity of the notification has been very stenuously contested before us by learned Counsel for the respondent. He has challenged its validity and also its applicability to the present case on the following grounds: (1) that it is *ultra vires* the powers conferred on the Central Government by s. 12; (2) that it can have no retrospective effect; and (3) that it contravenes Art. 14 of the Constitution.

We shall consider these arguments in the order in which we have stated them. The first question is whether the notification is validly made under s. 12 or is it *ultra vires* the powers conferred on the Central Government by that section? On behalf of the respondent it is urged that a condition for the exercise of the power under s. 12 is contained in the opening clause, which says: "If any difficulty arises in giving effect to the provisions of any of the Acts, rules or orders extended by section 3 or section 11 to any State etc." The contention is that no difficulty arose in giving effect to the provisions of any of the Acts, rules or orders referred to in the opening clause, to any State etc. and, therefore, the condition for the exercise of the power is not fulfilled and on that ground the notification is invalid. We are unable to accept this argument as correct. Section 10 of the Income-tax Act says, in its first sub-section, that the tax shall be payable by an assessee in respect of the profits or gains of any business, profession or vocation carried on by him. Sub-s. (2) thereof says that such profits or gains shall be computed after making certain allowances, and one of these allowances is in respect of the depreciation of such buildings, machinery, plant, etc. as are used for the purpose of the business (cl. vi). The depreciation except in certain cases is calculated on the written down value, which expression is explained

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in sub-s. (5) of s. 10. Clause (b) of the sub-section states:

"S. 10(5)— (a) .....

(b) In the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby or under executive orders issued when the Indian Income-tax Act, 1886 (II of 1886), was in force".

It is obvious that in applying cl. (b) to an assessee in a Part B State there would be an initial difficulty, in as much as prior to 1950 when the Indian Income-tax Act came into force in a Part B State no depreciation could have been actually allowed to such an assessee under the Income-tax Act or under any Act repealed thereby; for example, the Hyderabad Income-tax Act was repealed by the Finance Act, 1950 and not by the Income-tax Act, and would not therefore be covered by cl. (b). Such and other difficulties led to the Removal of Difficulties Order, 1950, which has not been seriously challenged before us. Indeed, the High Court said that it was not open to the respondent to challenge the validity of the Removal of Difficulties Order, 1950, because such a point was not taken before the Tribunal. Learned Counsel for the respondent has then submitted that whatever initial difficulty there might have been in giving effect to the Indian Income-tax Act in a Part B State, that difficulty was solved by paragraph 2 of the Removal of Difficulties Order, 1950, and, in any view, there was no fresh difficulty which could necessitate the addition of an Explanation in 1953 or 1956. Here again we think that the submission is not correct. The basic and normal scheme of depreciation under the Indian Income-tax Act is that it decreases every year, being a percentage of the written down value which in the first year is the actual cost and in succeeding years actual cost less all depreciation actually allowed under the Income-tax Act or any Act repealed thereby etc. The Hyderabad Income-tax Act not having been repealed by the Income-tax Act but by the Finance Act, 1950, there was a difficulty in

allowing depreciation to an assessee in a Part B State in the first year of assessment under the Indian Income-tax Act. This difficulty was sought to be removed by paragraph 2 of the Removal of Difficulties Order, 1950. If, however, depreciation actually allowed under the Hyderabad Income-tax Act was taken into account in computing the aggregate depreciation allowance and the written down value, an anomalous result would follow as in the present case, namely, depreciation allowance to be allowed to the assessee in the accounting year under the Indian Income-tax Act would be more than what was allowed in previous years under the Hyderabad Income-tax Act. This would create a disparity and be against the scheme of the Indian Income-tax Act. It was therefore necessary to explain paragraph 2 of the Removal of Difficulties Order, 1950, to assimilate or harmonise the position regarding depreciation allowance, and the Explanation added in 1953 or 1956 was obviously intended to remove the difficulty arising out of that disparity or disharmony.

Furthermore, the true scope and effect of s. 12 seems to be that it is for the Central Government to determine if any difficulty of the nature indicated in the section has arisen and then to make such order, or give such direction, as appears to it to be necessary to remove the difficulty. Parliament has left the matter to the executive; but that does not make the notification of 1956 bad. In *Pandit Banarsi Das Bhanot* v. *The State of Madhya Pradesh & Ors.* (1) we said at page 435: "Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods and the like". We are, therefore, of the view that the notification of 1956, was validly made under s. 12 and is not *ultra vires* the powers conferred on the Central Government by that section.

The second question is—does the notification apply

(1) [1959] S.C.R. 427.

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to the assessment in the present case, which is an assessment for the year 1951-52? The notification was made in 1956 and it added an Explanation to paragraph 2 of the Removal of Difficulties Order, 1950. It says that a particular expression occuring in that paragraph means and shall be deemed always to have meant the aggregate allowance for depreciation taken into account in computing the written down value etc., under any law of a Part B State. The argument on behalf of the respondent is that the law which governs an assessment for the assessment year 1951-52 is the law in force at the time when the Finance Act, 1951, came into force; accordingly, so the argument proceeds, paragraph 2 of the Removal of Difficuties Order, 1950, as it stood on April 28, 1951, when the Finance Act, 1951, came into force, will apply in the present case. We consider this argument to be unsound. The Explanation, though added in 1956, explains the meaning of paragraph 2 of the Removal of Difficulties Order, 1950 and says in express terms that the paragraph shall be deemed always to have had that meaning. Section 12 by the very nature of its intent and purpose confers on the Central Government power to make an order to remove a difficulty which has already arisen, and the power to remove the difficulty must necessarily include the power to remove the difficulty from the time it arose. The Central Government has, therefore, the power to make an order or give a direction so as to remove the difficulty from the very beginning, and that is what the notification of 1956 does. It applies to the assessment of 1951-52; indeed it applies to all assessments made under the Indian Income-tax Act in which paragraph 2 of the Removal of Difficulties Order, 1950, operates.

The last challenge to the validity of the notification of 1956 is that it contravenes Art. 14 of the Constitution, because it discriminates between different classes of tax payers. Learned Counsel for the respondent has asked us to consider the cases of assessees in three different areas which subsequently come in a Part B State: in one area there was no law relating to

income-tax; in the second there was a law relating to income-tax under which written down value was computed on the basis of depreciation actually allowed year after year, while in the third the written down value was computed in the manner provided under the Hyderabad Income-tax Act; it is pointed out that on the extension of the Indian Income-tax Act (read with paragraph 2 of the Removal of Difficulties Order, 1950 and the Explanation) to those areas, the assessee in the first area will get depreciation allowance on the *actual cost*; in the second area he will get such allowance on the basis of *actual cost less depreciation actually allowed*; and in the third area he will get such allowance on the *actual cost less depreciation taken into account.* It is contended that this resultant discrimination is arbitrary and without any rational justification. We think that learned Counsel for the respondent has ignored one essential consideration which clearly vitiates his argument. In the matter of depreciation allowance, the assessee in the three areas in the example given by him do not stand on the same footing; they are not situated alike so as to be entitled to be treated alike. It is obvious that an assessee from an area where there was no income-tax law at all can never say that in the matter of depreciation allowance as respects buildings, machinery, plant etc., he is on a par with a person in an area where there was a law relating to income-tax allowing depreciation on such buildings, machinery, plant etc. The same would be the position with regard to areas where the previous law as to depreciation was different. Indeed, to treat all these persons alike would be tantamount to unequal treatment. In our view, the notification of 1956 creates no unequal treatment of persons in a like situation; it applies to all who are in a like situation, namely, all those to whom paragraph 2 of the Removal of Difficulties Order, 1950, applies. We consider that the challenge to the notification based on Art. 14 is wholly unsubstantial.

It has not been disputed before us that a change in

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law validly made and applicable to a case pending in appeal must be considered and given effect to by the Appellate Court. The conclusion we have reached is that the notification of 1956 was validly made and applies to the present case. In view of this conclusion we have considered it unnecessary to examine the notification of 1953 or the reasons for which the High Court held that notification to be bad.

For the reasons given above, we allow this appeal and set aside the judgment and order of the High Court dated February 16, 1954. The question referred to the High Court is answered in favour of the appellant. The appellant has succeeded by reason of the notification of 1956 and taking that circumstance into consideration, we direct that there will be no order for costs for the hearing in this Court.

Appeal allowed.

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November 11.

STATE OF UTTAR PRADESH AND OTHERS

v.

BASTI SUGAR MILLS CO., LTD.

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Industrial Dispute—Bonus—Statute empowering Government to direct payment of bonus by notification—Validity of—Whether retrospective—United Provinces Industrial Disputes Act, 1947, (U. P. 28 of 1947), s. 3(b) and (d)—Constitution of India, Art. 19(1)(f).

The Government of U. P. appointed a Court of enquiry under ss. 6 and 10 of the United Provinces Industrial Disputes Act, 1947, and referred to it the present dispute. The Court of enquiry submitted its report to the Government, whereupon the Government issued a notification in July, 1950, directing the various sugar factories to pay bonus to their workmen for the years 1948-49 as well as to pay certain amounts as bonus for the years 1947-48.

The respondents obtained writ of prohibition from the High

Court against the Government, prohibiting it from enforcing the notification. The State Government came up in appeal, urging that the provisions of cl. (b) of s. 3 of the United Provinces Industrial Disputes Act, 1947, were wide enough to permit it to issue such a direction to the employer because by doing so the State Government would be imposing a condition of employment in future.

The respondents, inter alia, contended that (1) clause (b) of s. 3 of the Act does not operate retrospectively; (2) bonus could only be a term of employment by agreement and could not be imposed by statute; (3) where there was an industrial dispute cl. (d) and not cl. (b) of s. 3 of the Act would apply and (4) if cl. (b) was applicable it was *ultra vires* being discriminatory and violative of Art. 14 of the Constitution and also violative of Art. 19(1) of the Constitution as it confers arbitrary powers on the State Government.

Held, that (i) though cl. (b) of s. 3 of the United Provinces Industrial Disputes Act, 1947, could not be given a retrospective effect, yet there was nothing therein which prohibited the State Government from giving a direction with regard to the payment of bonus and by giving such a direction the State Government was not giving retrospective effect to the provisions of that clause nor did it add a new term or a condition for a period which was over, it merely required the employer to pay an additional sum of money to their employees as a term and condition of employment in future;

(ii) though normally wage is a term of contract it can be made a condition of employment by statute, and it was open to the State Government under cl. (b) of s. 3 to make the payment of bonus to workmen a condition of their employment in future;

(iii) where the employees bargained in their collective capacity, the fact that the personnel of the factory when the order for the payment of bonus was made by the Government and in the year to which dispute related were not the same, did not affect the power of the Government as the order would apply only to those employees who had worked during the period in question and not to new employees;

(iv) the normal way of dealing with an industrial dispute would be to have it dealt with judicially and not by resort to executive action, but cl. (b) of s. 3 empowers the Government to act promptly in case of an emergency and arms it with additional powers to deal with such an emergency in the public interest;

(v) when the Government had made an executive order under cl. (b) of s. 3 on the ground that it was in the public interest to do so it was open to the aggrieved party to move the Government to refer the industrial dispute for conciliation or adjudication under cl. (b) of s. 3 of the Act.

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(vi) the provisions of cl. (b) of s. 3 are not in any sense alternative to those of cl. (d) and the former could be availed of by the State Government only in an emergency and as a temporary measure. The right of the employer or the employee to require the dispute to be referred for conciliation or adjudication would still be there and could be exercised by them by taking appropriate steps;

(vii) clause (b) of s. 3 of the Act is not violative of the provisions of Art. 19(1)(g) of the Constitution as it permits action to be taken thereunder by the Government only in an emergency and in the public interest. The restriction placed upon the employer is only a temporary one and having been placed in the public interest falls under cl. (6) of Art. 19 of the Constitution.

Ram Nath Koeri and Anr. v. *Lakshmi Devi Sugar Mills and Ors.*, (1956) II L.L.J. 11, approved.

L. D. Mills v. *U. P. Government*, A.I.R. 1954 All. 705, overruled.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 790 of 1957.

Appeal from the judgment and decree dated February 10, 1954, of the Allahabad High Court in Civil Misc. Writ No. 280 of 1950.

C. B. Aggarwala, G. C. Mathur and *C. P. Lal*, for the appellants.

G. S. Pathak and *D. N. Mukherjee*, for the respondent No. 1.

1960. November 11. The Judgment of the Court was delivered by

Mudholkar J.

MUDHOLKAR J.—This is an appeal by the State of Uttar Pradesh against the decision of the Full Bench of the Allahabad High Court in a writ petition. In the writ petition the respondents challenged certain orders made by the Government of Uttar Pradesh under s. 3, cl. (b) of the United Provinces Industrial Disputes Act, 1947, (XXVIII of 1947) requiring the respondents to pay bonus at certain rates for the years 1947-48 and 1948-49 to their workers and also payment of retaining allowances to the skilled seasonal workmen and clerical staff. The circumstances under which the orders were made are briefly these:

The Indian National Sugar Mills Workers' Federation, Lucknow, served notices on various sugar factories in Uttar Pradesh on December 15, 1949, in which they made six demands. We need, however, mention only one of them as that alone is in controversy in this appeal. That demand related to the bonus for the year 1948-49 and to the restoration of the reduction which had been made in the previous year's bonus. By that notice the Federation threatened a strike in the industry with effect from January 16, 1960, if the demands were not met by the sugar factories. Since this situation brought into existence an industrial dispute, the Government of Uttar Pradesh, in exercise of the power conferred by ss. 6 and 10 of the Industrial Disputes Act, 1947, (XIV of 1947) appointed a Court of Inquiry and referred the dispute to it. The notification also stated the points which were referred to the Court of Inquiry. That notification was twice amended but nothing turns on those amendments. A full enquiry was held by the Court of Inquiry at which the representatives of both the employers as well as the employees were represented and material was placed before the Court of Inquiry by both the sides. The Court of Inquiry submitted its report to the Government on April 15, 1950. On receipt of this report the Government of Uttar Pradesh published the report in the Uttar Pradesh gazette on May 8, 1950, as provided for in s. 17 of the Industrial Disputes Act, 1947. On July 5, 1950, the Government of Uttar Pradesh, in exercise of the powers conferred by s. 3(b) of the Uttar Pradesh Industrial Disputes Act, 1947, issued a notification directing the various sugar factories to pay bonus to their workmen for the year 1948-49 as well as to pay certain amounts as bonus for the year 1947-48. A further direction was made in the notification for payment of retaining allowance to the skilled seasonal workmen and clerical staff with effect from the off season in the year 1950. Thereupon the Indian Sugar Millers Association, which is an Association of sugar factories in India and is registered under the Trade Union Act made a petition before the High Court at Allahabad under

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Art. 226 of the Constitution for the issue of a writ against the Government of Uttar Pradesh prohibiting the Government from enforcing the notification. The writ petition was dismissed by the High Court on September 14, 1950, on the ground that the Association had no legal interest in the matter. Thereupon various sugar mills preferred separate writ petitions before the High Court, the respondents before us being one of them. As many as fourteen grounds were taken on their behalf in their writ petition. We are, however, concerned with only three of them to which Mr. G. S. Pathak, who appears for the respondents confined his arguments. Before we refer to those grounds we would complete the narration of facts. The High Court of Allahabad allowed the writ petitions, in so far as the question of payment of bonus was concerned, though Sapru, J., one of the judges constituting the Full Bench, expressed a doubt as to the correctness of the view that the order of the State Government as regards the payment of bonus was invalid. After the decision of the High Court, the State of Uttar Pradesh applied for a certificate under Art. 133(1)(b) and Art. 133(1)(c) of the Constitution. The High Court having granted the certificate, the present appeal has been brought to this Court.

In order to appreciate the points raised by Mr. G. S. Pathak, it is necessary to set out the provisions of s. 3 of the Uttar Pradesh Industrial Disputes Act, 1947. They are as follows:

"If, in the opinion of the State Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order, make provision—

(a) for prohibiting, subject to the provisions of the order, strikes or lock-outs generally, or a strike or lock-out in connection with any industrial dispute;

(b) for requiring employers, workmen or both to observe for such period, as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order;

(c) for appointing industrial courts;

(cc) for appointing committees representative both of the employer and workmen for securing amity and good relations between the employer and workmen and for settling industrial disputes by conciliation; for consultation and advice on matters relating to production, organization, welfare and efficiency;

(d) for referring any industrial dispute for conciliation or adjudication in the manner provided in the order;

(e) for requiring any public utility service, or any subsidiary undertaking not to close or remain closed and to work or continue to work on such conditions as may be specified in the order;

(f) for exercising control over any public utility service, or any subsidiary undertaking, by authorising any person (hereinafter referred to as an authorised controller) to exercise, with respect to such service, undertaking or part thereof such functions of control as may be specified in the order; and, on the making of such order the service, undertaking or part thereof such functions of control as may be specified in the order; and, on the making of such order the service, undertaking or part, as the case may be, shall so long as the order continues to be carried on in accordance with any directions given by the authorised controller in accordance with the provisions of the order and every person having any functions of management of such service, undertaking or part thereof shall comply with such directions;

(g) for any incidental or supplementary matters which appear to the State Government necessary or expedient for the purposes of the order: Provided that no order made under clause (b)

(i) shall require an employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months preceding the date of the order;

(ii) shall, if an industrial dispute is referred for adjudication under clause (d), be enforced after the decision of the adjudicating authority is announced by, or with the consent of, the State Government."

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The view taken by the High Court was that clause (b) of s. 3 of the Uttar Pradesh Industrial Disputes Act, 1947, is prospective in operation in that thereunder it is open to the State Government to ask an employer or an employee to observe a term or a condition of employment in future and that consequently it is not competent thereunder to require an employer to pay bonus to workmen in respect of a period of employment which is already past. The view of the High Court was challenged before us on behalf of the State. According to the State the provisions of the aforesaid clause are wide enough to permit the making of such a direction to the employer because by doing so the State Government would only be imposing a condition of employment in future. In answer to this contention Mr. Pathak has, as already stated, raised three points and they are as follows:

(1) Clause (b) of s. 3 does not operate retrospectively and must be construed as having a prospective operation only.

(2) This clause does not apply at all where an industrial dispute has arisen and that the appropriate provision under which the State Government can take action where an industrial dispute has arisen is cl. (d).

(3) If cl. (b) is susceptible of the interpretation that it is applicable even when an industrial dispute has arisen then it is *ultra vires* in as much as it would enable the State Government to discriminate between an industry and an industry or an industrial unit and another industrial unit or between a workman and a workman by referring some cases for adjudication to an industrial court under cl. (d) and passing executive order itself in respect of others. The provisions of cl. (b), according to him, are violative of Art. 14 of the Constitution. Further, according to him, they are also violative of the provisions of Art. 19(1)(g) of the Constitution in as much as they confer an arbitrary power on the State Government to require an employer to pay whatever it thinks fit to an employee and thus place an unreasonable restriction on the rights of the employer to carry on his business.

We entirely agree with the learned judges of the Allahabad High Court that cl. (b) of s. 3 cannot be given a retrospective effect. But we are unable to agree with them that the State Government in making a direction to the employers to pay bonus for the years in question purported to give a retrospective operation to the provisions of that clause. The order made by the State Government in regard to bonus is to the effect that it shall be paid for the year 1947-48 to those persons who worked during that year and for the year 1948-49 to those persons who worked in that year. This payment was directed to be made within six weeks of the making of the order. By giving this direction the State Government did no more than attach a condition to the employment of workmen in the year 1950-51 in sugar factories affected by the order. That is all that it has done. Mr. Pathak contended that bonus has certain attributes of a wage and wage being a matter of contract can only be a term of employment agreed to between the employer and the employee but could not be a condition of employment which could be imposed by a statute or which could be imposed by a Government acting under a statute. We agree that normally wage is a term of contract but it would be futile to say that it cannot be made a condition of employment. The Minimum Wages Act provides for the fixation of a statutory minimum wage payable to a worker in respect of certain types of employments and is an instance of wage being made a condition of employment. That apart, whether wage or bonus is a term of a contract or a condition of employment it is clear that s. 3 empowers the State Government to require the employers and workmen or both to observe any term or condition of employment for a specified period. Since the law enables the State Government to impose a term it is apparent that the legislature which enacted that law did not import into that word a consensual sense. We cannot, therefore, accept the argument that under cl. (b) it was not open to the State Government to make the payment of bonus to

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workmen a condition of their employment in future and thus augment their past wages.

Mr. Pathak then referred to the following observations in the judgment of Bhargava, J.

"Obviously there can be no question of requiring any one to observe for a future period terms and conditions of employment which have already remained effective and have already been carried out by those persons".

According to Mr. Pathak the effect of the order of the Government is to add a new term or a condition with regard to employment for a period which is already over. We would again point out that this is not the effect of the order of the Government. The effect of that order is merely to require the employer to pay an additional sum of money to his employees as a term and condition of work in future. Mr. Pathak, however, said that this would involve payment of bonus even to new employees, that is, those who had not participated in earning the profits in the past and that this would be contrary to the very conception of bonus. The answer to that is that under the order of the Government such bonus is payable only to those workers who had worked during the years in question and not to new employees. It is further to be borne in mind that in the dispute in question the employees were bargaining in their collective capacity and, therefore, the question whether the personnel forming the employees of the factories in July, 1950, when the order was made by the Government, and in the years 1947-48 and 1948-49 to which the dispute relates was the same is quite immaterial. As has been rightly pointed out by Sapru, J., "The employees might well have taken in the industrial dispute the line that the payment of bonus in respect of the years 1947-48 and 1948-49 to the workmen employed in those years was regarded by those who were employed in future as a preliminary and essential condition for not only the settlement of the industrial dispute in progress but also for carrying on their future work in sugar factories". We also concur with the observations of the learned judge that by coming to the conclusion that the workers' demand should be

conceded the State Government was not passing an order which will have retrospective effect but was passing an order which was to ensure that the workmen to be employed in the year 1950 would work in a contented manner. It must not be forgotten that the dispute was in the present, that is, it existed when the impugned order was made, though its origin was in the past. What the order did was to resolve that dispute and this it could only do by removing its cause.

Mr. Pathak then relied upon the following observations of Bhargava, J., in *L. D. Sugar Mills* v. *U. P. Government* (1):

"The expression 'to observe for such period as may be specified, such terms and conditions of employment as may be determined' gives an indication that clause (b) of s. 3 of the U. P. Industrial Disputes Act, 1947, is meant for the purpose of passing orders by which the Government gives directions about what the terms and conditions of employment should be and not how a particular term and condition of employment already in existence should be acted upon."

Bhargava, J.'s decision was, however, reversed in *Ram Nath Koeri and Another* v. *Lakshmi Devi Sugar Mills and Ors.* (2) by a division bench of the Allahabad High Court in Letters Patent Appeal brought against Bhargava, J.'s decision. We agree with the view taken by the Appellate Bench.

In our opinion, therefore, there is nothing in cl. (b) of s. 3 of the Act which prohibited the State Government from making a direction to the sugar factories with regard to the payment of bonus for the years 1947-48 and 1948-49 in their order of July 7, 1950 and that by making such a direction the State Government was not giving a retrospective effect to the provisions of that clause. In this connection it is relevant to remember that any direction as to payment of bonus must inevitably be based on the available surplus, and such surplus can be determined only at the end of a given year. Therefore, what the impugned

(1) A.I.R. 1954 All. 705, 714. (2) (1956) II L. L. J. 11.

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order purports to do is to require the employers to pay specified amounts in future, though the said amounts are fixed by reference to the profits made in the two preceding years. If a direction as to payment of bonus can be issued under s. 3(b) it cannot, therefore, be said to be retrospective.

The next argument of Mr. Pathak appears, at first sight, to be more formidable. He points out that undoubtedly an industrial dispute had arisen, and indeed it is upon that basis that the State Government proceeded to appoint a Court of Inquiry. Therefore, according to Mr. Pathak resort could be taken by the State Government only to the special provisions of cl. (d) and not to the more general provisions of cl. (b) of s. 3. In other words, where there is an industrial dispute, the appropriate thing for the Government to do is to refer it for conciliation or adjudication under the provisions of cl. (d) and not to deal with the matter by an executive order as it has done in this case. Mr. Pathak then refers to a further passage from the judgment of Bhargava, J., just cited which is as follows:

"It appears from the language that this provision was not meant for the purpose of dealing with individual disputes arising out of the application of a term or condition of employment and no power was granted to the State Government under this provision of law, to sit as an adjudicator to decide a dispute that might have arisen relating to the working and actual application of terms and conditions of employment already in force. The provision was for the purpose of enabling the State Government to vary the agreed terms and conditions of employment for purposes specified in s. 3 of U. P. Industrial Disputes Act, 1947, under the pressing necessities or expediency justifying such course of action."

We entirely agree with Mr. Pathak that the normal way of dealing with an industrial dispute under the Act would be to have it dealt with judicially either by conciliation or by adjudication and that judicial process cannot be circumvented by resort to executive action. The proceeding before a conciliator or an

adjudicator is, in a sense, a judicial proceeding because therein both the parties to the dispute would have the opportunity of being heard and of placing the relevant material before the conciliator or adjudicator. But there may be an emergency and the Government may have to act promptly "for securing the public safety or convenience or the maintenance of public order or supplies and services essential to the life of the community or maintaining employment." It was, therefore, necessary to arm it with additional powers for dealing with such an emergency. Clause (b) of s. 3 was apparently enacted for this purpose. An order made thereunder would be in the nature of a temporary or interim order as would be clear from the words "for such period as may be specified" appearing therein and from the second proviso to s. 3. Under this proviso where an industrial dispute is referred for adjudication under cl. (d) an order made under cl. (b) cannot be enforced after the decision of the adjudicating authority is announced by or with the consent of the State Government. It would, therefore, follow from this that where the Government has made an executive order, as it did in this case, under cl. (b) of s. 3, it is open to the aggrieved party to move the Government to refer the industrial dispute for conciliation or adjudication under cl. (d) of s. 3. Mr. Pathak, however, stated that under this section, the Government has a discretion whether or not to refer a dispute for conciliation or adjudication under cl. (d). But in our opinion where once the Government has acted under cl. (b) on the ground that it was in the public interest to do so, it would not be open to the Government to refuse to refer the dispute under cl. (d) for conciliation or adjudication. Mr. C. B. Agarwal, who appeared for the State of Uttar Pradesh conceded, and we think rightly, that this would be so and added that in case the State Government was recalcitrant it could be forced to do its duty by the issue of a writ of mandamus by the High Court under Art. 226 of the Constitution.

There is a further argument of Mr. Pathak which must be noticed and that argument is that there is

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nothing in cl. (b) which limits its operation to an emergency and that it is, therefore, not open to us to place a construction thereon of the kind we are placing. The opening words of s. 3 themselves indicate that the provisions thereof are to be availed of in an emergency. It is true that even a reference to an arbitrator or a conciliator could be made only if there is an emergency. But then an emergency may be acute. Such an emergency may necessitate the exercise of powers under cl. (b) and a mere resort to those under cl. (d) may be inadequate to meet this situation. Whether to resort to one provision or other must depend upon the subjective satisfaction of the State Government upon which powers to act under s. 3 have been conferred by the legislature. No doubt, this result is arrived at by placing a particular construction on the provisions of that section but we think we are justified in doing so. As Mr. Pathak himself suggested in the course of his arguments, we must try and construe a statute in such a way, where it is possible to so construe it, as to obviate a conflict between its various provisions and also so as to render the statute or any of its provisions constitutional. By limiting the operation of the provisions of cl. (b) to an emergency we do not think that we are doing violence to the language used by the legislature. Further, assuming that the width of the language could not be limited by construction it can be said that after the coming into force of the Constitution the provisions can, by virtue of Art. 13, have only a limited effect as stated above and to the extent that they are inconsistent with the Constitution, they have been rendered void.

In our view, therefore, the provisions of cl. (b) of s. 3 are not in any sense alternative to those of cl. (d) and that the former could be availed of by the State Government only in an emergency and as a temporary measure. The right of the employer or the employee to require the dispute to be referred for conciliation or adjudication would still be there and could be exercised by them by taking appropriate steps. Upon the construction we place on the

provisions of cl. (b) of s. 3 it is clear that no question of discrimination at all arises. Similarly the fact that action was taken by the Government in an emergency in the public interest would be a complete answer to the argument that that action is violative of the provisions of Art. 19(1)(g). The restriction placed upon the employer by such an order is only a temporary one and having been placed in the public interest would fall under cl. (6) of Art. 19 of the Constitution.

Upon this view we hold that the High Court was in error in issuing a writ against the State Government quashing their order in so far as it related to payment of bonus. The appeal is allowed and order of the High Court is set aside. Costs of this appeal will be paid by the respondents.

Appeal allowed.

MANOHAR LAL

v.

THE STATE OF PUNJAB

1960

November 11.

(JAFER IMAM, J. L. KAPUR, K. C. DAS GUPTA, RAGHUBAR DAYAL and N. RAJAGOPALA AYYANGAR, JJ.)

Trade Employees—Close day—Enactment, if violative of fundamental rights—Workers' Welfare—Protection—Restriction, if unreasonable—Punjab Trade Employees Act, 1940, (Punj. X of 1940) s. 7 (1)

The appellant who was a shopkeeper was convicted for the second time by the Additional District Magistrate for contravening the provisions of s. 7(1) of the Punjab Trade Employees Act, 1940, under which he was required to keep his shop closed on the day which he had himself chosen as a "close day". He raised the plea that the Act did not apply to his shop as he did not employ any stranger but that himself alone worked in it and that the application of s. 7(1) to his shop would be violative of his fundamental rights under Arts. 14, 19(1)(f) and (g) of the Constitution and also that the restriction imposed was not reasonable within Art. 19(6) as it was not in the interest of the general

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public. The High Court dismissed his application for revision of the Magistrate's order. On appeal on a certificate of the High Court,

Held, that the main object of the Act was the welfare of the employees and to protect their as well as the employers' health by preventing them from overwork. Such a restriction being in the interest of the general public was reasonable within the meaning of Art. 19(6) of the Constitution.

The provisions of s. 7(1) were constitutionally valid and were justified as for securing administrative convenience and avoiding evasion of those provisions designed for the protection of the workmen.

Manohar Lal v. *The State*, [1951] S.C.R. 671, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 173/1956.

Appeal from the judgment and order dated May 23, 1956, of the Punjab High Court in Criminal Revision No. 1058/1954.

K. L. Arora, for the appellant.

N. S. Bindra and *R. H. Dhebar*, for the respondent.

1960. November 11. The Judgment of the Court was delivered by

Ayyangar J.

AYYANGAR J.—This appeal on a certificate under Arts. 132 and 134(1) of the Constitution granted by the High Court of Punjab raises for consideration the constitutionality of s. 7(1) of the Punjab Trade Employees Act, 1940.

The appellant—Manohar Lal—has a shop at Ferozepore Cantt. in which business is carried on under the name and style of 'Imperial Book Depot'. Section 7 of the Punjab Trade Employees Act, 1940 (hereinafter called the Act), enacts:

"7. (1) Save as otherwise provided by this Act, every shop or commercial establishment shall remain closed on a close day.

(2)(i). The choice of a close day shall rest with the occupier of a shop or commercial establishment and shall be intimated to the prescribed authority within two months of the date on which this Act comes into force."

to extract the provision relevant to this appeal. The

appellant had chosen Friday as "the close day", i.e., the day of the week on which his shop would remain closed. The Inspector of Shops and Commercial Establishments, Ferozepore Circle, visited the appellant's shop on Friday, the 29th of January, 1954, and found the shop open and the appellant's son selling articles. Obviously, if s. 7(1) were valid, the appellant was guilty of a contravention of its terms and he was accordingly prosecuted in the Court of the Additional District Magistrate, Ferozepore, for an offence under s. 16 of the Act which ran:

"Subject to the other provisions of this Act, whoever contravenes any of the provisions of this Act .....shall be liable on conviction to a fine not exceeding twenty-five rupees for the first offence and one hundred rupees for every subsequent offence".

The appellant admitted the facts but he pleaded that the Act would not apply to his shop or establishment for the reason that he had engaged no strangers as employees but that the entire work in the shop was being done by himself and by the members of his family, and that to hold that s. 7(1) of the Act would apply to his shop would be unconstitutional as violative of the fundamental rights guaranteed by Arts. 14, 19(1)(f) and (g) of the Constitution. The additional District Magistrate rejected the plea raised by the appellant regarding the constitutionality of s. 7(1) in its application to shops where no "employees" were engaged and sentenced him to a fine of Rs. 100 and simple imprisonment in default of payment of the fine (since the appellant had been convicted once before). The appellant applied to the High Court of Punjab to revise this order, but the Revision was dismissed. The learned Judges, however, granted a certificate of fitness which has enabled the appellant to file the appeal to this Court.

Though the validity of s. 7(1) of the Act was challenged in the High Court on various grounds, learned Counsel who appeared before us rested his attack on one point. He urged that the provision violated the

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appellant's right to carry on his trade or business guaranteed by Art. 19(1)(g) and that the restriction imposed was not reasonable within Art. 19(6) because it was not in the interest of the general public. Learned Counsel drew our attention to the long title of the Act reading " An Act to limit the hours of work of Shop Assistants and Commercial Employees and to make certain regulations concerning their holidays, wages and terms of service " and pointed out that the insistence on the appellant to close his shop, in which there were no " employees ", was really outside the purview of the legislation and could not be said to subserve the purposes for which the Act was enacted. In short, the submission of the learned Counsel was that the provision for the compulsory closure of his shop for one day in the week served no interests of the general public and that it was unduly and unnecessarily restrictive of his freedom to carry on a lawful trade or business, otherwise in accordance with law, as he thought best and in a manner or mode most convenient or profitable.

We are clearly of the opinion that the submissions of the learned Counsel should be repelled. The long title of the Act extracted earlier and on which learned Counsel placed considerable reliance as a guide for the determination of the scope of the Act and the policy underlying the legislation, no doubt, indicates the main purposes of the enactment but cannot, obviously, control the express operative provisions of the Act, such as for example the terms of s. 7(1). Nor is the learned counsel right in his argument that the terms of s. 7(1) are irrelevant to secure the purposes or to subserve the underlying policy of the Act. The ratio of the legislation is social interest in the health of the worker who forms an essential part of the community and in whose welfare, therefore, the community is vitally interested. It is in the light of this purpose that the provisions of the Act have to be scrutinized. Thus, s. 3 which lays down the restrictions subject to which alone " young persons ", defined as those under the age of 14, could be employed in any shop or commercial establishment, is obviously with a view to

ensuring the health of the rising generation of citizens. Section 4 is concerned with imposing restrictions regarding the hours of work which might be extracted from workers other than " young persons ". Section 4(1) enacts :

" Subject to the provisions of this Act, no person shall be employed about the business of a shop or commercial establishment for more than the normal maximum working hours, that is to say, fifty-four hours in any one week and ten hours in any one day."

bringing the law in India as respects maximum working hours in line with the norms suggested by the International Labour Convention. Sub-clauses (4) and (5) of this section are of some relevance to the matter now under consideration :

" (4) No person who has to the knowledge of the occupier of a shop or commercial establishment been previously employed on any day in a factory shall be employed on that day about the business of the shop or commercial establishment for a longer period than will, together with the time during which he has been previously employed on that day in the factory, complete the number of hours permitted by this Act.

(5) No person shall work about the business of a shop or commercial establishment or two or more shops or commercial establishments or a shop or commercial establishment and a factory in excess of the period during which he may be lawfully employed under this Act."

It will be seen that while under sub-cl. (4) employers are injuncted from employing persons who had already worked for the maximum number of permitted hours in another establishment, sub-cl. (5) lays an embargo on the worker himself from injuring his health by overwork in an endeavour to earn more. From this it would be apparent that the Act is concerned—and properly concerned—with the welfare of the worker and seeks to prevent injury to it, not merely from the action of the employer but from his own. In other words, the worker is prevented from attempting to earn more wages by working longer hours than is good

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for him. If such a condition is necessary or proper in the case of a worker, there does not seem to be anything unreasonable in applying the same or similar principles to the employer who works on his own business. The learned Judges of the High Court have rested their decision on this part of the case on the reasoning that the terms of the impugned section might be justified on the ground that it is designed in the interest of the owner of the shop or establishment himself and that his health and welfare is a matter of interest not only to himself but to the general public. The legislation is in effect the exercise of social control over the manner in which business should be carried on—regulated in the interests of the health and welfare not merely of those employed in it but of all those engaged in it. A restriction imposed with a view to secure this purpose would, in our opinion, be clearly saved by Art. 19(6).

Apart from this, the constitutionality of the impugned provision might be sustained on another ground also, viz., with a view to avoid evasion of provisions specifically designed for the protection of workmen employed. It may be pointed out that acts innocent in themselves may be prohibited and the restrictions in that regard would be reasonable, if the same were necessary to secure the efficient enforcement of valid provisions. The inclusion of a reasonable margin to ensure effective enforcement will not stamp a law otherwise valid as within legislative competence with the character of unconstitutionality as being unreasonable. The provisions could, therefore, be justified as for securing administrative convenience and for the proper enforcement of it without evasion. As pointed out by this Court in *Manohar Lal* v. *The State* (1) (when the appellant challenged the validity of this identical provision but on other grounds):

"The legislature may have felt it necessary, in order to reduce the possibilities of evasion to a minimum, to encroach upon the liberties of those who would not otherwise have been affected.....To require a shopkeeper, who employs one or two men,

(1) [1951] S.C.R. 671, 675.

to close and permit his rival, who employs perhaps a dozen members of his family, to remain open, clearly places the former at a grave commercial disadvantage. To permit such a distinction might well engender discontent and in the end react upon the relations between employer and employed."

We have, therefore, no hesitation in repelling the attack on the constitutionality of s. 7(1) of the Act. The appeal fails and is dismised.

Appeal dismissed.

IMPERIAL CHEMICAL INDUSTRIES (INDIA) PRIVATE LIMITED

v.

THE WORKMEN

(AND CONNECTED APPEAL)

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, JJ.)

Industrial Dispute—Award, if can deprive workmen of pre-existing benefits—Age of retirement—Fixation—Relevant considerations—Failure of Tribunal to consider evidence adduced by parties—Duty of Supreme Court.

The workmen of the Imperial Chemical Industries at Bombay claimed, firstly, twice the employee's normal rate of pay for the work done on Sundays and holidays and secondly that all employees of the company shall not compulsorily be retired by the company before they attain the age of 60. The company disputed the demands on the grounds that it had paid Sunday and holiday work allowance in terms of an earlier award, and as no change of circumstances had taken place since the making of the award a revision was not justified; as for the age of retirement as it had fixed the retirement age at 55 for all its employees throughout India, any revision would have repercussion in other branches of the company.

The tribunal partly allowed the claim of the workmen and directed the company to give the employees concerned for work done on Sundays and holidays half a day's total salary and dearness allowance; and for the work done by the employees on

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festival holiday, a day's salary and dearness allowance, but the employees would not be entitled to a substituted holiday.

The Tribunal in making the distinction between work done on Sundays on the one hand and festival holidays on the other, in effect, placed the workmen in worse position than before the award with respect to the work done on festival holidays and deprived the workmen of their right to a compensatory weekly off or a substituted holiday, and also of a part of the benefits to which they were entitled under the pre-existing arrangement.

Further the Tribunal without taking into consideration the recent trend in Bombay with regard to the age of retirement and an inportant document produced by the workmen in support thereof, which conclusively showed that in Bombay the age of retirement was almost invariably fixed at 60 and not at 55, fixed the age of retirement at 58 years.

Held, that the Tribunal in making an award could not deprive the workmen of the benefits to which they were entitled to under the pre-existing arrangement and place them in a worse position than before the award when the company did not want any change in its favour. In the instant case the allowance in respect of the work done by the employees on festival holidays would continue to be in accordance with the practice prevailing before the present dispute arose.

Held, further, that in fixing the age of retirement no hard and fast rule can be laid down. The decision on the question always depends on a proper assessment of the relevant factors and may conceivably vary from case to case.

In industrial adjudication it is generally recognised that where an employer adopts a fair and reasonable pension scheme that would play an important part in fixing the age of retirement at a comparatively earlier stage. If a retired employee can legitimately look forward to the prospect of earning a pension then the hardship resulting from early compulsory retirement is considerably mitigated : that is why cases where there is a fair and reasonable scheme of pension in vogue would not be comparable or even relevant in dealing with the age of retirement in a concern where there is no such pension scheme.

The recent trend in the Bombay area clearly appears to be to fix the age of retirement at 60. The material facts in the instant case being very similar to the facts in the case of the *Dunlop Rubber Co. (India) Ltd.* v. *Workmen*, the age of retirement of workmen concerned shoud be raised to 60 from 55.

Held, also, that the Supreme Court generally does not like to interfere with the decision of a Tribunal, if it is satisfied that the Tribunal has reached its conclusion after considering the relevant evidence adduced before it; but if in reaching its conclusion the Tribunal loses sight of an important document and fails to take into account evidence adduced before it, it becomes necessary for the Supreme Court to consider whether

it should interfere with the discretion exercised by the Tribunal or not.

The Dunlop Rubber Co. (India) Ltd. v. *Workmen & Ors.* [1960] 2 S.C.R. 51 relied on.

Guest, Keen, Williams Private Ltd. v. *P. J. Sterling & Ors.*, [1960] 1 S.C.R. 348 referred to.

CIVIL APPELLATE JURISDICTION. Civil Appeals Nos. 471 and 472 of 1960.

Appeals by Special Leave from the Award dated the 22nd December, 1959, of the Industrial Tribunal, Bombay, in Reference (I. T. No. 163 of 1959).

M. C. Setalvad, Attorney-General for India, *S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra*, for the Appellant (In C.A. No. 471 and Respondent No. 1 in C. A. No. 1 of 1960).

C. L. Dudhia and *K. L. Hathi*, for the Respondents (In C. A. No. 571 of 60 and Appellants in C. A. No. 472 of 60).

1960. November 14. The Judgment of the Court was delivered by

GAJENDRAGADKAR J.—These two cross appeals are directed against the decision of the Industrial Tribunal in respect of two of the demands referred to it for adjudication. Five industrial demands were made against the Imperial Chemical Industries (India) Private Limited, Bombay (hereafter called the company), by its workmen (hereafter called the workmen), and they were referred for industrial adjudication by the Government of Bombay under s. 10(1) of the Industrial Disputes Act, 1947 (XIV of 1947). These demands were considered by the Industrial Tribunal in the light of the evidence adduced before it by the respective parties and decided on the merits. Two of the demands which are the subject matter of the present appeals were demands Nos. 3 and 5. By demand No. 3 the workmen claimed that for the work done on Sundays and holidays observed by the company clerical as well as service staff shall be paid twice the employee's normal rate of pay consisting of basic salary, dearness allowance and other allowances if

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any. Demand No. 5 made by the workmen was that all employees of the company shall not be compulsorily retired by the company before they attain the age of 60 except in case of voluntary retirement by the employees concerned. The company is an All India concern and has its branches at several places in India. At its Bombay office 1,400 employees are engaged by the company ; out of these 800 employees are concerned with the present dispute; 600 out of them belong to the clerical cadre whereas the remaining 200 belong to the cadre of the subordinate staff.

The two demands set out above were disputed by the company. In regard to demand No. 3 the company stated that it paid Sunday or holiday work allowance in terms of an earlier award known as the Naik Award, and since no change of circumstances had taken place since the making of the said award a revision in the matter of the said payment was not justified. The company further claimed that the allowance paid by it to its employees was reasonable, fair and adequate. In regard to demand No. 5 the company pleaded that since 1950 the company had fixed the retirement age at 55 for all its employees throughout India, and that any revision made in that behalf so far as the employees in the present dispute are concerned would have serious repercussions in the other branches of the company. It was also urged that the age of retirement fixed by the company was fair and reasonable. The company drew attention to the fact that it pays a generous Provident Fund of 10% contribution from either side which does not exist in many others concerns in Bombay.

In regard to demand No. 3 the Tribunal has partly allowed the claim of the workmen and has directed the company to give to the employees concerned, for work done on Sundays and holidays, half of a day's total salary and dearness allowance (calculated by dividing the total of the basic wage, special allowance and dearness allowance for the month by 30). In regard to the work done by the employees on festival holidays the Tribunal has purported to order that the allowance in that behalf should be a day's salary and

dearness allowance calculated as above, but employees will not be entitled to a substituted holiday. It is this part of the award that is challenged by the workmen in their appeal.

In regard to demand No. 5 the Tribunal has taken the view that a case had been made out by the workmen for the revision of the age of retirement fixed by the company and it has held that it would be reasonable to fix the said age of retirement at 58 instead of 55. This direction is challenged by the company in its appeal as well as by the workmen in their appeal. The company contends that no change should have been made in the age of retirement, whereas the workmen urge that the retirement age should have been fixed at 60 instead of 58. Thus Civil Appeal No. 471 of 1960 filed by the company is concerned only with the fixation of the age of retirement, whereas Civil Appeal No. 472 of 1960 which has been filed by the workmen is concerned with the age of retirement as well as the direction issued by the Tribunal in regard to the payment of allowance to the workmen for work done on festival holidays.

In regard to the direction issued by the Tribunal in respect of work done on festival holidays it is obvious that the impugned direction is due to an oversight. We have already pointed out that whereas the workmen wanted a revision of the practice prevailing in regard to the payment of allowances for work done on Sundays and holidays the company wanted the status quo to continue. The payment which the company was making in respect of the said work was in accordance with the Naik Award, and the company's case was that there was no justification for changing the said practice. It is thus obvious that the company did not want any change in its favour and to the detriment of the workmen. It was apparently not realised by the Tribunal that in making a distinction between work done on Sundays on the one hand and work done on festival holidays on the other, and in making two different directions in respect of the said two categories of work, the Tribunal's order in regard

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to the latter category of work would have the effect of placing the workmen in a worse position after the award than before. The relevant direction deprives the workmen of their right to a compensatory weekly off or a substituted holiday, and the inevitable consequence of this direction would be ultimately to deprive the workmen of a part of the benefits to which they are entitled under the pre-existing arrangement. This position cannot be and has not been seriously disputed. Therefore we must uphold the plea raised by Mr. Dudhia on behalf of the workmen and direct that in respect of work done on festival holidays the practice prevailing before the present dispute arose should continue.

Then, as regards the age of retirement, the learned Attorney-General, for the company, has strenuously contended that the Tribunal was in error in changing the age of retirement from 55 to 58. He argues that in dealing with this question two important facts must be borne in mind. The company is an All India concern, and it is of great importance that the terms and conditions of service prevailing in the several branches of the company all over the country should be stabilised and made uniform as far as is reasonably possible, and in the matter of retirement the company has achieved uniformity by fixing the age of retirement at 55 since 1950. This arrangement should not be disturbed because it would inevitably upset the age of retirement, in all other branches. He has also relied on the fact that the general terms and conditions of service provided by the company to its employees are very liberal, and he has made special reference to the Provident Fund which the company has started for the benefit of its employees. Even otherwise, so the argument runs, it cannot be said that it is unreasonable to fix the age of retirement at 55. In support of these contentions he has relied on the decision of this Court in *The Dunlop Rubber Co. (India) Ltd.* v. *Workmen* (1).

On the other hand Mr. Dudhia contends that the decision of this Court in the case of the *Dunlop Company* (1) is in favour of the demand made by the

(1) [1960] 2 S.C.R. 51.

workmen and the Tribunal was in errror in not fixing the age of retirement at 60 applying the principles laid down by this Court in the case of the *Dunlop Company* (1). Besides, he points out that in dealing with the question on the merits the Tribunal has unfortunately failed to consider one important document filed by the workmen along with their statement of the claim (Ex. B). This document would conclusively show that in Bombay the age of retirement is almost invariably fixed at 60 and not at 55.

The question about the age of retirement has been considered by this Court in the case of *Guest, Keen, Williams Private Ltd.* v. *P. J. Sterling* (2). In that case certain general considerations which may be relevant in determining the age of retirement have been dismissed. In the case of the *Dunlop Company* (1) the same considerations were repeated, and it was held that the decision of the Tribunal by which the age of retirement was fixed at 60 should not be interfered with. In the latter case some of the considerations on which the learned Attorney-General has relied were present. The employer was an All India concern and the argument that changing the terms and conditions of service in regard to the age of retirement in one place might unsettle the uniformity and has serious repercussions in other branches was urged and considered by this Court. It was there pointed out that though the consideration relied upon by the employer was relevant and material its effect had to be judged in the light of other material and relevant circumstances, and it was added that one of the important material considerations in this connection would be that the age of retirement can be and often is determined on industry-cum-region basis. It was from this point of view that the Court took into account the fact that in Bombay for some time past there has been a progressive tendency to fix the age of retirement at 60, and if consistently with the said tendency the Tribunal fixed the retirement age at 60 in the case of the *Dunlop Company* (1) this Court saw no reason to take a different view. In our opinion, in so

(1) [1960] 2 S.C.R. 51. (2) [1960] 1 S.C.R. 348.

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far as the considerations on which the company relies in the present appeal were common to the considerations urged in the case of the *Dunlop Company* (1) the decision in the latter case is more in favour of the workmen than of the company.

It is true that in matters of this kind this Court generally does not like to interfere with the decisions of the Tribunal if it is satisfied that the Tribunal has reached its conclusions after considering the relevant evidence adduced before it. There is no doubt that in fixing the age of retirement no hard and fast rule can be laid down. The decision on the question would always depend on a proper assessment of the relevant factors and may conceivably vary from case to case; but in the present case it seems to us that Mr. Dudhia is right in contending that in reaching its conclusion the Tribunal has somehow lost sight of an important document filed by the workmen along with their claim. This document (Ex. B) shows that out of 13 industrial concerns there set out, in regard to 10 the age of retirement has been fixed at 60 either by an award or by agreement, and that in regard to the remaining 3 there is no age of retirement. The record shows that the facts mentioned in this statement were not disputed before the Tribunal. Indeed in most of the cases reference is made to an award, and it was presumably realised by the company that the awards in those respective cases had in fact fixed the age of retirement at 60. This document has not been considered at all by the Tribunal in dealing with the question about the age of retirement, and that gives strength to the argument of Mr. Dudhia that this Court ought to reconsider the merits of the dispute for itself.

It appears that the company filed a list (Ex. C-1) in support of its case that the age of retirement had been fixed at 55 in 14 industrial concerns; and in reply to this list the workmen filed their own explanation (Ex. U-1). This explanation shows that in some of the cases an industrial dispute was actually pending adjudication or demands had been made by the employees to raise the age of retirement. In

(1) [1960] 2 S.C.R. 51.

regard to 4 Oil Companies specified by the company in its list (Ex. C-1) it appears that all of them have a pension scheme, and that undoubtedly makes a substantial difference. It is generally recognised in industrial adjudication that where an employer adopts a fair and reasonable pension scheme that would play an important part in fixing the age of retirement at a comparatively earlier stage. If a retired employee can legitimately look forward to the prospect of earning a pension then the hardship resulting from early compulsory retirement is considerably mitigated; that is why cases where there is a fair and reasonable scheme of pension in vogue would not be comparable or even relevant in dealing with the age of retirement in a concern where there is no such pension scheme. In regard to Godrej and Boyce there was a dispute between the parties as to the real age of retirement fixed by the employer; similarly there was a dispute about the age of retirement in Brooke Bond (India) Private Limited. The learned Tribunal considered the evidence supplied by the two documents Ex. C-1 and Ex. U-1 and held that having regard to all the relevant circumstances it would not be unreasonable to fix the retiring age at 58 in the present case. It is true that in dealing with this question the Tribunal has commenced its discussion with the observation that in a number of concerns the retirement age is 60, and that there had been for some time a trend to increase the retirement age from 55 to upwards; but the tone and trend of the discussion leave no room for doubt that the Tribunal failed to take into account the evidence supplied by the workmen in their document Ex. B filed along with their claim. This evidence strongly suggests almost a uniform tendency in Bombay to fix the age of retirement at 60 and not 55. If the Tribunal had considered this evidence and given reasons why it did not justify the workmen's claim for fixing the age of retirement at 60 it would have been another matter. Since the award does not refer to this document and gives no reasons why the trend disclosed by the document should not be adopted in the present case it has become necessary for this Court to consider that question for itself.

The learned Attorney-General contends that the

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industrial concerns to which the said document Ex. B refers are not comparable to the company, and so no importance should be attached to the trend disclosed by the said document. We are not impressed by this argument. One has merely to look at the industrial concerns specified in the list filed by the company to realise that if the said concerns are comparable in the present proceedings there is no reason why the concerns specified in Ex. B should be rejected as not comparable. Besides, in the case of the *Dunlop Company* (1), as in the present case, the dispute was and is between clerical and the subordinate staff and their employer, so that some of the conditions which may be relevant in fixing the age of retirement of factory workers may not necessarily apply. As this Court pointed out in the case of the *Dunlop Company* (1) the recent trend in the Bombay area clearly appears to be to fix the age of retirement at 60. That being so we see no reason why the age of retirement of the workmen in the present appeal should not be similarly fixed. As we have already observed, if the Tribunal had considered the uniform trend disclosed by Ex. B and had stated its reasons for not giving effect to that trend it would have been another matter; we would then have considered whether we should interfere with the discretion exercised by the Tribunal or not. The Tribunal however does not appear to have considered this evidence. On the whole we are satisfied that Mr. Dudhia is right in contending that the material facts in this case are very similiar to the facts in the case of the *Dunlop Company* (1). That being so, we think that the age of retirement in the case of the workmen concerned in the present appeal should be raised to 60 from 55.

The result is Civil Appeal No. 471 of 1960 filed by the company fails and is dismissed, whereas Civil Appeal No. 472 of 1960 filed by the workmen is allowed, and the directions of the award under appeal are modified. The workmen will be entitled to their costs from the company.

Appeal No. 471 dismissed. Appeal No. 472 allowed.

(1) [1960] 2 S.C.R. 51.

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November 14.

M/S. SWADESHI COTTON MILLS CO., LTD., KANPUR

v.

RAJESHWAR PRASHAD AND ORS.

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, JJ.)

Industrial Dispute—Compromise during pendency of appeal—Validity—Procedure—The U. P. Industrial Disputes Act, 1947 (U. P. XXVIII of 1947), ss. 6-c, 2(t)—U. P. Industrial Disputes Rules, 1957, r. 5(1)—Payment of Wages Act, 1936 (Act 4 of 1936), s. 23.

While this appeal by special leave, relating to an industrial dispute was pending in this Court a Director of the appellant employer and a representative of the respondents employees made an application to the Court praying that an order might be passed in terms of a compromise since an agreement was alleged to have been entered into by the appellants and the respondents. Some of the respondents contested this compromise and the court sent issues to the Tribunal for finding whether the alleged compromise actually took place between the parties, and if so, was it valid. The Tribunal returned findings to the effect that the compromise did actually take place and was valid. Those findings were contested in the appeal.

Held, that a compromise agreement seeking to settle an industrial dispute which was still pending decision in this Court would not contravene the provisions of s. 23 of the Payment of Wages Act which contemplated rights not likely to be modified or reversed in any judicial proceedings.

The procedure prescribed by s. 6-C of the U. P. Industrial Disputes Act and the provisions thereof did not affect the powers of this Court, or the competence of the parties, to amicably settle a dispute pending before it.

The procedure for obtaining an order in terms of the compromise entered into between the parties pending the appeal in this Court is prescribed by its own rules and the provisions of s. 2(t) of the U. P. Industrial Disputes Act and rule 5(1) of the Rules made thereunder have no application to such case.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 53 of 1958.

Appeal by special leave from the Decision dated February 28, 1957, of the Labour Appellate Tribunal, Bombay, in Appeal No. III-160 of 1956.

S. P. Varma, for the appellants.

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v.
Rajeshwar Prashad & Others

Gajendragadkar J.

L. K. Jha, Janardan Sharma, R. C. Prasad and *Maqbool Ahmad Khan*, for the respondents.

1960. November 14. The Judgment of the Court was delivered by

GAJENDRAGADKAR, J.—This appeal by special leave arises from an industrial dispute between the appellant Messrs. Swadeshi Cotton Mills and the respondents, its employees, and the short preliminary question which is raised for our decision is whether an order should not be passed in this appeal in terms of the compromise agreement alleged to have been reached between the appellant and the respondents. It appears that on December 28, 1955, an industrial dispute between the parties was referred by the Government of Uttar Pradesh to the Industrial Tribunal, U. P., Allahabad, for adjudication under ss. 3, 4 and 8 of the U. P. Industrial Disputes Act, 1947 (U.P. Act XXVIII of 1947) and in pursuance of the provisions of cl. 11 of G. O. No. U-464(LL)/XXXVI-B-257 (LL)/1954 issued on July 14, 1954. The dispute thus referred was whether the existing rates of wages of jobbers mentioned in the annexure employed in the weaving department of the appellant need any revision; if so, with what details and from what date? The Tribunal tried this issue and came to the conclusion that no case for revision had been made out by the respondents. Against this decision of the Tribunal the respondents preferred an appeal before the Labour Appellate Tribunal. Their appeal succeeded and the Appellate Tribunal directed that the award of the original Tribunal should be set aside, and that the appellant "shall introduce from the date of reference a uniform rate of two annas in both the old and new sheds irrespective of the number of looms assigned to the line jobbers". It would be noticed that as a result of this decision the existing rates have been revised and the revision has been ordered to take effect retrospectively from the date of reference. It is against this decision of the Labour Appellate Tribunal that the appellant has preferred the present appeal by special leave.

Pending this appeal in this Court the appellant purported to enter into a compromise with the respondents and the terms of the compromise were reduced to writing, and in pursuance of the said compromise an application was made to this Court on February 26, 1958, signed by Mr. Bagla, on behalf of the appellant in his capacity as a Director of the appellant, and Mr. Maqbool Ahmad Khan, for the respondents, in his capacity as the General Secretary of the Suti Mill Mazdoor Sabha, Kanpur. This application set out the material terms of the compromise. One of the terms of the compromise is that the revised rate should take effect not from December 28, 1955, which is the date of reference but from July 1, 1957. Certain other modifications have also been made in the decision under appeal.

Before the appeal could be placed on the Board for passing orders in terms of this compromise an application was made on behalf of some of the respondents alleging that the General Secretary Mr. Khan had no authority or power to enter into any compromise as a representative of the respondents, and that the compromise alleged to have been entered into by him with the appellant was not acceptable to the respondents. In support of this case the application referred to a resolution passed by the General Council of the Mazdoor Sabha whereby it was declared that no office bearer could conclude an agreement with an employer about an industrial dispute without the consent of the General Council, and reliance was also placed on the relevant provisions in the constitution of the Mazdoor Sabha.

Thereafter the petition for compromise was placed before this Court for hearing on April 10, 1960, and the Court directed that the application for recording compromise as well as the appeal itself should both be placed together for hearing before the Court as soon as the parties file their respective statements of the case. After the statements were filed the appeal and the petition were placed before this Court on May 5, 1960, and the Court by an interlocutory judgment

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sent two issues to the Tribunal with a direction that the Tribunal should hear the parties on those issues and make its findings thereon. The two issues were: (1) Has the compromise set up by the appellant taken place between the parties; (2) If yes, is the compromise valid? In pursuance of this order the Tribunal has recorded evidence, heard the parties and made its findings. It has found that the compromise in fact has taken place as alleged in the petition made before this Court in that behalf, and that the said compromise is valid. In dealing with the first question of fact the Tribunal has considered the evidence exhaustively in the light of the background of the dispute between the parties; it has found that negotiations went on between the parties for a fairly long time during which period the parties discussed the pros and cons of the compromise, that during these negotiations Mr. Khan was watchful of the interests of the respondents, that the compromise had been approved by the workmen concerned, that on the whole it is to their advantage and does not at all militate against the accepted principles of industrial adjudication, and what is more it has been acted upon and has not remained a mere paper transaction. It has explained that the opposition to the compromise proceeded substantially from the dispute between Mr. Khan, the Secretary, and Mr. Bajpai, the President, and the Tribunal felt no doubt that the compromise was the result of bona fide attempt on the part of both the parties to settle the dispute amicably in order to create goodwill and co-operation amongst the employer and the employees.

On the question of law raised by the second issue the Tribunal has held that the compromise is perfectly valid. It has considered the relevant provisions of the constitution of this Sabha, the practice prevailing in regard to such compromises and to several agreements of compromise entered into consistently with the said practice. It was urged before the Tribunal that the compromise is invalid under s. 6-B of the U.P. Industrial Disputes Act, 1947, as well as s. 2(vi)(c) of the Payment of Wages Act, 1936 (Act 4 of 1936).

These contentions have been rejected by the Tribunal. In the result the findings recorded on both the issues are in favour of the compromise.

After these findings were received in this Court, the appeal and the compromise petition have now come before us for final disposal. The finding of fact recorded by the Tribunal on the first issue has not been and cannot be challenged before us. It must therefore be taken to have been established that at the relevant time Mr. Khan was the General Secretary of the respondents' Sabha, and as such was entitled to represent them and did represent them during the course of the present adjudication proceedings, and that the compromise reached between him and the appellant is the result of mutual discussions carried on for some time and its terms on the whole are beneficial to the respondents. The practice prevailing in this Sabha and a large number of precedents which are consistent with the said practice indicate clearly that the Secretary of the Union who represents the workmen in industrial disputes has always been authorised and has exercised his authority to settle such disputes when it was thought reasonable and proper to do so. As we have often indicated it is always desirable that industrial disputes should be amicably settled because such settlement conduces to happy industrial relationship and encourages co-operation between the parties. That is why when industrial disputes are brought before this Court under Art. 136 of the Constitution this Court generally appreciates attempts made to settle disputes amicably, and in proper cases encourages such settlements. Mr. Jha, for the respondents, however, contends that though amicable settlement of industrial disputes may otherwise be desirable, in law such settlement or compromise is illegal. If we come to the conclusion that compromise of industrial disputes pending an appeal is prohibited by law, or is otherwise inconsistent with such provisions it may be necessary to hold that the present compromise is bad in law however much amicable settlement of industrial disputes may otherwise be desirable. Therefore the question which arises for our

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decision on the present compromise petition is: Is the contention raised by Mr. Jha correct that the compromise is invalid in law?

The first point urged by Mr. Jha in support of this argument is that the present compromise is prohibited by s. 23 of the Payment of Wages Act. This Act has been passed to regulate the payment of wages to certain classes of persons employed in industry, and there is no doubt that the wages as revised by the Labour Appellate Tribunal in the present case would constitute wages under s. 2 (vi) of this Act. Section 23 provides that any contract or agreement, whether made before or after the commencement of this Act, whereby an employed person relinquishes any right conferred by this Act shall be null and void in so far as it purports to deprive him of such right. The relevant provisions of this Act require the fixation of wage periods, provide for the time of payment of wages, authorises certain deductions, and permits the imposition of fines only subject to the conditions specified in that behalf. Section 15 of the Act provides for the determination of claims arising out of deduction of wages or delay in payment of wages and penalty for malicious or vexatious claims. Section 16 prescribes for the making of an application in which such claims can be set up; and s. 18 provides for the powers for the authorities appointed under the Act. Mr. Jha contends that the revised wage structure directed by the Labour Appellate Tribunal entitles the respondents to claim the respective amounts there indicated as their wages, and the effect of the impugned compromise is that the respondents are relinquishing a part of their right in that behalf. Mr. Jha contends that in giving up their claim for the retrospective operation of the decision of the Labour Appellate Tribunal for a substantial part of the period the respondents are required to contract themselves out of their legal rights conferred by the award and therefore referable to this Act, and that makes the compromise invalid. This argument is misconceived because it fallaciously assumes that the decision under appeal has become final and that the rights accruing under

the said decision would not be and cannot be affected by any compromise. The most significant fact to remember in this connection is that the decision on which the alleged rights are based is itself subject to an appeal before this Court, and in that sense it is not a final decision at all; it is liable to be reversed or modified, and that being so the rights claimable under the said decision are also liable to be defeated or materially affected. In such a case the industrial dispute would undoubtedly be pending before this Court, and it would be idle for Mr. Jha to contend that an attempt to settle such a dispute and not to invite a decision of this Court contravenes the provisions of s. 23 of this Act. Just as an industrial dispute could have been settled between the parties either before it was referred for adjudication to the Industrial Tribunal, or after it was referred and before the award was pronounced by the Tribunal, so would it be open to the parties to settle the dispute so long as it was pending either before the Labour Appellate Tribunal or before this Court. The provisions of s. 23 of this Act postulate certain definite rights which are not likely or liable to be modified or reversed in any pending judicial proceedings, and since this factor is absent in cases where an appeal is pending before this Court it would not be reasonable to rely on the said provisions and contend that they in substance prevent or prohibit amicable settlement of disputes.

The other argument urged against the validity of the compromise is based on the provisions of s. 6-C of the U. P. Industrial Disputes Act, 1947. This section corresponds substantially to s. 19 of the Industrial Disputes Act XIV of 1947. It provides, *inter alia*, that an award shall in the first instance remain in operation for the period of one year or such shorter period as may be specified therein, and gives the State Government power to extend the period of operation from time to time if it thinks fit. It also provides that the State Government, either on its own motion or on the application of any party bound by the award, shorten the period of its operation, if it is shown that there has been a material change in the circumstances

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on which the award was based. The argument is that any modification in the award can only be made by adopting the procedure prescribed by s. 6-C. In our opinion there is no substance in this argument. Section 6-C undoubtedly confers upon the State Government certain powers to fix the duration of the operation of the award, but there can be no doubt that the section can have no bearing on the powers of this Court in dealing with an industrial dispute brought before it under Art. 136 of the Constitution. The award to which s. 6-C refers is an award which has become final in the sense that it is no longer subject to consideration by any Tribunal or Court. So long as an award is pending before a Tribunal or a Court the jurisdiction of the Tribunal or the Court to deal with it in accordance with law is not affected by s. 6-C, and the competence of the parties to settle their dispute pending before the Tribunal or the Court is also not affected or impaired by the said section. In other words, what we have said about the argument based on the provisions of s. 23 of the Payment of Wages Act applies with equal force to the present argument as well.

Then it is contended that the impugned compromise is a settlement within the meaning of s. 2(t) of the U. P. Act and as such it can be executed only in the manner prescribed by the Act. Section 2(t) defines a settlement as one which is arrived at in the course of conciliation proceedings and as including a written agreement between the employer and the workmen arrived at otherwise than in the course of conciliation proceedings when such an agreement has been signed between the parties thereto in such manner as may be prescribed and a copy thereof has been sent to the State Government and the conciliation officer. Rule 5(1) of the U. P. Industrial Disputes Rules, 1957, prescribes the procedure for recording a settlement as defined by s. 2(t). It is true that this procedure has not been followed, but it is difficult to understand how s. 2(t) or the procedure prescribed by r. 5(1) can have any application to a compromise agreement which has been entered into between the parties pending the

appeal in this Court. The compromise in question is intended to be filed in this Court for the purpose of enabling the parties to request this Court to pass an order in terms of the said compromise. The procedure for obtaining such an order which has to be followed is the procedure prescribed by the rules of this Court, just as if a compromise was reached before the Tribunal the procedure to be followed before it would be the procedure prescribed by its rules. Therefore we have no doubt that the compromise in question cannot attract the procedure prescribed by r. 5(1).

The result is that the finding recorded by the Tribunal that the compromise in question is valid is obviously right and must be confirmed. Since it is found that the compromise in fact has taken place and is otherwise valid, we have no hesitation in directing that an order should be drawn in terms of the said compromise in the present appeal.

Order accordingly.

THE STATE OF BOMBAY
v.
M/S. RATILAL VADILAL AND BROS.

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November 15.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH JJ.)

Sales Tax—'Dealer'—Meaning of—Appeal by special leave—When available—Bombay Sales Tax Act, 1953 (Bom. III of 1953), ss. 27(1), (b), (c), 30(1), 34(1) and (2)—Constitution of India, Art. 136.

One Nanalal Karsandas, who was a brick manufacturer, held a priority certificate for purchasing coal under the Colliery Control Order and purchased a certain quantity of coal from M/s. S. G. Rungta Colliery through the respondents who were commission agents. The respondents applied to the Collector for determining whether they could be described as "dealers" under the Bombay Sales Tax Act, 1953. The Collector held that they were dealers but the Sales Tax Tribunal held otherwise. No step was taken thereafter for a reference to the High

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Court under ss. 34(1) and 30(1) of the Act. On appeal by the State of Bombay by special leave,

Held, that the respondents could not be described as "dealers" under the Act as the nature of their business as disclosed by them did not show that they were carrying on the business of selling goods in the State of Bombay but were only commission agents arranging sales to other persons.

The proper course for the appellant was to move the High Court and exhaust all his remedies before invoking the jurisdiction of this court under Art. 136 of the Constitution.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 429 of 1959.

Appeal by special leave from the judgment and order dated December 6, 1957 of the former Bombay Sales Tax Trlbunal in Appeal No. 6 of 1956.

C. K. Daphtary, Solicitor-General of India, H. R. Khanna and *R. H. Dhebar*, for the appellant.

N. A. Palkhivala, S. P. Mehta, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the respondents.

1960. November 15. The Judgment of the Court was delivered by

Hidayatullah J. HIDAYATULLAH, J.—The State of Bombay has appealed to this Court with special leave, against an order of the Sales Tax Tribunal, Bombay, dated December 6, 1957, by which the Tribunal allowing the appeal before it, set aside an order of the Collector of Sales Tax passed under s. 27 of the Bombay Sales Tax Act, 1953.

The respondents, Ratilal Vadilal & Bros., are commission agents doing business as clearing and transport contractors. On June 25, 1954, they applied to the Collector of Sales Tax, Bombay, under ss. 27(a), (b) and (c) of the Act describing the nature of their business, citing one instance thereof, for determination of the question whether they could be called "dealers" within the Act. The Collector by his order held that they were dealers, and were required to register themselves under the Act. On appeal, the Tribunal held otherwise, and hence this appeal by the State of Bombay.

It appears that no action was taken to ask for a reference to the High Court of Bombay under s. 34(1) read with ss. 30(1) and (2) of the Act. We have frequently noticed that all the remedies which are open to an appellant are not first exhausted before moving this Court. Ordinarily, this Court will not allow the High Court to be bypassed in this manner, and the proper course for an appellant is to exhaust all his remedies before invoking the jurisdiction of this Court under Art. 136. In the present case, however, the matter is simple, and the learned counsel for the respondent requested us to determine the question, stating that his client who was a small trader and who made the application for the clarification of the law, would be dragged through Courts once again, if we were to decide this appeal on this short point. In view of this, though we decide this appeal, we must not be held to lay down a *cursus curiae* for this Court.

The matter relates to a time after the Colliery Control Order, 1945, came into force. Under that Order, no person could acquire or purchase coal from a colliery except under authority of the Central Government for which purpose he had to obtain a priority certificate from the State Coal Controller. Under the scheme of the Order, *del credere* agents were allowed to act and to charge a commission of one rupee per ton of coal.

One Nanalal Karsandas, a brick manufacturer, was allotted a priority certificate in respect of 22 tons of coal on June 17, 1954. He dealt with M/s. S.C. Rungta Colliery, Burhar, through the respondents. The consignment was in the name of Karsandas, but the bill was sent by the Colliery to the respondents, and the respondents, in their turn, made out a bill in which they charged, in addition to the amount of the bill of the Colliery, a sum of Rs. 22 as their commission. The liability to pay the Colliery rested upon the respondents, but they claimed to be acting as mere " middlemen " between the Colliery and Karsandas. The respondents stated that their business was along these lines with other constituents also, and asked the Collector to determine whether they could be described as "dealers" within the Act, and required registration.

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"Dealer" in the Bombay Sales Tax Act, 1953, is defined as follows:

"dealer" means any person who carries on the business of selling goods in the State of Bombay, whether for commission, remuneration or otherwise..." (Explanation omitted).

It would appear that to be a dealer, the person must carry on the business of selling goods in the State of Bombay. The short question in this case, therefore, was whether the respondents were carrying on such a business in respect of coal.

The scheme of the Control Order shows that no sale of coal could take place except to a person holding a certificate. A sale otherwise was in contravention of the Control Order. The certificate which has been produced in the case, though made out in the name of the respondents, shows the consumer as the consignee. It is thus plain that there was no sale by the Colliery to the respondents, but directly to Karsandas, though through the agency of the respondents. The respondents also, when they made out the bill to Karsandas, mentioned that he was the consignee, and that they were only charging their "middlemen" commission. In these circumstances, it is difficult to hold that the Colliery sold coal to the respondents, and that they, in turn, sold it to Karsandas. There were no two sales involved; there was only one sale, and that was by the Colliery to the consumer. The respondents never became owners by purchase from the Colliery, because the Colliery would not have sold coal to them, nor could they have bought it unless they had obtained a certificate. The position of the respondents was merely that of agents, arranging the sale to a disclosed purchaser, though guaranteeing payment to the Colliery on behalf of their principal. In view of what we have said, no business of selling coal was disclosed in the instance cited before the Collector, and the order of the Tribunal was correct on the facts placed before it.

In the result, the appeal fails and will be dismissed with costs.

Appeal dismissed.

THE STATE OF PUNJAB

v.

SODHI SUKHDEV SINGH

1960

November 15.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Evidence — Production of documents — "Affairs of State", meaning of—Privileged documents—Scope of—Ministerial certificate, if and when conclusive—Collateral evidence to find nature of document—Court's power—Inspection of documents—Code of Civil Procedure (Act 5 of 1908), O. 11, rr. 14, 19(2), O. 14, r. 14—Indian Evidence Act, 1872 (1 of 1872), ss. 123, 162.

The respondent who was a District and Sessions Judge in the erstwhile State of Pepsu was removed from service on April 7, 1953 by an order passed by the President of India who was then in charge of the administration of the State. A representation made by the respondent on May 18, 1955, was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end, and its views were expressed in the form of a Resolution dated September 28, 1955; but before taking any action it invited the advice of the Public Service Commission. On receipt of the report of the Public Service Commission, the Council of Ministers considered the matter again on March 8, 1956, and its views were recorded in the minutes of the proceedings. On August 11, 1956, the representation made by the respondent was considered over again by the Council and a final conclusion was reached in respect of it. In accordance with the said conclusion an order was passed which was communicated to the respondent to the effect that he might be re-employed on some suitable post. On May 5, 1958, the respondent instituted a suit against the State of Punjab for a declaration that the removal of his service on April 7, 1953, was illegal, and filed an application under O. 14, r. 4, and O. 11, r. 14, of the Code of Civil Procedure for the production of certain documents, which included the proceedings of the Council of Ministers dated September 28, 1955, March 8, 1956, and August 11, 1956, and the report of the Public Service Commission. The State objected to the production of the said documents claiming privilege under s. 123 of the Indian Evidence Act, 1872, and the Chief Secretary of the State filed an affidavit giving reasons in support of the claim. The question was whether having regard to the true scope and effect of the provisions of ss. 123 and 162 of the Act the claim of privilege raised by the State was sustainable.

Held, that the documents dated September 28, 1955, March 8, 1956, and August 11, 1956, which embodied the minutes of

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the meetings of the Council of Ministers indicating the advice which the Council ultimately gave to the Rajpramukh, were expressly saved by Art. 163(3) of the Constitution of India and fell within the category of documents relating to "affairs of State" within the meaning of s. 123 of the Indian Evidence Act, 1872.

Accordingly, they were protected under s. 123, and as the head of the department, the Chief Secretary, did not give permission for their production, the Court cannot compel the State to produce them.

Held, further (Subba Rao, J., *dissenting*), that the report of the Public Service Commission being the advice tendered by it, was also protected under s. 123 of the Act.

Held, also (Kapur, J., *dissenting*), that the words "records relating to affairs of State" in s. 123 cannot be given a wide meaning so as to take in every document pertaining to the entire business of State, but should be confined only to such documents whose disclosure may cause injury to the public interest.

The second clause of s. 162 refers to the objections both as to the production and admissibility of the document and entitles the court to take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised under s. 123, to determine the validity of the objections.

Case law reviewed.

Per Sinha, C. J., Gajendragadkar and Wanchoo, JJ.—Though under ss. 123 and 162 the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question, the matter being left for the authority concerned to decide, the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its production and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under s. 123. Where s. 123 confers wide powers on the head of the department to claim privilege on the ground that the disclosure may cause injury to public interest, scrupulous care must be taken to avoid making a claim for such a privilege on the ground that the disclosure of the document may defeat the defence raised by the State. The apprehension that the disclosure may adversely affect the head of the department or the Minister in charge of the department or even the Government in power, or that it may provoke public criticism or censure in the Legislature, should not weigh in the mind of the head of the department and the sole test which should determine his decision is injury to public interest and nothing else.

The privilege under s. 123 should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the department should

make the claim, and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary, the Court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reason why it is apprehended that their disclosure would lead to injury to public interest.

If the affidavit produced in support of the claim for privilege is found to be unsatisfactory a further affidavit may be called, and in a proper case the person making the affidavit whether he is a Minister or the Secretary should be summoned to face cross-examination on the relevant points.

The provisions of O. 11, r. 19(2), of the Code of Civil Procedure must be read subject to s. 162 of the Indian Evidence Act and where a privilege is claimed at the stage of inspection under O. 11, r. 19(2), of the Code, the Court is precluded from inspecting the privileged document in view of s. 162 of the Act.

Per Kapur, J.—The words of s. 123 of the Act are very wide and cover all classes of documents which may fall within the phrase "affairs of State", some noxious and others innocuous, and may even appear to be unduly restrictive of the rights of the litigant but if that is the law the sense of responsibility of the official concerned and his sense of fair play has to be trusted. Under that section discretion to produce or not to produce a document is given to the head of the department and the court has not the power to override the ministerial certificate against production.

The words "or take other evidence to enable it to determine on its admissibility" in s. 162 on their plain language do not apply to production and the taking of evidence must have reference to admissibility. The section does not entitle the court to take other evidence i.e., other than the document, to determine the nature of the document or the reasons impelling the head of the department to withhold the production of the document.

It is permissible for the Court to determine the collateral facts whether the official claiming the privilege is the person mentioned in s. 123, or to require him to file a proper affidavit or even to cross-examine him on such matters which do not fall within the enquiry as to the nature of the document or nature of the injury. He may also be cross-examined as to the existence of the practice of the department to keep documents of the class

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secret but beyond that the ministerial discretion should be accepted and it should neither be reviewed nor overruled.

Per Subba Rao, J.—(1) "Records relating to affairs of State" in s. 123 of the Act mean documents of State whose production would endanger the public interest; documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State, but in special circumstances they may partake of that character and it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

(2) Under no circumstances can a court inspect such a document or permit giving of secondary evidence of its contents.

(3) Under s. 162 the Court has overriding power to disallow a claim of privilege raised by the State, but in its discretion, the court will exercise its power only in exceptional circumstances when public interest demands. The said claim shall be made by an affidavit filed by the Minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. Ordinarily, the court shall accept the affidavit of a Minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege.

(4) The disclosure of the report of the Public Service Commission may expose the Government if the latter ignores a good advice, but such an exposure is certainly in public interest and in a conflict between the administration of justice and the claim of privilege by the State, the claim must be overruled.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 337 of 1960.

Appeal by special leave from the judgment and order dated January 19, 1960, of the Punjab High Court in Civil Revision No. 596 of 1959.

N. S. Bindra and *D. Gupta*, for the appellant.

Gopal Singh, for the respondent.

H. M. Seervai, Advocate-General for the State of Maharashtra and *R. H. Dhebar*, for the Intervener.

1960. November 15. The judgment of B. P. Sinha, C. J., P. B. Gajendragadkar, J. and K. N. Wanchoo, J. was delivered by P. B. Gajendragadkar, J. J. L. Kapur, J. and K. Subba Rao, J., delivered separate judgments.

GAJENDRAGADKAR, J.—This appeal raises for our decision a question of law of general importance under ss. 123 and 162 of the Indian Evidence Act, 1872, (hereafter called the Act). Originally the same point had been raised in another civil appeal before this Court, Civil Appeal No. 241 of 1955. The said appeal was the result of a dispute between Dowager Lady Dinbai Dinshaw Petit on the one hand and the Union of India and the State of Bombay on the other. Having regard to the importance of the point raised by the said appeal a Division Bench of this Court before whom it first came for hearing directed that it should be placed for disposal before a Constitution Bench, and accordingly it was placed before us. The appellant and the respondent in the present appeal then applied for permission to intervene because the same point arose for decision in this appeal as well; that is how this appeal was also placed before us to be heard after the Bombay appeal. After the Bombay appeal was heard for some days parties to the said appeal amicably settled their dispute and a decree by consent was passed. In the result the point of general importance raised by the said appeal fell to be considered in the present appeal; and so the appellant and the respondent in the said appeal asked for permission to intervene in the present appeal, and we directed that the arguments urged by Mr. Viswanatha Sastri and Mr. Seervai, for the appellant and the State of Bombay respectively, should be treated as arguments urged by interveners in the present appeal. Mr. Bindra, who appears for the appellant State of Punjab in the present appeal, and Mr. Gopal Singh who represents the respondent Sodhi Sukhdev Singh, have substantially adopted the arguments urged by Mr. Seervai and Mr. Sastri respectively and have also addressed us on the special facts in their appeal; that is how the point of law in regard to the scope and effect of ss. 123 and 162 of the Act has to be decided in the present appeal.

This appeal has been brought to this Court by special leave granted by this Court, and it arises from a suit filed by the respondent against the appellant on May 5, 1958. It appears that the respondent was

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a District and Sessions Judge in the erstwhile State of Pepsu. He was removed from service on April 7, 1953, by an order passed by the President of India who was then in charge of the administration of the said State. The respondent then made a representation on May 18, 1955. This representation was considered by the Council of Ministers of the said State on September 28, 1955, because in the meantime the President's rule had come to an end and the administration of Pepsu was entrusted to the Council of Ministers. The Council expressed its views in the form of a Resolution on the representation of the respondent; but before taking any action it invited the advice of the Public Service Commission. On receiving the said advice the Council again considered the said representation on March 8, 1956, and views on the merits of the representation were expressed by the Members of the Council. These were recorded in the minutes of the proceedings. Finally, on August 11, 1956, the representation was considered over again by the Council, and it reached a final conclusion in respect of it. In accordance with the said conclusion an order was passed which was communicated to the respondent. The order read thus: "Reference his representation dated the 18th May, 1955, against the order of his removal from service; the State Government have ordered that he may be re-employed on some suitable post".

After this order was communicated to him the respondent filed the present suit against the appellant and claimed a declaration, inter alia, that his removal from service on April 7, 1953, was illegal, void and inoperative and prayed for the recovery of Rs. 62,700-6-0 as arrears of his salary. The appellant disputed the respondent's claim on several grounds. Issues were accordingly framed by the trial judge on January 27, 1959. Meanwhile the respondent had filed an application under O. 14, r. 4 as well as O. 11, r. 14 of the Civil Procedure Code for the production of documents mentioned in the list annexed to the application. The trial court issued notice against the appellant for the production of the said documents.

In reply to the notice Mr. E. N. Mangat Rai, Chief Secretary of the appellant, made an affidavit claiming privilege under s. 123 of the Act in respect of certain documents whose production had been ordered, and gave reasons in support of the claim. On the same day Mr. Mangat Rai made another affidavit in which he gave reasons for claiming similar privilege in respect of certain other documents. The statements made in these affidavits were challenged by the respondent who submitted a counter affidavit. After the affidavits had thus been filed by the parties the trial court heard their arguments on the question of privilege, and on August 27, 1959, it upheld the claim of privilege made by the appellant for the production of some documents, and accepted the reasons given by Mr. Mangat Rai in support of the said claim of privilege.

The respondent then moved the High Court of Punjab under s. 115 of the Code of Civil Procedure and Art. 227 of the Constitution for the quashing of the said order. The petition for revision (C. R. 596 of 1959) first came up for decision before D. K. Mahajan, J., at Chandigarh. The learned judge took the view that the question raised by the petition was of considerable importance, and so he ordered that the papers should be placed before the learned Chief Justice to enable him to direct that the matter be decided by a larger Bench. Thereupon the petition was placed for decision before Dulat and Dua, JJ., who, after hearing the parties, reversed the order under revision in respect of four documents, and directed that the said documents be produced by the appellant. The appellant then applied to the High Court for a certificate under Art. 133 but its application was dismissed. It then came to this Court and applied for and obtained special leave to challenge the validity of the order passed by the Punjab High Court; and in the appeal the only question which has been urged before us is that having regard to the true scope and effect of the provisions of ss. 123 and 162 of the Act the High Court was in error in refusing to uphold the claim of

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privilege raised by the appellant in respect of the documents in question.

The question thus posed will naturally have to be answered on a fair and reasonable construction of the two statutory provisions of the Act. It has, however, been very strenuously urged before us by Mr. Seervai that before proceeding to construe the said provisions it is necessary that the Court should bear in mind the historical background of the said provisions. His argument is that ss. 123 and 162 as they were enacted in the Act in 1872 were intended to introduce in India the English Law in regard to what is commonly described as the Crown privilege in the same form in which it obtained in England at the material time; and so he has asked us to determine in the first instance what the true state of English Law was in or about 1872 A. D.

In order to decide this question three representative English decisions must be considered. In *Home* v. *Lord F. C. Bentinck* (1) the Court was dealing with a claim made by H who had sued the president of the enquiry for a libel alleged to be contained in the report made by him. It appears that H was a commissioned officer in the Army and the Commander-in-Chief of the said Army had directed an assemblage of commissioned military officers to hold an enquiry into the conduct of H. According to H the said report contained libellous matter, and so he had sued the president of the enquiry. At the trial H desired that the report submitted by the court of enquiry should be produced and this request was resisted by the defendant on the ground that the document in question was a privileged communication. This plea was upheld. Dallas, C. J., referred to the precedents relevant to the decision of the point, and observed that the basis of the said precedents was that the disclosure would cause danger to the public good. He then considered the nature of the enquiry which had been directed against H, and observed that in the course of the enquiry a number of persons may be called before the court and may give information as witnesses which they would not choose to

(1) (1820) 2 Brod. & B. 130 : 129 E. R. 907.

have disclosed; but, if the minutes of the court of enquiry are to be produced on an action brought by the party, they reveal the name of every witness and the evidence given by each. Not only this but they also reveal what has been said and done by each member of the existing court of enquiry; and, according to the learned judge, the reception of the said minutes would tend directly to disclose that which is not permitted to be disclosed; and so, independently of the character of the court the production of the report was privileged on the broad rule of public policy and convenience that matters like those covered by the report are secret in their nature and involve delicate enquiry and the names of persons who ought to stand protected.

The next decision to which our attention has been invited is *Smith* v. *The East India Company* (1). In that case the dispute with which the Court was concerned had arisen with respect to a commercial transaction in which the East India Company had been engaged with a third party; and privilege was claimed in regard to the correspondence which had been carried on by the defendant with the Board of Control. It was held that the said correspondence was, on the ground of public policy, a privileged communication, and so the Company were not bound to produce or set forth the contents of it in answer to a bill of discovery filed against them by the third party in relation to the transaction to which it referred. Lord Lyndhurst upheld the claim of privilege not because the correspondence purported to be confidential nor because it was official, but because of the effect of the provisions of c. 85 of Act 3 & 4 W. 4 on which the claim of privilege was founded. It was noticed that the Company had been prohibited from carrying on any commercial transactions except for the purpose of winding up their affairs or for the purposes of the Government of India; and it was held that the result of the relevant provisions, and particularly of s. 29 was that the Directors of the East India Company were required to make communication of all their

(1) (1841) 1 Ph. 50: 41 E.R. (Chancery) 550.

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acts, transactions and correspondence of every description to the Board of Control. That is why a claim for privilege in respect of the said correspondence was upheld. This decision shows that a claim for privilege could have been made even for correspondence which had reference to a commercial transaction in circumstances similar to those in that case.

The last decision on which considerable reliance has been placed by Mr. Seervai is the case of *Beatson* v. *Skene* (3). It may incidentally be pointed out that Chief Baron Pollock's observations in this judgment are frequently cited in judicial decisions where the question of privilege falls to be considered. In that case the plaintiff had been a general who commanded a corps of irregular troops during the war in Crimea. Complaint having been made about the insubordination of troops the corps was placed under the superior command of V. Thereupon the plaintiff resigned his command. V directed S to inspect and report upon the state of the corps, and referred S for information to the defendant who was a Civil Commissioner. The defendant, in a conversation with S, made a defamatory statement respecting the conduct of the plaintiff. The plaintiff brought an action against the defendant for slander. The defence set up against the plaintiff's claim was that what had passed between the defendant and S was a privileged communication. The jury had found a verdict for the defendant. A new trial was claimed by the plaintiff, inter alia, on the ground that the learned judge had declined to compel the production of certain documents. It appeared that the Secretary for War had been subpoenaed to produce certain letters written by the plaintiff to him and also the minutes of the court of enquiry as to the conduct of S in writing the letter to V. The plea for a new trial was rejected on the ground that the Court was of the opinion that the non-production of the said documents furnished no ground for a new trial. There was a difference of opinion among the members of the Court on the question as to whether Bramwell, J., was justified in upholding the claim of privilege. Pollock,

(3) (1860) 5 H. & N. 838: 157 E.R. 1415.

C. B., Bramwell, B., and Wilde, B., held that the claim for privilege was properly upheld, whereas Martin, B., took a contrary view.

Dealing with the claim made that the production of the documents would be injurious to the public service Pollock, C. B., observed that the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice, and he posed the question: How is this to be determined? Then Pollock, C. B., proceeded to observe that the question must be determined either by a presiding judge or by the responsible servant of the Crown in whose custody the paper is; and he remarked that the judge would be unable to determine it without ascertaining what the document is and why the publication of it would be injurious to public service—an enquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. He further held that "the administration of justice is only a part of the general conduct of the affairs of any State or nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community". Martin, B., however, was of the opinion that whenever the judge is satisfied that the document may be made public without prejudice to the public service the judge ought to compel its production notwithstanding the reluctance of the head of the department to produce it. It would thus be seen that according to the majority view the question as to whether any injury to public interest would be caused by the production of the document could not be determined by the Court, because such an enquiry would tend to defeat the very purpose for which privilege is claimed, whereas, according to the minority view it was for the Court to hold an enquiry and determine whether any injury would follow the production of the document.

Mr. Seervai contends that these decisions correctly represent the legal position in regard to the Crown privilege in England in the second half of the Nineteenth Century, and, according to him, when the

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Indian Evidence Act was drafted by Sir James Fitzjames Stephen he intended to make provisions in the Act which would correspond to the said position in the English Law. In other words, the argument is that ss. 123 and 162 are intended to lay down that, when a privilege is claimed by the State in the matter of production of State documents, the total question with regard to the said claim falls within the discretion of the head of the department concerned, and he has to decide in his discretion whether the document belongs to the privileged class and whether its production would cause injury to public interest. It is in the light of this background that Mr. Seervai wants us to construe the relevant sections of the Act.

In support of this argument Mr. Seervai has also referred us to the draft prepared by Sir James Fitzjames Stephen at the instance of Lord Coleridge for adoption by the English Parliament, and has relied on Art. 112 in the said draft. Art. 112 provides, *inter alia*, that no one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, unless the officer at the head of the department concerned permits him to do so. It also refers to some other matters with which we are not concerned. This part of Art. 112 as framed by Sir James Fitzjames Stephen seems to include the provisions of ss. 123 and 124 of the Act. It is significant that there is nothing in this Article which corresponds to s. 162 of the Act. Mr. Seervai concedes that the draft prepared by Sir James Fitzjames Stephen was not adopted by Parliament, and even now there is no statutory law of evidence in England; even so, he contends that the intention which Sir James Fitzjames Stephen had in drafting the relevent sections of the Indian Evidence Act must have been similar to his intention in drafting Art. 112, and that is another fact which we may bear in mind in construing the relevant sections of the Act. We ought, however, to add that though Mr. Seervai elaborately argued this part of his case he fairly conceded that recourse to extrinsic aid in interpreting a statutory provision would be justified only

within well recognised limits; and that primarily the effect of the statutory provisions must be judged on a fair and reasonable construction of the words used by the statute itself.

Let us now turn to s. 123. It reads thus:

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

This section refers to evidence derived from unpublished official records which have a relation to any affairs of State, and it provides that such evidence shall not be permitted to be given unless the head of the department concerned gives permission in that behalf. In other words, as a result of this section a document which is material and relevant is allowed to be withheld from the Court, and that undoubtedly constitutes a very serious departure from the ordinary rules of evidence. It is well known that in the administration of justice it is a principle of general application that both parties to the dispute must produce all the relevant and material evidence in their possession or their power which is necessary to prove their respective contentions; that is why the Act has prescribed elaborate rules to determine relevance and has evolved the doctrine of onus of proof. If the onus of proof of any issue is on a party and it fails to produce such evidence, s. 114 of the Act justifies the inference that the said evidence if produced would be against the interest of the person who withholds it. As a result of s. 123 no such inference can be drawn against the State if its privilege is upheld. That shows the nature and the extent of the departure from the ordinary rule which is authorised by s. 123.

The principle on which this departure can be and is justified is the principle of the overriding and paramount character of public interest. A valid claim for privilege made under s. 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and

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that, where a conflict arises between public interest and private interest, the latter must yield to the former. No doubt the litigant whose claim may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and the Court, in reaching the said decision, may feel dissatisfied; but that will not affect the validity of the basic principle that public good and interest must override considerations of private good and private interest. Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of s. 123. Subject to this reservation the maxim *silus populi est supreme les* which means that regard for public welfare is the highest law is the basis of the provisions contained in s. 123. Though s. 123 does not expressly refer to injury to public interest that principle is obviously implicit in it and indeed is its sole foundation.

Whilst we are discussing the basic principle underlying the provisions of s. 123, it may be pertinent to enquire whether fair and fearless administration of justice itself is not a matter of high public importance. Fair administration of justice between a citizen and a citizen or between a citizen and the State is itself a matter of great public importance; much more so would the administration of justice as a whole be a matter of very high public importance; even so, on principle, if there is a real, not imaginary or fictitious, conflict between public interest and the interest of an individual in a pending case, it may reluctantly have to be conceded that the interest of the individual cannot prevail over the public interest. If social security and progress which are necessarily included in the concept of public good are the ideal then injury to the said ideal must on principle be avoided even at the cost of the interest of an individual involved in a particular case. That is why Courts are and ought to be vigilant in dealing with a claim of privilege made under s. 123.

If under s. 123 a dispute arises as to whether the

evidence in question is derived from unpublished official records that can be easily resolved; but what presents considerable difficulty is a dispute as to whether the evidence in question relates to any affairs of State. What are the affairs of State under s. 123? In the latter half of the Nineteenth Century affairs of State may have had a comparatively narrow content. Having regard to the notion about governmental functions and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security and good neighbourly relations. Thus, if the contents of the documents were such that their disclosure would affect either the national defence or public security or good neighbourly relations they could claim the character of a document relating to affairs of State. There may be another class of documents which could claim the said privilege not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions expressed, or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy. In the efficient administration of public affairs government may reasonably treat such a class of documents as confidential and urge that its disclosure should be prevented on the ground of possible injury to public interest. In other words, if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such document or such class of documents may also claim the status of documents relating to public affairs.

It may be that when the Act was passed the concept of governmental functions and their extent was limited, and so was the concept of the words "affairs of State" correspondingly limited; but, as is often

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said, words are not static vehicles of ideas or concepts. As the content of the ideas or concepts conveyed by respective words expands, so does the content of the words keep pace with the said expanding content of the ideas or concepts, and that naturally tends to widen the field of public interest which the section wants to protect. The inevitable consequence of the change in the concept of the functions of the State is that the State in pursuit of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial, and documents in relation to such commercial activities undertaken by the State in the pursuit of public policies of social welfare are also apt to claim the privilege of documents relating to the affairs of State. It is in respect of such documents that we reach the marginal line in the application of s. 123; and it is precisely in determining the claim for privilege for such border-line cases that difficulty arises.

It is, however, necessary to remember that where the Legislature has advisedly refrained from defining the expression "affairs of State" it would be inexpedient for judicial decisions to attempt to put the said expression into a strait jacket of a definition judicially evolved. The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court. "Affairs of State", according to Mr. Seervai, are synonymous with public business and he contends that s. 123 provides for a general prohibition against the production of any document relating to public business unless permission for its production is given by the head of the department concerned. Mr. Seervai has argued that documents in regard to affairs of State constitute a genus under which there are two species of documents, one the disclosure of which will cause no injury to public interest, and the other the disclosure of which may cause injury to public interest. In the light of the consequence which may flow from their disclosure the two species of documents can be described as innocuous and noxious respectively. According to Mr. Seervai the effect of s. 123

is that there is a general prohibition against the production of all documents relating to public business subject to the exception that the head of the department can give permission for the production of such documents as are innocuous and not noxious. He contends that it is not possible to imagine that the section contemplates that the head of the department would give permission to produce a noxious document. It is on this interpretation of s. 123 that Mr. Seervai seeks to build up similarity between s. 123 and the English Law as it was understood in 1872. In other words, according to Mr. Seervai the jurisdiction of the Court in dealing with a claim of privilege under s. 123 is very limited and in most of the cases, if not all, the Court would have to accept the claim without effective scrutiny.

On the other hand it has been urged by Mr. Sastri that the expression " documents relating to any affairs of State " should receive a narrow construction; and it should be confined only to the class of noxious documents. Even in regard to this class the argument is that the Court should decide the character of the document and should not hesitate to enquire, incidentally if necessary, whether its disclosure would lead to injury to public interest. This contention seeks to make the jurisdiction of the Court wider and the field of discretion entrusted to the department correspondingly narrower.

It would thus be seen that on the point in controversy between the parties three views are possible. The first view is that it is the head of the department who decides to which class the document belongs; if he comes to the conclusion that the document is innocuous he will give permission to its production; if, however, he comes to the conclusion that the document is noxious he will withhold such permission; in any case the Court does not materially come into the picture. The other view is that it is for the Court to determine the character of the document, and if necessary enquire into the possible consequences of its disclosure; on this view the jurisdiction of the Court is very much wider. A third view which does not

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accept either of the two extreme positions would be that the Court can determine the character of the document, and if it comes to the conclusion that the document belongs to the noxious class it may leave it to the head of the department to decide whether its production should be permitted or not; for it is not the policy of s. 123 that in the case of every noxious document the head of the department must always withhold permission. In deciding the question as to which of these three views correctly represents the true legal position under the Act it would be necessary to examine s. 162. Let us therefore, turn to that section.

Section 162 reads thus:

"A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility."

The first clause of s. 162 requires that a witness summoned to produce a document must bring it to the Court and then raise an objection against either its production or its admissibility. It also authorises the Court, and indeed makes it its obligation, to decide the validity of either or both of the said objections. It is significant that the objections to the production or admissibility of evidence specified in s. 162 relate to all claims of privilege provided by the relevant sections of Chapter IX of Part III of the Act. Section 123 is only one of such privileges so that the jurisdiction given to the Court to decide the validity of the objections covers not only the objections raised under s. 123 but all other objections as well. Take for instance the privilege claimed under s. 124 of the Act which provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest

would suffer by the disclosure. It is clear, and indeed it is not disputed, that in dealing with an objection against the production of a document raised under s. 124 the Court would have first to determine whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be disclosed or not. This illustration brings out the character and the scope of the jurisdiction conferred on the Court dealing with an objection raised under s. 162.

The second clause of s. 162 in terms refers to the objection as to the admissibility of the document. It seems to us that this clause should be construed to refer to the objections both as to the production and the admissibility of documents; otherwise, in the absence of any limitation on its power the Court would be justified in exercising its authority under, and discharging its obligation imposed by, cl. 1 of s. 162 by inspecting the document while holding an enquiry into the validity of the objection raised against its production under s. 123, and that would be inconsistent with the material provision in cl. 2 of s. 162. That is why we hold that the second clause covers both kinds of objections. In other words, admissibility in the context refers both to production and admissibility. It may be added that "matters of State" referred to in the second clause are identical with "affairs of State" mentioned in s. 123.

Reading this clause on this assumption what is its effect? It empowers the Court to inspect the document while dealing with the objection; but this power cannot be exercised where the objection relates to a document having reference to matters of State and it is raised under s. 123. In such a case the Court is empowered to take other evidence to enable it to determine the validity of the objection. Mr. Seervai contends that the first part of cl. 2 which deals with the inspection of the document is confined to the objection relating to the production of the document,

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and on that basis he contends that since inspection is not permissible in regard to the document falling under s. 123 the Court can do nothing else but record its approval to, and uphold the validity of, the objection raised by the head of the department. In regard to the objection as to the admissibility of the said document, however, he concedes that the Court can take other evidence, if necessary, and then determine its validity. According to him, such evidence would be necessary and permissible when the objection to admissibility is based for instance on want of stamp or absence of registration. In our opinion, this construction though ingenious is not supportable on a plain and grammatical construction of the clause read as a whole; it breaks up the clause artificially which is plainly not justified by rules of grammar. We are satisfied that the Court can take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised even under s. 123. If the privileged document cannot be inspected the Court may well take other collateral evidence to determine its character or class. In other words, the jurisdiction conferred on the Court to deal with the validity of an objection as to the production of a document conferred by the first clause is not illusory or nominal; it has to be exercised in cases of objections raised under s. 123 also by calling for evidence permissible in that behalf. It is perfectly true that in holding an enquiry into the validity of the objection under s. 123 the Court cannot permit any evidence about the contents of the document. If the document cannot be inspected its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection.

This position would be clear if at this stage we consider the question as to how an objection against the production of document should be raised under s. 123. It is well settled and not disputed that the privilege should not be claimed under s. 123 because it is apprehended that the document if produced would defeat the defence raised by the State. Anxiety

to suppress a document may be natural in an individual litigant and so it is checked and kept under control by the provisions of s. 114 of the Act. Where, however, s. 123 confers wide powers on the head of the department to claim privilege on the ground that the disclosure may cause injury to public interest scrupulous care must be taken to avoid making a claim for such a privilege on the ground that the disclosure of the document may defeat the defence raised by the State. It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister in charge of the department, or even the government in power, has no relevance in making a claim for privilege under s. 123. The apprehension that the disclosure may adversely affect the head of the department or the department itself or the Minister or even the government, or that it may provoke public criticism or censure in the Legislature has also no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. The sole and the only test which should determine the decision of the head of the department is injury to public interest and nothing else. Since it is not unlikely that extraneous and collateral purposes may operate in the mind of the person claiming the privilege it is necessary to lay down certain rules in respect of the manner in which the privilege should be claimed. We think that in such cases the privilege should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary the Court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been

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duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reason why it is apprehended that their disclosure would lead to injury to public interest. This last requirement would be very important when privilege is claimed in regard to documents which prima facie suggest that they are documents of a commercial character having relation only to commercial activities of the State. If the document clearly falls within the category of privileged documents no serious dispute generally arises; it is only when Courts are dealing with marginal or border-line documents that difficulties are experienced in deciding whether the privilege should be upheld or not, and it is particularly in respect of such documents that it is expedient and desirable that the affidavit should give some indication about the reasons why it is apprehended that public interest may be injured by their disclosure.

It is conceded by Mr. Seervai that if the affidavit produced in support of the claim for privilege is found to be unsatisfactory a further affidavit may be called, and in a proper case the person making the affidavit whether he is a Minister or the Secretary should be summoned to face cross-examination on the relevant points. Mr. Seervai, however, contends that the object of such cross-examination must be limited to test the credibility of the witness and nothing more. We do not see why any such a limitation should be imposed on cross-examination in such a case. It would be open to the opponent to put such relevant and permissible questions as he may think of to help the Court in determining whether the document belongs to the privileged class or not. It is true that the scope of the enquiry in such a case is bound to be narrow and restricted; but the existence of the power in the Court to hold such an enquiry will itself act as a salutary check on the capricious exercise of the power conferred under s. 123; and as some of the decisions show the existence of this power is not merely a matter of theoretical abstraction (Vide for instance, *Ijjat Ali Talukdar* v. *Emperor* (1)).

(1) I.L.R. [1944] 1 Cal. 410.

Thus our conclusion is that reading ss. 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under s. 123 or not.

In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not. We are not impressed by Mr. Seervai's argument that the Act could not have intended that the head of the department would permit the production of a document which belongs to the noxious class. In our opinion, it is quite conceivable that even in regard to a document falling within the class of documents relating to affairs of State the head of the department may legitimately take the view that its disclosure would not cause injury to public interest. Take for instance the case of a document which came into existence quite some time before its production is called for in litigation; it is not unlikely that the head of the department may feel that though the character of the document may theoretically justify his refusing to permit its production, at the time when its production is claimed no public injury is likely to be caused. It is also possible that the head of the department may feel that the injury to public interest which the disclosure of the document may cause is minor or insignificant, indirect or remote; and having regard to the wider extent of the direct injury to the cause of justice which may result from its non-production he may

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decide to permit its production. In exercising his discretion under s. 123 in many cases the head of the department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that s. 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing ss. 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion.

In this connection it is necessary to add that the nature and scope of the enquiry which, in our opinion, it is competent to the Court to hold under s. 162 would remain substantially the same whether we accept the wider or the narrower interpretation of the expression "affairs of State". In the former case the Court will decide whether the document falls in the class of innocuous or noxious documents; if it finds that the document belongs to the innocuous class it will direct its production; if it finds that the document belongs to the noxious class it will leave it to the discretion of the head of the department whether to permit its production or not. Even on the narrow construction of the expression "affairs of State" the Court will determine its character in the first instance; if it holds that it does not fall within the noxious class which alone is included in the relevant expression on this view an order for its production will follow; if the finding is that it belongs to the noxious class the question about its production will be left to the discretion of the head of the department. We have already stated how three views are possible on this point. In our opinion, Mr. Seervai's contention which adopts one extreme position ignores the effect of s. 162, whereas the contrary position which is also extreme in character ignores the provisions of s. 123. The view

which we are disposed to take about the authority and jurisdiction of the Court in such matters is based on a harmonious construction of s. 123 and s. 162 read together; it recognises the power conferred on the Court by cl. (1) of s. 162, and also gives due effect to the discretion vested in the head of the department by s. 123.

It would thus be clear that in view of the provisions of s. 162 the position in India in regard to the Court's power and jurisdiction is different from the position under the English Law as it obtained in England in 1872. It may be true to say that in prohibiting the inspection of documents relating to matters of State the second clause of s. 162 is intended to repel the minority view of Baron Martin in the case of *Beatson* (1). Nevertheless the effect of the first clause of s. 162 clearly brings out the departure made by the Indian Law in one material particular, and that is the authority given to the Court to hold a preliminary enquiry into the character of the document. That is why we think that the arguments so elaborately and ingeniously built up by Mr. Seervai on the basis of the background of the Indian Evidence Act breaks down in the light of the provisions of s. 162. We may add that in substance and broadly stated the consensus of judicial opinion in this country is in favour of this conclusion. (Vide: e.g., *Kaliappa Udayan* v. *Emperor* (2); *R. M. D. Chamarbaugwala* v. *Y. R. Parpia* (3); *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux & Ors.* (4); *The Public Prosecutor, Andhra* v. *Venkata Narasayya* (5); and *Ijjat Ali Talukdar* v. *Emperor* (6)). Therefore we think it is unnecessary to refer to these decisions in detail or to examine the reasons given by them in support of the conclusion reached by them.

There are, however, two decisions which have struck a note of dissent, and so it is necessary to examine them. In *W. S. Irwin* v. *D. J. Reid* (7) it appears that the Court was incidentally dealing with

(1) (1860) 5 H. & N. 838 ; 157 E. R. 1415.
(2) A.I.R. 1937 Mad. 492.
(3) A I.R. 1950 Bom. 230.
(4) A.I.R. 1950 East Punjab 228.
(5) A.I.R. 1957 Andhra 486.
(6) I.L.R. [1944] 1 Cal. 410.
(7) (1921) I.L.R. 48 Cal. 304.

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the scope and effect of s. 123 of the Act. In that case the plaintiff was one of the members of the committee, known as the Champaran Agrarian Enquiry Committee, and as such member he had effected a settlement between the indigo planters and the tenants about the partial refund of tawan or remission of sarabeshi. The defendant Irwin wrote three letters to the members after the settlement which taken together would import that his consent to the settlement was obtained by misrepresentation and all facts were not disclosed to him. Thereupon Reid filed a suit claiming Rs. 50,000 as damages against Irwin for making the said defamatory statements which according to him greatly injured his credit and reputation and had brought him into public odium and contempt. It appears that at the trial an attempt was made to compel the production of the minutes of the committee. The said attempt failed because the Government of Bihar and Orissa claimed privilege under s. 123. In appeal it was urged that the privilege should not have been upheld, but the appellant's plea was not accepted by the Court. "The public officer concerned", observed Mookerjee, A. C. J., "and not the judge is to decide whether the evidence referred to shall be given or withheld. If any other view were taken the mischief intended to be avoided would take place as the judge could not determine the question without ascertaining the contents of the document, and such enquiry, if it did take place, must, for obvious reasons take place in public". In support of this decision the learned judge referred to some English decisions; amongst them was the case of *Beatson* v. *Skene* (1). It would be noticed that in making these incidental observations the Court has not considered the true effect of the provisions of s. 162. Indeed no reference was made to the said section and the matter does not appear to have been seriously argued and naturally, because the point was not directly raised for decision. In this connection we ought to point out that in a subsequent decision of the said High Court in *Ijjat Ali Talukdar's case* (2) a contrary view has been

(1) (1860) 5 H. & N. 838: 157 E.R. 1415. (2) I.L.R. [1944] 1 Cal. 410.

taken and it is the subsequent view which has prevailed in the Calcutta High Court thereafter.

In *Khawaja Nazir Ahmad* v. *The Crown* (1) the High Court of Judicature at Lahore has held that when a privilege is claimed under s. 123 the Court simply gives effect to the decision of the head of the department by adding its own command to it but the Court has no power to examine the document in order to verify the correctness of the allegations or the grounds on which the privilege is claimed. Abdur Rahman, J., who delivered the judgment of the Bench in that case, has considered the relevant Indian and English decisions, and has based his conclusion substantially on the judgment of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.* (2), to which we will presently refer. The learned judge appears to have construed s. 162 in the manner suggested by Mr. Seervai. In fact Mr. Seervai's argument was that the construction placed by Abdur Rahman, J. on s. 162 had not been considered by the other Indian decisions when they brushed aside his conclusion. "I feel convinced", said Abdur Rahman, J., "that the objection as to the production of the document, apart from its admissibility (for want of registration or contravening the rule as to when secondary evidence of a document can be admitted—if the document is merely a copy and not original) can only be decided by its inspection by the Court, followed, as it must necessarily have been, by an order of production, although not in the sense of its contents having been disclosed to the party summoning the document at any rate at that stage". We have already indicated our reasons for not accepting this artificial construction of the second clause in s. 162. This decision also has been dissented from by a Full Bench of the Lahore High Court in *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux & Ors.* (3) and the view taken by the Full Bench in that case prevails in the Punjab High Court ever since.

In the course of arguments before us a large number of English decisions have been cited by the learned

(1) (1945) I.L.R. 26 Lah. 219. (2) [1942] A.C. 624.
(3) A.I.R. 1950 East Punjab 228.

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counsel appearing for both the parties. Having regard to the fact that our decision ultimately rests, as it must, on the construction of the relevant provisions of the Act, we do not think it necessary to refer to all the cases to which our attention was drawn; we propose to confine ourselves to three decisions which have made a substantial contribution to the discussion of the problem, and which represent three distinct and different trends of judicial opinion on the point with which we are dealing.

The first case to which we would refer is the decision of the Privy Council in *Robinson* v. *State of South Australia* (1). In that case the appellant had brought an action in the Supreme Court of South Australia against the respondent State claiming damages for alleged negligence in the care of wheat placed in the control of the State under the Wheat Harvests Acts, 1915-17. Upon an order for discovery the respondent State, by an affidavit made by a civil servant, claimed privilege in respect of 1892 documents tied in three bundles, and stated to be State documents comprising communications between officers administering the department concerned. There was exhibited to the affidavit a minute by the responsible Minister stating, inter alia, that the disclosure of the documents would be contrary to the interests of the State and of the public. The claim for privilege had been upheld by the Australian Courts but it was rejected by the Privy Council which held that the minute was inadequate to support the claim; it was too vague in the circumstances of the case, and was not a statement on oath showing that the Minister had himself considered each of the documents, or indicating the nature of the suggested injury to the interests of the public. The Privy Council, therefore, directed that the Supreme Court of South Australia should exercise its power under O. 31, r. 14, sub-r. (2), to inspect the documents, because it thought that the said course was less likely to cause delay than an order for a further and better affidavit of documents. The litigation in that case had been preceded by another litigation, and on the

(1) [1931] A.C. 704.

facts thus disclosed the Privy Council was satisfied that the action in question was one of a large number which were then pending, and against which a similar relief was claimed, all being alike dependant for success upon the establishment of the same facts. That is how full discovery by the respondent had become "the immediately vital issue between the parties".

Dealing with the merits of the privilege the Privy Council cited with approval Taylor's observation that "the principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires"(1). Lord Blanesburgh, who delivered the judgment of the Board observed that "it cannot be assumed that documents relating to trading, commercial or contractual activities of the State can never be claimed to be protected under this head of privilege", but he added that "the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed". Then he referred to the fact that in view of the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to the liabilities arising therefrom which were frequently put forward, it is necessary for the Courts to remember that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation, extended. The judgment then proceeds to add that in truth the fact that documents if produced might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security. Then the power of the Court to call for the production of documents for which privilege was claimed was examined in the light of previous decisions, and in the light of the provisions of O. 31, r. 14, sub-r. (2). "Where, as in the present case", it was observed, "the State is not only sued as defendant under the authority of statute, but is in the suit bound to give discovery, there seems little, if any,

(13) Taylor on "Evidence", s. 939.

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reason why the Court in relation to this privileged class of its documents should have any less power than it has to inspect any other privileged class of its documents, provided of course, that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist". The procedure which should be adopted in claiming the privilege was then considered, and it was held that the affidavit produced, which in its sweep covered no fewer than 1892 documents in number, was of the vaguest generality and as such unsatisfactory. The Privy Council then considered the question as to whether a further opportunity should be given to the State to make a better affidavit but it thought that it would be inexpedient to adopt such a course because it would involve further serious delay, "without, it may be, advancing any further the final solution to the question at issue". That is why the Supreme Court was asked to exercise its power under the relevant rule to inspect the documents and then decide whether the privilege should be upheld or not. It is significant that even when giving such a direction their Lordships took the precaution of adding that the judge, in giving his decision as to any document, will be careful to safeguard the interest of the State and will not, in any case of doubt, resolve the doubt against the State without further enquiry from the Minister. It only remains to add that so far as Australia is concerned it does not appear that there is any statutory provision corresponding to s. 162 of the Act, and so, even after this judgment was pronounced by the Privy Council, Courts in India have not given effect to the operative part of the order in regard to the inspection of the document by Courts having regard to the statutory prohibition imposed by s. 162 in that behalf.

This pronouncement of the Privy Council was subsequently criticised by the House of Lords in *Duncan & Anr.* v. *Cammell Laird & Co. Ltd.* (1). It appears that the submarine Thetis which had been built up by the respondents under contract with the Admiralty was undergoing her submergence tests in Liverpool Bay, and, while engaged in the operation of a

(1) [1942] A.C. 624.

trial drive, sank to the bottom owing to the flooding of her two foremost compartments and failed to return to the surface with the result that all who were in her, except four survivors were overwhelmed. This unfortunate accident gave rise to a large number of actions against the respondents for damages for negligence. Pending the trial of the said claims the plaintiffs wanted discovery of certain specified documents to which the defendants objected, and the objection of the defendants was supported by Mr. Alexander who was the First Lord of the Admiralty in his affidavit made in that behalf. The documents to the productien of which an objection was thus raised included (either in original or as a copy) the contract for the hull and machinery of the Thetis and other letters and reports. The Master before whom the objection was raised refused to order inspection. His decision was confirmed by Hilbery, J., sitting in Chambers, and the Court of Appeal unanimously confirmed the judge's order. The plaintiffs, however, were given leave to appeal to the House of Lords; that is how the matter reached the House of Lords.

Viscount Simon, L. C., who pronounced a composite judgment on behalf of himself and on behalf of Lord Thankerton, Lord Russel of Killowen and Lord Clauson, exhaustively considered the whole law on the subject of Crown Privilege; and in his speech he made the categorical statement that in his opinion the Privy Council was mistaken in regarding the Australian rule of procedure as having any application to the subject-matter and in ordering the inspection of the documents which were in question before the Privy Council. Viscount Simon began his speech with the consideration of the previous decisions of the House of Lords, and held that the matter in substance was concluded by previous authorities in favour of upholding the objections. He observed that the common law principle is well established that, where the Crown is a party to a suit, discovery of documents cannot be demanded from it as a matter of right, though in practice, for reasons of fairness and in the

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interests of justice, all proper disclosure and production would be made. As a result of the examination of the several decisions Viscount Simon deduced the principle which has to be applied in such cases in these words: "Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production". In this connection he stated that public interest may be damnified where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. Then he proceeded to examine the question as to whether when objection has been duly taken the judge should treat it as conclusive; and his answer was that an objection validly taken to production on the ground that this would be injurious to public interest is conclusive; but, of course, he proceeded to make pertinent observations for the guidance of those who are entrusted with the power to make a claim. It would be noticed that even this decision would not be of material assistance to us because, as we have repeatedly pointed out, our decision must ultimately rest on the relevant statutory provisions contained in the Indian Evidence Act; and so, the conclusion that a valid certificate issued by the Minister in charge is conclusive may not be strictly applicable to a claim for privilege similarly made by a Minister in charge in India. As we have already indicated, the preliminary enquiry contemplated by the first clause of s. 162 has to be held by the Court, and it is after the Court has found in favour of the character of the document pleaded by the State that the occasion arises for the head of the department to exercise his discretion conferred by s. 123. Incidentally, we may point out that Lord Thankerton and Lord Russel of Killowen, who were parties to this

decision, were also parties to the decision of the Privy Council in the case of *Robinson* (1).

In regard to the decisions in the cases of *Robinson* (1) and *Duncan* (2) respectively, it may be permissible to make one general observation. In both these cases the nature of the documents for which privilege was claimed, the time at which the dispute arose and the other surrounding circumstances were very unusual and special though in different ways, and so, as often happens, the shift in emphasis from one aspect of the same principle to another and the strong language used took colour from the nature of the special facts. Incidentally we may also add that the epilogue to the decision in *Robinson's case* (1) illustrates what untoward consequences may follow from an erroneous decision or a miscalculation as to the injury to public interest which may be caused by disclosure.*

Nearly five years after the judgment in *Duncan's case* (2) was pronounced, the Crown Proceedings Act (10 & 11 Geo. 6, c. 44) was passed in 1947, and the Crown Privilege recognised under the common law of England is now regulated by s. 28 of the said Act. Section 28 which deals with discovery provides in substance that subject to the rules of court in any civil proceedings there specified the Crown may be required by the Court to make discovery of documents and produce documents for inspection, and that in such proceedings the Crown may also be required to answer interrogatories. This legislative invasion of the Crown's prerogative is, however, subject to the proviso that the said section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to public interest. It would be noticed that s. 28 read with the proviso confers on the Courts specified by it powers which are much narrower than

(1) [1931] A.C. 704. (2) [1942] A.C. 624.

*For a graphic account of the aftermath of the enquiry held by the Supreme Court of South Australia, pursuant to the Privy Council's decision in *Robinsons's case* (1), see "Law and Orders" by Sir C. K. Allen, 2nd Ed., p. 374, foot-note 5a.

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those which are conferred on the Indian Courts under cl. 1 of s. 162 of the Act.

In the decision in *Duncan's case* (1) Viscount Simon had assumed that the law as laid down by the said decision was equally applicable to Scotland. This assumption has been seriously challenged by another decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board* (2). In that case Viscount Simonds has referred to a large number of earlier decisions dealing with the relevant law as it is administered in Scotland and commented on the decision in *Duncan's case* (1) by saying that the observations in the said case, in so far as they relate to the law of Scotland must be regarded as *obiter dicta*. "In the course of the present appeal", added Lord Simonds, "we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been, and is now, in the law of Scotland an inherent power of the Court to override the Crown's objections to produce documents on the ground that it would injure the public interest to do so", though he added that "very rarely in recent times has this inherent right been exercised". Lord Radcliffe, who agreed with the conclusion of the House with some reluctance, has made strong comments on the plea of privilege which is raised on behalf of the Crown in such matters. Adverting to the contention that the public interest may be injured by the production of the document Lord Radcliffe observed that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. According to Lord Radcliffe it was not unreasonable to expect that the Court would be better qualified than the Minister to measure the importance of such principles in application to the particular case that is before it. It is on that assumption that the Scottish Law has reserved to the Courts the duty of making some assessment of the relative

(1) [1942] A.C. 624. (2) (1956) Scots Law Times Reports, 41.

claims of the different aspects of public interest where production of a document is objected to by the Crown. Then, in his characteristic style Lord Radcliffe has observed "I should think it a very great pity indeed if a power of this kind, a valuable power, came to be regarded as a mere ghost of theory having no practical substance, and the Courts abdicated by disuse in the twentieth century a right of control which their predecessors in the earlier centuries have been insistent to assert". The learned law Lord has also made some strong comment on the formula which has been evolved by Viscount Simon in *Duncan's case* (1), and had stated that the phrase "necessary for the proper functioning of the public service" is a familiar one, and I have a misgiving that it may become all too familiar in the future". The result of this decision appears to be that in Scotland, where the common law doctrine of the Crown Privilege is not strictly enforced, a privilege can be claimed by the Minister on grounds set forth by him in his affidavit. The certificate would be treated as very strong presumptive evidence of the claim made but the Court would nevertheless have inherent power to override the said certificate. It is unnecessary for us to consider the true nature and effect of this power because in India in this particular matter we are governed by the provisions of s. 162 which confer power on Courts to determine the validity of the objection raised under s. 123, and so there would be no occasion or justification to exercise any inherent power.

Though we do not propose to refer to the other decisions to which our attention was invited, we may incidentally observe that the decision in *Duncan's case* (1) has been followed by English Courts, but sometimes the learned judges have expressed a sense of dissatisfaction when they are called upon to decide an individual dispute in the absense of relevant and material documents. (Vide : *Ellis* v. *Home Office* (2)). Before we part with this topic we may also indicate that it appears that in the long history of reported judicial decisions only on three occasions the right to

(1) [1942] A.C. 624. (2) [1953] 2 All E. R. 149.

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inspect documents has been either theoretically asserted or actually execised in England. In *Hennessy* v. *Wright* (1), Field, J., observed that he would consider himself entitled to examine privately the documents to the production of which the Crown objected, and to endeavour by this means and that of questions addressed to the objector to ascertain whether the fear of injury to public service was the real motive in objecting. In point of fact, however, the learned Judge did not inspect the documents. From the judgment of the Court of Appeal in *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.* (2), it appears that Scrutton, J., had inspected the documents to the production of which an objection was raised. The learned judge has, however, added that having seen the documents he thought that the government may be right in the view that they ought not to be produced to others, and that he would not take the responsibility of ordering them to be produced against the wishes of the government. In *Spigelmann* v. *Hocker & Anr.* (3), Macnaghten, J., inspected the document to the production of which an objection was raised. The result of these decisions is that in England a valid certificate issued by the Minister in support of the privilege claimed is conclusive; while in Scotland, though it would normally be treated as such, Courts reserve to themselves an inherent right to revise or review the certificate in a proper case.

It now remains to consider whether the High Court was right in holding that the privilege claimed by the appellant in respect of the four documents in question was not justified, and that takes us to the consideration of the relevant facts in the present appeal. The documents of which discovery and inspection were claimed are thus described by the respondent:

(1) Original order passed by Pepsu Government on September 28, 1955, on the representation dated May 18, 1955, submitted by Sodhi Sukhdev Singh;

(2) Original order passed by the Pepsu Government

(1) (1888) 21 Q.B. 509. (2) [1916] 1 K.B. 822.
(3) (1933-34) 1 Times L.R. 87.

on March 8/9, 1956, reaffirming the decision passed on September 28, 1955, referred to above;

(3) Original order passed by the Pepsu Government in their cabinet Meeting dated August 11, 1956, revising their previous order on the representation of Sodhi Sukhdev Singh dated May 18, 1955; and

(4) Report of the Public Service Commission on the representation of Sodhi Sukhdev Singh dated May 18, 1955, after the Pepsu Government's decision on September 28, 1955.

In dealing with this question and in reversing the order passed by the trial court by which the privilege had been upheld, the High Court has purported to apply the definition of the expression "affairs of State" evolved by Khosla, J., as he then was, in the case of *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux & Ors.* (1): "It is, therefore, sufficiently clear", said the learned judge, "that the expression "affairs of State" as used in s. 123 has a restricted meaning, and on the weight of authority, both in England and in this country, I would define "affairs of State" as matters of a public nature in which the State is concerned, and the disclosure of which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations". It is this definition which was criticised by Mr. Seervai on the ground that it purported to describe the genus, namely, affairs of State, solely by reference to the characteristics of one of its species, namely, documents whose disclosure was likely to cause injury to public interest. Having adopted this definition the High Court proceeded to examine whether any injury would result from the disclosure of the documents, and came to the conclusion that it was difficult to sustain the plea that the production of the documents would lead to any of the injuries specified in the definition evolved by Khosla, J. On this ground the High Court allowed the contention of the respondent and directed the State to produce the documents in question.

We have already held that in dealing with the

(1) A.I.R. 1950 East Punjab 228.

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'question of privilege raised under s. 123 it is not a part of the Court's jurisdiction to decide whether the disclosure of the given document would lead to any injury to public interest; that is a matter for the head of the department to consider aud decide. We have also held that the preliminary enquiry where the character of the documents falls to be considered is within the jurisdiction and competence of the Court, and we have indicated how within the narrow limits prescribed by the second clause of s. 162 such an enquiry should be conducted. In view of this conclusion we must hold that the High Court was in error in trying to enquire into the consequences of the disclosure; we may add that the decision of the High Court suffers from the additional infirmity that the said enquiry has been confined only to the specified classes of injury specified by Khosla, J., in his definition which cannot be treated as exhaustive. That being so, we think the appellant is justified in complaining against the validity of the decision of the High Court.

Let us then consider whether the documents in question do really fall within the category of documents relating to "affairs of State". Three of the documents the discovery of which the respondent claimed are described as original orders passed by the Pepsu Cabinet on the three respective dates. It is difficult to understand what was exactly meant by describing the said documents as original orders passed on those dates; but quite apart from it the very description of the documents clearly indicates that they are documents relating to the discussions that took place amongst the members of the Council of Ministers and the provisional conclusions reached by them in regard to the respondent's representation from time to time. Without knowing more about the contents of the said documents it is impossible to escape the conclusion that these documents would embody the minutes of the meetings of the Council of Ministers and would indicate the advice which the Council ultimately gave to the Rajpramukh. It is hardly necessary to recall that advice given by the

Cabinet to the Rajpramukh or the Governor is expressly saved by Art. 163, sub-art. (3), of the Constitution; and in the case of such advice no further question need to be considered. The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers. Indeed it is very difficult to imagine how advice thus tendered by the Public Service Commission can be excluded from the protection afforded by s. 123 of the Act. Mr. Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent. Until the final order is thus communicated to the respondent it would be open to the Council to consider the matter over and over again, and the fact that they reached provisional conclusions on two occasions in the past would not alter the character of the said conclusions. The said conclusions, provisional in character, are a part of the proceedings of the Council of Ministers and no more. The report received by the Council from the Public Service Commission carries on its face the character of a document the disclosure of which would lead to injury of public interest. It falls in that class of document which "on grounds of public interest must as a class be withheld from production". Therefore, in our opinion, the conclusion appears inescapable that the documents in question are protected under s. 123, and if the head of the department does not give permission for their production, the Court cannot compel the appellant to produce them. We should have

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stated that the two affidavits made by the Chief Secretary in support of the plea of the claim of privilege satisfied the requirements which we have laid down in our judgment, and no comment can be effectively made against them. The argument that in its pleadings the appellant accepted the description of the respondent that the document contained orders is hardly relevant or material. The affidavits show what these documents purport to be and that leads to the inference which irresistibly follows from the very description of the documents given by the respondent himself in his application by which he called for their production and inspection.

Before we part with this appeal we may incidentally refer to another point which was argued at some length before us by both the learned counsel for interveners. Mr. Viswanatha Sastri contended that the provisions of s. 162 can be invoked only where a witness has been summoned to produce a document and a privilege is claimed by him in respect of it. According to him the said provisions cannot be invoked where the Court is called upon to decide the validity of the claim of privilege at the stage of inspection of the documents. In other words, where the State is a party to the suit and an application for inspection of documents is made against it by its opponent, and a claim for privilege is put forward by the State, the Court is entitled under O. 11, r. 19, sub-s. (2), to inspect the documents for the purpose of deciding as to the validity of the claim of privilege. That is the clear provision of O. 11, r. 19, sub-r. (2), and the power conferred on the Court by the said provision is not subject to s. 162 of the Act. This position is seriously disputed by Mr. Seervai.

The procedural law in regard to discovery, production and inspection of documents is contained in O. 11, rr. 12, 21. It is true that O. 11, r. 19, sub-r. (2) provides that in dealing with a claim of privilege "it shall be lawful for the Court to inspect the document for the purpose of deciding the validity of the claim of privilege". The question is, what is the effect of this provision when it is considered along with s. 162 of the Act ?

Before briefly indicating our conclusion on this point we may observe that this contention does not appear to have been raised in any judicial decisions to which our attention was drawn. Indeed it appears generally to have been assumed that in the matter of deciding a claim for privilege made by the State the provisions of s. 162 of the Act would apply whether the said claim is made at the earlier stage of inspection or later when evidence is formally tendered. That, however, is another matter.

It is true that s. 162 in terms refers to a witness who is summoned to produce a document and provides for the procedure which should be adopted and the powers which should be exercised in dealing with a privilege claimed by such a witness; but there is no doubt that the provisions of the Act are intended to apply to all judicial proceedings in or before any Court; that in terms is the result of s. 1 of the Act, and the proceedings before the Court under O. 11, r. 19, are judicial proceedings to which prima facie s. 162 would apply. Similarly, s. 4, sub-s. (1), of the Code of Civil Procedure provides, inter alia, that in the absence of any specific provisions to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force; that is to say, in the absence of any provisions to the contrary the Evidence Act would apply to all the proceedings governed by the Code. Besides, it would be very strange that a claim for privilege to which O. 11, r. 19, sub-r. (2), refers is allowed to be raised under s. 123 of the Act, whereas, the procedure prescribed by the Act in dealing with such a claim by s. 162 is inapplicable. If s. 123 of the Act applies and a claim for privilege can be raised under it, prima facie there is no reason why s. 162 should not likewise apply.

But apart from these general considerations the relevant scheme of the Code of Civil Procedure itself indicates that there is no substance in the argument raised by Mr. Sastri. Order 27 prescribes the procedure which has to be adopted where suits are filed by or against the government; a plaint or written statement proposed to be filed by the government has to be

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signed under r. 1 by such person as the government may by general or special order appoint in that behalf, which means that the government can only act through its agent duly appointed in that behalf. The Minister who is the political head of the department or the Secretary who is its administrative head is not the government; and so whenever the government sues or is sued and makes its pleadings it always acts through its duly authorised agents. The scheme of the relevant rules of O. 27 is consistent with this position.

Section 30 of the Code empowers the Court either on its own motion or on an application of a party to issue summonses to persons whose attendance is required either to give evidence or produce document, and to order that any fact may be proved by an affidavit. Order 4, r. 5, contemplates that, at the time of issuing the summons, the Court has to determine whether the summons should be for the settlement of issues only or for the final disposal of the suit; and the relevant form of the summons (No. 1 in First Schedule, Appendix B) shows that in the case of a suit against the government of a State a summons can be issued to compel the attendance of any witness and the production of any document. This shows that where the State is a party a summons may have to be issued to its appropriate officer calling upon him to produce the documents for inspection. The provisions of rr. 14, 15 and 16 of O. 11 show that affidavits have to be filed by the parties, and the filing of affidavits which is permitted by O. 19 is undoubtedly one mode of giving evidence. Order 16, r. 1, provides for the issue of a summons to persons whose attendance is required inter alia to produce documents; and r. 21 of the said order expressly provides that where any party to a suit is required to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as are applicable. Thus there can be little doubt that where a privilege is claimed at the stage of inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Act

under which the privilege is claimed as well as the provisions of s. 162 which deal with the manner in which the said privilege has to be considered are equally applicable; and if the Court is precluded from inspecting the privileged document under the second clause of s. 162 the said prohibition would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection. It is hardly necessary to point out that a contrary view would lead to this manifestly unreasonable result that at the stage of inspection the document can be inspected by the Court, but not at the subsequent stage of trial. In our opinion, the provisions of O. 11, r. 19, sub-r. (2), must, therefore, be read subject to s. 162 of the Act.

The result is that the appeal is allowed, the order passed by the High Court set aside and that of the trial court restored with costs throughout.

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KAPUR, J.—I have read the judgment prepared by my learned brother Gajendragadkar, J., and agree with the conclusion but in my opinion the Court cannot take other evidence in regard to the nature of document, for which privilege is claimed, and my reasons are these:

In India the law of privilege in regard to official documents is contained in s. 123 of the Indian Evidence Act which has to be read with s. 162 of that Act. The various kinds of privileges claimable under the Evidence Act are contained in Chapter IX, two sections amongst these are ss. 123 and 126, the former dealing with state privilege relating to "affairs of State" and the latter with communications with a legal adviser. In s. 123 the opening words are "no one shall be permitted....." and in the latter "no barrister etc., shall at any time be permitted.....". In the other sections dealing with privilege the opening words are "no person shall be compelled.....". This difference in language indicates that the legislature intended to place the privilege of the State in regard to official documents on a different footing than the other forms of privileges mentioned in the

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Act in so far as it put a ban on the court permitting any evidence of the kind mentioned in s. 123 from being given, so that if, unwittingly any evidence mentioned therein was sought to be given, the court would not permit it unless the other conditions were satisfied.

In s. 123 the provision is against the giving of evidence which is derived from unpublished official records relating to any affairs of State except when the head of the department concerned in his discretion gives permission for the evidence to be given. The important words are "derived", "unpublished" and "affairs of State". The word "derived" means coming out of the source and therefore refers to original as well as secondary evidence of documents whether oral or documentary. The words "unpublished official records" are not very difficult of interpretation and must depend upon the circumstances of each case. If the record is shown to have already been published, it ceases to be an unpublished record. But the difficulty arises as to the meaning of the words "affairs of State", because the ban is put on evidence derived from official documents relating to affairs of State. At the time when the Indian Evidence Act was enacted, affairs of State were confined to governmental or political activities of Government, but with the expanding of the activities of the State, which, because of the changed concept of the State, comprise also socio-economic, commercial and industrial activities the words "affairs of State" must necessarily have a much wider meaning than it originally had. But the language of the sections remains the same and so also the limitation on the giving of evidence derived from such documents and therefore what was considered to be within the discretion of the head of the department to disclose or not to disclose still remains within his discretion and merely because the scope of the words "affairs of State" had been extended, the extent of the discretion has not thereby decreased or become limited and the words "who shall give or withhold such permission as he thinks fit" indicate that the discretion to remove the ban vests in the head of the department and no one else.

The real difficulty arises in the interpretation of the words "affairs of State". What are they? How is the meaning of the words to be determined and by whom? When a claim is made by a proper authority in a proper form, is that conclusive of the nature of the document or has the court to proceed to determine the efficacy of the claim by taking other evidence as to its nature or the effect of its disclosure. It was contended that the decision, whether the document belongs to the category falling within the expression "affairs of State" or not has to be of the court and not of the official mentioned in the section. In a way that is correct because the conduct of the trial must always remain in the hands of the court but what is implied in the contention raised was that the court must first decide whether the document belongs to the class comprised in the expression "affairs of State" and then the official concerned may give or withhold his consent. It was also submitted that in order to enable the court to determine the validity of the claim of privilege the official concerned, when making the claim, may have to state the nature of the document or at least the nature of the injury to the public interests or to the efficient working of the public service, as the case may be, which the disclosure of the document or evidence derived therefrom would result in.

Section 162 of the Evidence Act was relied upon in support of the above contention. That section applies to all documents in regard to which claim of privilege of any kind may be claimable including that falling under s. 123 and therefore the language of s. 162 had necessarily to be wide. It has been described as not being clear by Bose, J., as he then was, in *Bhaiya Saheb* v. *Ram Nath Rampratap Bhadupote* (1). The section requires a witness summoned to produce a document to bring it to the court in spite of any objection which he may take to its production or to its admissibility and the court is empowered to decide both the questions. It is the next part which is relied upon in support of the contention that the court can

(1) I.L.R. [1940] Nag. 240, 247.

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take other evidence to decide both the questions of production and the question of admissibility. The words are "the court, if it sees fit may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility". It was argued that this part of the section empowered the court to take other evidence not only to decide the question of admissibility of the document but also its production. The language of this part of the section does not lend support to this contention because it gives discretion to the court to inspect the document or take other evidence to enable it to determine the admissibility of the document. The interposing of the words "unless it refers to matters of State", has reference to privilege under s. 123 and therefore it disentitles the court to inspect the document. The sequence envisaged by the section is that a witness summoned to produce a document is bound to bring it to the court. He may then take objection to its production under any of the sections, viz., 121 to 131 or he may object to its admissibility and both these objections have to be decided by the court. Then comes the second part of the section. If the document refers to "matters of State"—there is no distinction in the meaning of the word "matters" and "affairs of State"—then the court may not inspect the document, but if the document is not of that class, then the court can inspect it and if it finds any objection to the admissibility, it may take other evidence to determine its admissibility. To take a concrete case, if a document is produced which is compulsorily registerable and it is not so registered, it would not be admissible in evidence under s. 49 of the Registration Act, but evidence may be led as to its admissibility for certain purposes, e.g., s. 53 A of the Transfer of Property Act. If it refers to that class of documents then the second part of s. 162 becomes applicable, i.e., the court may inspect the document which will help it in deciding the question of privilege and admissibility. But if a claim is properly made by a proper official on the ground that it refers to matters of State, the court will stay its hands and refrain from inspecting it.

The words "or to take.....its admissibility" on their plain language do not apply to production and consequently the taking of evidence must have reference to the admissibility of the document.

All the High Courts in India are in accord that the court will not inspect the document if it relates to matters of State. If that is so it would be difficult to sustain the contention that it can decide the question whether the matter relates or does not relate to affairs of State. If the original cannot be inspected, no other evidence can be produced as to its contents. The effect of this prohibition is not only as if the document had been destroyed, but as if it never existed. If that is the position, then it becomes difficult to see how the question of its production can be decided by the court by taking other evidence or how the court can decide whether a particular document falls within the prohibition imposed by s. 123 of the Evidence Act. In this connection the words of Lord Kinnear in *The Lord Commissioner of the Admiralty* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (1) are quite apposite. It was there said:

"I think it is not improbable that even if an officer of the department were examined as a witness, we should not get further forward, because the same reasons which induced the department to say that the report itself ought not to be produced might be thought to preclude the department from giving explanation required".

If the court cannot inspect the document, if no secondary evidence can be given as to its contents and if the necessary materials and the circumstances which would indicate the injury to the public interests or detriment to the proper functioning of the services cannot be before the court it cannot be in a position to decide whether the document relates to affairs of State or not and the logical conclusion would be that the court is debarred from overruling the discretion of the head of the department concerned, because the court cannot say whether the disclosure or non-disclosure would be detrimental or not. If, on the other

(1) (1909) S.C. 335, 343.

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hand, the contention is accepted that the court can decide by taking other evidence as to whether the document relates to the affairs of State then the discretion to ban its production by the head of the department must necessarily become illusory. If the court takes upon itself the task of deciding the nature of the document, then it will be taking upon itself the very grave duty of deciding a vital question as to what are the affairs of State without having the necessary material before it or without knowing the exigencies of the public service or the effect of the disclosure of the State secret or how far the disclosure will injure the public interests and it may thus unwittingly become the instrument of giving publicity to something which the head of the department considered injurious to the public interests, the law having given to the head of the department concerned to make this determination. No doubt the discretion is wide and covers all classes of documents which may fall within the phrase "affairs of State", some noxious and others innocuous and may even appear to be unduly restrictive of the rights of the litigant but if that is the law the sense of responsibility of the official concerned and his sense of fair play has to be trusted. The second part of s. 162 therefore cannot be said to permit the taking of other evidence, i.e., other than the document to determine the question of its production when it is of the category falling under s. 123. That part does not entitle the court to determine the nature of the document or the adequacy of the reasons which impelled the proper official to claim privilege. It would be relevant to quote the observations of Isaacs, J., in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth* (1):

"I distinctly adverted to the necessary fact that the right of discovery given to the litigant for the furtherance of public justice must be subject to the still higher consideration of the general welfare that the order to make proper discovery does not destroy the privilege of public interest, and that the ground of public policy may intervene and prevent the injury to

(1) (1913) 16 C.L.R. 178, 201.

the community which coercive disclosure might produce. If that were not so, every gun in every fort and every safe in the Treasury would be open through the medium of the Court to the observation of any plaintiff of any nationality who could make a prima facie case of the infringement to which it was relevant. One of the authorities to which I referred in that connection was the judgment of Turner, L. J. in *Wadeer* v. *East India Co.*, 8 D.M. & G., 182 at p. 191 and that judgment is, I think, of great value in this case also".

It will be helpful to refer to the law on the subject in England as laid down in English cases because the basis of the Indian Law is the law of that country. The question of privilege has been described by Viscount Simon L. C., in *Duncan* v. *Cammell Laird & Co., Ltd.* (1) as a question of high constitutional importance because it involves a claim by the Executive Government to restrict the material which might otherwise be available for the court trying the case and this description was repeated by the House of Lords in the Scottish case *Corporation of Glasgow* v. *Central Land Board* (2). It may be the material which a party to the litigation may desire in its own interest and without which equal justice may be prejudiced. The question of privilege may not only arise in cases where the State is party to the suit but may equally arise where the contestants in a suit are private parties and whether as a party to the suit or not the State may decline to produce a document. In *Duncan's case* (1) the privilege of the crown, though it was described as not a happy expression, was upheld on the ground that the interest of the State must not be put in jeopardy by the production of a document which would injure it and which is also a principle to be observed in administering justice, "quite unconnected with the interests or claims of the particular parties in litigation and, indeed, is a rule upon which the Judge should, if necessary, insist even though no objection is taken at all." The sort of grounds to afford justification for withholding the documents were given by Viscount Simon as follows:—

(1) [1942] A.C. 624. (2) 1956 S.C. 1 (H.L.).

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"It would not be a good ground that, if they were produced the consequences might involve the department or the government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the document produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified e.g. where disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

Thus the documents, which are protected from production, are those the production of which would be prejudicial to the public interests or those which belong to that class which as a matter of practice, are kept secret for the proper maintenance of the efficient working of the public service.

Objection has been taken to the authority of this rule enunciated by Viscount Simon L. C., on the ground that it is in serious conflict with another principle that the proper administration of justice is also a matter of public interest, i. e., "*fiat justitia ruat caelum*" but as was said by Viscount Simonds in *Glasgow Corporation* v. *Central Land Board* (1), "The paramountcy of the public interest has been recognized and preserved". This principle, which was reenunciated by Viscount Simon, L. C., had been the law of England for over a century before *Duncan's case* (2). In *Earl* v. *Vass* (3) it was held that public officers are not entitled or compellable to produce written communications made by them officially relative to the character and conduct of a party applying

(1) 1956 S.C. 1 (H.L.). (2) [1942] A.C. 624.

(3) (1822) 1 Sh. Sc. App. 229.

for a public office when the production is demanded in an action for damages against the writer. Lord Eldon, L. C., at p. 230 observed:—

"I apprehend, in all cases in which it has been held, upon the principle of public policy, that you shall not be compellable to give evidence of, or produce such instruments—that is, wherever it is held you are not on grounds of public policy, to produce them—you cannot produce them and that it is the duty of the judge to say you shall not produce them....."

Lord Eldon referred with approval to the decision in *Home* v. *Lord William Bentinck* (1) which was of the year 1820. The principle there laid down was that production of instruments and papers must be shut out if it was against public policy. At p. 919 the learned Chief Justice said:—

"It seems therefore that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience that these matters, secret in their nature, and involving delicate enquiry and the names of persons, stand protected".

The injury to public service was recognized in *Beatson* v. *Skene* (2) where Pollock, C. B., said:

"It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the papers; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community. If indeed, the head of the

(1) (1820) 2 Brod. & B. 130: 129 E.R. 907.
(2) (1860) 5 H. & N. 838: 157 E.R. 1415.

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department does not attend personally to say that the production will be injurious but sends the documents to be produced or not as the Judge may think proper, or as was the case in *Dickson* v. *The Earl of Wilton* beford Lord Campbell (reported in Foster and Finlason's N. P. Rep., p. 425), where a subordinate was sent with the document with instructions to object but nothing more, the case may be different."

Martin B. did not entirely agree with the view of the other three learned Barons and he was of the opinion that if the document could be produced without prejudice to public service he ought to compel its production notwithstanding the reluctance of the head of the department to produce it. It was pointed out by Pollock, C. B., that this might apply to extreme cases and "extreme cases throw little light on the practical rules of life".

In *Smith* v. *East India Company* (1) which related to a commercial transaction as to the liability to pay freight a similar privilege was upheld. It was argued that communications between officials and communications between Directors and Board of Control were official correspondence and were privileged. On appeal the Lord Chancellor held that in order that superintendence and control should be exercised effectively and for the benefit of the public it was necessary that unreserved communication should take place between the East India Company and the Board of Control.

In *Homer* v. *Ashford* (2) which was of the year 1825, Best, C. J., said:—

"The first object of the law is to promote public interest; the second to preserve the rights of individuals".

In this connection it may not be out of place to recall the striking language of Knight Bruce, V. C., quoted at p. 401 of *Macintosh* v. *Dun* (3) in the judgment of Lord Macnaughten:—

"Truth like other good things, may be loved unwisely—may be pursued too keenly—may cost too

(1) (1841) 1 Ph. 50: 41 E.R. 550.

(2) (1825) 3 Bing. 322; 130 E.R. 537, 539.

(3) (1908) A. C. 390.

much". And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great to pay for truth itself." Thus the law as stated in these old English cases shows that what was injurious to the public interest or prejudicial to the proper functioning of the public services was not to be disclosed and if the objection was based on these grounds it must prevail. As to who was to determine this, the judge or the official, Pollock C. B. decided in favour of the official because the enquiry could not be held in private and if it was held in public the mischief would have been done. *Beatson* v. *Skene* (1).

It was with this background of the state of the English law that Sir James Fitzjames Stephen drafted the law of evidence which was enacted into the Indian Evidence Act (Act 1 of 1872).

Scrutton, J., in *Asiatic Petroleum Company Ltd.* v. *Anglo-Persian Oil Company Ltd.* (2) which was a case between private parties inspected the document to the production of which objection was taken, and having seen it he said that he would not take the responsibility of ordering it to be produced against the wishes of the Government. When the matter was taken in appeal, Swinfen Eady, L. J., was of the opinion that the rule was not confined to documents of political or administrative character. The foundation of the rule was that the information cannot be disclosed without injury to the public interest and not that the document was confidential or official, and that if the production would be injurious to the public service, the general public interest must be considered paramount to the individual interest of the suitor. This was a document which was written by the defendants, who owned a pipeline from Persia to their refinery in the Persian Gulf, to their agents in Persia which contained confidential information from the Board of Admiralty.

The Scottish cases have also upheld the privilege of the Crown in regard to production although it has

(1) (1860) 5 H. & N. 838; 157 E.R. 1415. (2) [1916] 1 K. B. 822.

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been stated that the inherent power of the court to itself see the document and to override but not to review the certificate of the official of the department concerned has always existed in Scottish courts. In *Duncan's case* (1) Viscount Simon, L. C., quoted with approval the observation of Lord Dunedin, the Lord President in the *Lord Commissioners of the Admiralty* v. *The Aberdeen Steam Trawling & Fishing Co., Ltd.* (2). That was a case where a Government department objected to the production of the document on the ground that the production would be prejudicial to public services and it was held that the view of the government department was final and the court will refuse production even in action in which the Government department was a party. The objection there was taken on an affidavit. At p. 340, the Lord President (Dunedin) said:—

"It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is a very strong step indeed for the Court to overrule that statement by the department. The Lord Ordinary has thought that it is better that he should determine the question. I do not there agree with him, because the question of whether the publication of a document is or is not detrimental to the public service depends so much upon the various points of view from which it may be regarded, and I do not think that the Court is in possession of these various points of view. In other words, I think that, sitting as Judges without other assistance, we might think that something was innocuous, which the better informed officials of the public department might think was noxious. Hence, I think the question is really one for the department, and not for your Lordships".

And Lord Kinnear agreed with Lord Dunedin and at p. 343 said:—

"I agree that we cannot take out of the hands of the Department the decision of what is or what is not detrimental to the public service. There are only two possible courses. We must either say that it is a good

(1) [1942] A.C. 624. (2) (1909) S.C. 335, 343.

ground of objection or we must overrule it altogether. I do not think that we should decide whether it would be detrimental to the public service or not; and I agree with what both your Lordships have said as to the position of the Court in reference to that question. We do not know the conditions under which the production of the document would or would not be injurious to the public service. I think it is not improbable that even if an officer of the Department were examined as a witness we should not get further forward, because the same reasons which induced the Department to say that the report itself ought not to be produced might be thought to preclude the Department from giving the explanations required. A department of Government, to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself, and therefore I agree we ought not to grant the diligence."

In a later Scottish case *Henderson* v. *M'Gown* (1) where in a suit between private parties income-tax returns were sought to be produced, the court held that it had the power, in the exercise of its discretion, to order production of documents in the custody of a public department in spite of its objection but in the circumstances it did not order production as it was unnecessary. Lord Johnston said at p. 826:—

"That is not to say that the court never can and never will overrule such a statement but merely that it would be a very strong step, and therefore a step for which the Court would require very grave justification. The Admiralty and the War Office are charged with the duty of providing for the safety of the realm, and, if either say that the production of a document in their hands would be prejudicial to the public interest, I think that we should naturally implicitly accept the statement. But there are distinctions between public departments. The interest of such a department as the Inland Revenue is that the public should be able to rely on all returns to them and

(1) (1916) S.C. 821.

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communications made to them being treated as confidential. This also is the public interest."

The latest Scottish case relied upon is a decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board* (1). In that case privilege was claimed by the Central Land Board on the ground that its production would adversely affect the public interests. The question for decision was whether Scottish courts were bound to give effect to the certificate of the Secretary of State or whether the court had an inherent jurisdiction not to review the certificate but to override it. The House of Lords was of the opinion that *Duncan's case* (2) did not affect the Law of Scotland and the Scottish courts possessed the inherent power to override the objections of the Minister and it did not exclude the court from making an order of production but in that case the power was not exercised. Viscount Simonds, L. C., said at p. 10 that *Duncan's case* (2) had settled that according to the Law of England an objection validly taken to production of documents on the ground that this would be injurious to the public interest is conclusive but to cite the case of *Lords Commissioners of the Admiralty* (3) as authoritative without regard to the earlier cases and the later case of *Henderson* v. *M'Gown* (4) must give an imperfect view of the law of Scotland. But even in Scotland the power had been rarely, very rarely, exercised by the courts; its exercise had been refused even where the result had been the prejudice of the private individual and the paramountcy of the public interest had been recognised and preserved. (p. 11). Lord Normand observed that for a 100 years the uniform track of authority asserted the inherent power of the court to disregard the crown's objection but the power had been seldom exercised; only the courts had emphatically said that it must be used with the greatest caution and only in special circumstances. In this connection Lord Normand said at p. 16:—

"It was also a firmly established rule that the courts could not dispute the certificate and that the

(1) 1956 S.C. 1 (H.L.).
(2) [1942] A.C. 624.
(3) (1909) S.C. 335, 343.
(4) (1916) S.C. 821.

question whether production would be contrary to public interest was for minister or the department concerned."

Lord Radcliffe in his speech said that *Duncan's case* (1) ought not to be treated as a decision which affected the law of Scotland. Dealing with the case before the court and the power reserved to the court to overrule the crown objection he said at p. 18:—

"I do not understand that the existence of the power involves that in Scotland, any more than in England, it is open to the court to dispute with the minister his view that production would be contrary to the public interest is well founded or to arrive at a view, contradictory of his that production would not in fact be at all injurious to that interest. If weight is given to the argument that the Minister in forming his view may have before him a range of considerations that is not open to the Court and that he is not under any obligation to set out these considerations in public, I think that it must follow that the Minister's view must be accepted by the Court as incapable of being displaced in by its own opinion". The view expressed in *Admiralty Commissioners* v. *Aberdeen*(2) was dissented from.

After referring to another aspect of public interest that impartial justice should be done in the courts of law, not least between citizen and Crown, the Lord Normand observed:

"If in the past the power to disregard the objection has hardly ever been exercised, that has been due, I think, to a very proper respect for the Crown's position and to a confidence that objections of this nature would not be advanced, or at any rate persisted in, unless the case was one in which production would involve material injury to the public welfare".

Thus, as was said by Lord Normand, there is a difference between the law of England and the law of Scotland on an important constitutional question. But in practice the difference was little as the exercise of the inherent power by the Scottish Courts had been rare.

(1) [1942] A.C. 624. (2) (1909) S.C. 335, 343.

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As the Privy Council judgment in *Robinson's case* (1) was from Australia it will be useful to refer to two Australian cases :—

In *Marconi's Wireless Telegraph Company Limited* v. *The Commonwealth* (2) where inspection was claimed of wireless telegraphic apparatus, Isaacs, J., in his minority judgment at p. 205 enunciated the following propositions which are relevant for the purpose of the present case :—

"(1) The rule of exclusion of State secrets applies, necessarily without distinction to the facts, documents and other objects. This was admitted by Mr. Irvine, and is established by such cases as *R. v. Watson* 2 Stark, 116 at p. 148; *R. v. Hardy* 24 St. Tri. 199, at col. 753; *R. v. Watson* 32 St. Tri. 1, at cols. 100-101.

(2) The rule proceeds on the same grounds whether the parties called on to produce the documents, &c., are or are not parties to the suit, that is, on the grounds of the prejudice to the public interests, which production would occasion (per Turner, L. J. in *Wadeer's case* S. D. M. & G., 1882; *Admiralty Commissioners* v. *Aberdeen Trawling Co.* (1909) Sess. Ca., 335.

(3) The right to protection depends upon the "character" of the documents, &c. (ib.).

(4) If the documents, &c., are prima facie private, as where they are in private hands then in the absence of Ministerial claim for protection, the Court, in case of objection by the private defendant on the ground of public policy, will ascertain their character that is, whether they are really governmental and, if they are, the next succeeding paragraph applies: *Smith* v. *East India Company* I Ph. 50.

(5) If the documents, &c., are of a political that is, a governmental "character", then even in the absence of any Ministerial claim for protection, it is the duty of the Court, on objection by private person holding them, to ascertain whether public prejudice will or may ensue from production, and, if it appears that public policy requires confidence between the objector and the Government, they are presumed

(1) [1931] A.C. 704. (2) (1913) 16 C.L.R. 178, 201.

prima facie to be confidential: *Smith* v. *East India Company* I Ph. 50 and per Wills, J. in *Hennessy* v. *Wright* 21 Q.B.D. 509, 518-519.

(6) If either by proof or undisplaced presumption confidence is required, then it is a rule of law, not of discretion, that the documents shall be excluded: *Marks* v. *Beyfus* 25 Q.B.D. 494 at pp. 498-500; *Stace* v *Griffith* L.R. 2 P. C., 420 at p. 428.

(7) If the documents, &c., are in fact "State documents", that is, "in possession of a government department", and the Minister having custody of them assures the Court that public prejudice will or may ensue from production, that, in the absence of what are called extreme cases and are practically negligible, is conclusive evidence of their character, that is, that they are confidential public documents, and that such prejudice will or may ensue, and the Court must act upon it: *Stace* v. *Griffith* L.R. 2 P.C. 420 at p. 428; *Beatson* v. *Skene* 5 H. & N. 838; *The Bellerophon* 44 L. J. Adm. 5; *Hughes* v. *Vargas* 9 R. 661; Halsbury's Laws of England, Vol. XI, p. 85; Taylor on Evidence, 10th ed., pp. 673, 674; Powell on Evidence, 9th ed., p. 273. Conclusiveness in such a case is not unique. Even a private claim for privilege in an ordinary affidavit of documents is (with certain exceptions immaterial here), taken as conclusive with respect even to the grounds stated for claiming privilege; See Halsbury's Laws of England, Vol. XI, p. 61 and *Morris* v. *Edwards* 15 App. Cas. 309."

The learned Judge dealing with the matter of privilege in public interest and the principles based on prevention of injury to the community observed at p. 203:

"Such a doctrine is inherent in all systems of law; for the first requirement of every organised society is to live, and so far as possible to live securely, and the next is to live with the greatest advantage to the community at large; and to these essentials the strict administration of justice in particular cases amongst members must yield."

Thus the principle is that private inconvenience must yield to public interest; in other words *Fiat justitia*

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ruat coelum is not always the right of a suitor because the proper maxim applicable is *salus populi suprema est lex* which transcends all other considerations. The majority of the Court in that case had held that there was nothing to warrant the conjecture that the inspection could disclose anything that could reasonably be called secret in any sense of the word. The matter was taken to the Privy Council but special leave to appeal was refused. The Lord Chancellor there said:—(See *Griffins case*, 36 C.L.R. 378, 386)

"Of course the Minister's statement or certificate must be conclusive on a particular document. How can it be otherwise?..... If the Minister certifies quite specifically, his certificate is to be taken as conclusive. The ground on which special leave to appeal was refused in that case appears to have been that, having regard to the form of the order, which carefully limited the right of inspection and reserved liberty to apply, it was not a convenient case in which to raise a great question of principle."

In *Griffin* v. *The State of South Australia* (1) objection to the production for inspection of documents was upheld on the ground that the statement of the Attorney General for the State that their production for inspection would be prejudicial to the public interest is conclusive. That was a case in which inspection of documents was sought in an action brought in the High Court of Australia by the plaintiff against the State of South Australia to recover damages for negligent storage of wheat. Knox, C. J., in the course of his judgment referred to the observations of the Lord Chancellor in *Marconi's case* (2) which have been quoted above. Isaacs, J., reiterated his previous opinion. Starke, J., was doubtful and he was of the opinion that there was no reason why the courts should not use the power confided in them for discovery. If some real doubt was established as to the accuracy of the Minister's statement there was no reason for refusing the power in a proper case particularly when the commercial activities of the Government were becoming more and more extensive and

(1) (1925) 36 C.L.R. 378. (2) (1913) 16 C.L.R. 178, 201.

the sphere of political and administrative action correspondingly wider. He was also of the opinion that the courts should be able to fully protect the public interests and do nothing to imperil them. The learned Judge in that particular case was not fully satisfied with the affidavit of the Minister.

The matter of privilege in Australia was taken to the Privy Council in *Robinson* v. *State of South Australia* (1). This case arose out of an action similar to *Griffin's case* (2) and a similar privilege was claimed. The Privy Council was of the opinion that the Minister's minute was inadequate to support the claim of privilege but it had not been lost by the inefficiency of the form in which it was claimed and the matter was a proper one for the court to exercise its power of inspection for which privilege was sought in order to determine whether their production will be prejudicial to public interest or to the efficient working of the public services.

Lord Blanesburgh said at p. 714:—

" As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production: See *Asiatic Petroleum Co.* v. *Anglo-Persian Oil* (1916) 1 K. B. 822, 829-830 and *Smith* v. *East India Co.* 1 Ph. 50."

and at p. 715 it was observed:—

"It must not be assumed from these observations of the Lord Justice that documents relating to the trading, commercial or contractual activities of a State can never be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be "some plain overruling principles of public interest concerned which cannot be disregarded"."

(1) [1931] A.C. 704. (2) (1925) 36 C.L.R. 378.

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After referring to various cases that have been set out above the Privy Council was of the opinion that the court was entitled to prescribe in any particular case the manner in which the claim of privilege should be made. It may accept unsworn testimony of the Minister in one case but in another where the circumstances seems to be to so require call for an affidavit from him. It may be that objection merely on ground of public policy may not be sufficient but it ought to appear that the mind of a responsible Minister had been brought to bear on the question of expediency in the public interest of giving or refusing the information asked for. This would be a guarantee that the opinion of the Minister which the court is asked to accept is one which has not been expressed inadvisedly or as a matter of mere departmental routine but is one put forward with the solemnity necessarily attaching to the sworn statements and that the privilege could not be asserted in relation to documents the contents of which had already been published. In that particular case the Minister had merely stated that he had considered this mass of documents and not that he had read them and considered each one of them. Lord Blanesburgh said at p. 722:—

"In view specially of the fact that the documents are primarily commercial documents he should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production. Above all, and especially in view of the last paragraph of the minute, the claim was one which should have been put forward under the sanction of an oath by some responsible Minister or State official."

Continuing it was observed that there may be some among the scheduled documents to which privilege may be genuinely attached and to give inspection of which without more would destroy the protection of the privilege and therefore it would or might be contrary to public interest to deprive the State of opportunity of regularising its claim to protection. The Board would have given this advice had it not been for the fact that it would have involved serious delay

without advancing further the final solution of the question. The case was therefore remitted to the Supreme Court with a direction that it was a proper one for the exercise by that court of the power of inspecting documents. The Privy Council was careful to add that the Judge in giving his decision as to any document would safeguard the interests of the State and would not resolve the doubt against the State without further enquiring from the Minister. In that case also the paramountcy of the consideration of public interest was recognized but as the privilege was not properly claimed and the document related to commercial activities of the State and it would have involved unnecessary prolongation of the action the Privy Council remitted the case for the court to exercise its power of inspection under the Rules and Orders of the court but with the further direction of safeguarding the interest of the State.

In *Duncan* v. *Cammell Laird & Co.* (1), the Court of Appeal held that the affidavit of the First Lord of Admiralty was conclusive if it stated that such production would be contrary to public interest, and the order for production was therefore refused. Du Parcq, L. J., pointed out that the Privy Council case (Robinson's case (2)) was not the final word on the subject in regard to production. The House of Lords in appeal did not agree with the judgment of the Privy Council and it is significant that two of the seven Law Lords in the House of Lords were parties to the Privy Council judgment. The House of Lords held that the affidavit of the Minister was conclusive and that inspection of a document by a court in private would be communicating with one party to the exclusion of the other and it accepted the principle that if it was prejudicial to the public interests or the document belonged to that class of documents which are kept secret for the proper functioning of the public services the production of the document would be refused. It was recognized in that case that it is the Judge who is in control of the trial and not the executive but the proper ruling for the judge to give

(1) [1942] A.C. 624. (2) [1931] A.C. 704.

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would be that an objection validly taken to the production on the ground of its being injurious to public interest is conclusive.

The English cases which were decided after the pronouncement of the House of Lords in *Duncan's case* (1) naturally followed the decision of the House of Lords. In *Ellis* v. *Home Office* (2) where a prisoner who had been attacked in jail by another prisoner who was a mental case asked for certain reports and privilege was claimed, the privilege was upheld but it was said that although it was essential that Government department should be entitled to claim privilege against disclosure of documents on the ground of public interest the ambit of privileges should be carefully scrutinized and each document should be examined. It may be mentioned that in that case Devlin, J., felt grave concern about the claim of this privilege because the result was that documents were to be treated as destroyed and no secondary evidence could be led and this concern of the trial judge was shared by the Court of Appeal. In *Broome* v. *Broome* (3) which was a defended suit for divorce, the wife wanted certain documents of the Soldiers', Sailors' and Airmen's Families Association but the Secretary of State issued a certificate in which he stated that the production would not be in public interest. It was held that Crown privilege from disclosure attached to all documents irrespective of where they originated or in whose custody they reposed provided that they had emanated from or came into the possession of some servant of the Crown.

In *Auton* v. *Rayner & Ors.* (4) it was pointed out at page 572 that the sole concern of the Minister was whether the interests of the State in the sphere for which he was responsible would be affected and therefore the documents or evidence should be withheld from the court. It was added that the Minister should accept and recognize that the proper administration of justice would be impeded or may be unattainable if any document or any evidence was withheld. In that case an action was brought against the

(1) [1942] A.C. 624.
(2) [1953] 2 All E.R. 149.
(3) [1955] 1 All E.R. 201.
(4) [1958] 3 All E.R. 566.

defendants, one of whom was a Police Officer, charging them with conspiracy to injure and defraud him, false imprisonment and malicious prosecution. The documents required by the plaintiff were reports made by the Police Officer to his superior officers and the communication which passed between the Metropolitan Police Force and other police force and the Secretary of State swore an affidavit indicating that the document should be withheld from production and that he had formed an impartial judgment that in the public interest and for the proper functioning of the public services the document should be withheld. The Court of Appeal held that the determination of the Secretary of State ought reasonably to be accepted and that the affidavit was, in the circumstances, conclusive.

The law in England may thus be summed up :—

(1) That a document need not be produced for inspection either on discovery or at the trial when objection is taken by the Minister that disclosure of the document would be contrary to public policy or detrimental to public interest or services. This privilege attaches irrespective of where the document originates or in whose custody it is provided it emanated from or came into possession of some servant of the crown;

(2) the privilege can be claimed or waived by the authority of the Minister or the head of the department;

(3) secondary evidence may not be given of a document for which privilege is established;

(4) official correspondence *per se* is not privileged on the ground of its being confidential or official nor is it a valid ground that production would involve the Government in criticism or expose want of efficiency in the administration or open up claims to compensation but the ground for privilege is that the production would be detrimental to the interest of the public or interfere with the efficient working of the public service or it belongs to class of documents which it is the practice of the department to keep secret;

(5) the minister's objection may be conveyed by a letter or by the official who attends at a trial but

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the court may require an affidavit by or the attendance of the Minister;

(6) before a privilege is claimed it is desirable that each document should be examined by the department concerned and inspection permitted of all documents which cannot harm the public interest;

(7) if a minister claims privilege the court will accept his statement and ought not to examine the document to see if the objection is well founded;

(8) public interest must not be put in jeopardy by the production of a document which could injure it and the court should, if necessary, prohibit the production even though no objection has been taken by the Government department.

It may be pointed out that the privilege was expressly reserved when by the Civil Proceedings Act, 1947, the Crown was made liable to give discovery in civil proceedings.

It is no doubt true and it must be recognized that the administration of public justice is also a part of public interest but as was pointed out by Viscount Simon L. C. in *Duncan's case* (1) the interest of the State is the interest of the citizen and if the former suffers the interest of the litigant also suffers and therefore public interest transcends the individual interest of a citizen. In *Duncan's case* (1) it was emphasised that the Minister in deciding whether it was his duty to object should bear in mind the considerations which justify withholding production, i.e., the public interest would otherwise be damnified, i.e., the disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. And that is the safeguard which both in England and India the law seems to have found sufficient for the protection of an individual's rights. Even in Scotland where the inherent right of the courts to override official discretion has been recognized the occasions for the exercise of that power have indeed been rare and even in the

(1) [1942] A.C. 624.

latest case *Glasgow Corporation* v. *Land Board* (1) that position was reiterated.

Although the concensus of opinion in India is that under the second part of s. 162 the court will not inspect the document if it relates to matters of State yet there is a track of decision which has taken the view that it is not for the head of the department claiming the privilege but for the court to decide whether the document falls within the category mentioned in s. 123. But in some other cases a different view has been taken. A reference to cases which fall on both sides of the line will be helpful.

In *Irwin* v. *Reid* (2) Mukherjea, A. C. J., held that the language of s. 123 showed that the court cannot be invited to discuss the nature of the document and the public official concerned and not the court is to decide whether the evidence referred to shall be given or withheld. "If any other view were taken, the mischief intended to be averted would take place, as the judge could not determine the question without ascertaining the contents of the document, and such inquiry, if it did take place must, for obvious reasons, take place in public: *Beatson* v. *Skene* (3), *Hennessy* v. *Wright* (4), *Jehangir* v. *Secretary of State* (5). The result practically is, that if the objection is raised by a proper authority the court cannot compel disclosure by primary or by secondary evidence."

The Lahore High Court in *Khawja Nazir Ahmad* v. *Emperor* (6) held that the head of the department who is in possession of the documents is the sole judge of the fact whether the documents should be protected from production on the ground of their being related to affairs of State and therefore though the decision would be that of the court, it would have to rule in favour of the privilege claimed by the head of the department. It was also held that the interests of the State must not be put in jeopardy by production of documents which would injure them and that was a principle to be observed in administering justice and

(1) (1956) S.C. 1 (H. L.)
(2) (1921) I.L.R. 48 Cal. 304.
(3) (1860) 5 H. & N. 838; 157 E.R. 1415.
(4) (1888) 21 Q.B.D. 509.
(5) (1903) 6 Bom. L.R. 131, 160.
(6) I.L.R. [1945] Lah. 219.

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indeed a rule on which the judge should insist even though no objection is taken at all. In that case there were certain confidential files of the Special Enquiry Agency containing notes, correspondence etc., relating to the case and containing a record of statements of various persons and a proper affidavit had been filed by the head of the department stating that the production would be injurious to public interests. Abdul Rahman, J., said "I feel convinced in my mind that the objection as to its production apart from its admissibility (e.g., for want of registration or contravening the rule as to when secondary evidence of a document can be admitted—if the document is merely a copy and not original) can only be decided by its inspection by the Court followed as it must necessarily have been by an order for its production, although not in the sense of its contents having been disclosed to the party summoning the document at any rate at that stage. If the Court is debarred under the statute from inspecting it, I cannot see how the objection as to its production can otherwise be decided". In *I. M. Lal* v. *Secretary of State* (1) this privilege was upheld. In that case it was held that s. 162 divided the privilege of documents into two categories. At p. 212 Abdul Rashid, J. (as he then was) observed :—

"The Court can inspect documents for the purpose of deciding the question of privilege only if those documents do not refer to matters of State. In other words an exception is made in respect of documents that refer to matters of State. Such documents cannot be inspected by the Court while all other documents for which privilege is claimed are open to inspection by the Court for the purpose of deciding the validity of the objection regarding privilege."

The Bombay High Court in *re Mantubhai Mehta* (2) in construing ss. 123, 124 and 162 has held that the officer summoned to produce the document is bound to bring it and if he takes objection to its production it is for the court to decide whether the objection is well founded or not but the court is not entitled to inspect it. This track of reasoning suffers from the

(1) A.I.R. 1944 Lah. 209. (2) I.L.R. [1945] Bom. 122.

same difficulty that has been pointed out that without looking at the document and taking into consideration the wide words of s. 123 it becomes difficult to hold that the court can decide as to whether the document relates to "affairs of State" and whether it should or should not be produced. In that Bombay judgment the learned Judge referred to the observations of Viscount Simon, L.C., in *Duncan's case* (1). Besides the learned Judge also referred to s. 124 the effect of which is not the same as of s. 123 of the Evidence Act. Bhagwati J. (as a Judge of the Bombay High Court) in *R.M.D. Chamarbaghwala* v. *Y. R. Parpia* (2) held that the court cannot inspect the document in order to determine whether they are unpublished official records relating to any affairs of State, but its jurisdiction to determine is not taken away by s. 162 and it is for the court to decide the question of production by taking all the circumstances into consideration barring inspection of the document. The learned Judge mainly referred to *Robinson's case* (3) and it appears that the learned Judge was not satisfied as to the documents being unpublished but the criterion he laid down was that only such documents are privileged which relate to affairs of State and the disclosure of which would be detrimental to public interest. The question really is the same as to who is to decide whether it is "matters" of "affairs of State".

The Calcutta High Court in a later judgment in *Ijjat Ali Talukdar* v. *Emperor* (4) took a contrary view different from its older view and held that the court is to decide whether conditions precedent to ss. 123 & 124 have been established. That was a case under the Excise Act and the Excise Commissioner was called upon to produce certain documents. The Commissioner claimed privilege under s. 123 on the ground that the files contained unpublished official records relating to affairs of State and Das J., as he then was, was of the opinion that the occasion for claiming privilege under s. 123 arose when it was sought to give evidence derived from unpublished official records

(1) [1942] A.C. 624.
(2) A.I.R. 1950 Bom. 230.
(3) [1931] A.C. 704.
(4) I.L.R. [1944] 1 Cal. 410.

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relating to any public affairs which was a condition precedent. He then referred to s. 124 of the Evidence Act. The second part of s. 162 provided the method or means to enable the court to decide the question, namely, by inspecting the document or by taking other evidence. Although the court was disentitled from inspecting the document, the duty of deciding the question was still on the court. At p. 419 the learned Judge observed:—

"In case of documents relating to affairs of State it may be difficult for the Court to decide the question, yet it need not be necessarily impossible for the Court to do it. Ordinarily no difficulty will arise, because heads of departments or public officers are not expected to act capriciously and ordinarily the Court will accept their statement. If necessary, the Court will require the officer to claim the privilege in the manner indicated in the Judgment of Lord Blanesburgh in the Australian case. If, however, the Court finds that an over-zealous officer is capriciously putting forward a claim of privilege, the Court will decide, as best as it can, by the means available to it, whether the claim is well founded."

As has already been said above the second part does not afford the means or methods to the Court to decide the question of privilege. The only method is inspection and that is denied to the court in cases falling under s. 123.

The second case which is on the other side of the line is the judgment of Bose J., as he then was, in *Bhaiya Saheb* v. *Ramnath Rampratap Bhadupote* (1). In that case the learned Judge was of the opinion that the insertion of the words "unless it refers to matters of State" in the middle of the paragraph seemed to indicate that the court might not inspect the document in respect of which the privilege was claimed until it had opportunity of determining upon its admissibility and for that purpose it could take other evidence which meant evidence other than the document produced. This line of reasoning is similar to that adopted in *Ijjat Ali's* (2) case.

(1) I.L.R. [1940] Nag. 240, 247. (2) I.L.R. [1944] 1 Cal. 410.

The Andhra Pradesh High Court in *Public Prosecutor, Andhra* v. *Damera Venkata Narsayya* (1) was of the opinion that when an objection under s. 123 is taken the court has no power to inspect the document but may take other evidence for the purpose of deciding the objection and if it comes to the conclusion that the evidence will be derived from the unpublished records relating to the affairs of the State the objection will have to be upheld and it will be left to the head of the department to give or withhold the permission and the criterion for the head of the department was whether or not the disclosure would cause injury to public interest and he was the sole judge of the matter with which the court cannot interfere. This case does not support the contention of the respondent.

The Patna High Court in *Lakhuram Hariram* v. *The Union of India* (2) held that the head of the department must first examine the document and he may then raise an objection but he is not absolved from the obligation of appearing in court and satisfying the court that the objection taken is valid and the court may require him to give an affidavit or further questions may be put in regard to the validity of the claim but the court is not entitled to inspect the document.

A. P. Srivastava, J., in *Tilka & Ors.* v. *State* (3) held that under s. 162 of the Evidence Act the court may inspect a document unless it relates to affairs of State and in such a case it will have to take other evidence relating to the nature of the document.

The words of s. 123 are very wide; and the discretion to produce or not to produce a document is given to the head of the department and the court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to affairs of State. Section 162 does not give the power to the court to call for other evidence which will indicate the nature of the document or which will

(1) I.L.R. [1957] And. Prad. 174. (2) A.I.R. 1960 Pat. 192.
(3) A.I.R. 1960 All. 543.

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have any reference to the reasons impelling the head of the department to withhold the document or documents. In the very nature of things when the original cannot be looked at and no secondary evidence is allowable the court will only be groping in the dark in regard to the nature of the document or the evidence. The correct way of looking at the Indian statute, therefore, is to interpret in the manner which is in accord with the English law, i.e., the court has not the power to override ministerial certificate against production.

It is permissible for the court to determine the collateral facts whether the official claiming the privilege is the person mentioned in s. 123, or to require him to file proper affidavit or even to cross-examine him on such matters which do not fall within the enquiry as to the nature of the document or nature of the injury but he may be cross-examined as to the existence of the practice of the department to keep documents of the class secret but beyond that ministerial discretion should be accepted and it should neither be reviewed nor overruled.

For these reasons I concur in the decision that this appeal must be allowed.

Subba Rao J. SUBBA RAO, J.—I have perused the judgments prepared by my learned brethren, Kapur and Gajendragadkar, JJ. I agree with them in maintaining the claim of privilege in regard to the three items described as "original orders" passed by the PEPSU Government, but regret my inability to agree with them in regard to the report of the Service Commission.

This appeal raises the question of the scope and content of the law of privilege attached to affairs of State and the procedure to be followed for ascertaining it. The facts are fully stated in the said judgments and I need not restate them; but I would prefer to give my own reasons for my conclusion.

It would be convenient at the outset to clear the ground. The arguments at the Bar have covered a wide field, but we are not concerned here with the law of privilege pertaining to the field of discovery and inspection of documents. We are called upon only to decide its

scope during the trial of a suit when a witness, who is summoned to produce a document, claims privilege on the ground that the document relates to affairs of State. I should not be understood to have expressed any opinion on the difficult question whether when the defendant is a State, the Court is not entitled to inspect the documents under O. XI, rule 19(2), Code of Civil Procedure.

The question falls to be considered on a true construction of two of the provisions of the Indian Evidence Act, 1872 (hereinafter called the Act), namely, ss. 123 and 162. They read:

Section 123: "No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

Section 162: "A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code (45 of 1869)."

The relevant parts of the foregoing sections may be summarized thus: Section 123 prohibits the giving of any evidence derived from unpublished official records relating to affairs of State except with the permission of the officer at the head of the department; while s. 162 enjoins on a witness summoned to produce a document to bring it to Court and empowers

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the Court to decide on the validity of any objection raised in respect of its production or admissibility. The argument of the Advocate-General is that the words "affairs of State" mean "the business of State", and, therefore, evidence derived from any unpublished official document relating to that business cannot be given as evidence except with the permission of the head of the department concerned, and that the Court under s. 162 of the Act must automatically accept the affidavit filed by the head of the department claiming such a privilege. Learned counsel for the respondent, on the other hand, defines the words "affairs of State" only to take in documents whose production would be against public interest, confines the power of the head of a department to permit or withhold the user of such a document in evidence, and sustains the Court's power to decide the question of privilege in respect of such a document on relevant materials without inspecting the document.

The crucial words in s. 123 are, "unpublished official records relating to any affairs of State". Under that section no one shall be permitted to give any evidence derived from such records except with the permission of the officer at the head of the department concerned. The words "affairs of State" have not been defined. Though in s. 123 the words used are "affairs of State", in s. 162 the words used are "matters of State". There does not appear to be any practical difference between the two sets of words. In Shorter Oxford Dictionary, III edition (1956), "matter" has been defined as "a thing, affair, concern" and "affairs of State" as "public business". These Dictionary meanings do not help to decide the content of the said words. The content of the said words, therefore, can be gathered only from the history of the provision. It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did in fact consolidate the English Law of Evidence. It has also often been stated with justification that Sir James Stephen has attempted to crystallize the principles contained in Taylor's work into substantive propositions. In case of doubt or

ambiguity over the interpretation of any of the sections of the Evidence Act we can with profit look to the relevant English common law for ascertaining their true meaning. In English common law the words "affairs of State" do not appear. The basis of the doctrine of Crown privilege is the injury to the public interests. The Judicial Committee in *Robinson* v. *State of South Australia* (1) says at p. 714,

"The principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."

The House of Lords in *Duncan* v. *Cammell Laird & Co.* (2) restated the same idea when it observed that the State should not withhold the production of documents except in cases where the public interest would otherwise be damnified.

The earlier decisions of the English courts indicate that the Crown privilege was sustained only in regard to documents pertaining to matters of administration, defence, and foreign relations whose disclosure would be against the public interest: see *Home* v. *Lord F. C. Bentinck* (3), *Smith* v. *The East India Company* (4) and *Beatson* v. *Skene* (5).

The decisions of the High Courts in India over a long period of time consistently gave the same meaning to the said words. It may also be stated that in and about the time when the Evidence Act was passed, the concept of a welfare State had not evolved in India and as such the words "affairs of State" could not have been, at that time, intended to take in the commercial or the welfare activities of the State. But when the words are elastic there is no reason why they should not be so construed as to include such activities also, provided the condition of public injury is also satisfied. It is, therefore, clear that the words "affairs of State" have acquired a secondary meaning, namely, those matters of State whose disclosure would cause injury to the public interest.

(1) [1931] A.C. 704. (2) [1942] A.C. 624.
(3) (1820) 2 Brod. & B. 130: 129 E.R. 907.
(4) (1841) 1 Ph. 50; 41 E.R. (Chancery) 550.
(5) (1860) 5 H. &. N. 838.

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The learned Advocate-General contends that this construction, if accepted, would give a meaning to the provisions of s. 123 of the Act which would be contrary to its tenor. He classifies documents relating to "affairs of State" into noxious and innocuous documents, and contends that documents, whose disclosure would affect the public interest, are noxious documents and that if the records which relate to the affairs of State mean only noxious documents, the said construction would bring out a result directly opposite to that contemplated by the section. When the section intends to prohibit the disclosure of noxious documents, the argument proceeds, the construction enables their disclosure if the head of the department permits it. Shortly stated, his contention is that the expression "affairs of State", that is, business of State, is the genus and the document, the disclosure of which is against the public interest, is the species, and that the head of the department is only empowered to permit the disclosure of documents falling outside the said species. This argument is apparently logical and rather attractive, but it is an oversimplification of the problem and is based upon a disregard of the legislative history and the long track of decisions of this country. If accepted, it enlarges the scope of the said privilege to such an extent that in effect and substance the control of the admissibility of documents shifts from the Court to the State or its subordinate officers, for every document relating to the business of State would be a privileged document unless the head of the department in his discretion permits the giving of evidence derived therefrom. Nor can I accept the construction that an absolute privilege is attached to every noxious document, i.e., to every State document the disclosure of which may cause injury to the public interest. This is giving too narrow a meaning to the words "public interest". If the non-disclosure of a particular State document is in public interest, the impartial and uneven dispensation of justice by Courts is also in public interest. They are indeed two aspects of public interest. There is no conflict or dichotomy between the two. In particular

circumstances one aspect may be paramount and in a different set of circumstances the other may be given precedence. In the last analysis, it is the question of balancing of the two aspects having regard to the circumstances of a particular case. The head of a department may as well permit the disclosure of a document even if ordinarily its disclosure affects public interest, if in his opinion the counter-balancing circumstances are in favour of disclosure rather than non-disclosure. I cannot, therefore, give a wide meaning to the words "records relating to affairs of State" so as to take in every unpublished document pertaining to the entire business of State, but confine them only to such of the documents whose disclosure would be injurious to public interest.

The next question is, who is empowered to decide the said question whether a particular document relates to affairs of State ?—whether it is the Court or the State. That is found in s. 162 of the Act. The learned Advocate-General contends that the first part of s. 162 makes a distinction between the production of a document and the admissibility of a document and that the first limb of the second part of the section provides for the production of a document and the second limb for its admissibility. He illustrates his argument thus: privilege may be raised in respect of production of a document on the ground that it pertains to matters of State, or on the ground that it is inadmissible for want of registration, deficiency of stamp, or similar other defects. The first clause of the second part of s. 162, the argument proceeds, enables the Court to inspect a document when the objection is to its production unless the document refers to a matter of State, and the second clause thereof empowers the Court to take evidence only when the objection is not to its production but to its admissibility. If this contention be accepted, it will lead to an anomaly, for grammatically construed the two limbs of the second part can be applied only to the question of admissibility and in that event, on the hypothesis suggested by the learned counsel, the Court will be entitled to look into a document even if it relates to a

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matter of State if the objection is only to its production and not to its admissibility. The more reasonable construction of the section is to give a wider meaning to the word "admissibility" so as to comprehend both production as well as admissibility, for the question of admissibility arises only after the document is produced and a party seeks to get it admitted in evidence. In this view, the second part of s. 162 can only mean that when an objection is raised either to the production or to the admissibility of a document, a Court can inspect the document and if it thinks necessary other evidence may be taken to decide on the objection raised. By the express terms of the section the Court is precluded from inspecting a document if it refers to matters of State. But in other respects the jurisdiction of the Court to decide on the objection raised is not different from that it possesses in respect of other privileged documents.

If so understood there cannot be any ambiguity in the scope of s. 162 of the Act. It says in express terms that when an objection is raised to the production of a document or to its admissibility, the validity of any such objection shall be decided by the court. The second part of the section states the material on the basis of which such an objection can be decided. It can either inspect the document or take other evidence to enable it to decide the validity of any objection raised. The only limitation in the case of a document referring to matters of State is that the court cannot inspect it. It is implicit in the limitation that in the case of documents pertaining to matters of State the court is precluded not only from inspecting the documents but also from permitting parties to adduce secondary evidence of their contents. "The other evidence" must necessarily be *de hors* the contents of the documents.

Even in England there is no divergence of view on the question who has to decide, when an objection to the production of a document is raised on the ground of privilege, the validity of the objection. In *Robinson's case* (1), the Judicial Committee observed at p. 716 thus:

(1) [1931] A.C. 704.

"The result of the discussion has been..... where in effect he concludes that the Court has in those cases always had in reserve the power to inquire into the nature of the documents for which protection is sought, and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against."

The House of Lords in *Duncan's case* (1), also recognized this power though it whittled down its scope by holding that the judge had to accept automatically the affidavit filed by a minister. Viscount Simon, L. C., states at p. 642 as follows:

"Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge.....It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed."

On the other hand, in Scotland the inherent right of courts to override official discretion is recognized. The House of Lords in *Glasgow Corporation* v. *Land Board* (2) gave a clear exposition of the law of that country. Viscount Simonds derives the principle of the court's power from the fact that the fair administration of justice between subject and subject and the Crown is a public interest of higher order and the protection is the care of the courts. Lord Radcliffe finds it on the doctrine that the interest of the Government for which the minister should speak with authority does not exhaust the public interest, for another aspect of that interest is seen in the need that impartial justice should be done in courts of law. These judgments of the high authority also recognized the fact that it is the court that has to decide an objection

(1) [1942] A.C. 624. (2) (1956) S.C. (H.L.) 1.

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raised by the State on the ground of privilege. There is a strong current of Indian decisions taking the same view: see *Khawja Nazir Ahmad* v. *Emperor* (1), *re Mantubhai Mehta* (2), *R. M. D. Chamarbaugwala* v. *Y. R. Parpia* (3), *Lijat Ali Talukdar* v. *Emperor* (4), *Bhaiya Saheb* v. *Ramnath Rampratap Bhadupote* (5), *Public Prosecutor, Andhra* v. *Damera Venkata Narasayya* (6), *Lakhuram Hariram* v. *The Union of India* (7), *Tilka* v. *State* (8). In a few cases a different view is expressed. It may, therefore, be stated without contradiction that the preponderance of authority is in favour of a court deciding the question of State privilege.

Some objections are raised in decided cases in England and restated in *Duncan's case* (9) against conferring such a power on courts. Apart from the fact that the statute expressly confers such a power, there are no merits in the objections raised. The objections are: (i) the judges are not well qualified to appreciate the highly technical matters which may arise with regard to some kinds of State secrets; (ii) if a judge is allowed to decide on evidence the question of privilege, it may prejudice a fair trial; and (iii) it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other. The objections raised have no substance. The first objection, if accepted, disqualifies a judge from deciding complicated technical questions that arise before him. A judge is trained to look at things objectively and can certainly decide, without inspecting the documents on the material supplied whether the production of a document will affect the public interest having regard to the circumstances of each case. Nor are there any merits in the second objection. In the words of Sir C. K. Allen, a judge worthy of his office can put out of his mind all issues except those which are raised and decided by the forensic process. It is common place that a judge is trained to decide a case only on

(1) I.L.R. [1945] Lah. 219.
(2) I.L.R. [1945] Bom. 122.
(3) A.I.R. 1950 Bom. 230.
(4) I.L.R. [1944] 1 Cal. 410.
(5) I.L.R. [1940] Nag. 240.
(6) I.L.R. [1957] A.P. 174.
(7) A.I.R. 1960 Pat. 192.
(8) A.I.R. 1960 All. 543.
(9) [1942] A.C. 624.

the admissible evidence actually adduced before him and not on any extraneous considerations. The third objection also has no basis in fact. So long as a judge takes care to rule out any question on the contents of a document in respect whereof privilege is claimed, he can certainly decide the question in the presence of both the parties. The objections have, therefore, no substance. On the other hand, there is every reason why the duty to decide on the question of State privilege must be left to a judge and not to the State. That is the reason why the legislature rightly conferred that power on the court. A judge is as much a part of a department of the State as an executive officer. But unlike the executive officer, a judge is trained to decide cases objectively not only between individuals *inter se* but also between the State and individuals. He can, therefore, be trusted to decide impartially on the question whether the production of a document in a case will affect the public interest. State documents in a secretariat, I presume, will be looked into by many officers dealing with the said documents, sometimes from the lowest to the highest in the department. It would be unrealistic to suggest that the disclosure of a State document to any one of those officers would not affect the public interest whereas the decision of its character by a judge would do so. It is, therefore, the duty of the court, whenever an objection is raised on the ground of State privilege to decide on relevant evidence whether the document relates to affairs of State.

Even if the wide construction of the words "affairs of State", namely, business of State, be accepted, the result will not be different. The section says that no one shall be permitted to give any evidence derived from unpublished official records relating to affairs of State, except with the permission of the officer at the head of the department concerned. The expression "affairs of State" in its ordinary significance is of the widest amplitude and will mean the entire business of State. It takes in the routine day-to-day administration and also highly confidential acts involving defence and foreign relations, and also in modern times

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the multifarious activities of a welfare State. The object of the section is simply to prohibit the use of undisclosed documents of State in evidence by persons who in the course of their duties deal with or look into those documents, without the permission of the officer at the head of the department concerned. The words used in the section "as he thinks fit" confer an absolute discretion on the head of the department to give or withhold such permission. The section does not lay down that the head of the department concerned should refuse permission only if the disclosure injures public interests, though ordinarily he may refuse permission on such matters affecting the State. One can visualize a situation when the officer in exercise of his absolute discretion refuses to give permission for the use of not only noxious documents but even of innocuous ones. The only limitation on his power is his reason and experience. The absolute discretion is capable of giving rise to mistake or even conscious abuse. The section does not really involve any doctrine of State privilege but is only a rule of commonsense and propriety. If the officer gives permission, there is an end of the matter; but, if he refuses, the party affected may take out necessary summons to the State Government to produce the document. The State Government may depute one of its officers to produce the document in court. Then only the occasion for raising the question of privilege arises and s. 162 governs that situation. An overriding power in express terms is conferred on a court under s. 162 of the Act to decide finally on the validity of the objection raised on the ground of privilege. The court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure, or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of s. 162 of the Act there is no limitation on the scope of the court's decision, though in the second part the

mode of enquiry is hedged in by conditions. In England, in the absence of a provision or a rule of common law similar to that of s. 162, there was room for conflict of views on the scope of the court's power. On the other hand, in Scotland the common law corresponding to s. 162 was invoked and the House of Lords recognized the inherent power of the Court to reject a claim of Privilege if the Court comes to a conclusion that the paramount interest of the administration of justice demands or compels such a disclosure. Section 162 of the Act in terms confers a similar power on courts and though it may have to be used with circumspection, it is a real and effective power. There is no conflict between s. 123 and s. 162 of the Act: the former confers a power on a head of a department to withhold permission from the standpoint of State administration, whereas s. 162 recognizes the overriding power of a court in the interest of higher public interest to overrule the objection of privilege.

The next point is, what is the procedure to be followed by a judge for deciding on the said objection? When an officer of the State is summoned as a witness to produce a document, if the State seeks to take a plea of privilege then it is the duty of the minister in charge of the department concerned to file an affidavit at the first instance. The affidavit so filed shall *ex facie* show that the minister concerned has read and considered each of the documents in respect of which the privilege is claimed. It shall also contain the general nature of the document and the particular danger to which the State would be exposed by its production. If the court is not satisfied with the contents of the affidavit, to enable it to decide whether the document in question refers to the affairs of State, it can summon the minister to appear as a witness. In effect and substance the said procedure has been suggested in *Robinson's case* (1) at p. 722. The same procedure is also indicated in *Duncan's case* (2) at p. 638. In the second case above referred, Viscount Simon L.C. says at p. 638 thus:

(1) [1931] A.C. 704. (2) [1942] A.C. 624.

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"If the question arises on subpoena at the hearing it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the court is not satisfied by this method, it can request the minister's personal attendance."

It may be suggested that this procedure may cause some inconvenience to the minister concerned. But if one realizes that every act of the exercise of the right of privilege detracts from the fair disposal of a case before the court and that the administration of justice is also part of the general conduct of the affairs of any State and that its impartiality and purity are as important as any other public interests, one will also appreciate that the requirement of the personal attendance of a minister, if necessary, to support his affidavit would be to a large extent a guarantee against unjust objections that may otherwise be raised. It is suggested that an affidavit of the head of a department, such as the Secretary, would do as well as that of a minister, but there is an essential distinction between a Secretary and a minister: the former may be frequently tempted to take the opposite view, particularly in cases where a claim against the State seems to him to be harsh or unfair, while the latter, being the political head subject to parliamentary control, may be expected, if he carefully scrutinizes a particular document, not to take such objection which obstructs the cause of justice unless absolutely necessary. I would, therefore, hold that the affidavit which states that a particular document relates to affairs of State must be sworn to only by a minister in charge of the department wherefrom the document or documents are summoned.

The next point is, what are the well established rules which help the court to decide whether a particular document pertains to affairs of State or not? The following relevant rules may be extracted from

the decision of the Judicial Committee in *Robinson's case* (1): (1) the privilege is a narrow one most sparingly to be exercised; (2) the principle of the rule is concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires; (3) as the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character; (4) its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production; (5) even in the case of documents relating to the trading, commercial or contractual activities of a State, it is conceivable that there may be some plain overruling principle of public interest concerned which cannot be disregarded; though in times of peace such cases must be very rare. The House of Lords in *Duncan's case* (2) has laid down the following negative and positive tests for deciding the question of privilege of the State. The negative tests are: (1) it is not a sufficient ground that the documents are State documents or official or marked confidential; (2) it would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere; (3) neither would it be good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims of compensation. The positive test is, where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. The last test has given rise to mild but definite protests within the limits of judicial propriety by the learned judges who

(1) [1931] A.C. 704. (2) [1942] A.C. 624.

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had the occasion to deal with the question of privilege and to vehement protests from jurists. Sir C. K. Allen, in his book "Law and Orders" (2nd edition), has observed at p. 384 thus:

"Everybody is agreed that public security and foreign relations are necessary heads of privilege. Both are wide in scope, and it is doubtful whether any other 'head' needs to be specified.....It would be of great advantage if statute could put an end to the pernicious doctrine that privilege can be claimed for classes of documents."

The argument of the learned Advocate-General is based upon an apprehension, which in my view is unfounded, that the court may always refuse the affidavit of a minister and insist on his personal attendance. The unpublished documents relating to defence, foreign relations and other documents of great public importance rarely come before municipal courts. Occasionally documents of day-to-day administration of the State may be relevant evidence, but very often documents pertaining to mercantile or welfare activities of the State would be summoned to establish a particular claim. In the case of documents of undoubted public importance, when the minister swears to an affidavit that in his discretion their production is against public interest, it may reasonably be expected that the judge would accept the statement. But the real difficulty is in the case of other documents, where the interests of private individuals and the State come into conflict, the judge should be in a position to examine the minister and others to ascertain by evidence collateral to the contents of the documents whether the assertion of the minister is justified.

The aforesaid discussion yields the following propositions: (1) under s. 162 of the Evidence Act the court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State; but in its discretion, the court will exercise its power only in exceptional circumstances when public interest demands, that is, when the public interest served by the

disclosure clearly outweighs that served by the non-disclosure. One of such instances is where the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. (2) The said claim shall be made by an affidavit filed by the minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. (3) Ordinarily the court shall accept the affidavit of a minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the minister and take other evidence to decide the question of privilege. (4) Under no circumstances can a court inspect such a document or permit giving of secondary evidence of its contents. (5) Subject to the overriding power of the court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State: (a) "records relating to affairs of State" mean documents of State whose production would endanger the public interest; (b) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (c) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (d) in cases of documents mentioned in (c) supra, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

Bearing the aforesaid principles in mind, I shall construe the nature of the documents in respect of which privilege is claimed in the present appeal. The so called order of the PEPSU Government is really the minutes recorded in the course of cabinet discussions. Under Art. 163(3) of the Constitution, the question

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whether any, and if so what, advice was tendered by ministers to the Governor shall not be inquired into in any court. In view of the constitutional protection, and the reason underlying such protection, I hold that in the present case the district court was right in sustaining the claim of privilege in regard to the said document.

In regard to the report of the Service Commission, on the assumption that it is a relevant document, I cannot see how public interest suffers by its disclosure. Service Commission is a statutory body constituted with definite powers conferred on it under the Constitution. Under Art. 320(3)(c) of the Constitution the State Public Service Commission shall be consulted on all disciplinary matters affecting a person serving under the Government of a State. This is one of the constitutional protections conferred on public servants. I cannot visualize how public interest would suffer if the report submitted by the Service Commission to the Government is disclosed, and how the disclosure of such a report prevents the Service Commission from expressing its views on any other case in future passes my comprehension. It may expose the Government if it ignores a good advice; but such an exposure is certainly in public interest. The Constitution does not put a seal of secrecy on the document; nor, in my view, public interest demands such secrecy. In a conflict between the administration of justice and the claim of privilege by the State, I have no hesitation to overrule the claim of privilege.

Before closing, I must notice one fact. In this case, the Chief Secretary filed an affidavit. But, in my view, the minister should have done it. The respondent did not object to this either in the district court or in the High Court. In the circumstances, I would not reject the claim of privilege on the basis of this procedural defect.

In the result, I would allow the appeal in respect of the minutes of the cabinet and dismiss it in other respects. As the parties have succeeded and failed in part, I direct them to bear their own costs throughout.

BY COURT: In accordance with the opinion of the majority, this appeal is allowed, the order passed by the High Court is set aside and that of the trial court restored with costs throughout.

Appeal allowed.

PANDIT JHANDU LAL & ORS.

v.

THE STATE OF PUNJAB & ORS.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Land Acquisition — Constitutional validity of enactment— Construction of labour colony for a company, if a public purpose— Test—Land Acquisition Act, 1894 (1 of 1894), ss. 4, 6, Part VII— Constitution of India, Arts. 31(2), 31(5)(a).

The Punjab Government issued notification under ss. 4 and 6 of the Land Acquisition Act, 1894, and started proceedings for acquisition of lands for the construction of a labour colony under the Government sponsored Housing Scheme for the workers of the Thapar Industrial Workers' Co-operative Housing Society Ltd. The appellants challenged the acquisition proceedings under Art. 226 of the Constitution on the ground, inter alia, that the procedure prescribed by Part VII of the said Act had not been admittedly complied with. The Division Bench in affirming the order of dismissal passed by the trial Judge held that although Art. 31 of the Constitution by prohibiting compulsory acquisition of property except for a public purpose had made Part VII of the Act redundant, the present proceedings were saved since the acquisition was for a public purpose.

Held, that the High Court was in error in holding that the Constitution had rendered Part VII of the Land Acquisition Act, 1894, redundant or null and void, although it was right in dismissing the appeal. That Act, as an existing Act, was saved by Art. 31(5)(a) from being affected by Art. 31(2) of the Constitution.

Acquisition of building sites for residential houses for industrial labour is for a public purpose even apart from s. 17(2)

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(b) of the Act as amended by the Land Acquisition (Punjab Amendment) Act of 1953.

Babu Barkava Thakur v. *The State of Bombay* [1961] 1 S.C.R. 128, referred to.

Although in the case of an acquisition for a company simpliciter, no declaration under s. 6 of the Act can be made without complying with the provisions of Part VII of the Act, it is not correct to say that no acquisition for a company for a public purpose can be made except under Part VII of the Act. If the cost of the acquisition is borne either wholly or partially by the Government, the purpose would be a public purpose within the meaning of the Act. But if the cost is entirely borne by the company it would be an acquisition for the company simpliciter and Part VII would apply.

Since in the instant case a part of the compensation was to be borne by the Government, it was not necessary to comply with the provisions of Part VII of the Act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4 of 1960.

Appeal by special leave from the Judgment and Order dated January 28, 1959 of the Punjab High Court in Letters Patent Appeal No. 52 of 1958 arising out of the Judgment and Order dated February 17, 1958 of the said High Court in Civil Writ Application No. 124 of 1957.

C. B. Aggarwala, Daya Swarup Mehra and *R. S. Gheba*, for the appellants.

S. M. Sikri, Advocate General for the State of Punjab, N. S. Bindra and *D. Gupta*, for respondent No. 1.

C. K. Daphtary, Solicitor General of India and *S. N. Andley*, for Respondent No. 2.

C. K. Daphtary, Solicitor General of India and *T.M. Sen*, for the Attorney-General for India (Intervener).

1960. November 16. The Judgment of the Court was delivered by

Sinha C. J.

SINHA, C. J.—This appeal, by special leave granted on May 29, 1959, is directed against the decision of the Letters Patent Bench (G. D. Khosla, C. J., and Dulat, J.) dated January 28, 1959, affirming that of the learned single Judge (Bishan Narain, J.) dated February 17, 1958, whereby he dismissed the

appellants' Writ Petition under Art. 226 of the Constitution.

It appears that the appellants are the owners of, what is said to be, agricultural land, measuring about 86 bighas odd, in village Munda Majra, Tehsil Jagadhari, in the district of Ambala. On October 27, 1954, the Additional District Magistrate of Ambala ordered the land aforesaid to be requisitioned under the Punjab Requisitioning & Acquisition of Immoveable Property Act (XI of 1953) for the construction of houses by members of the Thapar Industries Co-operative Housing Society Ltd., Yamuna Nagar. Possession of the land was taken on November 5, 1954. The appellants, at once, instituted a suit on November 14, 1954, in the Court of the Subordinate Judge, Jagadhari, challenging the requisition proceedings. The suit was ultimately decreed by the Court on June 21, 1955, and the possession of the property in question was restored to the petitioners. On May 27, 1955, the first respondent, i. e., the State of Punjab, through the Secretary, Labour Department, issued a notification under s. 4 of the Land Acquisition Act (1 of 1894) (which hereinafter will be referred to as the Act). The notification, under s. 4 is in these terms—

"No. 4850-S-LP-55/14144. Whereas it appears to the Governor of Punjab that land in the locality hereunder specified is likely to be needed by the Government for a public purpose, namely, for the construction of a Labour Colony under the Government sponsored Housing Scheme for the Industrial Workers of the Thapar Industrial Workers' Co-operative Housing Society Limited, Jamna Nagar (District Ambala), it is hereby notified that the land described in the specifications below is likely to be required for the above purpose.

This notification is made under the provisions of Section 4 read with section 17 of the Land Acquisition Act, 1894, as amended by the Land Acquisition (Punjab Amendment) Act, 1953, to all to whom it may concern and the Collector shall cause public notice of the substance of this notification to be given at convenient places in the said locality;

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In exercise of the powers conferred by the aforesaid sections, the Governor of the Punjab is pleased to authorise the President of the above said Society with the members and servants to enter upon and survey any land in the locality and do all other acts required or permitted by that section.

Further in exercise of the powers conferred by sub-section (4) of Section 17 of the said Act the Governor of Punjab is pleased to direct that, on the grounds of urgency, the provisions of Section 5(a) of the said Act, shall not apply in regard to this Acquisition".

Later, the same day, another notification, under s. 6 of the Act, was issued. This notification, under s. 6, states that it appeared to the Governor of Punjab that the land is required to be taken by Government for a public purpose, namely, for the construction of a Labour Colony under the Government sponsored Housing Scheme for the Industrial Workers of the Thapar Industrial Workers' Co-operative Housing Society Limited (which is the second respondent in this case). It also says that under the provisions of s. 7 of the Act, the Collector, Ambala, is directed to take order for the acquisition of the land. The Patwari effected delivery of possession of the lands in question to the second respondent on August 21, 1955. Even before the delivery of possession had been effected, the appellants promptly instituted their suit on August 20, 1955, in the Court of the Subordinate Judge Class I, Jagadhari, for a perpetual injunction restraining the second respondent from entering upon or taking possession of the land in question, or making any construction thereon. The trial Court dismissed the suit on June 25, 1956, on the preliminary ground that the suit was not competent in the absence of a previous notice under s. 59 of the Punjab Co-operative Societies Act, 1955 (XIV of 1955). The appellants appealed to the Senior Sub-Judge, Ambala, who dismissed their appeal, upholding the decision of the trial Court that the notice was a condition precedent to the institution of the suit. Their second appeal was dismissed by the Punjab High Court on February 6, 1957. During the pendency of the civil litigation aforesaid, in spite of the fact that the second respondent had

obtained delivery of possession through Government agency, by an Order of Injunction issued by the Court, construction had been stayed. As soon as the High Court decided the suit in favour of the respondents, the second respondent "started making huge constructions on the land in dispute in a very speedy manner", as alleged by the appellants in their petition under Art. 226 of the Constitution, which they filed on February 13, 1957. From the High Court also, they obtained similar Stay Orders whereby building operations were stopped. In their Writ Petition, the appellants, as petitioners in the High Court, challenged the acquistion proceedings on a number of grounds, of which it is only necessary to notice the one which has formed the subject matter of decision in the High Court, namely, that the proceedings were void for want of compliance with the procedure laid down in Chapter VII (mistake for Part VII) of the Act. It is not necessary to refer to the other contentions raised in the Writ Petition, because it is common ground before us that the whole controversy must be determined by the answer to the question, 'whether or not the proceedings were vitiated by reason of the admitted fact that no proceedings under Part VII of the Act had been taken in making the acquisition'.

The matter was heard, in the first instance, by Bishan Narain, J. The learned Judge dismissed the petition, holding that the acquisition was by the Government for a public purpose, namely, of construction of tenements for industrial workers, under a scheme subsidised by the Government out of public funds; that Part VII of the Act had no application to the present proceedings, and that, therefore, the notification under s. 6 was not invalid. The appellants preferred an appeal, under the Letters Patent. The Letters Patent Bench dismissed the appeal, but for different reasons. After an examination of the precedents of the different High Courts, bearing on the controversy in this case, the Bench came to the conclusion, which may better be expressed in its own words:—

"There is thus considerable authority for the

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view advanced by the learned counsel for the appellants that compliance with the provisions of Part VII is obligatory in the case of all acquisitions for a company. In the present case the acquisition was undoubtedly for the benefit of a company. I have given this matter my most anxious consideration, and, with great respect to the learned Judges, whose decisions have been noted above, I find myself unable to subscribe to the views expressed by them. It seems to me that their views were coloured by the background of the provisions of the Constitution. Article 31 of the Constitution prohibits compulsory acquisition of property for anything except a public purpose. Therefore, acquisition for anything which is not a public purpose cannot now be done compulsorily, but it has never been disputed that before the Constitution came into force land could have been acquired compulsorily by Government for a purpose which was not public. There is nothing in the Land Acquisition Act to warrant the assumption that the embargo placed by Article 31 of the Constitution found place in the Act. It seems to me that the Land Acquisition Act contemplates two categories of acquisitions".

After an examination of the provisions of the Act, the High Court observed that the Land Acquisition Act came into force when there was no bar to compulsory acquisition for private purposes. Such a bar was only imposed, for the first time, by Art. 31 of the Constitution. After the Constitution came into force, Part VII of the Act became redundant or null and void. But, in its view, the present acquisition proceedings were saved from all attack based on non-compliance with the provisions of Part VII of the Act. The reason for this conclusion, according to the High Court, was that as the land was acquired for a public purpose, there was no need to comply with the provisions of Part VII, even though the Company is to bear all the expenses for the acquisition.

It is manifest that the main point for determination in this appeal is: Whether or not the acquisition proceedings had been vitiated by reason of the admitted fact that there was no attempt made by the

Government to comply with the requirements of Part VII of the Act. It is equally clear that the Letters Patent Bench of the High Court was misled in its conclusions, because all the provisions of Art. 31 of the Constitution had not been brought to their notice. It is not correct to say that Part VII of the Act had become redundant or null and void, as suggested by the High Court, because that Part provided for acquisition for a private purpose. As held by this Court in a recent decision, in the case of *Babu Barkaya Thakur* v. *The State of Bombay* (1), the Act deals with two kinds of acquisitions: (1) for a public purpose, at the cost of the Government, and (2) for a purpose akin to such a purpose, at the cost of a Company, and to the latter class of acquisition, the provisions of Part VII are attracted. It was further held in that case that acquisition of a site for building residential houses for industrial labour was a public purpose, and that the Land Acquisition Act was immune from attack based on the provisions of Art. 31(2) of the Constitution, in view of the provisions of cl. 5(a) of that Article, which saved an existing law of the nature of the Act in question. As will presently appear, the conclusion of the High Court is entirely correct, but the process of reasoning by which it has reached that conclusion is erroneous. That process suffers from the initial error arising from the fact that the provisions of Art. 31(5) of the Constitution had not been brought to the notice of that Bench. If the Bench were cognisant of the true legal position that the Land Acquisition Act, in its entirety, including Part VII dealing with the acquisition of Land for Companies, was not subject to any attack under Art. 31(2) of the Constitution, it would not have based that conclusion on that ratio. Otherwise, there would be no answer to the contention in which the appellants had persisted throughout the long course of litigation in which they have indulged in their vain effort to save the land from being used for the public purpose aforesaid. The Letters Patent Bench has also fallen

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into another error in assuming that "the compensation was paid in its entirety by the Company". It is better to clear the ground by showing that this assumption is not well-founded in fact.

In their Writ Petition, as originally filed in the High Court, it was not categorically stated by the appellants that the compensation in respect of the land in question was paid, or was to be paid, by the Company. It may be stated here, by the way, that it is common ground that the second respondent is a Company within the meaning of the Act, being a registered society under the Co-operative Societies Act. It is also common ground that the purpose for which the land was being acquired was for erecting residential quarters for industrial labour, which had organised itself into the Co-operative Housing Society, the second respondent. It was only at a later stage of the proceedings in the High Court, that is to say, in the replication filed on behalf of the appellants to the Written Statement filed by the Government, in answer to the appellant's Writ Petition, that, for the first time, it was alleged by the appellants that "the entire amount of compensation has been borne by the respondent society". This allegation has not been either supported or countered by evidence on either side. But it has been pointed out by the learned single Judge that it was clear from the Government Housing Scheme that a substantial amount to be expended on this Scheme comes out of the Revenues, in the form of subsidies and loans. It was stated at the Bar, with reference to the terms and conditions of the Government Housing Scheme, that 25% to 50% of the cost of land and structures to be built upon the land was to be advanced by Government out of public funds, in the shape of subsidy and loan. It would, thus, appear that the High Court was not right in the assumption made as aforesaid.

It is clear from the statement of facts on record that the respondent No. 2 is a 'Company', within the meaning of the Act; that the land is acquired for the benefit of the Company, and at its instance, and that a large proportion of the compensation money was to

come out of public funds, the other portion being supplied by the Company or its members. There is also no doubt that the structures to be made on the land would benefit the members of the Co-operative Society. But, the private benefit of a large number of industrial workers becomes public benefit within the meaning of the Land Acquisition Act. In this connection, it may be mentioned that s. 17 of the Act was amended by the Land Acquisition (Punjab Amendment) Act (II of 1954) in these terms—

"17(2)(b). Whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land for the purpose of any library or educational institution or for the construction, extension or improvement of any building or other structure in any village for the common use of the inhabitants of such village, or any godown for any society registered under the Co-operative Societies Act, 1912 (II of 1912), or any dwelling-house for the poor, or the construction of labour colonies under a Government-sponsored Housing Scheme, or any irrigation tank, irrigation or drainage channel, or any well, or any public road,

the Collector may, immediately after the publication of the notice mentioned in sub-section (1), and with the previous sanction of the appropriate Government enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances".

It will appear from the (amended) s. 17(2)(b), quoted above, that the construction of labour colonies, under a Government-sponsored Housing Scheme, has been included in the category of 'works of public utility'. As already indicated, even apart from the indication given by the (amended) section 17, quoted above, this Court has held, in the recent decision (1) that building of residential quarters for industrial labour is public purpose. Hence, even apart from the amended provisions of s. 17, it is clear on the authorities that the purpose for which the land was being acquired was a public purpose.

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Having cleared the ground, it now remains to consider the terms of s. 6, on which great reliance was placed on behalf of the appellants. There is no doubt that, as pointed out in the recent decision of this Court (1), the Act contemplates acquisition for a public purpose and for a Company, thus conveying the idea that acquisition for a Company is not for a public purpose. It has been held by this Court, in that decision, that the purposes of public utility, referred to in ss. 40-41 of the Act, are akin to public purpose. Hence, acquisition for a public purpose as also acquisitions for a Company are governed by considerations of public utility. But the procedure for the two kinds of acquisitions is different, in so far as Part VII has made substantive provisions for acquisitions of land for Companies. Where acquisition is made for a public purpose, the cost of acquisition for payment of compensation has to be paid wholly or partly out of Public Revenues, or some fund controlled or managed by a local authority. On the other hand, in the case of an acquisition for a Company, the compensation has to be paid by the Company. But, in such a case, there has to be an agreement, under s. 41, for the transfer of the land acquired by the Government to the Company on payment of the cost of acquisition, as also other matters not material to our present purpose. The agreement contemplated by s. 41 is to be entered into between the Company and the Appropriate Government only after the latter is satisfied about the purpose of the proposed acquisition, and subject to the condition precedent that the previous consent of the Appropriate Government has been given to the acquisition. The 'previous consent' itself of the Appropriate Government is made to depend upon the satisfaction of that Government that the purpose of the acquisition was as laid down in s. 40. It is, thus, clear that the provisions of ss. 39-41 lay down conditions precedent to the application of the machinery of the Land Acquisition Act, if the acquisition is meant for a Company. Now, s. 6 itself contains the prohibition to the making of the necessary declaration under that section in these terms—

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"Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority".

Section 6 is, in terms, made subject to the provisions of Part VII of the Act. The provisions of Part VII, read with s. 6 of the Act, lead to this result that the declaration for the acquisition for a Company shall not be made unless the compensation to be awarded for the property is to be paid by a company. The declaration for the acquisition for a public purpose, similarly, cannot be made unless the compensation, wholly or partly, is to be paid out of public funds. Therefore, in the case of an acquisition for a Company simpliciter, the declaration cannot be made without satisfying the requirements of Part VII. But, that does not necessarily mean that an acquisition for a Company for a public purpose cannot be made otherwise than under the provisions of Part VII, if the cost or a portion of the cost of the acquisition is to come out of public funds. In other words, the essential condition for acquisition for a public purpose is that the cost of the acquisition should be borne, wholly or in part, out of public funds. Hence, an acquisition for a Company may also be made for a public purpose, within the meaning of the Act, if a part or the whole of the cost of acquisition is met by public funds. If, on the other hand, the acquisition for a Company is to be made at the cost entirely of the Company itself, such an acquisition comes under the provisions of Part VII. As in the present instance, it appears that part at any rate of the compensation to be awarded for the acquisition is to come eventually from out of public revenues, it must be held that the acquisition is not for a Company simpliciter. It was not, therefore, necessary to go through the procedure prescribed by Part VII. We, therefore, agree with the conclusion of the High Court, though not for the same reasons.

The appeal, accordingly, is dismissed with costs.

Appeal dismissed.

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RAM PADARATH MAHTO

v.

MISHRI SINGH & ANR.

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, JJ.)

Election — Disqualification—Contract with Govcrnment for stocking foodgrains—Whether for performance of services undertaken by Government—Representation of the People Act, 1951 (43 of 1951) s. 7(d).

The appellant was a member of a joint Hindu family which carried on the business of Government stockists of grain under a contract with the Government of Bihar. His nomination for election to the Bihar Legislative Assembly was rejected on the ground that he was disqualified under s. 7(d) of the Representation of the People Act, 1951, as he had an interest in a contract for the performance of services undertaken by the Bihar Government. The appellant contended that the service undertaken by the Government was the sale of foodgrains under the Grain Supply Scheme and the contract was not for the sale of such foodgrains and did not attract the provisions of s. 7(d).

Held, that the contract was not one for the performance of any service undertaken by the Government and the appellant was not disqualified under s. 7(d). A contract of bailment which imposed on the bailee the obligation to stock and store the foodgrains in his godowns was not a contract for the purpose of the service of sale of grain which the Government had undertaken. The Government had undertaken the work of supplying grain but the contract was not one for the supply of grain.

N. Satyanathan v. *K. Subramanyam*, [1955] 2 S.C.R. 83 and *V. V. Ramaswamy* v. *Election Tribunal, Tirunelveli*, (1933) 8 E.L.R. 233, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 388 of 1960.

Appeal by special leave from the judgment and order dated February 3, 1959, of the Patna High Court in Election Appeal No. 10 of 1958.

S. P. Varma, for the appellant.

L. K. Jha and *D. Govardhan*, for respondent No. 1.

L. K. Jha and *K. K. Sinha*, for respondent No. 2.

1960. November 17. The Judgment of the Court was delivered by

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Gajendragadkar J.

GAJENDRAGADKAR, J.—Is the appellant Ram Padarath Mahto disqualified for membership of the Bihar Legislature under s. 7(d) of the Representation of the People Act, 1951 (hereafter called the Act)? That is the short question which arises for our decision in the present appeal by special leave. The appellant was one of the candidates for the Dalsinghsarai Constituency in the District of Darbhanga in Bihar for the State Legislature. The said Constituency is a Double-Member Constituency; it was required to elect two members, one for the general and the other for the reserved seat for scheduled castes in the Bihar Legislative Assembly. It appears that the said Constituency called upon voters to elect members on January 19, 1957. January 29, 1957 was fixed as the last date for the filing of the nomination papers. The appellant filed his nomination paper on January 28, 1957, and on the next day seven other members filed their nomination papers. On February 1, 1957, the nomination paper filed by the appellant was rejected by the returning officer on two grounds; he held that the appellant being an Inspector of Co-operative Societies was a Government servant at the material time and so was disqualified from standing for election. He also found that the appellant was a member of a joint and undivided Hindu family which carried on the business of Government as stockist of grain under a contract between the Government of Bihar and a firm of the joint family known as Nebi Mahton Bishundayal Mahto. Thereafter the election was duly held, and Mr. Mishri Singh and Mr. Baleshwar Ram, respondents 1 and 2 were declared duly elected to the general and reserved seat respectively. The validity of this election was challenged by the appellant by his Election Petition No. 428 of 1957. To this petition he impleaded the two candidates declared to have been duly elected and five others who had contested in the election. Before the Election Tribunal the appellant urged that he was not in the employ of the Government of Bihar at the material time. He pointed out that he had resigned his job on January 13,

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1957, and his resignation had been accepted on January 25, 1957, relieving him from his post as from the later date. He also contended that there was a partition in his family and that he had no share or interest in the contract in question. Alternatively it was argued that even if the appellant had an interest in the said contract it did not fall within the mischief of s. 7(d) of the Act. These pleas were traversed by respondents 1 and 2 who contested the appellant's election petition.

The Election Tribunal found that the petitioner was not a Government servant on the day he filed his nomination paper, and so according to it the returning officer was wrong in rejecting his nomination paper on the ground that he was a Government servant at the material time. The Election Tribunal rejected the appellant's case that there was a partition in the family, and held that at the relevant time the appellant continued to be a member of the joint Hindu family which had entered into the contract in question with the Government of Bihar. However, in its opinion, having regard to the nature of the said contract it was not possible to hold that the appellant was disqualified under s. 7(d), and so it came to the conclusion that the returning officer was in error in rejecting the appellant's nomination paper on this ground as well. In the result the Tribunal allowed the election petition, declared that the nomination paper had been improperly rejected, and that the election of the two contesting respondents was void.

Against this decision the two contesting respondents filed two appeals in the High Court at Patna (Election Appeals Nos. 9 and 10 of 1958). The High Court has confirmed the finding of the Tribunal that the appellant was not a Government servant at the material time. It has also agreed with the conclusion of the Tribunal that at the relevent time the appellant was a member of the undivided Hindu family. On the construction of the contract, however, it differed from the view adopted by the Tribunal, and it has held that as a result of the said contract the appellant was disqualified under s. 7(d) of the Act. This finding

inevitably led to the conclusion that the appellant's nomination paper had been properly rejected. On that view the High Court did not think it necessary to consider whether the Tribunal was right in declaring void the election of not only respondent 1 but of respondent 2 as well. It is against this decision of the High Court that the appellant has come to this Court by special leave; and the only question which is raised on his behalf is that the High Court was in error in coming to the conclusion that he was disqualified under s. 7(d). The decision of this question naturally depends primarily on the construction and effect of the contract in question.

Section 7 of the Act provides for disqualification for membership of Parliament or of State Legislatures. Section 7(d), as it stood at the material time and with which we are concerned in the present appeal provides, inter alia, that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly of a State, if whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in a contract for the supply of goods to, or for the execution of any works or the performance of any services undertaken by, the appropriate Government. On the concurrent findings recorded by the High Court and the Tribunal it cannot now be disputed that the appellant has interest in the contract in question; so that the first part of s. 7(d) is satisfied. The High Court has found that the contract attracts the last part of s. 7(d) inasmuch as according to the High Court the Government of Bihar had undertaken to discharge the service of supplying grain to the residents of Bihar and the firm of the appellant's family had entered into a contract for the performance of the said services. The last part of s. 7(d) postulates that the appropriate Government has undertaken to perform certain specific services, and it is for the performance of such services that the contract had been entered into by a citizen. In other words, if a citizen has entered into a contract with the appropriate Government for the

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performance of the services undertaken by the said Government he attracts the application of s. 7(d). This provision inevitably raises two questions: what are the services undertaken by the appropriate Government? Has the contract been entered into for the performance of the said services?

At this stage it is necessary to consider the material terms of the contract. This contract was made on February 8, 1956, between the Governor of Bihar who is described as the first party and the firm which is described as the second party. The preamble to the contract shows that the first party had to stock and store foodgrains in Darbhanga District for sale in pursuance of the Grain Supply Scheme of the Government for which a proper custodian and bailee for reward was necessary. It also recites that the second party had applied to become such custodian and bailee of such stock of foodgrains as the first party shall deliver to the second party in one lump or from time to time on terms and in the manner expressly specified under the contract, or as may be necessarily implied. Clause 1 of the contract provides that the second party shall, at the direction of the first party, take over foodgrains from the railway wagons or from any place as directed by the first party; thereafter the second party had to cause the grains to be stored in his godown at Dalsinghsarai and had to redeliver the same to the first party after weighing either at the second party's godown approved by the first party or at any other place as directed by the first party. The movement of the grain had to be done by the second party himself or by a transport contractor appointed by the first party. Clause 2 imposed on the second party the liability to maintain a register and keep accounts as prescribed thereunder. Under cl. 3 the second party undertook to keep such stocks and establishments as may be necessary at his own expense. Clause 4 imposed upon the second party the obligation to protect the stock of foodgrains or to make good the losses except as thereinafter provided. Clauses 5 to 8 are not material for our purpose. Clause 9 provides that the second party shall deposit the sum of

Rs. 5,000 in a Savings Bank account which has been pledged to the District Magistrate, Darbhanga, and comply with the other conditions specified in the clause. Clause 10 deals with the remuneration of the second party. It provides that the first party shall be liable to pay to the second party remuneration for the undertaking in this agreement at the rate of Re. 1 per cent on the value of the stocks moved or taken over from his custody under the orders or directions of the first party or his agent calculated at the rate fixed by the Government from time to time for wholesale sales of grain. The clause adds that no remuneration shall be payable to the second party if the first party takes over the whole of the balance stock lying with the second party for reasons of the termination of the agreement. The rest of the clauses need not be recited.

It would thus be seen that the agreement in terms is one of bailment. The State Government wanted to entrust the work of stocking and storing foodgrains to a custodian or bailee. In that behalf the appellant's firm made an application and ultimately was appointed a bailee. There is no doubt that by this contract the firm has undertaken to do the work of stocking and storing foodgrains belonging to the State Government; and if it can be reasonably held that the service undertaken by the State Government in the present case was that of stocking the foodgrains the contract in question would obviously attract the provisions of s. 7(d). Mr. Varma, however, contends that the service undertaken by the State Government is the sale of foodgrains under its Grain Supply Scheme; and he argues that unless the contract shows that it was for sale of the said goods it cannot attract the provisions of s. 7(d). Unfortunately the scheme adopted by the State Government for the supply of grain has not been produced before the Election Tribunal, and so the precise nature and extent of the services undertaken by the State Government fall to be determined solely by reference to the contract in question. It is true that the contract relates to the stocking and storing of foodgrains which the State Government wanted to sell to the residents of Bihar; but can it be said

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that stocking and storing of foodgrains was such an integral or essential part of the selling of goods that a contract for stocking and storing foodgrains should necessarily be regarded as a contract for their sale? In our opinion, it is difficult to accept the argument that stocking and storing of foodgrains is shown to be such an essential and integral part of the supply scheme adopted by the State Government.

Theoretically speaking stocking and storing foodgrains cannot be said to be essential for the purpose of carrying out the scheme of sale of foodgrains, because it would conceivably be possible for the State Government to adopt a scheme whereby goods may be supplied without the State Government having to store them; and so the work of stocking and storing of foodgrains may in some cases be conceivably incidental to the scheme and not its essential part. It is significant that sale of goods under the contract was never to take place at the godown of the firm. It had always to take place at other selling centres or shops; and thus, between the stocking and storing of goods and their sale there is an element of time lag. The only obligation that was imposed on the firm by this contract was to be a custodian or bailee of the goods, keep them in good order and deliver them after weighment as directed by the first party. It cannot be denied that the remuneration for the bailee has been fixed at the rate of Re. 1 per cent on the value of the stocks moved or taken over from his custody; but that only shows the mode or method adopted by the contract for determining the remuneration including rent of the godowns; it cannot possibly show the relationship of the contract with the sale of goods even indirectly. Can it be said that the contract entered into by the State Government for purchasing foodgrains from agriculturists who grow them or for transporting them after purchase to the godowns are contracts for the sale or supply of goods? Purchase of goods and their transport are no doubt preparatory to the carrying out of the scheme of selling them or supplying them, and yet it would be difficult to hold that contracts entered into by the State Government with the agriculturists or the transport agency is a contract for the

sale of goods. We have carefully considered the material terms of this contract, and on the record as it stands we are unable to accept the conclusion of the High Court that a contract of bailment which imposed on the bailee the obligation to stock and store the foodgrains in his godown can be said to be a contract for the purpose of the service of sale of grain which the State Government had undertaken within the meaning of s. 7(d).

It appears that before the High Court it was not disputed by the appellant that the service whose performance had been undertaken by the State Government consisted in the supply of grain to the people of the State of Bihar; and the High Court thought that from this concession it inevitably followed that the firm had a share and was interested in the contract for the performance of the service undertaken by the Government of Bihar. It seems to us that the concession made by the appellant does not inevitably or necessarily lead to the inference drawn by the High Court. If the service undertaken by the State Government is one of supplying grain how does it necessarily follow that a contract by which the bailee undertook to store the grain was a contract for the supply of grain? It may sound technical, but in dealing with a statutory provision which imposes a disqualification on a citizen it would be unreasonable to take merely a broad and general view and ignore the essential points of distinction on the ground that they are technical. The narrow question is: if the State Government undertook the work of supplying the grain, is the contract one for the supply of grain?; in our opinion, the answer to this question must be in the negative; that is why we think the High Court did not correctly appreciate the effect of the contract when it held that the said contract brought the appellant's case within the mischief of s. 7(d).

In coming to its conclusion the High Court thought that its view was supported by a decision of this Court in *N. Satyanathan* v. *K. Subramanyan* (1). In that case the appellant who was a contractor had entered into an agreement with the Central Government

(1) [1955] 2 S.C.R. 83.

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whereby he had offered to contract with the Governor-General for the provision of a motor vehicle service for the transit and conveyance of all postal articles for the period specified in the contract, and the Governor-General had accepted the offer. As a consideration for the same the Government had agreed to pay to the contractor Rs. 200 per month during the subsistence of the agreement "as his remuneration for the service to be rendered by him". It appears that on this contract two questions were raised before this Court. First it was urged that it could not be said that the Central Government had undertaken any service within the meaning of s. 7(d) of the Act when it made arrangements for the carriage of mailbags and postal articles through the contractor. This contention was rejected on the ground that though the Government was not bound in the discharge of its duties as a sovereign State to make provision for postal mail service, it had in fact undertaken to do so under the Indian Post Offices Act for the convenience of the public. "It cannot be gainsaid", observed Sinha, J., as he then was, "that the postal department is rendering a very useful service, and that the appellant has by his contract with the Government undertaken to render that kind of service on a specified route"; and he added, "the present case is a straightforward illustration of the kind of contract contemplated under s. 7(d) of the Act". This straightforward illustration, in our opinion, clearly brings out the class and type of contracts which fall within s. 7(d) of the Act. Government must undertake to render a specified service or specified services and the contract must be for the rendering of the said service or services. That was precisely what the contract in the case of *N. Satyanathan* (1) purported to do. It is difficult to see how this case can be said to support the conclusion of the High Court that the contract for stocking and storing of goods is a contract for rendering the service of supplying and selling the same to the residents of the place.

In this connection Mr. Jha, for the respondents, has drawn our attention to a decision of the Madras High

(1) [1955] 2 S.C.R. 83.

Court in *V. V. Ramaswamy* v. *Election Tribunal, Tirunelveli* (1). In that case the Court was concerned with four contracts by which the contracting party agreed "to hold the reserve grain stock belonging to the Government of Madras, safely store it, and dispose of it according to the directions of the Government". In other words, it was a contract not only for the stocking and storing of foodgrains but also of disposing of it, and that naturally meant that the contract was for service which the State Government had undertaken to perform. This decision cannot assist the respondents in the present appeal.

In the result we hold that the High Court was not justified in reversing the finding of the Tribunal that the contract in question did not attract the provisions of s. 7(d) of the Act. The appeal must, therefore, be allowed and the order passed by the High Court set aside. We cannot finally dispose of the matter, because one question still remains to be considered, and that is whether the conclusion that the appellant's nomination paper had been improperly rejected would lead to the decision that the election of not only respondent 1 but also respondent 2 should be declared to be void. The Election Tribunal has declared the whole election to be void, and in their respective appeals filed before the High Court both the respondents have challenged the correctness of that finding. The High Court, however, thought that since in its opinion the nomination paper of the appellant had been properly rejected it was unnecessary to deal with the other point. The point will now have to be considered by the High Court. We would, therefore, set aside the order passed by the High Court and remand the proceedings to it in order that it may deal with the other question and dispose of the appeals expeditiously in accordance with law. In the circumstances of this case we direct that the parties should bear their own costs in this Court. Costs in the High Court will be costs in the appeal before it.

Appeal allowed.

(1) (1953) 8 E.L.R. 233.

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THE AHMEDABAD TEXTILE INDUSTRY'S RESEARCH ASSOCIATION

v.

THE STATE OF BOMBAY AND OTHERS

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, JJ.)

Industrial Dispute—Research Institute, if an industry—"Industry", Meaning of—Test—Industrial Disputes Act, 1947 (14 of 1947), s. 2(j).

The appellant association was founded in 1947 and the object of the founders was to establish a textile research institute for the purpose of carrying on research and other scientific work in connection with the textile trade or industry and other trade and industry allied therewith or necessary thereto. The cost of maintaining the association was met partly by members and partly by grants from Government and other sources.

The activity of the association was systematically undertaken; its object was to render material services to a part of the community, namely, member-mills, the material services being the discovery of process of manufacture etc., with a view to secure greater efficiency, rationalisation and reduction of costs of the member-mills; it was being carried on with the help of employees some of whom were technical personnel on payment of remuneration, they had no rights in the results of the research carried on by them as employees of the Association which were the property of the Association and it was organised or arranged in the manner in which a trade or business is generally organised.

Disputes arose between the appellant and its workmen which related to wage-scale and dearness allowance and payment of house-rent allowance which was referred for adjudication. The appellant questioned the reference on the ground that the appellant was not an industry and that the Tribunal was wrong in holding that the appellant was included within the definition of the word "Industry" of s. 2(j) of the Industrial Disputes Act, and contended that it was a research centre in the nature of educational activity and therefore had no analogy with activities in the nature of trade or business.

The question therefore was whether appellant was an undertaking within the meaning of s. 2(j) of the Industrial Disputes Act and its activities satisfied the tests laid down in *State of Bombay* v. *Hospital Mazdoor Sabha.*

Held, that the manner in which the activity in question was organised or arranged, the condition of the co-operation between employer and employee necessary for its success and its object to

render material service to the community could be regarded as some of the features which would be distinctive activities to which s. 2 (j) of the Act could be applied.

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In the instant case, the manner in which the association was organised clearly shows that the undertaking as a whole was in the nature of business and trade organised with the object of discovery of ways and means by which member-mills may obtain larger profits in connection with their industries. The activity of the association was clearly within the definition of the word "Industry" in s. 2(j) of the Industrial Disputes Act and could not be assimilated to a purely educational institution and satisfies the test laid down in the *State of Bombay* v. *Hospital Mazdoor Sabha.* Thus the Association is an undertaking within the meaning of s. 2(j) of the Act.

When this dispute arose between the Association and its employees it was an industrial dispute and could be properly referred for adjudication under the Act.

The State of Bombay v. *The Hospital Mazdoor Sabha,* [1960] 2 S.C.R. 866 followed. *The Federated States School Teachers' Association* v. *The State of Victoria,* (1929) 41 C.L.R. 569 not applicable.

CIVIL APPELLATE JURISDICTION. Civil Appeal No. 22 of 1959.

Appeal by Special Leave from the Award dated the 31st October, 1957, of the Industrial Tribunal, Bombay in Reference (I. T.) No. 141 of 1957.

M. C. Setalvad, Attorney-General for India, *J. B. Mehta* and *I. N. Shroff* for the Appellant.

Vidya Dhar Mahajan, K. L. Hathi and *R. H. Dhebar* for Respondent No. 1.

N. C. Shah, President, Engineering Mazdoor Sabha for Respondent No. 3.

1960. November 17. The Judgment of the Court was delivered by

WANCHOO, J.—This is an appeal by special leave against the award of the Industrial Tribunal, Bombay. There was a dispute between the appellant and its workmen, which was referred by the Government of Bombay for adjudication. It related to the wage-scale and dearness allowance of certain employees of the appellant and also to the payment of house-rent

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allowance. The main contention of the appellant before the Tribunal was that the reference was not competent under the Industrial Disputes Act, No. XIV of 1947 (hereinafter called the Act), as the appellant was not an industry within the meaning of the Act. The Tribunal rejected this contention and held that the reference was valid. It then went into the merits of the dispute, with which we are however not concerned in the present appeal. The only point urged before us on behalf of the appellant is that the Tribunal was wrong in holding that the appellant was included within the definition of the word "industry" and therefore the reference was competent.

"Industry" is defined in s. 2(j) of the Act as meaning any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. The main question canvassed before the Tribunal was whether the appellant was an undertaking within the meaning of s. 2(j). The question as to what is an undertaking for the purpose of s. 2(j) has come up for consideration before this Court in a number of cases, the last of which is *The State of Bombay* v. *The Hospital Mazdoor Sabha* (1), where a question arose whether a hospital run by government was an undertaking within the meaning of s. 2(j). It was pointed out in that case that though s. 2(j) used words of very wide denotation, a line would have to be drawn in a fair and just manner so as to exclude some callings, services or undertakings. If all the words used therein were given their widest meaning, all services and all callings would come within the purview of the definition including those services rendered by a servant purely in a personal or domestic matter and even in a casual way. It had therefore to be considered where the line should be drawn and what limitations should be reasonably implied in interpreting the wide words used in s. 2(j). Further, the contention that the word "undertaking" used in s. 2(j) should be treated as analogous to trade or business and therefore the undertaking in question must involve an economic activity in which capital is invested

(1) [1960] 2 S.C.R. 866.

and which is carried on for profit or for the production or sale of goods by the employment of labour was not accepted in full and it was pointed out that an activity could and must be regarded as an industry even though in its carrying on profit motive might be absent. Further it was held that absence of investment of any capital would not necessarily mean that an undertaking was not included within s. 2(j).

That case then proceeded to consider what kinds of activities could be excluded from the meaning of "undertaking" for purposes of s. 2(j). It was pointed out that activities of government which could be properly described as sovereign activities were outside the scope of s. 2(j), as they were functions which a constitutional government could and must undertake for governance and which no private citizen could undertake. These sovereign activities were defined in the words of Lord Watson as "the primary and inalienable functions of a constitutional government" but would not necessarily include an activity undertaken by government in pursuit of its welfare policies. It was also pointed that though in the absence of profit motive an activity might be regarded as an undertaking, the presence of such motive would be a relevant circumstance in considering whether the undertaking was an industry within the meaning of s. 2(j).

The case then went on to consider the attributes the presence of which would make an activity an undertaking under s. 2(j) on the ground that it was analogous to trade or business. It was pointed out that it was difficult to state these attributes definitely or exhaustively but as a working principle it was said that an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees would be an undertaking within the meaning of the Act provided it was carried on in an organised manner like trade or business. Thus the manner in which the activity in question is organised or arranged, the condition of the co-operation between employer and employee necessary for its success

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and its object to render material service to the community could be regarded as some of the features which would be distinctive of activities to which s. 2(j) applied. We have therefore to see whether the appellant's activity satisfies the tests laid down in this case and if it does, it would be an undertaking within the meaning of s. 2(j).

It will be necessary for this purpose to examine the objects with which the appellant-association was founded and the activities which it is carrying on. The main contention of the learned Attorney-General is that the appellant-association is a research centre and is in the nature of educational activity and therefore has no analogy with an activity in the nature of trade or business. He relies in this connection on a decision of the Australian High Court, *The Federated State School Teachers' Assn.* v. *The State of Victoria* (1), where it was held that educational activities of the State carried on under appropriate statutes and statutory regulations relating to education did not constitute industry within the meaning of s. 4 of the Commonwealth Conciliation and Arbitration Act.

The appellant-association was founded in 1947 and the object of the founders was to establish a textile research institute for the purpose of carrying on research and other scientific work in connection with the textile trade or industry and other trades and industries allied therewith or necessary thereto. The research to be conducted was for the purpose of investigation into manufacture and improvement of materials used in the textile industry, utilisation of the products of the industry, improvement of machinery and appliances used by the industry, improvement of various processes of manufacture with a view to secure greater efficiency, rationalisation and reduction of costs, research into the conditions of work, time and motion studies, fatigue and rest pauses, standardisation of methods of work, conditioning of factories and diseases and accidents arising out of employment in a textile mill. In order to carry out these objects, the appellant-association was to establish, equip and

(1) (1929) 41 C.L.R. 569.

maintain laboratories, work-shops or factories and conduct and carry on experiments; to prepare, edit, print, publish, issue, acquire and circulate books, papers, periodicals etc. and to establish, form and maintain museums, libraries and collections of literature, statistics, scientific data and other information relating to the industry and to disseminate the same by means of reading papers, delivery of lectures, giving of advice and the appointment of advisory officers; to employ or retain skilled, professional or technical advisers or workers in connection with the objects of the association on payment of such fees or remuneration as might be thought expedient; to found, aid or maintain schools or colleges for textile research and endow scholarships and bursaries, to support students engaged in research work; and to encourage the discovery of, and investigate and make known the nature and merits of inventions, improvements, processes, materials and designs which may be capable of being used by members of the association for any of the purposes of the said industry. It will thus be seen that though the object of the association was research, that research was directed with the idea of helping the member mills to improve methods of production in order to secure greater efficiency, rationalisation and reduction of costs. The basis therefore of the research carried on by the appellant was to help the textile industry and particularly the member mills in making larger profits and this was to be done primarily by the employment of technical personnel on payment of remuneration. Reference in this connection may be made to r. 13 of the Rules and Regulations of the appellant-association, which lays down that any member of the association who considers that its interests are prejudicially affected by any research proposed to be undertaken by the association may object to government against the undertaking of the proposed research. Rule 13 read with r. 45 also envisages that if such an objection is taken the proposed research will not be carried on till the objection is decided by the government, though it is provided that the government may direct the research to be carried

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on during the time the objection is pending consideration of government. The administration of the appellant-association is vested in a council in which the majority consists of the representatives of the textile industry. The research is carried on, as already indicated, under the supervision of a Director of Research, by technical personnel, who are generally paid employees of the appellant-association; but all such technical personnel employed by the association have to give an undertaking to observe strict secrecy in respect of all researches undertaken. They are also to give an undertaking not to use or take advantage in their private capacity of special knowledge so obtained or put into operation any invention or process of which they might have obtained knowledge as aforesaid. It is also provided that any invention or process can be put into operation to the extent to which, and as and when it may be permitted to be so done in common with all members of the association in strict accordance with the Rules and Regulations made by the council. The effect of this provision in r. 42 of the Rules and Regulations is that the result of research is the property not of the person making the research but of the association, to be used by its members in accordance with the Rules and Regulations made by the Council. Then r. 44 provides that every employee of the association engaged on research shall contract in writing that he will in consideration of his employment hold exclusively for the benefit of and assigned to the association at the cost of the association all rights and ownership in any discoveries, inventions, designs or other results arising in the course of such employment upon such research. These provisions make it clear that though the appellant-association has been established for purposes of research, the main object of the research is the benefit of the members of the association. The cost of maintaining the association is met partly by members and partly by grants from government and other sources. It will thus be clear that in effect the association has been established to carry on research with respect to textile industry jointly for the benefit of its members;

but for this, each member-mill might have had to establish its own research department, which would be a part of its activity. Can it be said under these circumstances that this is an undertaking which is purely of educational character and therefore covered by the Australian case mentioned above? We are of opinion, considering the objects and the Rules and Regulations of the appellant-association, that it answers the tests laid down in the *Hospital case* (1) and must be held to be an undertaking within the meaning of s. 2(j). It is an activity systematically undertaken; its object is to render material services to a part of the community (namely, member-mills)—the material services being the discovery of processes of manufacture etc. with a view to secure greater efficiency, rationalisation and reduction of costs of the member-mills; it is being carried on with the help of employees (namely, technical personnel) who have no rights in the results of the research carried on by them as employees of the association; it is organised or arranged in a manner in which a trade or business is generally organised; it postulates co-operation between employers (namely, the association) and the employees (namely, the technical personnel and others) which is necessary for its success, for the employers provide monies for carrying on the activities of the association and its object clearly is to render material service to a part of the community by discovery of processes of manufacture etc. with a view to secure greater efficiency, rationalisation and reduction of costs. The activities of this association therefore have in our opinion little in common with the activities of what may be called a purely educational institution. It is true that the employees who have raised the present industrial dispute do not actually contribute to the research, which is carried on under the appellant-association; but the manner in which the association is organised and the fact that the technical personnel who carry on the research are also employees who have no rights in the results of their research, clearly show that the undertaking as a whole is in the nature of

(1) [1960] 2 S.C.R. 866.

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business and trade organised with the object of discovering ways and means by which the member-mills may obtain larger profits in connection with their industries. In these circumstances we have no hesitation in coming to the conclusion that the appellant-association is carrying on an activity which clearly comes within the definition of the word "industry" in s. 2(j) and which cannot be assimilated to a purely educational institution. In this view of the matter, when a dispute arose between the appellant and some of its employees, it was an industrial dispute and could be properly referred for adjudication under the Act.

The appeal fails and is hereby dismissed with one set of costs.

Appeal dismissed.

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November 17.

SETABGUNJ SUGAR MILLS LTD.

v.

THE COMMISSIONER OF INCOME-TAX, CENTRAL, CALCUTTA.

J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.

Income Tax—Company having several activities—Set-off of loss in one, when can be claimed against profits in another—Whether activities constitute one business or separate businesses—Mixed question of law and fact—Indian Income Tax Act, 1922, (11 of 1922) ss. 24(2), 66(2).

The appellant company which had different ventures claimed to set off against the profits of one venture the losses of its other venture which were brought forward from the back years, contending that the losses were of the same business and s. 24(2) of the Indian Income-tax Act applied. The tribunal rejected the appellants contention and gave reasons why the various activities of the company could not be construed as the same business for the application of s. 24(2).

The company then asked the Tribunal to make a reference to the High Court on questions of law arising out of Tribunal's order. The Tribunal declined to make a reference. The company moved the High Court of Calcutta, under s. 66(2) of

Income-tax Act, for calling upon the Tribunal to state a case but the application was summarily dismissed. The company appealed to the Supreme Court, by special leave, against the decision of the Income-tax Appellate Tribunal and also the order of the Calcutta High Court.

Held, that the question whether different ventures carried on by an individual or a company form one business is a mixed question of law and facts. The principle is to find out whether there is any interconnection, any interlacing, any interdependence, any unity at all, embracing the ventures as laid down in *Scales* v. *George Thompson & Co. Ltd.* These principles have to be applied to the facts before a legal inference can be drawn that a particular business is composed of separate businesses and not one business. The ultimate conclusion is a legal inference from facts proved and is one of mixed law and fact on which application of s. 24(2) of the Act depends.

In the instant case a question of law did arise on which the High Court should have asked for a statement of the case. The question of law is "whether on the facts and circumstances of the case, the business activities of the company, to wit, manufacture and sale of sugar and sale and purchase of gunnies, jute, mustard seeds, constituted the same business within the meaning of s. 24(2) of the Indian Income-tax Act, 1922".

The High Court is directed to call for a statement of the case from the Tribunal and dispose of it according to law.

Scales v. *George Thompson & Co. Ltd.*, (1927) 13 T. C. 83, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 143 of 1958.

Appeal by Special Leave from the Judgment and Order dated the 15th March, 1955, of the Income-tax Appellate Tribunal of India, Calcutta in I. T. A. No. 4309 of 1954.

Civil Appeal No. 144 of 1958.

Appeal by Special Leave from the Judgment and Order dated the 27th April, 1956, of the Calcutta High Court in Income-tax Matter No. 9 of 1956.

N. A. Palkhivala (In both the Appeals) and *B. P. Maheshwari* for the Appellants.

K. N. Rajagopal Sastri and *D. Gupta* for the Respondent.

1960. November 17. The Judgment of the Court was delivered by

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Setabgunj Sugar Mills Ltd. v. The Commissioner of Income-tax, Central, Calcutta.

Hidayatullah J.

HIDAYATULLAH, J.—These are two consolidated appeals by special leave. The first is directed against an order of the Income-tax Appellate Tribunal, Calcutta Bench dated March 15, 1955, and the other, against an order of the Calcutta High Court dated April 27, 1956, declining to ask for a statement of the case under s. 66(2) of the Indian Income-tax Act.

The facts are as follows: Setabgunj Sugar Mills, Ltd., is the appellant. This Company was incorporated in 1934, and was established to take over some sugar mills run by a firm. Included in the objects for which the Company was established was the business of buyers, sellers and dealers in jute, gunnies, oil seeds, etc. For the first few years, the Company carried on the business of manufacture and sale of sugar only. In the accounting year ending August 31, 1945, the Company had some transactions in gunnies and made a profit. In the next accounting year ending August 31, 1946, the Company made also a profit in transactions in gunnies and jute. In the accounting year ending August 31, 1947, (corresponding assessment year being 1948-49), the Company did business in mustard seeds, gunnies and hessian and made profit. After this assessment year, the Company ceased to have any business other than the manufacture and sale of sugar.

We are concerned with the assessment year 1948-49, corresponding to the accounting year ending August 31, 1947. In that year, the profits from the sale of gunnies, mustard and jute amounted to Rs. 6,14,018. Some of the business was done by purchases or sales in the territory now in Pakistan. During the same accounting year, the sugar business resulted in a loss of Rs. 2,09,306. The loss in sugar business was set off against the profits of the other businesses, and the Income-tax Officer by his order assessed the Company on an income of Rs. 4,04,712. The Company claimed to set off against this profit, business losses of back years in its business in sugar amounting to Rs. 13,43,069, which had been brought forward from the previous year. The contention of the Company was that these losses were of the same business, and

that s. 24(2) of the Indian Income-tax Act applied. This contention was not accepted. On appeal to the Appellate Assistant Commissioner, the contention of the Company was accepted. The Commissioner of Income-tax then preferred an appeal before the Income-tax Appellate Tribunal (Calcutta Bench), which was allowed. The Tribunal gave reasons why the various activities of the Company could not be construed as the same business for the application of s. 24(2).

The Company then asked the Tribunal to make a reference to the High Court on four questions of law which, it stated, arose out of the Tribunal's order. The Tribunal declined to make a reference. The Company next moved the High Court under s. 66(2) of the Act for calling upon the Tribunal to state a case on the four questions, but its application was summarily dismissed. The Company has now, with special leave, appealed against the order of the Tribunal reversing the decision of the Appellate Assistant Commissioner and also against the order of the High Court declining to call for a statement of the case.

The question whether, on the application of the settled tests, different ventures carried on by an individual or a company form the same business is a mixed question of law and fact. Certain principles are applied to determine whether on the facts found a legal inference can be drawn that the different ventures constitute separate businesses or viewed together, can be said to constitute the same business. These principles were stated by Rowlatt, J. in *Scales* v. *George Thompson & Co. Ltd.* (1). The learned Judge observed:

".....the real question is, was there any interconnection, any interlacing, any inter-dependence, any unity at all embracing those two businesses."

The learned Judge also observed that what one had to see was whether the different ventures were so interlaced and so dovetailed into each other as to make them the same business. These principles have to be applied to the facts, before a legal inference can be drawn that a particular business is composed of

(1) (1927) 13 T.C. 83, 89.

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separate businesses, and is not one business. No doubt, findings of fact are involved, because a variety of matters bearing on the unity of the business have to be investigated, such as unity of control and management, conduct of the business through the same agency, the inter-relation of the businesses, the employment of same capital, the maintenance of common books of account, employment of same staff to run the business, the nature of the different transactions, the possibility of one being closed without affecting the texture of the other and so forth. When, however, the true facts have been determined, the ultimate conclusion is a legal inference from proved facts, and it is one of mixed law and fact, on which depends the application of s. 24(2) of the Act. In our opinion, a question of law did arise in the case, on which the High Court should have asked for a statement of the case. That question of law is:

"Whether on the facts and circumstances of the case, the business activities of the Company to wit, manufacture and sale of sugar and sale and purchase of gunnies, jute, mustard seeds constituted the same business within the meaning of s. 24(2) of the Indian Income-tax Act, 1922?"

We accordingly allow Civil Appeal No. 144 of 1958, with costs, and direct the High Court to call for a statement of the case from the Tribunal on this question, and dispose of it, according to law.

As regards Civil Appeal No. 143 of 1958, which questions the order of the Tribunal, we express no opinion, though we may state that the learned counsel for the Department attempted to show that the order of the Tribunal in the circumstances of the case was correct, and that no other decision but the one given by the Tribunal was possible. In view of the fact that the Appellate Assistant Commissioner had drawn an inference contrary to that of the Tribunal, it cannot be said that the legal inference was one and one alone. We, however, express no opinion either way, because we are satisfied that a question of law did arise in the case, and have, therefore, allowed the other appeal, so that the matter may be examined by

the High Court in the first instance, on a statement of the case by the Tribunal.

Civil Appeal No. 143 of 1958, will, therefore, be dismissed, but without any order as to costs.

C. A. No. 144 of 1958 allowed.

C. A. No. 143 of 1958 dismissed.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, BOMBAY

v.

BIPINCHANDRA MAGANLAL AND CO. LTD., BOMBAY

S. K. Das, M. Hidayatullah and J. C. Shah, JJ.

Income-tax—Profit and assessable income—Difference between —Smallness of profit—How determined—Indian Income-tax Act, 1922 (11 of 1922), ss. 10 (2) (vii) second proviso, 66(1).

The respondent company purchased certain machinery for Rs. 89,000 and sold it for the same value, but in the books of account the written down value of the machinery was shown in the year of account as Rs. 73,392. The Income Tax Officer in computing the assessable income of the company added the difference, i.e. Rs. 15,608, between the actual value and the written down value to the profit of the company. The Income Tax Officer also passed an order under s. 23A of the Income Tax Act, and directed that the undistributed portion of the assessable income, shall be deemed to have been distributed amongst the shareholders as dividend. Appeals against the order of the Income-tax Officer proved unsuccessful and the Appellate Tribunal referred the following question to the High Court under s. 66(1):—

"Whether the sum of Rs. 15,608 should have been included in the assessee company's "profit" for the purpose of determining whether the payment of a larger dividend than that declared by it would be unreasonable."

The High Court answered the question in the negative. On appeal by special leave,

Held, that the view taken by the High Court was correct.

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By the fiction in s. 10(2)(vii) second proviso, read with s. 2(6C), what is really not income is, for the purpose of computation of assessable income, made taxable income: but on that account, it does not become commercial profit, and if it is not commercial profit, it is not liable to be taken into account in assessing whether in view of the smallness of profits a larger dividend would be unreasonable.

"Smallness of profit" should not be equated with "smallness of assessable income" but should be determined in accordance with commercial principles.

Sir Kasturchand Ltd. v. *Commissioner of Income-tax, Bombay City*, (1949) XVII I.T.R. 493, *Ezra Proprietary Estates Ltd.* v. *Commissioner of Income-tax, West Bengal*, (1950) XVIII I.T.R. 762 and *Commissioner of Income-tax, Bombay City* v. *F. L. Smith & Co. (Bombay) Ltd.*, (1959) XXXV I.T.R. 183, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 761 of 1957.

Appeal by special leave from the judgment and order dated February 24, 1955, of the former Bombay High Court in I.T.R. 48/X of 1954.

Hardayal Hardy and *D. Gupta*, for the appellant.

N. A. Palkhivala and *I. N. Shroff*, for the respondent.

1960. November 17. The Judgment of the Court was delivered by

Shah J.

SHAH, J.—The Income Tax Appellate Tribunal, Bombay Bench "A", referred under s. 66(1) of the Indian Income Tax Act, 1922—hereinafter referred to as the Act—the following question:

"Whether the sum of Rs. 15,608 should have been included in the assessee Company's "profit" for the purpose of determining whether the payment of a larger dividend than that declared by it would be unreasonable ?"

The High Court answered the question in the negative. Against the order of the High Court, with special leave under Art. 136 of the Constitution, this appeal is preferred.

M/s. Bipinchandra Maganlal & Co., Ltd.—hereinafter referred to as the Company—is registered under the Indian Companies Act. The Company is one in

which the public are not substantially interested within the meaning of s. 23A Explanation of the Act. Its paid-up capital at the material time was Rs. 20,800 made up as follows:

20 shares of Rs. 50 each fully paid up and 1980 shares of Rs. 50 each, Rs. 10 being paid up per share.

In December 1945, the Company purchased certain machinery for Rs. 89,000 and sold it sometime in March, 1947, for the price for which it was originally purchased. In the books of account of the Company, the written down value of the machinery in the year of account 1946-47 (April 1, 1946 to March 31, 1947) was Rs. 73,392. The trading profits of the Company as disclosed by its books of account for the year 1946-47 were Rs. 33,245. At the General Meeting held on October 21, 1947, the Company declared a dividend of Rs. 12,000 for the year of account. In assessing tax for the year of assessment 1947-48, the Income Tax Officer computed the assessable income of the Company for the year of account 1946-47 at Rs. 48,761 after adding back to the profit of Rs. 33,245 returned by the Company, Rs. 15,608 realised in excess of the written down value of the machinery sold in March, 1947. The Income Tax Officer passed an order under s. 23A of the Act that Rs. 15,429 (being the undistributed portion of the assessable income of the Company as reduced by taxes payable) shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the General Meeting, and the proportionate share of each shareholder shall be included in his total income. Appeals preferred against his order to the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal proved unsuccessful, but the Appellate Tribunal at the instance of the Company referred the question set out hereinbefore to the High Court at Bombay under s. 66(1) of the Act.

Section 23A(1) of the Act as it stood at the relevant time (in so far as it is material) was as follows:—

"Where the Income Tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company upto the end

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of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than 60% of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof, he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the share-holders as at the date of the general meeting aforesaid, ..."

Clearly, by s. 23A, the Income Tax Officer is required to pass an order directing that the undistributed portion of the assessable income of any company (in which the public are not substantially interested) shall be deemed to have been distributed as dividends amongst the shareholders if he is satisfied that (i) the company has not distributed 60% of its assessable income of the previous year reduced by the income-tax and super-tax payable, (ii) unless payment of a dividend, or a larger dividend than that declared, having regard to (a) losses incurred by the company in the earlier years or (b) the smallness of the profits made in the previous year, be unreasonable. The total assessable income of the Company for the year of account was Rs. 48,761 and the tax payable thereon was Rs. 21,332: 60% of Rs. 27,249 (assessable income reduced by the income tax and super-tax due) exceeded the dividend declared by Rs. 4,458. The first condition to the exercise of jurisdiction by the Income Tax Officer under s. 23A was therefore indisputably fulfilled. But the Income Tax Officer had

still to be satisfied whether having regard to the smallness of the profit (there is no evidence in this case that loss was incurred by the Company in earlier years), it would be unreasonable to distribute dividend larger than the dividend actually declared. The Income Tax Officer did not expressly consider this question: he rested his decision on the rejection of the contention raised by the Company that the difference between the price of the machinery realised by sale and the written down value in the year of account could not be taken into account in passing an order under s. 23A. He, it seems, assumed that if that difference be taken into account, distribution of larger dividend was not unreasonable, and the Tribunal proceeded upon the footing that the assumption was correctly made.

Counsel for the Revenue submits in support of the appeal that the expression "smallness of profit" means no more than smallness of the assessable income, and that in any event, in the computation of profits, the amount realised by sale of the machinery in the year of account in excess of its written down value was liable to be included in considering whether the condition relating to "smallness of profit" was fulfilled.

At the material time, s. 2(6C) of the Act defined "income" as inclusive amongst others of any sum deemed to be profits under the second proviso to cl. (vii) of sub-s. (2) of s. 10. By s. 10, in the computation of profits or gains of an assessee under the head "Profits and gains of business, profession or vocation" carried on by him, the amount by which the written down value of any building, machinery or plant which has been sold, discarded or demolished or destroyed exceeds the amount for which the building, machinery or plant is actually sold or its scrap value is to be allowed as a deduction. This allowance is however subject to an exception prescribed by the second proviso to cl. (vii) sub-s. (2) of s. 10 that where the amount for which any building, machinery or plant is sold exceeds the written down value, so much of the

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excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profit of the previous year in which the sale took place. In computing the profits and gains of the Company under s. 10 of the Act, for the purpose of assessing the taxable income, the difference between the written down value of the machinery in the year of account and the price at which it was sold (the price not being in excess of the original cost) was to be deemed to be profit in the year of account, and being such profit, it was liable to be included in the assessable income in the year of assessment. But this is the result of a fiction introduced by the Act. What in truth is a capital return is by a fiction regarded for the purposes of the Act as income. Because this difference between the price realized and the written down value is made chargeable to income tax, its character is not altered, and it is not converted into the assessee's business profits. It does not reach the assessee as his profits: it reaches him as part of the capital invested by him, the fiction created by s. 10(2)(vii) second proviso notwithstanding. The reason for introducing this fiction appears to be this. Where in the previous years, by the depreciation allowance, the taxable income is reduced for those years and ultimately the asset fetches on sale an amount exceeding the written down value, i.e., the original cost less depreciation allowance, the Revenue is justified in taking back what it had allowed in recoupment against wear and tear, because in fact the depreciation did not result. But the reason of the rule does not alter the real character of the receipt. Again, it is the accumulated depreciation over a number of years which is regarded as income of the year in which the asset is sold. The difference between the written down value of an asset and the price realized by sale thereof though not profit earned in the conduct of the business of the assessee is notionally regarded as profit in the year in which the asset is sold, for the purpose of taking back what had been allowed in the earlier years.

A company normally distributes dividends out of its business profits and not out of its assessable income.

There is no definable relation between the assessable income and the profits of a business concern in a commercial sense. Computation of income for purposes of assessment of income tax is based on a variety of artificial rules and takes into account several fictional receipts, deductions and allowances. In considering whether a larger distribution of dividend would be unreasonable, the source from which the dividend is to be distributed and not the assessable income has to be taken into account. The Legislature has not provided in s. 23A that in considering whether an order directing that the undistributed profits shall be deemed to be distributed, the smallness of the assessable income shall be taken into account. The test whether it would be unreasonable to distribute a larger dividend has to be adjudged in the light of the profit of the year in question. Even though the assessable income of a company may be large, the commercial profits may be so small that compelling distribution of the difference between the balance of the assessable income reduced by the taxes payable and the amount distributed as dividend would require the company to fall back either upon its reserves or upon its capital which in law it cannot do. For instance, in the case of companies receiving income from property, even though tax is levied under s. 9 of the Act on the bona fide annual value of the property, the actual receipts may be considerably less than the annual value and if the test of reasonableness is the extent of the assessable income and not the commercial profit, there may frequently arise cases in which companies may have to sell off their income producing assets. The Legislature has deliberately used the expression "smallness of profit" and not "smallness of assessable income" and there is nothing in the context in which the expression "smallness of profit" occurs which justifies equation of the expression "profit" with "assessable income". Smallness of the profit in s. 23A has to be adjudged in the light of commercial principles and not in the light of total receipts, actual or fictional. This view appears to have been taken by the High Courts in India without any dissentient

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opinion, see *Sir Kasturchand Ltd.* v. *Commissioner of Income Tax, Bombay City* (1), *Ezra Proprietary Estates Ltd.* v. *Commissioner of Income Tax, West Bengal* (2) and *Commissioner of Income Tax, Bombay City I* v. *F. L. Smidth & Co., (Bombay) Ltd.* (3).

By the fiction in s. 10(2)(vii) second proviso, read with s. 2(6C), what is really not income is, for the purpose of computation of assessable income, made taxable income: but on that account, it does not become commercial profit, and if it is not commercial profit, it is not liable to be taken into account in assessing whether in view of the smallness of profits a larger dividend would be unreasonable. In our judgment, the High Court was right in holding that the amount of Rs. 15,608 was not liable to be taken into account in considering whether having regard to the smallness of the profit made by the Company, it would be unreasonable to declare a larger dividend.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) (1949) XVII I.T.R. 493. (2) (1950) XVIII I.T.R. 762.
(3) (1959) XXXV I.T.R. 183.

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November 18.

MAHARAJA PRAVIR CHANDRA BHANJ DEO KAKATIYA

v.

THE STATE OF MADHYA PRADESH

(JAFER IMAM, J. L. KAPUR, K. C. DAS GUPTA, RAGHUBAR DAYAL and N. RAJAGOPALA AYYANGAR, JJ.)

"Ruler"—Recognition by President—Whether ex-Ruler for purposes outside the Constitution—Maufidar, Meaning of—Constitution of India, Art. 366(22)—Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M. P. I of 1951), s. 2(m).

The appellant was the Ruler of the State of Baster which was later integrated with the State of Madhya Pradesh. He was recognised by the President as a Ruler under Art. 366(22) of the Constitution. The respondent resumed certain lands belonging to the appellant under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950. The appellant contended that he was still a Ruler and not an ex-Ruler and as such did not come within the definition of "proprietor" given in the Act.

Held, that the appellant was an ex-Ruler for the purposes of the Act and was within the class of persons who were by name included in the definition of 'proprietor' and was within the scope of the Act. Factually the appellant was an ex-Ruler. He was a Ruler for the purposes of the privy purse guaranteed to him. There was nothing in Art. 366(22) which required a court to treat such a person as a Ruler for purposes outside the Constitution. Further, the appellant was also a maufidar in respect of the lands acquired which were exempt from the payment of rent or tax. The expression "maufidar" was not necessarily confined to a grantee from a State or a Ruler of a State; he could be the holder of land which was exempted from payment of rent or tax.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 198 of 1954.

Appeal from the judgment and order dated October 16, 1952, of the former Nagpur High Court in Misc. Petn. No. 1231 of 1951.

M. S. K. Sastri, for the appellant.

H. L. Khaskalam, B. K. B. Naidu and *I. N. Shroff,* for the respondent.

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1960. November 18. The Judgment of the Court was delivered by

IMAM, J.—This is an appeal from the judgment of the Nagpur High Court dismissing the appellant's petition under Arts. 226 and 227 of the Constitution of India. The High Court certified under Art. 132(1) of the Constitution that the case involved a substantial question of law as to the interpretation of the Constitution. Hence the present appeal.

The appellant was the Ruler of the State of Baster. After the passing of the Indian Independence Act, 1947, the appellant executed an Instrument of Accession to the Dominion of India on August 14, 1947. Thereafter, he entered into an agreement with the Dominion of India popularly known as "The Stand Still Agreement". On December 15, 1947, he entered into an agreement with the Government of India whereby he ceded the State of Baster to the Government of India to be integrated with the Central Provinces and Berar (now the State of Madhya Pradesh) in such manner as the Government of India thought fit. Consequently the Governments in India came to have exclusive and plenary authority, jurisdiction and powers over the Baster State with effect from January 1, 1948.

The Legislature of the State of Madhya Pradesh passed the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951), hereinafter referred to as the Act, which received the assent of the President of India on January 22, 1951. The preamble of the Act stated that it was one to provide for the acquisition of the rights of proprietors in estates, *mahals*, alienated villages and alienated lands in Madhya Pradesh and to make provisions for other matters connected therewith. Under s. 3 of the Act, vesting of proprietary rights in the State Government takes place on certain conditions, mentioned in that section, being complied with. The definition of 'proprietor' is stated in s. 2 cl. (m) and it is

"in relation to—

(i) the Central Provinces, includes an inferior proprietor, a protected *thekadar* or other *thekadar*, or protected headman;

(ii) the merged territories, means a *maufidar* including an ex-Ruler of an Indian State merged with Madhya Pradesh, a Zamindar, *Ilaquedar*, *Khorposhdar* or *Jagirdar* within the meaning of *wajib-ul-arz*, or any *sanad*, deed or other instrument, and a *gaontia* or a *thekadar* of a village in respect of which by or under the provisions contained in the *wajib-ul-arz* applicable to such village the *maufidar*, the *gaontia*, or the *thekadar*, as the case may be, has a right to recover rent or revenue from persons holding land in such village;".

The definition of 'mahal' is stated in s. 2(j) and it is

"'mahal", in relation to merged territories, means any area other than land in possession of a *raiyat* which has been separately assessed to land revenue, whether such land revenue be payable or has been released, compounded for or redeemed in whole or in part;".

Before the High Court the appellant contended that he was still a Sovereign Ruler and absolute owner of the villages specified in Schedules A and B of his petition under Arts. 226 and 227 of the Constitution. He urged that his rights had been recognized and guaranteed under the agreements entered into by him with the Government of India. The provisions of the Act, therefore, did not apply to him. It was further contended that the provisions of the Act did not apply to a Ruler or to the private property of a Ruler which was not assessed to land revenue. He relied on Art. 6 of the Instrument of Accession and the first paragraph of Art. 3 of the Merger Agreement. The High Court held that if the petitioner's rights under Art. 6 of the Instrument of Accession and Art. 3 of the Merger Agreement had been infringed it was clear from the provisions of Art. 363 of the Constitution that interference by the courts was barred in disputes arising out of these two instruments. The High Court was also of the opinion that Art. 362 of the Constitution was of no assistance to the appellant.

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After referring to the definition of the word 'proprietor' in the Act, the High Court was of the opinion that the word 'maufidar' in s. 2(m) of the Act had not been used in any narrow or technical sense. A 'maufidar' was not only a person to whom a grant of *maufi* lands had been made but was also one who held land which was exempt from the payment of "rent or tax". It accordingly rejected the contention on behalf of the appellant that the word 'maufidar' is necessarily confined to a grantee from the State or Ruler and therefore a Ruler could not conceivably be a *maufidar*. The High Court also rejected the contention on behalf of the appellant that as he was a "Ruler" within the meaning of that expression in Art. 366(22) of the Constitution he did not come within the expression 'ex-Ruler' as contained in the definition of the word 'proprietor' in the Act. The expression 'Ruler' as defined in Art. 366(22) of the Constitution applied only for interpreting the provisions of the Constitution. The expression 'ex-Ruler' given in the Act must therefore be given the ordinary dictionary meaning. According to Shorter Oxford English Dictionary, 'Ruler' means "one who, or that which, exercises rule, especially of a supreme or sovereign kind. One who has control, management, or headship within some limited sphere". The High Court accordingly took the view that although the appellant did exercise such a rule in the past he ceased to exercise it in his former Domain after the agreements of accession and merger had come into operation. Accordingly the appellant must be regarded as an ex-Ruler and as he was also a *maufidar* he fell within the definition of the word 'proprietor' in the Act.

The question whether the villages mentioned in Schedules A and B of the petition under Arts. 226 and 227 of the Constitution fell in any of the categories, "Estates, Mahals, Alienated lands", was also considered by the High Court. In its opinion they did not fall within the category of Estates or Alienated lands but they did fall within the category of *Mahals*. According to the definition of 'Mahal' in s. 2(j) of the Act the same must be separately assessed to land

revenue. According to the appellant they had not been assessed to land revenue but this was denied on behalf of the State of Madhya Pradesh. The High Court was of the opinion that in these circumstances it was for the appellant to establish that the villages in question had never been assessed to land revenue but no evidence had been led to this effect. On the contrary, according to the High Court, it would appear from the documents on the record that the villages known as 'Bhandar villages' had been assessed to land revenue. As the rest of the villages in Schedule A and the villages in Schedule B, upto the date of the High Court judgment, had not been recognized as the private property of the appellant by the Government of India as required by the second and third paragraphs of the Merger Agreement, the appellant could not assert his ownership over them. The High Court, accordingly, dismissed his petition under Arts. 226 and 227 of the Constitution.

Two questions in the main were urged before us (1) whether the appellant is a proprietor within the meaning of that expression in the Act and (2) whether the villages in question came within the definition of the word 'mahal' contained in the Act. On behalf of the appellant it had also been urged that the Act could not defeat the rights of the appellant guaranteed under Art. 3 of the Merger Agreement. It seems clear to us, however, that in view of the provisions of Art. 363(1) of the Constitution any dispute arising out of the Merger Agreement or the Instrument of Accession is beyond the competence of the courts to enquire into. The High Court rightly decided this point against the appellant.

With reference to the first point we would first consider whether the appellant is an ex-Ruler for the purposes of the Act. That he is so factually cannot be denied, since he ceded his State to the Government of India to be integrated with the Central Provinces and Berar (now the State of Madhya Pradesh) in such manner as the Government of India thought fit. He further ceded to the Government of India full and exclusive authority, jurisdiction and powers in relation

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to the governance of his State when he agreed that the administration of that State would be transferred to the Government of India as from January 1, 1948. The question is whether his recognition for the purposes of the Constitution as Ruler by virtue of the provisions of Art. 366(22) of the Constitution of India continues his status as a Ruler for purposes other than the Constitution. Art. 366(22) states:

" "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler".

Article 291 refers to the privy purse payable to Rulers. It states:

"Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income."

Article 291 refers to any covenant or agreement entered into by the Ruler of any Indian State before the commencement of the Constitution. The covenant or agreement referred to in this Article certainly includes the Instrument of Accession and the Merger Agreement. The effect of the Merger Agreement is clearly one by which factually a Ruler of an Indian State ceases to be a Ruler but for the purposes of the Constitution and for the purposes of the privy purse guaranteed, he is a Ruler as defined in Art. 366(22) of the Constitution. There is nothing in the provisions of Art. 366(22) which requires a court to recognise such a person as a Ruler for purposes outside the Constitution. In our opinion, the High Court rightly held that

the appellant was an ex-Ruler and that Art. 366(22) of the Constitution did not make him a Ruler for the purposes of the Act. As the appellant was an 'ex-Ruler', he was within the class of persons who were by name specifically included in the definition of 'proprietor' and therefore clearly within the scope of the Act.

That the appellant was not only an ex-Ruler but a *maufidar* appears to us to be clear. The ordinary dictionary meaning of *maufi* is "Released, exempted, exempt from the payment of rent or tax, rent free" and *maufidar* is "A holder of rent-free land, a grantee". It was common ground in the High Court that the villages in question were exempt from the payment of rent or tax. In our opinion, the High Court rightly took the view that the expression 'maufidar' was not necessarily confined to a grantee from a State or a Ruler of a State. A *maufidar* could be a person who was the holder of land which was exempted from the payment of rent or tax. In our opinion, the appellant certainly came within the expression 'maufidar' besides being an 'ex-Ruler' of an Indian State merged with Madhya Pradesh.

It is, however, contended on behalf of the appellant that the most important part of the definition was the concluding portion where it was stated that in the case of a *maufidar* he must be a person who by or under the provisions contained in the *wajib-ul-arz* applicable to his village, had the right to recover rent or revenue from persons holding land in such village. It was contended that even if the appellant was a *maufidar*, there was nothing to show that with reference to any village held by him it was entered in the *wajib-ul-arz*, that he had a right to recover rent or revenue from persons holding land in such village. In the petition under Arts. 226 and 227 of the Constitution, filed by the appellant in the High Court, it was nowhere asserted that even if he was regarded as a *maufidar* it was not entered in the *wajib-ul-arz* with respect to any of his *maufi* villages that he had a right to recover rent or revenue from persons holding land in such villages. From the judgment of the High

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Court it would appear that no such argument was advanced before it. In the application for a certificate under Art. 132(1) of the Constitution we can find no mention of this. In the statement of the case filed in this Court also there is no mention of this fact. There is thus no material on the record to establish that the appellant as a *maufidar* had no right to recover rent or revenue from persons holding land in his villages. The burden was on the appellant to prove this fact which he never attempted to discharge. It is impossible therefore to accept this contention on behalf of the appellant raised for the first time before us in the course of the submissions made on behalf of the appellant.

Regarding the second point arising out of the definition of 'Mahal', the High Court definitely found that the petitioner had given no evidence to establish that the villages in question were not assessed to land revenue. On the contrary, at least with reference to the *Bhandar* villages documents on the record showed that these villages had been assessed to land revenue. Since it was a question of fact whether the villages had been assessed to land revenue, which was denied on behalf of the State of Madhya Pradesh, the High Court rightly held that the contention of the appellant in this respect could not be accepted. As for the other villages, in Schedules A and B of the petition of the appellant under Arts. 226 and 227 of the Constitution the High Court, in our opinion, rightly held that the petition was not maintainable as these villages had not yet been recognised by the Government of India as the private property of the appellant.

In our opinion, the appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

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November 18.

PRATAP SINGH

v.

THE STATE OF VINDHYA PRADESH (NOW MADHYA PRADESH)

JAFER IMAM, J. L. KAPUR, K. C. DAS GUPTA, RAGHUBAR DAYAL and N. RAJAGOPALA AYYANGAR, JJ.

Criminal Procedure—Right of Appeal—Procedure when appellant in jail—If discriminatory—Finality of order on appeal—Code of Criminal Procedure 1898 (V of 1898) ss. 420, 421, 430—Constitution of India Art. 14.

The appellant filed an appeal while he was in jail which was summarily dismissed on merits. Thereafter he filed a Memorandum of Appeal through a pleader which was rejected on the ground that it was not maintainable owing to his appeal from jail under s. 420 of the Code of Criminal Procedure having been dismissed earlier. His review petition before the Judicial Commissioner was also dismissed but his prayer for certificate under Art. 132(1) was granted.

The question was whether s. 421 of the Code of Criminal Procedure which enables a court to dismiss an appeal filed by a convicted person, while he was in jail, without hearing him offended against Art. 14 of the Constitution.

Held, that the Code of Criminal Procedure in giving the right of appeal in Ch. XXXI based it on a classification which was rational and reasonably connected with the object the Legislature had in view in enacting that chapter. The position of a convicted person in jail, and therefore unable to present an appeal either in person or through a pleader, was entirely different and distinct from that of a convicted person who was able to do so. The Proviso to s. 421 of the Code of Criminal Procedure in no way offends against the provisions of Art. 14 of the Constitution.

Held, also, that a second appeal from the same judgment of conviction presented through a pleader was not maintainable because the previous order dismissing the first appeal under s. 420 presented from jail was lawful and final under s. 430 of the Code.

CRIMINAL APPELLATE JURISDICTION. Criminal Appeal No. 106 of 1956.

Appeal from the Judgment and Order dated the 7th April, 1956, of the former Judicial Commissioner's

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Court, Vindhya Pradesh, Rewa in Misc. Crl. Application No. 70 of 1956.

A. D. Mathur for the Appellant.

B. K. B. Naidu and *I. N. Shroff* for the Respondent.

1960. November 18. The Judgment of the Court was delivered by

Imam J.

IMAM, J.—The Judicial Commissioner of Vindhya Pradesh granted a certificate under Art. 132(1) of the Constitution of India as in his opinion the case involved a substantial question of law as to the interpretation of the Constitution. Hence the present appeal.

The appellant was convicted under s. 307, Indian Penal Code and s. 19(f) of the Indian Arms Act by the Sessions Judge of Chatarpur. He was sentenced to 10 years' rigorous imprisonment under s. 307, Indian Penal Code and to 3 years' rigorous imprisonment under s. 19(f) of the Indian Arms Act. He filed an appeal while he was in jail which was summarily dismissed on merits on October 28, 1955. Thereafter, on October 31, 1955, he filed a Memorandum of Appeal through a pleader which was rejected on November 1, 1955, on the ground that it was not maintainable owing to his appeal from jail under s. 420 of the Code of Criminal Procedure having been dismissed on October 28, 1955.

Thereafter, he filed a petition before the Judicial Commissioner that the order dated October 28, 1955, dismissing his appeal from jail should be reviewed and his appeal should be reheard on merits. This petition was also dismissed by the Judicial Commissioner. The appellant had prayed for a certificate under Arts. 132 and 134(c) of the Constitution. The Judicial Commissioner was of the opinion that no ground had been established for grant of a certificate under Art. 134(c) but a certificate should issue under Art. 132(1).

The only question for determination in this appeal is whether the case involves any substantial question of law as to the interpretation of the Constitution. It

had been urged before the Judicial Commissioner that s. 421 of the Code of Criminal Procedure which enabled a court to dismiss an appeal filed by a convicted person, while he was in jail, without hearing him offended against Art. 14 of the Constitution as it discriminated between him and a convicted person who presented his appeal either in person or through a pleader.

Before we consider whether s. 421 of the Code offends against the provisions of Art. 14 of the Constitution it is desirable to set out shortly the scheme of appeals under Chapter XXXI of the Code of Criminal Procedure before its amendment which came into force in 1956. Section 404 expressly states that no appeal shall lie from any judgment or order of a criminal court except as provided for by the Code or by any other law for the time being in force. This provision is in accordance with the general principle that no appeal lies as a matter of right unless the right of appeal is conferred by law. There are various provisions in Chapter XXXI providing for an appeal from various orders and sentences passed by the Criminal courts. Section 410 enables any person convicted at a trial held by a Sessions Judge or an Additional Sessions Judge to appeal to the High Court. The Court of Judicial Commissioner, Vindhya Pradesh, was a High Court for the purposes of the Code. The appeal of the appellant from jail against his conviction and sentence by the Sessions Judge therefore lay to the Court of the Judicial Commissioner. Under s. 418 an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case, the appeal would lie only on a matter of law, except in a case where a person had been sentenced to death, his appeal would lie on a matter of fact as well as a matter of law although he was tried by a jury. The section also enables any other person convicted at the same trial with a person so sentenced to appeal on a matter of fact as well as a matter of law. Section 419 enjoins that every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader and every such

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petition shall, unless the court to which it is presented otherwise directs, be accompanied by a copy of the judgment or order appealed against and in cases tried by jury a copy of the heads of the charge recorded under s. 367. Section 420 enables a person who is in jail to present his petition of appeal and the copies accompanying the same to the Officer-In-charge of the jail who shall thereupon forward such petition or copy to the proper Appellate Court. Under s. 421 on receiving the petition and copy under s. 419 or s. 420 the Appellate Court shall peruse the same and if it considers that there are no sufficient grounds for interfering, it may dismiss the appeal summarily. There is a proviso to this section which states that no appeal presented under s. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. The only other section for the purpose of this appeal, to which reference need be made, is s. 430 which states that judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in s. 417 and Chapter XXXII.

It will be seen from these provisions of the Code that a convicted person, in cases where an appeal is provided for by the Code, may file a petition of appeal in writing presented by him or his pleader and that if he is in jail he may file his petition of appeal through the jail authorities who are obliged to forward the petition to the Appellate Court concerned. Whether an appeal is filed under s. 419 or under s. 420 of the Code, the Appellate Court has been expressly authorized, after perusing the petition of appeal and copies of the judgment or charge to the jury, if it considers that there is no sufficient ground for interference, to dismiss the appeal summarily. In the present case, the appellant was in jail and he presented his petition of appeal to the Court of the Judicial Commissioner under s. 420 through the jail authorities. It was summarily dismissed on merits on October 28, 1955. If that order was lawfully made the decision of the Appellate Court was final under s. 430 of the Code. Consequently, the appeal presented by

the appellant through his pleader on October 31, 1955, was patently not maintainable.

We come now to the question whether s. 421 offends against the provisions of Art. 14 of the Constitution which states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This Court has decided in many cases what are the matters to be considered in order to determine whether a particular piece of legislation is discriminatory and consequently in contravention of the provisions of Art. 14. It is unnecessary to refer to them. The object of Chapter XXXI of the Code of Criminal Procedure was to make provisions for appeals against conviction in certain cases. Where no appeal is provided by this Chapter no further question arises because no one can claim that he has a right to appeal from any decision of a criminal court. Every person convicted at a trial held by a Sessions Judge or an Additional Sessions Judge has been given the right to appeal to the High Court by virtue of the provisions of s. 410 of the Code. The right to appeal having been so given the Code provided the manner in which such appeal should be presented which is to be found in ss. 419 and 420 of the Code. These two sections contemplate various possibilities (1) that a convicted person who is not in jail presents his petition of appeal in person; (2) that a convicted person though unable to present his petition of appeal personally owing to various reasons, including his being in jail, can present it through his pleader and (3) where the convicted person is in jail and thus unable to present his petition in person and is unable to engage a pleader to present his petition of appeal, can present it through the jail authorities. Where the convicted person presents his appeal in person or through a pleader under s. 421 his appeal shall not be dismissed summarily unless he or his pleader is given a reasonable opportunity of being heard in support of his petition. No such consideration arises in the case of a convicted person who is unable to present his petition in person or through a pleader. There is a rational basis for

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making the classification mentioned above which has a reasonable connection with the object of the legislation providing for appeals under Chapter XXXI. Under s. 410 there is no discrimination as any person convicted at a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court. Where the convicted person is able to present his petition of appeal in person his position is entirely different from a person who is unable to do so because he is in jail. Similarly, a convicted person whether in jail or not who can present his petition through a pleader is in a different position from a convicted person who is in jail and is unable to present his petition through a pleader. The Code intended in the case of a convicted person who presents his petition of appeal while in jail that his petition and the judgment of the court which convicted him must be considered by the Appellate Court before it is summarily dismissed, otherwise the right of appeal conferred on such a person under s. 410 would be meaningless. In the case of such a person no question could arise of his being heard in person because he has not presented the appeal in person nor could there be any question of his pleader being heard because no pleader had been engaged by him to present the appeal. Different considerations arise in the case of a convicted person who presents his petition of appeal in person or through a pleader in which case he or his pleader must be heard before the appeal is summarily dismissed. There is, therefore, a rational basis for making the classification into three categories which has a reasonable connection with the object of the Code. It could not therefore be said that the proviso to s. 421 offends against the provisions of Art. 14 of the Constitution.

It was, however, contended that although an appeal filed under s. 420 may have been dismissed summarily a subsequent appeal filed through a pleader ought to have been heard and the Judicial Commissioner erred in holding that the appeal did not lie. The appeal could not have been summarily rejected without the pleader having been

heard. From that point of view the provisions of s. 421 had not been complied with. It is sufficient to say that if the order dated October 28, 1955, dismissing the appellant's appeal under s. 420 was lawful, a second appeal from the same judgment of conviction presented through a pleader was not maintainable because the previous order of the High Court dismissing the appeal was final under s. 430 of the Code of Criminal Procedure. Certain cases were relied upon to which reference has been made by the Judicial Commissioner. Those cases can be distinguished from the present case. In none of them was it decided that where an order dismissing the appeal is lawful a subsequent appeal filed through a pleader was maintainable. In our opinion, there is no substance in this point, once it is held that the order dated October 28, 1955, was a lawful order which, we think, it was, as in our opinion the proviso to s. 421 in no way offends against the provisions of Art. 14 of the Constitution. The appeal is accordingly dismissed.

Appeal dismissed.

KEKI BEJONJI AND ANOTHER

v.

THE STATE OF BOMBAY.

(JAFER IMAM, K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

Criminal Trial—Search—Recovery of articles—Denial of all knowledge of articles recovered—No questions put on articles recovered—accused, if prejudiced—Presumption—Servant in premises of master—Whether in possession of master's goods—Code of Criminal Procedure, 1898 (V of 1898), s. 342—Bombay Prohibition Act, 1949 (Bom. 25 of 1949), ss. 65(b), 65(f), 66(b).

During the search of the premises of the appellant No. 1 a complete working still was found which was being worked by the appellant No. 1 and his servant, appellant No. 2. The Presidency Magistrate was satisfied that a working still and

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illicit liquor were found. The appellant No. 1 was examined under section 342 of the Code of Criminal Procedure, he volunteered the statement that he did not know anything of the contraband seized by the police; so no specific question about the still and other articles recovered from his premises were put by the Presidency Magistrate who convicted the appellants under ss. 65(b), 65(f) & 66(b) of the Bombay Prohibition Act, relying on the facts of the recovery of still and illicit liquor and did not use the provision of s. 103 for presumption against the appellants.

The appellants on appeal by special leave contended, (1) that no presumption under s. 103 of the Act could arise; and that he had been denied the opportunity to rebut the presumption under s. 103 of the Act, as no questions were put to them when they were examined under s. 342 of the Code of Criminal Procedure (3) that as the Magistrate had not used the provision of s. 103 for presumption against the appellants, the High Court ought not to have convicted the appellants on the presumption arising under s. 103 of the Act without giving them an opportunity to rebut the same.

On behalf of appellant No. 2 it was further urged that he was merely a servant of appellant No. 1; if any one was in possession of the still it was appellant No. 1 and no presumption against him could arise under s. 103 of the Act.

Held, that when an accused is examined under s. 342 of the Code of Criminal Procedure and volunteers statement denying all knowledge of articles recovered from his possession, no prejudice is caused to him if no further questions are put to explain the possession of articles found in the premises occupied by him.

The presumption which arises under s. 103 of the Bombay Prohibition Act is that an offence under the Act is committed when a person is found in mere possession, without further evidence, of any still, utensil, implement or apparatus whatsoever for the manufacture of such intoxicant until contrary is proved. Thus no prejudice was caused to the appellant No. 1 when the High Court relied upon the presumption arising under s. 103 of the Act to uphold his conviction under s. 65(f) of the Act.

Held, further, that it cannot be said of merely an employee in the premises that he was in physical possession of the things belonging to his master unless they were left in his custody.

Where an offence under s. 65(f) of the Bombay Prohibition Act has not been established beyond reasonable doubt and the possession of still does not amount to an offence under the section no presumption could arise under s. 103 of the Act against a person that he was in possession of the still for which he could not account satisfactorily.

In the instant case the still being in the possession of the master and there being no evidence that the employee in any

way aided his master to come into possession of the still, it could not be said that the appellant No. 2 was in such possession of the still as would amount to an offence under s. 65(f) of the Act.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 124 of 1959.

Appeal by special leave from the judgment and order dated June 19 and 20, 1959, of the former Bombay High Court in Criminal Appeal No. 411 of 1959 arising out of the judgment and order dated March 17, 1959, of the Presidency Magistrate XX Court, Mazagaon, Bombay in Case Nos. 1952-54/P of 1958.

B. M. Mistri, Ravinder Narain, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra* for the Appellants.

Nur-ud-din Ahmed and *R. H. Dhebar,* for the Respondent.

1960. November 18. The Judgment of the Court was delivered by

Imam J.

IMAM, J.—The appellants were convicted under ss. 65(b), 65(f) and 66(b) of the Bombay Prohibition Act of 1949, hereinafter referred to as the Act, by the Presidency Magistrate XX Court, Mazagaon, Bombay. The appellant No. 1 was sentenced to 9 months' rigorous imprisonment and a fine of Rs. 1,000 under s. 65(b). No separate sentence was imposed under the other sections. Appellant No. 2 was sentenced to 6 months' rigorous imprisonment and fine of Rs. 500 under s. 65(b). No separate sentence was imposed under the other sections. They appealed to the Bombay High Court against their convictions and sentence. The High Court set aside their convictions under ss. 65(b) and 66(b) of the Act but maintained their conviction under s. 65(f) read with s. 81 relying on the presumption against the appellants arising out of s. 103 of the Act. The High Court accordingly directed that the sentence of imprisonment and fine imposed upon the appellants by the Presidency Magistrate under s. 65(b) be regarded as the sentence of imprisonment and fine imposed on the appellants under s. 65(f) read with s. 81.

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According to the case of the prosecution, there was a search on August 2, 1958, of certain premises in the occupation of appellant No. 1 on the third floor of Dhun Mansion, Khetwadi 12th Lane. A complete working still was found there and both the appellants were working it. Appellant No. 2 was pumping air into the cylinder with a motor pump while appellant No. 1 was holding a rubber tube attached to the tank. An iron stand with a boiler on it was also found there. Below the boiler there was a stove which was burning. There was also a big jar near the still. According to the prosecution, this big jar contained illicit liquor. Another glass jar was used as a receiver which, according to the prosecution, also contained 20 drams of illicit liquor. The, boiler contained four gallons of wash. There were also 11 wooden barrels containing wash. In the drawing room of the premises a small glass jar containing 20 drams of illicit liquor, a bottle of 1½ drams of illicit liquor and a pint bottle containing 3 drams of illicit liquor were also found. A *panchnama* was drawn up concerning the recovery of these articles. It was the case of the prosecution that the appellants were manufacturing illicit liquor and were in possession of a still and other materials for the purpose of manufacturing intoxicant and were also in possession of illicit liquor.

The Presidency Magistrate was satisfied that a working still and illicit liquor in the glass jars and the two bottles were found in the premises in question. The High Court also was of the opinion that a working still was found there but it thought that it would not be safe to rely upon the conflicting and unsatisfactory evidence in the case to hold that illicit liquor had been found in the premises in question, as it had not been satisfactorily proved that the bottles and the glass jars had been sealed in the presence of the *panchas*. The High Court was further of the opinion that there was no evidence on the record to show that the very bottles which were attached and the sample bottles in which was contained the wash were the bottles which were examined by the Chemical Examiner in respect

of which he made a report to the Magistrate. Accordingly, it was of the opinion that the convictions under ss. 65(b) and 66(b) could not stand.

On behalf of the appellants it was urged that no presumption under s. 103 of the Act could arise as it had not been established, on the findings of the High Court, that the still was an apparatus for the manufacture of any intoxicant as is ordinarily used in the manufacture of any intoxicant. It was further argued that no questions were put to the accused, when they were examined under s. 342 of the Code of Criminal Procedure, in this connection and therefore they had been denied the opportunity to rebut the presumption. The Presidency Magistrate had not used the provisions of s. 103 against the appellants because he had found that in fact illicit liquor had been recovered from the premises and that the still was for manufacturing such intoxicant. If the Presidency Magistrate had at all intended to use the presumption under s. 103 against the appellants, he was bound to have given them an opportunity to rebut it. If at the appellate stage the High Court was of the opinion that it had not been established that any illicit liquor had been recovered as a result of the search, then it ought not to have convicted the appellants on the presumption arising under s. 103 without giving the appellants an opportunity to rebut the same. In this case the offence under s. 65(f) would be the using, keeping or having in possession a still or apparatus for the purpose of manufacturing any intoxicant other than toddy. It was not established by the evidence that the still or apparatus recovered from the premises occupied by appellant No. 1 was one which is not ordinarily used for the manufacture of toddy.

It was further urged on behalf of appellant No. 2 that he could not be convicted either for being in possession of the still or under s. 65(f) read with s. 81, that is to say, abetment of an offence under s. 65(f) of the Act. This appellant was merely a servant of appellant No. 1. If any one was in possession of the still it was appellant No. 1. There was also no evidence to show that appellant No. 2 had abetted

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appellant No. 1 in coming into possession of the still. Appellant No. 2 was merely using the pump, presumably under the orders of his master, and as he could not be said to be in possession of the still, no presumption against this appellant could arise under s. 103 of the Act.

We would deal with the case of appellant No. 2 first. There is no evidence that he in any way aided his master to come into possession of the still. It would be reasonable to suppose that when he was using the pump he was doing so on the orders of his master and he may not have been aware of what was being manufactured, whatever suspicion may arise from his conduct. It cannot also be said that he was in possession of the still. The still was in the possession of his master. He was merely an employee in the premises and cannot be said to be in physical possession of things belonging to his master unless they were left in his custody. It seems to us that whatever suspicion there may be against the appellant No. 2 it cannot be said that it has been established beyond reasonable doubt that he was in such possession of the still as would amount to an offence under s. 65(f) of the Act. In the circumstances, no presumption could arise under s. 103 against him that he was in possession of the still for which he could not account satisfactorily. We would accordingly allow the appeal of appellant No. 2 and set aside his conviction and sentence.

So far as the appellant No. 1 is concerned, there can be no question that he was found in possession of a still which, having regard to the nature of the still as disclosed by the evidence, is ordinarily used for the manufacture of an intoxicant such as liquor. Having regard to the description of the still, as found on the record, we are satisfied that the still in question is not ordinarily used for the manufacture of toddy. Indeed, it is doubtful that any still is required for the manufacture of toddy because toddy is either fermented or not. If the toddy is unfermented the need for a still is unnecessary. On the other hand, if the toddy is fermented, the process of fermentation is a natural

one and does not require the aid of any apparatus to ferment it. It was said, however, that by heating the toddy, a higher degree of fermentation takes place and it becomes more potent. We have, however, no evidence on the record as to this. Even if we assume that toddy, when heated, becomes highly fermented and therefore more potent, there is nothing to show that the heating process to achieve this required an elaborate still of the kind found in the premises of appellant No. 1.

It was, however, pointed out that no questions were put to the appellant in order to give him an opportunity to rebut the presumption arising out of s. 103 of the Act. It is, however, to be remembered that when the appellant was examined under s. 342 of the Code of Criminal Procedure he had volunteered the statement that he did not know about the various contrabands seized by the police. Since this was his attitude in the matter, it is difficult to understand what further questions could have been put to him to explain the possession of the still and the various other articles found in the premises occupied by him. It is not possible to say in this particular case that this appellant had been prejudiced by the failure of the Magistrate to put to him any specific questions about the still and the other articles found in the premises occupied by him.

The presumption which arises under s. 103 of the Act is that an offence under the Act is committed where a person is found in mere possession, without further evidence, of any still, utensil, implement or apparatus whatsoever for the manufacture of any intoxicant as are ordinarily used in the manufacture of such intoxicant until the contrary is proved. It is difficult to conceive that the appellant could have given any satisfactory evidence to establish that the still and other articles found in the premises occupied by him could ordinarily be used for the manufacture of toddy. We are accordingly satisfied that there was no prejudice caused to the appellant, in the circumstances of the present case, when the High Court relied upon the presumption arising under s. 103

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to uphold his conviction under s. 65(f) of the Act. It was finally urged that the sentence should be reduced. In our opinion, the sentence imposed cannot be said to be unduly severe having regard to the provisions of the Act.

Accordingly, the appeal of appellant No. 2 is allowed and his conviction and sentence are set aside but the appeal of appellant No. 1 is dismissed.

Appeal disposed of accordingly.

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November 21.

M/S. DAMODAR VALLEY CORPORATION

v.

THE STATE OF BIHAR

(B. P. SINHA, C. J., S. J. IMAM, A. K. SARKAR, K. SUBBA RAO and J. C. SHAH, JJ.)

Sales Tax—Liability—Agreement to supply equipment and machinery to contractor—If a sale or hire—Test—Bihar Sales Tax Act, 1947 (19 of 1947) s. 2(g), 13(5), 25.

The appellant Corporation was assessed to sales tax under s. 13(5) of the Bihar Sales Tax Act, 1947, on the price of machinery and equipment, amounting approximately to Rs. 42,63,305, supplied to two contractor firms on the basis of an agreement which it entered into with them for the construction of a dam. The agreement provided, inter alia, that the price of the machinery and equipment supplied was to be paid by the contractors and until that was done they were to remain the property of the Corporation. It was further agreed that the Corporation would take them over after the completion of the work at their residual value, to be calculated in the manner set out in the agreement, provided that they were properly looked after during the period of operation; and if the contractors so chose earlier, if they were declared surplus and certified as such by the consulting Engineer. The price was to be paid in 18 equal instalments, two-thirds of which was realisable in any case, and thereafter the Corporation was to consider the date or dates of taking them over after assessment of the depreciation in order to arrive at the residual value. The Corporation was not bound to take over if the residual life of the equipment fell below one-third of the standard life as fixed by the parties.

The contractors were to replenish the stock of spare parts supplied to them at their own cost. The appellant's case was that the transaction represented by the agreement was not a sale within the meaning of the Act. The Sales Tax authorities held against it and the only question that was ultimately referred to the High Court by the Board of Revenue under s. 25 of the Act was whether the property in the equipment and machinery passed to the contractors and the transaction amounted to a sale. The High Court answered the question in the affirmative, holding that the transaction was a sale within the meaning of s. 2(g) of the Act. The High Court having refused the necessary certificate, the appellant appealed by special leave granted by this court.

Held, that the appeal must be confined to the question debated in the High Court. It is well settled that, while functioning in its advisory capacity under a taxing statute, the High Court cannot go beyond the question referred to it or on a reference called by it. That the appeal was by special leave could make no difference and the scope of the controversy could not be extended beyond what could be legally raised before the High Court.

The two fold test to determine whether a particular agreement is a contract of mere hiring or of purchase on deferred payments is (1) whether the hirer is under an obligation to purchase the goods and (2) whether he has the right to return the goods at any time during the subsistence of the contract. What has to be considered in each case is the substance of the agreement and not the words describing its category.

Helby v. *Matthews and others*, (1895) A.C. 471, referred to.

So judged, there could be no doubt that on the terms of the agreement between the parties the transaction in the instant case was clearly a sale on deferred payments with an option to repurchase and not a mere contract of hiring.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 285 of 1959.

Appeal by Special Leave from the Judgment and Decree dated the 13th July, 1956, of the Patna High Court in M. J. C. No. 404 of 1954.

M. C. Setalvad, Attorney-General for India and *S. P. Varma*, for the Appellants.

A. V. Viswanatha Sastri, *Suresh Aggarwala* and *D. P. Singh*, for the Respondent.

1960. November 21. The Judgment of the Court was delivered by

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SINHA, C.J.—This appeal, by special leave, is directed against the judgment and order of the High Court of Patna dated July 13, 1956 disposing of a reference under s. 25(1) of the Bihar Sales Tax Act, 1947, which hereinafter will be referred to as the Act, made by the Board of Revenue, Bihar.

The facts of this case have never been in dispute and may shortly be stated as follows. The appellant is a Corporation incorporated under the Damodar Valley Corporation Act (XIV of 1948) and will hereinafter be referred to as the Corporation. It is a multi-purpose Corporation, one of its objects being the construction of a number of dams in Bihar and Bengal with a view to controlling floods and utilising the stored water for purposes of generation of electricity. One of such dams is the Konar Dam in the district of Hazaribagh in Bihar. For the construction of the aforesaid Dam the Corporation entered into an agreement with Messrs Hind Construction Ltd. and Messrs Patel Engineering Co. Ltd. on May 24, 1950, and appointed them contractors for the aforesaid purpose. They will hereinafter be referred to as the Contractors. As a result of a change in the design of the Dam, it became necessary to enter into a supplementary agreement and on March 10, 1951, cl. 8 of Part II of the original agreement was amended and a fresh cl. 8 was substituted. Under the new cl. 8 of the agreement, as amended, the Corporation agreed to make available to the contractors such equipment as was necessary and suitable for the construction aforesaid. The Contractors are charged the actual price paid by the Corporation for the equipment and machinery thus made available, inclusive of freight and customs duty, if any, as also the cost of transport, but excluding sales tax. The equipment thus supplied by the Corporation to the Contractors was classified into two groups, Group A and Group B, as detailed in Schedule No. 2. The machinery in Group A was to be taken over from the Contractors by the Corporation, after the completion of the work at their "residual value" which was to be calculated in the manner set out in the agreement. The machinery in Group B was to become the

property of the Contractors after its full price had been paid by them. No more need be said about the machinery in Group B, because there is no dispute about that group, the Contractors having accepted the position that Group B machinery had been sold to them. The controversy now remaining between the parties relates to the machinery in Group A.

On August 12, 1952, the Superintendent of Sales Tax, Hazaribagh, assessed the Corporation under s. 13(5) of the Act for the period April, 1950 to March, 1952. It is not necessary to set out the details of the tax demand, because the amount is not in controversy. What was contended before the authorities below and in this Court was that the transaction in question did not amount to a "sale" within the meaning of the Act. The Superintendent rejected the contention raised on behalf of the Corporation that it was not liable to pay the tax in respect of the machinery supplied to the Contractors. The Corporation went up in appeal to the Deputy Commissioner of Sales Tax against the said order of assessment. By his order dated May 5, 1953, the Deputy Commissioner rejected the contention of the appellant as to its liability under the Act, but made certain amendments in the assessment, which are not material to the points in controversy before us. The Deputy Commissioner repelling the Corporation's contentions based on the Act, held *inter-alia* that the supply of equipment in Group A of the agreement aforesaid amounted to a sale and was not a hire; that the condition in the agreement for the "taking over" of the equipment on conditions laid down in the agreement was in its essence a condition of re-purchase and that the Corporation was a "dealer" within the meaning of the Act. The Corporation moved the Board of Revenue, Bihar, in its revisional jurisdiction under s. 24 of the Act. The Board of Revenue by its resolution dated October 1, 1953, rejected the revisional application and upheld the order of the authorities below. Thereafter, the Corporation made an application to the Board of Revenue under s. 25 of the Act for a reference to refer the following

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questions to the High Court at Patna, namely, (a) whether the assessment under s. 13(5) of the Act is maintainable, (b) whether, in the facts and circumstances of the case, it can be held that the property in the goods included in Schedule A did pass to the Contractors and the transaction amounted to a sale, and (c) whether the terms of the agreement amount to sale transactions with the Contractors and taking over by the Corporation amounts to re-purchase. This application was made on December 22, 1953, but when the application for making a reference to the High Court came up for hearing before the Board of Revenue on May 20, 1954, and after the parties had been heard, counsel for the Corporation sought leave of the Board to withdraw questions (a) and (c) from the proposed reference and the Board passed the following order:—

"Leave is sought by the learned advocate for the petitioner to drop questions (a) and (c) from the reference. The leave is granted. There remains only question (b) for reference to the High Court....."

Thus only question (b) set out above was referred to the High Court for its decision. After hearing the parties, a Division Bench of the High Court, Ramaswami, C. J. and Raj Kishore Prasad, J., heard the reference and come to the conclusion by its judgment dated July 13, 1956, that the reference should be answered in the affirmative, namely, that the transaction in question amounted to a sale within the meaning of s. 2(g) of the Act.

Thereupon the Corporation made an application headed as under Art. 132(1) of the Constitution and prayed that the High Court "be pleased to grant leave to appeal to the Supreme Court of India and grant the necessary certificate that this case is otherwise a fit case for appeal to the Supreme Court....."

Apart from raising the ground of attack dealt with by the High Court on the reference as aforesaid, the Corporation at the time of the hearing of the application appears to have raised other questions as would appear from the following extract from the judgment and order of the High Court dated January 31, 1957:—

"It was conceded by learned counsel for the petitioner that the case does not fulfil the requirements of Article 133(1) of the Constitution; but the argument is that leave may be granted under Article 132 of the Constitution as there is a substantial question of law with regard to the interpretation of the Constitution involved in this case. We are unable to accept this argument as correct. It is not possible for us to hold that there is any substantial question of law as to the interpretation of the Constitution involved in this case. The question at issue was purely a matter of construction of section 2(g) of the Bihar Sales Tax Act and that question was decided by this Court in favour of the State of Bihar and against the petitioner. It is argued now on behalf of the petitioner that the provisions of section 2(g) of the Bihar Sales Tax Act are ultra vires of the Constitution, but no such question was dealt with or decided by the High Court in the reference. We do not, therefore, consider that this case satisfies the requirements of Art. 132(1) of the Constitution and the petitioner is not entitled to grant of a certificate for leave to appeal to the Supreme Court under this Article.

The application is accordingly dismissed."

Having failed to obtain the necessary certificate from the High Court, the Corporation moved this Court and obtained special leave to appeal under Art. 136 of the Constitution. The leave was granted on March 31, 1958.

Though the scope of the decision of the High Court under s. 25 of the Act on a reference made to it is limited, the Corporation has raised certain additional points of controversy, which did not form part of the decision of the High Court. Apart from the question whether the transaction in question amounted to a sale within the meaning of the Act, the statement of the case on behalf of the appellant raises the following additional grounds of attack, namely, (1) that the Corporation is not a dealer within the meaning of the Act, (2) that the proviso to s. 2(g) of the Act is *ultra vires* the Bihar Legislature and (3) that the Act itself is *ultra vires* the Bihar Legislature by reason of the

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legislation being beyond the scope of entry 48 in List II of Schedule 7 of the Government of India Act, 1935. Hence, a preliminary objection was raised on behalf of the respondent that the additional grounds of attack were not open to the Corporation in this Court. It is, therefore, necessary first to determine whether the additional grounds of attack set out above are open to the Corporation. In our opinion, those additional grounds are not open. They were never raised at any stage of the proceedings before the authorities below, or in the High Court. This Court is sitting in appeal over the decision of the High Court under s. 25 of the Act. The High Court in coming to its conclusion was acting only in an advisory capacity. It is well settled that the High Court acting in its advisory capacity under the taxing statute cannot go beyond the questions referred to it, or on a reference called by it. The scope of the appeal to this Court, even by special leave, cannot be extended beyond the scope of the controversy that could have been legally raised before the High Court. It is manifest that the High Court could not have expressed its opinion on any matter other than the question actually before it as a result of the reference made by the Board of Revenue. The preliminary objection must, therefore, be allowed and the appeal limited to the question whether the transaction in question in this case amounted to a sale within the meaning of the Act.

It is manifest that this controversy between the parties has to be resolved with reference to the terms of the contract itself. Clause 8 of the agreement as amended is a very complex one as will presently appear from the following extracts, being the relevant portions of that clause :—

"The Corporation may hire or make available such of its equipment as is suitable for construction for the use of the Contractor. The actual prices paid by the Corporation for the equipment thus made available, inclusive of freight, insurance and custom duties, if any, and the cost of its transport to site but excluding such tax as sales tax whether local, municipal, State or Central, shall be charged to the

Contractor and the equipment shall remain the property of the Corporation until the full prices thereof have been realised from the Contractor. Equipment lent for the Contractor's use, if any, shall be charged to him on terms of hiring to be mutually agreed upon; such terms will cover interest on capital cost and the depreciation of the equipment.

The Corporation will supply to the Contractor the machinery mentioned in Schedule No. 2, Group A and Group B below."

Then follows a description seriatim of the many items of machinery in Group A with the number of such machinery and the approximate cost thereof. In this Group A, there are fourteen items of which it is only necessary to mention the first one, that is to say, four excavators with accessories approximately valued at Rs. 12,46,390; and no. 14, two excavators of another model, approximately costing Rs. 3,35,000. The total approximate cost of the machinery in Group A is estimated to be Rs. 42,63,305. Then follow the descriptions of machinery in Group B, the approximate cost of which is Rs. 21,84,148. Then follow certain conditions in respect of equipments included in Group A, in these words:—

"The Corporation will take over from the Contractor item 1 and 14 on the completion of the work at a residual value calculated on the basis of the actual number of hours worked assuming the total life to be 30,000 hours and assuming that the machinery will be properly looked after during the period of its operation. The remaining items of this group will be taken over by the Corporation at their residual value taking into account the actual number of hours worked and the standard life of such machinery for which Schedule F, as last relised, ? of the U. S. Bureau of Industrial Revenue, on the probable useful life and depreciation rates allowable for Income Tax purpose (vide Engineering News Record dated March 17, 1949) will serve as a basis, provided that the machinery shall be properly looked after by the Contractor during the period of its operation. Provided further that such residual value of the machinery shall be assessed

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jointly by representatives of the Corporation and of the Contractor and that in case of difference of opinion between the two parties the matter shall be settled through arbitration by a third party to be agreed to both by the Corporation and the Contractor.

The items included in this group will be taken over by the Corporation from the Contractor either on the completion of the work or at an earliar date if the Contractor so wishes, provided that in the latter case the equipments will be taken over by the Corporation only when they are declared surplus at Konar and such declaration is duly certified by the Consulting Engineer, within a period of 15 days of such declaration being received by the Corporation.

In respect of the machinery which shall have been delivered to the Contractor on or before the 31st of December 1950, their cost shall be recovered from the Contractor in eighteen equal instalments beginning with January 1951 and in respect of the remaining items included in this group of machinery, their cost will be recovered from the Contractor in eighteen equal instalments beginning with July 1951, provided that these remaining items shall have been delivered to the Contractor prior to the last specified date. Provided—

(a) that the total actual price for these equipments which has been provisionally estimated at Rs. 42,63,305 will be chargeable to the Contractor as per first para of clause 1 above.

(b) that after approxmimately two thirds of total cost or an amount of Rs. 28,43,000 (Rupees twenty eight lakhs forty three thousand) approximately has been recovered from the Contractor on account of these equipments the Corporation will consider the date or dates when it could take over the equipments still under use by the Contractor, assess the extent to which they have already been depreciated and thereby arrive at their residual value; and

(c) that the recovery or refund of the amount payable by or to the Contractor on account of these equipments will be decided only if the Corporation is fully satisfied that their residual life at the time of

their being finally handed over to the Corporation shall under no circumstances fall below one third of their respective standard life as agreed upon by the Corporation and the Contractor."

Then follow terms and conditions in respect of Group 'B' which are not relevant to our purpose. Thereafter, the following conditions appear:—

"In respect of equipments whether in Group A or B made available by the Corporation to the Contractor.

The following conditions shall apply to all equipments, i.e., those included in Group A and B above and others, if any;

(a) The Contractor shall continuously maintain proper machine cards separately in respect of each item of equipment, clearly showing therein, day by day, the number of actual hours the machine has worked together with the dates and other relevant particulars.

(b) The Contractor shall maintain all such equipments in good running condition and shall regularly and efficiently give service to all plant and machinery, as may be required by the Corporation's Chief Engineer who shall have the right to inspect, either personally or through his authorised representatives all such plant and equipment and the machine cards maintained in respect thereof at mutually convenient hours.

(c) No item of equipment made available by the Corporation on loan or hire shall at any time be removed from the work site under any circumstances until the full cost thereof has been recovered from the Contractor by the Corporation and thereafter only if in the opinion of the Consulting Engineer the removal of such item or items is not likely to impede the satisfactory prosecution of the work.

Similarly no item of equipment or material belonging to the Contractor but towards the cost of which money has been advanced by the Corporation shall at any time be removed from the work site under any circumstances until the amount of money so advanced has been recovered from the Contractor by

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the Corporation and thereafter if in the opinion of the Consulting Engineer the removal of such item or items is not likely to impede the satisfactory prosecution of the work.

(d) The Corporation shall supply to the Contractor whatever spares have been procured or ordered for the equipment already supplied or to be supplied by the Corporation to the Contractor under the terms of this Agreement and that thereafter the replenishment of the stock of spares shall be entirely the responsibility of the Contractor who shall therefore take active steps in time to procure fresh spares so as to maintain a sufficient reserve.

The spares to be supplied by the Corporation will be issued to the Contractor by the Executive Engineer, Konar as and when required by the Contractor against indent accompanied by a certificate that the spares previously issued to him have been actually used up on the machines for which they were intended.

(e) Whenever spares are issued to the Contractor in accordance with this provision, their actual prices inclusive of freight, insurance and customs but excluding storage and handling charges shall be debited against him and recovered from his next fortnightly bill.

(f) In order to enable the Contractor to take active steps for planning the procurement of additional spares in advance, the Corporation shall forthwith furnish to him a complete list of all the spares which it has procured or ordered for the equipment to be supplied to the Contractor."

The portions quoted above contain the relevant terms and conditions in respect of the transaction in question, so far as it is necessary to know them for the purpose of this case. It will be noticed that the Corporation made available to the Contractors different kinds of machinery and equipment detailed in Group A of the approximate value of Rs. 42,63,000 odd, for which the price paid by the Corporation inclusive of freight, insurance, customs duty etc. has to be charged to them. But the machinery and the equipment so

made available to the Contractors were to remain the property of the Corporation until the full price thereof had been realised from the Contractors. It is also noteworthy that the agreement makes a distinction between the aforesaid part of the agreement and the equipment lent to the contractors in respect of which the contractors had to be charged in terms of hiring, including interest on capital cost and the depreciation of equipment. Thus clearly the agreement between the parties contemplated two kinds of dealings between them, namely (1) the supply of machinery and equipments by the Corporation to the Contractors and (2) loan on hire of other equipment on terms to be mutually agreed between them in respect of the machinery and equipment supplied by the Corporation to the Contractors. There is a further condition that the Corporation will take over from the contractors items 1 and 14, specifically referred to above, and the other items in Group A at their "residual value" calculated on the basis indicated in the paragraph following the description of the machinery and the equipments. But there is a condition added that the "taking over" is dependent upon the condition that the machinery will be properly looked after during the period of its operation. There is an additional condition to the taking over by the Corporation, namely, the work for which they were meant had been completed, or earlier, at the choice of the Contractors, provided that they are declared surplus for the purposes of the construction of the Konar Dam and so certified by the Consulting Engineer. Hence, it is not an unconditional agreement to take over the machinery and equipment as in GroupB. The total approximate price of Rs. 42,63,305 is payable by the Contractors in 18 equal instalments. Out of the total cost thus made realisable from the Contractors two-thirds, namely, Rs. 28,42,000 approximately, has to be realised in any case. After the two-thirds amount aforesaid has been realised from the contractors on account of supply of the equipments by the Corporation, the Corporation had to consider the date or dates of the "taking over" of the equipment after assessing the extent to which it

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had depreciated as a result of the working on the project in order to arrive at the "residual value" of the same. The refund of the one third of the price or such other sum as may be determined as the "residual value" would depend upon the further condition that the Corporation was fully satisfied that their "residual life" shall, under no circumstances, fall below one-third of their respective standard life as agreed upon by the parties. It would, thus, appear that the "taking over" of such of the equipments as were available to be returned was not an unconditional term. The Corporation was bound to take them over only if it was satisfied that their "residual life" was not less than one-third of the standard life fixed by the parties. It is clear from the terms and conditions quoted above that there was no right in the contractors to return any of the machinery and equipments at any time they liked, or found it convenient to do so. The conditions which apply to all equipments, whether in Group A or in Group B, are also relevant to determine the nature of the transaction. The contractors are required to "continuously maintain proper machine cards showing certain relevant particulars". It is their duty to maintain the equipments in good running condition and to regularly and effectively service them. No item of machinery and equipment could be removed by the contractors under any circumstances until the full cost thereof had been recovered from them and even then only if the removal of those items of machinery or equipment was not likely to impede the satisfactory progress of the work. Then follows the most important condition that the Contractors themselves shall have to replenish their stock of spare parts of the machinery made available to them by the Corporation. When spare parts are supplied to the Contractors by the Corporation, they shall be liable for the actual price of those parts inclusive of freight, insurance and customs duty.

Those substantially are the terms of the contract between the parties and the sole question for determination in this appeal is whether, in respect of the machinery and equipments admittedly supplied by the Corporation to the Contractors, it was a mere

contract of hiring, as contended on behalf of the appellant Corporation, or a sale or a hire purchase, as contended on behalf of the respondent State. The law on the subject is not in doubt, but the difficulty arises in applying that law to the facts and circumstances of a particular case on a proper construction of the document evidencing the transaction between the parties. It is well settled that a mere contract of hiring, without more, is a species of the contract of bailment, which does not create a title in the bailee, but the law of hire purchase has undergone considerable development during the last half a century or more and has introduced a number of variations, thus leading to categories, and it becomes a question of some nicety as to which category a particular contract between the parties comes under. Ordinarily, a contract of hire purchase confers no title on the hirer, but a mere option to purchase on fulfilment of certain conditions. But a contract of hire purchase may also provide for the agreement to purchase the thing hired by deferred payments subject to the condition that title to the thing shall not pass until all the instalments have been paid. There may be other variations of a contract of hire purchase depending upon the terms agreed between the parties. When rights in third parties have been created by acts of parties or by operation of law, the question, which does not arise here, may arise as to what exactly were the rights and obligations of the parties to the original contract. It is equally well-settled that for the purpose of determining as to which category a particular contract comes under, the court will look at the substance of the agreement and not at the mere words describing the category. One of the tests to determine the question whether a particular agreement is a contract of mere hiring or whether it is a contract of purchase on a system of deferred payments of the purchase price is whether there is any binding obligation on the hirer to purchase the goods. Another useful test to determine such a controversy is whether there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract. If there is such a right reserved, then

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clearly there is no contract of sale, vide *Helby* v. *Matthews and others* (1). Applying these two tests to the transaction in the present case, it becomes clear that it was a case of sale of goods with a condition of repurchase on certain conditions depending upon the satisfaction of the Corporation as to whether the "residual life" of the machinery or the equipment was not less than one-third of the standard life in accordance with the terms agreed between the parties. It is clear on those terms that there is no right reserved to the contractors to return the goods at any time that they found it convenient or necessary. On the other hand, they were bound to pay two-thirds of the total approximate price fixed by the parties in equal instalments. The Contractors were not bound under the terms to return any of the machinery or the equipments, nor was the Corporation bound to take them back unconditionally. The term in the agreement regarding the "taking over" of the machinery or equipments by the Corporation on payment of the "residual value" is wholly inconsistent with a contract of mere hiring and is more consistent with the property in the goods having passed to the Contractors, subject to the payment of all the instalments of the purchase price. Furthermore, the stipulation that the Contractors themselves will have to supply the spare parts, as and when needed, for replacements of the worn out parts is also consistent with the case of the respondent that title had passed to the contractors and that they were responsible for the upkeep of the machinery and equipments and for depreciation. If it were a mere contract of hiring, the owner of the goods would have continued to be liable for replacements of worn out parts and for depreciation. Applying those tests to the terms of the agreement between the parties, it is clear that the transaction was a sale on deferred payments with an option to re-purchase and not a mere contract of hiring, as contended on behalf of the appellant.

It must, therefore, be held that the judgment of the High Court is entirely correct and the appeal must be dismissed with costs.

Appeal dismissed.

(1) (1895) A.C. 471.

THE HINGIR-RAMPUR COAL CO., LTD. AND OTHERS

v.

THE STATE OF ORISSA AND OTHERS

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November 21.

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Mining Areas, Development of--Enactment by State Legislature authorising constitution of mining areas and development fund—Imposition of cess—Constitutional validity—Competency of State Legislature—Orissa Mining Areas Development Fund Act, 1952 (Orissa XXVII of 1952), s. 4—Constitution of India, Art. 372, Seventh Schedule, List II, Entry 23, 66, List I, Entries 52, 54, 84—Adaptation of Laws Order, 1950, cls. 16, 21.

The petitioners challenged the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, which by s. 3 empowered the State Government to constitute mining areas for the purpose of providing them with certain amenities after hearing objections from the lessees, by s. 4 to impose and collect a cess not exceeding 5% of the valuation of the minerals at the pit's mouth and by s. 5 created a fund to which the cess was to be credited. The petitioners' case, inter alia, was that the impugned Act and the rules made thereunder were *ultra vires* the powers of the State Legislature, the cess levied thereunder was not a fee but a duty of excise on coal within Entry 84 of List I of the Seventh Schedule to the Constitution and repugnant to Coal Mines Labour Welfare Fund Act, 1947 (Act XXXII of 1947), and, alternatively, even supposing it was a fee relatable to Entries 23 and 66 of List II, it was hit by Entry 54 of List I read with the Mines and Minerals (Regulation and Development) Act 1948 (Act LIII of 1948), or by Entry 52 of List I read with the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951). It was urged on behalf of the State, inter alia, that the cess was a fee and not a duty of excise and the competence of the State Legislature to levy it was not affected by the Central Acts.

Held (per Gajendragadkar, Sarkar, Subba Rao and Mudholkar, JJ.), that the cess imposed by the Act was a fee relatable to Entries 23 and 66 of List II of the Seventh Schedule to the Constitution and the Constitutional validity of the impugned Act was beyond question.

Although there can be no generic difference between a tax and a fee since both are compulsory exactions of money by public authorities, there is this distinction between them that whereas a tax is imposed for public purposes and requires no consideration to support it, a fee is levied essentially for services rendered and there must be an element of *quid pro quo* between the person

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who pays it and the public authority that imposes it. While a tax invariably goes into the consolidated fund, a fee is earmarked for the specified services in a fund created for the purpose. Whether a cess is one or the other would naturally depend on the facts of each case. If in the guise of a fee, the Legislature imposes a tax, it is for the Court on a scrutiny of the scheme of the levy, to determine its real character. The distinction is recognised by the Constitution which while empowering the appropriate Legislatures to levy taxes under the Entries in the three lists refers to their power to levy fees in respect of any such matters, except the fees taken in court, and tests have been laid down by this Court for determining the character of an impugned levy.

Matthews v. *Chicory Marketing Board,* 60 C.L.R. 263, *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* [1954] S.C.R. 1005, *Mahant Sri Jagannath Ramanuj Das & Anr.* v. *The State of Orissa,* [1954] S.C.R. 1046, and *Ratilal Panachand Gandhi* v. *The State of Bombay,* [1954] S.C.R. 1055, referred to.

P. P. Kutti Keva & Ors. v. *The State of Madras,* A.I.R. 1954 Mad. 621, *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.,* (1950) A.C. 87 and *Parton & Anr.* v. *Mils Board (Victoria),* (1949) 80 C.L.R. 229, considered and held inapplicable.

In determining whether a levy is a fee the true test must be whether its primary and essential purpose is to render specific services to a specified area or class, it being of no consequence that the State may ultimately and indirectly be benefited by it.

So judged, the scheme of the impugned Act leaves no manner of doubt that the levy authorised by it is a fee and not a tax.

The amount of the levy must depend on the extent of the services sought to be rendered and if they are proportionate, it would be unreasonable to say that since the impost is high it must be a duty of excise. The rate specified by s. 4(2) of the Act, therefore, cannot by itself alter the character of the levy and constitute a trespass by the State Legislature on the legislative powers of the Parliament under Entry 84 of the List I.

Nor can the method prescribed by the Legislature for recovering the levy by itself alter its character. The method is a matter of convenience and, though relevant, has to be tested in the light of other relevant circumstances. It is not permissible to challenge the *vires* of a statute relatable to an Entry in List II solely on the ground that the method adopted for the recovery of the impost can and generally is adopted in levying a duty of excise.

Ralla Ram v. *The Province of East Punjab,* [1948] F.C.R. 207, *Byramjee Jeejeebhoy* v. *The Province of Bombay & Anr.* I.L.R.

1940 Bom. 58 and *Governor-General in Council* v. *Province of Madras*, (1945) L.R. 72 I.A. 91, considered.

The limitation imposed by the latter part of Entry 23 of List II is a limitation on the legislative competence of the State Legislature itself and the test whether a statute passed by the State Legislature thereunder was *ultra vires* would be whether the requisite declaration under Entry 54, List I, has been made by Parliament by law covering the same field or not; it is not necessary in order to make the declaration effective that rules should also be made and enforced.

Although by operation of Art. 372 of the Constitution Act LIII of 1948 was an existing Act substantially covering the same field as covered by the impugned Act, there was no adaptation of s. 2 of that Act whereby a declaration implied by it could be said to have been adapted to a declaration by Parliament. Clause 16 of the Adaptation of Laws Order, 1950, properly construed, cannot be held to refer to the Dominion Legislature and equate it with the Parliament. It can be resorted to only where the existing law expressly refers to some authority that can be equated with the corresponding new authorities. Since the Dominion Legislature was not so referred to, its competence under the Constitution Act of 1935, repealed by the Constitution of India, was clearly outside the clause. Nor can cl. 21 of the order be of any help to the petitioners.

Consequently, in the absence of the requisite Parliamentary declaration, the competence of the Orissa State Legislature under Entry 23 read with Entry 66 of the List II was not impaired and the impugned Act must be deemed to have repealed the Central Act, so far as that State was concerned.

This case incidentally discloses that in regard to the requisite Parliamentary declaration prescribed by Entry 54 in List I in its application to the pre-constitution Acts under corresponding Entry 36 in List I of the Constitution Act of 1935, there is a lacuna which has not been covered by any clauses of the Adaptation of Laws Order, 1950.

Nor was the impugned Act *ultra vires* the State Legislature by operation of Entry 52 of List I read with s. 2 of the Industries (Development and Regulation) Act, 1951 (LXV of 1951). That Act, in pith and substance, deals more directly with the control of certain specified industries including the coal industry, while the impugned Act is concerned with the development of the mining areas notified under it. The field covered by the two Acts was not, therefore, the same.

Per Wanchoo, J.—In order to determine whether a levy is a tax or a fee, what has to be considered is the pith and substance of the levy. Where the levy in pith and substance is not essentially different from a tax, it cannot be converted into a fee by crediting it to a special fund and attaching certain services to it.

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The Commissioner, Hindu Religious Endowments, Madras, v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, [1954] S.C.R. 1005, *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*, [1954] S.C.R. 1046 and *Ratilal Panachand Gandhi* v. *The State of Bombay*, [1954] S.C.R. 1055, discussed.

A duty of excise in pith and substance is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is different and distinct from a sales tax and in law they do not overlap.

Governor-General in Council v. *Province of Madras*, 72 I.A. 91, referred to.

What the impugned Act did was to provide for the levying of the cess on the goods produced at a rate not exceeding five per centum of the value at the pit's mouth. The cess was, therefore, in pith and substance a duty of excise falling within Entry 84 of List I, which the State legislature could not levy.

It was not correct to say that the method employed by the impugned Act for realising the cess was a mere method of quantification and did not affect its character which was that of a fee. In the present case the very mode of the levy of the cess is nothing other than the levy of a duty of excise, and, therefore, the principle of quantification for purposes of a fee could not be so extended as to convert what was in pith and substance a tax into a fee.

Sri Byramjee Jeejeebhoy v. *The Province of Bombay*, I.L.R. 1940 Bom. 58, *Municipal Corporation, Ahmedabad* v. *Patel Gordhandas Hargovandas*, I.L.R. 1954 Bom. 41 and *Ralla Ram* v. *The Province of East Punjab*, [1948] F.C.R. 207, considered.

K. C. Gajapati Narayan Deo v. *The State of Orissa*, [1954] S.C.R. 1, referred to.

The cess levied under s. 4 of the Act could not be justified as a tax on mineral rights under Entry 50 of List II of the Seventh Schedule and the impugned Act was in effect a colourable piece of legislation.

ORIGINAL JURISDICTION: Petition No. 87 of 1959.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

M. P. Amin, Dara P. Mehta, P. M. Amin, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra* for the petitioners.

A. V. Viswanatha Sastri, R. Ganapathy Iyer, P. Kesava Pillai and *T. M. Sen*, for the respondents.

H. N. Sanyal, Additional Solicitor-General of India, B. Sen and *R. H. Dhebar*, for the Intervener.

1960. November, 21. The Judgment of P. B. Gajendragadkar, A. K. Sarkar, K. Subba Rao and J. R. Mudholkar, JJ., was delivered by P. B. Gajendragadkar J., K. N. Wanchoo, J., delivered a separate judgment.

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GAJENDRAGADKAR, J.—This is a petition filed under Art. 32 of the Constitution in which the validity of the Orissa Mining Areas Development Fund Act, 1952 (XXVII of 1952), is challenged. The first petitioner is a public limited company which has its registered office at Bombay. A large majority of its shareholders are citizens of India; some of them are themselves companies incorporated under the Indian Companies Act. Petitioners Nos. 2 to 7 are the Directors of Petitioner No. 1, the second petitioner being the Chairman of its Board of Directors. These petitioners are all citizens of India. At all material times the first petitioner carried on and still carries on the business of producing and selling coal excavated from its collieries at Rampur in the State of Orissa. Two leases have been executed in its favour; the first was executed on October 17, 1941, by the Governor of Orissa whereby all that piece or parcel of land in the registration district of Sambalpur admeasuring about 3341.79 acres has been demised for a period of 30 years commencing from September 1, 1939, in consideration of the rent reserved thereby and subject to the covenants and conditions prescribed thereunder; and the second is a surface lease executed in its favour by Mr. Mohan Brijraj Singh Deo on April 19, 1951, in relation to a land admeasuring approximately 211.94 acres for a like period of 30 years commencing from February 4, 1939, in consideration of the rent and subject to the terms and conditions prescribed by it.

Pursuant to s. 5 of the Orissa Estates Abolition Act, 1951, all the right, title and interest of the Zamindar of Rampur in the lands demised to the first petitioner under the second lease vested in respondent 1, the State of Orissa. Since then the first petitioner has duly paid the rent reserved by the said lease to the appropriate authorities appointed by respondent 1,

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and has observed and performed all the conditions and convenants of the said lease. In exercise of its rights under the said two leases the first petitioner entered upon the lands demised and has been carrying on the business of excavating and producing coal at its collieries at Rampur.

In December, 1952, the Legislature of the State of Orissa passed the impugned Act; and it received the assent of the Governor of Orissa on December 10, 1952. It was, however, not reserved for the consideration of the President of India nor has it received his assent. In pursuance of the rule-making power conferred on it by the impugned Act respondent 1 has purported to make rules called the Orissa Mining Areas Development Act Rules, 1955; these rules have been duly notified in the State Gazette on January 25, 1955.

Subsequently, the Administrator, respondent 2, appointed under the impugned Act issued a notification on June 24, 1958, whereby the first petitioner's Rampur colliery has been notified for the purpose of liability for the payment of cess under the impugned Act. The area of this colliery has been determined at 3341·79 acres. In its appeal filed under rule 3 before the Director of Mines the first petitioner objected to the issue of the said notification, *inter alia*, on the ground that the impugned Act and the rules framed under it were *ultra vires* and invalid; no action has, however, been taken on the said appeal presumably because the authority concerned could not entertain or deal with the objections about the vires of the Act and the rules.

Thereafter on March 26, 1959, the Assistant Administrative Officer, respondent 3, called upon the first petitioner to submit monthly returns for the assessment of the cess. The first petitioner then represented that it had filed an appeal setting forth its objections against the notification, and added that until the said appeal was disposed of no returns would be filed by it. In spite of this representation respondent 3, by his letter of May 6, 1959, called upon the

first petitioner to submit monthly returns in the prescribed form and issued the warning that failing compliance the first petitioner would be prosecuted under s. 9 of the impugned Act. A similiar demand was made and a similar warning issued by respondent 3 by his letter dated June 6, 1959. It is under these circumstances that the present petition has been filed.

The petitioners contend that the impugned Act and the rules made thereunder are *ultra vires* the powers of the Legislature of the State of Orissa, or in any event they are repugnant to the provisions of an existing law. According to the petition the cess levied under the impugned Act is not a fee but is in reality and in substance a levy in the nature of a duty of excise on the coal produced at the first petitioner's Rampur colliery, and as such is beyond the legislative competence of the Orissa Legislature. Alternatively it is urged that even if the levy imposed by the impugned Act is a fee relatable to Entries 23 and 66 in List II of the Seventh Schedule, it would nevertheless be *ultra vires* having regard to the provisions of Entry 54 in List I read with Central Act LIII of 1948. The petitioners further allege that even if the said levy is held to be a fee it would be similarly *ultra vires* having regard to Entry 52 in List I read with Central Act LXV of 1951. According to the petitioners the impugned Act is really relatable to Entry 24 in List III, and since it is repugnant with Central Act XXXII of 1947 relatable to the same Entry and covering the same field the impugned Act is invalid to the extent of the said repugnancy under Art. 254. On these allegations the petitioners have applied for a writ of *mandamus* or a writ in the nature of the said writ or any other writ, order or direction prohibiting the respondents from enforcing any of the provisions of the impugned Act against the first petitioner; a similar writ or order is claimed against respondent 3 in respect of the letters addressed by him to the 1st petitioner on March 3, 1959 and June 6, 1959.

This petition is resisted by respondent 1 on several grounds. It is urged on its behalf that the levy

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imposed by the impugned Act is a fee relatable to Entries 23 and 66 in List II and its validity is not affected either by Entry 54 read with Act LIII of 1948 or by Entry 52 read with Act LXV of 1951. In the alternative it is contended that if the said levy is held to be a tax and not a fee, it would be a tax relatable to Entry 50 in List II, and as such the legislative competence of the State Legislature to impose the same cannot be successfully challenged. Respondent 1 disputes the petitioner's contention that the impugned Act is relatable to Entry 24 in List III; and so, according to it, no question of repugnancy with the Central Act XXXII of 1947 arises.

After this appeal was fully argued before us Mr. Amin suggested—and Mr. Sastri did not object—that we should hear the learned Attorney-General on the question as to whether even if the levy imposed by the impugned Act is a fee relatable to Entries 23 and 66 in List II of the Seventh Schedule, it would nevertheless be *ultra vires* having regard to the provisions of Entry 54 in List I read with Central Act LIII of 1948. Accordingly we directed that a notice on this point should be served on the learned Attorney-General and the case should be set down for hearing on that point again. For the learned Attorney-General the learned Additional Solicitor-General appeared before us in response to this notice and we have had the benefit of hearing his arguments on the point in question.

The first question which falls for consideration is whether the levy imposed by the impugned Act amounts to a fee relatable to Entry 23 read with Entry 66 in List II. Before we deal with this question it is necessary to consider the difference between the concept of tax and that of a fee. The neat and terse definition of tax which has been given by Latham, C. J., in *Matthews* v. *Chicory Marketing Board*(1) is often cited as a classic on this subject. "A tax", said Latham, C. J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this defini-

(1) (1938) 60 C.L.R. 263, 276.

tion also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of *quid pro quo* between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of *quid pro quo* between the tax-payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an

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excessive extent as to be a pretence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court.

The question about the distinction between a tax and a fee has been considered by this Court in three decisions in 1954. In *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1) the vires of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951), came to be examined. Amongst the sections challenged was s. 76(1). Under this section every religious institution had to pay to the Government annual contribution not exceeding 5% of its income for the services rendered to it by the said Government; and the argument was that the contribution thus exacted was not a fee but a tax and as such outside the competence of the State Legislature. In dealing with this argument Mukherjee, J., as he then was, cited the definition of tax given by Latham, C.J., in the case of *Matthews* (2), and has elaborately considered the distinction between a tax and a fee. The learned judge examined the scheme of the Act and observed that "the material fact which negatives the theory of fees in the present case is that the money raised by the levy of the contribution is not earmarked or specified for defraying the expense that the Government has to incur in performing the services. All the collections go to the consolidated fund of the State and all the expenses have to be met not out of those collections but out of the general revenues by a proper method of appropriation as is done in the

(1) [1954] S.C.R. 1005. (2) (1938) 60 C.L.R. 263.

case of other Government expenses". The learned judge no doubt added that the said circumstance was not conclusive and pointed out that in fact there was a total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution. That is why s. 76(1) was struck down as *ultra vires*.

The same point arose before this Court in respect of the Orissa Hindu Religious Endowments Act, 1939, as amended by amending Act II of 1952 in *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa* (1). Mukherjea, J., who again spoke for the Court, upheld the validity of s. 49 which imposed the liability to pay the specified contribution on every Mutt or temple having an annual income exceeding Rs. 250 for services rendered by the State Government. The scheme of the impugned Act was examined and it was noticed that the collections made under it are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute a fund which is contemplated by s. 50 of the Act, and this fund to which the Provincial Government contributes both by way of loan and grant is specifically set apart for the rendering of services involved in carrying out the provisions of the Act. The same view was taken by this Court in regard to s. 58 of the Bombay Public Trust Act, 1950 (Act XXIX of 1950) which imposed a similar contribution for a similar purpose in *Ratilal Panachand Gandhi* v. *The State of Bombay* (2). It would thus be seen that the tests which have to be applied in determining the character of any impugned levy have been laid down by this Court in these three decisions; and it is in the light of these tests that we have to consider the merits of the rival contentions raised before us in the present petition.

On behalf of the petitioners Mr. Amin has relied on three other decisions which may be briefly considered. In *P. P. Kutti Keya* v. *The State of Madras* (3), the Madras High Court was called upon to consider, *inter*

(1) [1954] S.C.R. 1046. (2) [1954] S.C.R. 1055.
(3) A.I.R. 1954 Mad. 621.

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alia, the validity of s. 11 of the Madras Commercial Crops Markets Act 20 of 1933 and Rules 28(1) and 28(3) framed thereunder. Section 11(1) levied a fee on the sales of commercial crops within the notified area and s. 12 provided that the amounts collected by the Market Committee shall be constituted into a Market Fund which would be utilised for acquiring a site for the market, constructing a building, maintaining the market and meeting the expenses of the Market Committee. The argument that these provisions amounted to services rendered to the notified area and thus made the levy a fee and not a tax was not accepted by the Court. Venkatarama Aiyar, J., took the view that the funds raised from the merchants for a construction of a market in substance amounted to an exaction of a tax. Whether or not the construction of a market amounted to a service to the notified area it is unnecessary for us to consider. Besides, as we have already pointed out we have now three decisions of this Court which have authoritatively dealt with this matter, and it is in the light of the said decisions that the present question has to be considered.

In *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.* (1), the Privy Council had to deal with the validity of forest protection impost levied by the relevant section of the Forest Act R. S. B. C. 1936. The lands in question were statutorily exempted from taxation, and it was urged against the validity of the impost that the levy of the said impost was not a service charge but a tax; and since it contravened the exemption from taxation granted to the land it was invalid. This plea was upheld by the Privy Council. The Privy Council did consider two circumstances which were relevant; the first that the levy was on a defined class of interested individuals, and the second that the fund raised did not fall into the general mass of the proceeds of taxation but was applicable for a special and limited purpose. It was conceded that these considerations were relevant but the Privy Council thought that the weight to be attached to them should not be exagge-

(1) (1950) A.C. 87.

rated. In appreciating the weight of the said relevant circumstances the Privy Council was impressed by the fact that the lands in question formed an important part of the national wealth of the Province and their proper administration, including in particular protection against fire, is a matter of high public concern as well as one of particular interest to individuals. In other words, the effect of the impugned provision was that the expenses of what was the public service of the greatest importance for the Province as a whole had been divided between the general body of taxpayers and those individuals who had a special interest in having their property protected. It would thus appear that this decision proceeded on the basis that what was claimed to be a special service to the lands in question was in reality an item in public service itself, and so the element of *quid pro quo* was absent. It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefitting the specified class or area the State as a whole may ultimately and indirectly be benefitted would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy.

In *Parton* v. *Milk Board (Victoria)* (1), the validity of the levy imposed on dairymen and owners of milk depots by s. 30 of the Milk Board Act of 1933 as amended by subsequent Acts of 1936-1939 was

(1) (1949) 80 C.L.R. 229.

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challenged, and it was held by Dixon, J., that the levy of the said contribution amounted to the imposition of a duty of excise. This decision was substantially based on the ground that the statutory board "performs no particular service for the dairyman or the owner of a milk depot for which his contribution may be considered as a fee or recompense"; that is to say the element of *quid pro quo* was absent *qua* the persons on whom the levy had been imposed. Therefore none of the decisions on which Mr. Amin has relied can assist his case.

Let us now examine the scheme of the impugned Act. As the preamble shows it has been passed because it was thought expedient to constitute mining areas and a Mining Areas Development Fund in the State of Orissa. It consists of 11 sections. Section 3 of the Act provides for the constitution of a mining area whenever it appears to the State Government that it is necessary and expedient to provide amenities like communications, water-supply and electricity for the better development of any area in the State of Orissa wherein any mine is situated, or to provide for the welfare of the residents or to workers in any such areas within which persons employed in a mine or a group of mines reside or work. Under this section the State Government has to define the limits of the area and is given the power to include within such area any local area contiguous to the same or to exclude from such area any local area comprised therein; that is the effect of s. 3(1). Section 3(2) empowers the owner or a lessee of a mine or his duly constituted representative in the said arca to file objections in respect of any notification issued under s. 3(1) within the period specified, and the State Government is required to take the said objection into consideration. After considering objections received the State Government is authorised to issue a notification constituting a mining area under s. 3(3). Section 4 deals with the imposition and collection of cess. The rate of the levy authorised shall not exceed 5 per centum of the valuation of the minerals at the pit's mouth. Section 5 provides for the constitution of the Orissa Mining Areas Development

Fund. This fund vests in the State Government and has to be administered by such officer or officers as may be appointed by the State Government in that behalf. Section 5(2) requires that there shall be paid to the credit of the said fund the proceeds of the cess recovered under s. 4 for each mining area during the quarter after deducting expenses, if any, for collection and recovery. Section 5(3) contemplates that to the credit of the said fund shall be placed all collections of cess under s. 5(2) as well as amounts from State Government and the local authorities and public subscriptions specifically given for any of the purposes of the fund. Section 5(4) deals with the topic of the application of the said fund. The fund has to be utilised to meet expenditure incurred in connection with such measures which in the opinion of the State Government are necessary or expedient for providing amenities like communications, water supply and electricity, for the better development of the mining areas, and to meet the welfare of the labour and other persons residing or working in the mining areas. Section 5(5) lays down that without prejudice to the generality of the foregoing provisions the fund may be utilised to defray any of the purposes specified in cls. (a) to (e). Under s. 5(6) the State Government is given the power to decide whether any particular expenditure is or is not debitable to the fund and their decision is made final; and s. 5(7) imposes on the State Government an obligation to publish annually in the gazette a report of the activities financed from the fund together with an estimate of receipts and expenditure of the fund and a statement of account. Section 6 prescribes the mode of constituting an advisory committee. It has to consist of such number of members and chosen in such manner as may be prescribed, provided however that each committee shall include representatives of mine-owners and workmen employed in mining industry. The names of the members of the committee are required to be published in the gazette. Section 7 deals with the appointment and functions of the statutory authorities to carry out the purpose of the Act, while s. 8 confers on the State Government power to

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make rules. Section 9 prescribes penalties and provides for prosecutions; and s. 10 gives protection to the specified authorities or officers in respect of anything done or intended to be done by them in good faith in pursuance of the Act or any rules or order made thereunder. Section 11, which is the last section, confers on the State Government the power to do anything which may appear to them to be necessary for the purpose of removing difficulties in giving effect to the provisions of the Act.

The scheme of the Act thus clearly shows that it has been passed for the purpose of the development of mining areas in the State. The basis for the operation of the Act is the constitution of a mining area, and it is in regard to mining areas thus constituted that the provisions of the Act come into play. It is not difficult to appreciate the intention of the State Legislature evidenced by this Act. Orissa is an underdeveloped State in the Union of India though it has a lot of mineral wealth of great potential value. Unfortunately its mineral wealth is located generally in areas sparsely populated with bad communications. Inevitably the exploitation of the minerals is handicapped by lack of communications, and the difficulty experienced in keeping the labour force sufficiently healthy and in congenial surroundings. The mineral development of the State, therefore, requires that provision should be made for improving the communications by constructing good roads and by providing means of transport such as tramways; supply of water and electricity would also help. It would also be necessary to provide for amenities of sanitation and education to the labour force in order to attract workmen to the area. Before the Act was passed it appears that the mine-owners tried to put up small-length roads and tramways for their own individual purpose, but that obviously could not be as effective as roads constructed by the State and tramway service provided by it. It is on a consideration of these factors that the State Legislature decided to take an active part in unsystematic development of its mineral areas which would help the mine-owners in moving their

minerals quickly through the shortest route and would attract labour to assist the excavation of the minerals. Thus there can be no doubt that the primary and the principal object of the Act is to develop the mineral areas in the State and to assist more efficient and extended exploitation of its mineral wealth.

The constitution of the advisory committee as prescribed by s. 4 emphasises the fact that the policy of the Act would be to carry out with the assistance of the mine-owners and their workmen. Thus after a mining area is notified an advisory committee is constituted in respect of it, and the task of carrying out the objects of the Act is left to the care of the said advisory committee subject to the provisions of the Act. Even before an area is notified the mine-owners are allowed an opportunity to put forward their objections. These features of the Act are also relevant in determining the question as to whether the Act is intended to render service to the specified area and to the class of persons who are subjected to the levy of the cess.

Section 5 shows that the cess levied does not become a part of the consolidated fund and is not subject to an appropriation in that behalf; it goes into the special fund earmarked for carrying out the purpose of the Act, and thus its existence establishes a co-relation between the cess and the purpose for which it is levied. It was probably felt that some additions should be made to the special fund, and so s. 5(3) contemplates that grants from the State Government and local authorities and public subscriptions may be collected for enriching the said fund. Every year a report of the activities financed by the fund has to be published together with an estimate of receipt and expenditure and a statement of accounts. It would thus be clear that the administration of the fund would be subject to public scrutiny and persons who are called upon to pay the levy would have an opportunity to see whether the cess collected from them has been properly utilised for the purposes for which it is intended to be used. It is not alleged by the petitioners

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that the levy imposed is unduly or unreasonably excessive so as to make the imposition a colourable exercise of legislative power. Indeed the fact that the accounts have to be published from year to year affords an indication to the contrary. Thus the scheme of the Act shows that the cess is levied against the class of persons owning mines in the notified area and it is levied to enable the State Government to render specific services to the said class by developing the notified mineral area. There is an element of *quid pro quo* in the scheme, the cess collected is constituted into a specific fund and it has not become a part of the consolidated fund, its application is regulated by a statute and is confined to its purposes, and there is a definite co-relation between the impost and the purpose of the Act which is to render service to the notified area. These features of the Act impress upon the levy the character of a fee as distinct from a tax.

It is, however, urged that the cess levied by s. 4(2) is in substance and reality a duty of excise. As we have already noticed s. 4(2) provides that the rate of such levy shall not exceed 5 per centum of the valuation of the minerals at the pit's mouth; in other words it is the value of the minerals produced which is the basis for calculating the cess payable by mine-owners, and that precisely is the nature in which duty of excise is levied under Entry 84 in List I. The said Entry empowers Parliament to impose duties of excise, inter alia, on goods manufactured or produced in India. When minerals are produced from mines and a duty of excise is intended to be imposed on them it would be normally imposed at the pit's mouth, and that is precisely what the impugned Act purports to do. It is also contended that the rate prescribed by s. 4(2) indicates that it operates not as a mere fee but as a duty of excise. This argument must be carefully examined before the character of the cess is finally determined. It is not disputed that under Entry 23 in List II read with Entry 66 in the said List the State Legislature can levy a fee in respect of mines and mineral development. Entry 23 reads thus: "Regulation of Mines and mineral development subject to

the provisions of List I with respect to regulation and development under the control of the Union". We will deal with the condition imposed by the latter part of this Entry later. For the present it is enough to state that regulation of mines and mineral development is within the competence of the State Legislature. Entry 66 provides that fees in respect of any of the matters in the said List can be imposed by the State Legislature subject of course to the exception of fees taken in any Court. The argument is that though the State Legislature is competent to levy a fee in respect of mines and mineral development, if the statute passed by a State Legislature in substance and in effect imposes a duty of excise it is travelling outside its jurisdiction and is trespassing on the legislative powers of Parliament.

This argument is based on two considerations. The first relates to the form in which the levy is imposed, and the second relates to the extent of the levy authorised. The extent of the levy authorised would always depend upon the nature of the services intended to be rendered and the financial obligations incurred thereby. If the services intended to be rendered to the notified mineral areas require that a fairly large cess should be collected and co-relation can be definitely established between the proposed services and the impost levied, then it would be unreasonable to suggest that because the rate of the levy is high it is not a fee but a duty of excise. In the present case, if the development of the mining areas involves considerable expenditure which necessitates the levy of the prescribed rate it only means that the services being rendered to the mining areas are very valuable and the rate-payer in substance is compensating the State for the services rendered by it to him. It is significant that the petitioners do not seriously suggest that the services intended to be rendered are a cloak and not genuine, or that the taxes levied have no relation to the said services, or that they are unreasonable and excessive. Therefore, in our opinion, the extent of the rate allowed to be imposed by s. 4(2) cannot by itself alter the character of the levy from a

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fee into that of a duty of excise. If the co-relation between the levy and the services was not genuine or real, or if the levy was disproportionately higher than the requirements of the services intended to be rendered it would have been another matter.

Then as to the form in which the impost is levied, it is difficult to appreciate how the method adopted by the Legislature in recovering the impost can alter its character. The character of the levy must be determined in the light of the tests to which we have already referred. The method in which the fee is recovered is a matter of convenience, and by itself it cannot fix upon the levy the character of the duty of excise. This question has often been considered in the past, and it has always been held that though the method in which an impost is levied may be relevant in determining its character its significance and effect cannot be exaggerated. In *Ralla Ram* v. *The Province of East Punjab* (1) the Federal Court had to consider the character of the tax levied by s. 3 of the Punjab Urban Immoveable Property Tax Act XVII of 1940. Section 3 provided as follows: "There shall be charged, levied and paid an annual to tax on buildings and lands situated in the rating areas shown in the schedule to this Act at such rate not exceeding twenty per centum of the annual value of such buildings and lands as the Provincial Government may by notification in official gazette direct in respect of each such rating area". The argument urged before the Federal Court was that the tax imposed by the said section was in reality a tax on income within the meaning of Item 54 in List I of the Seventh Schedule to the Constitution Act of 1935, and as such it was not covered by Item 42 in List II of the said Schedule. This argument was rejected on the ground that the tax levied by the Act was in pith and substance a tax on lands and buildings covered by Item 42. It would be noticed that the basis of the tax was the annual value of the building which is the basis used in the Indian Income-tax Act for determining income from property; and so, the attack against the section was based on

(1) (1948) F.C.R. 207.

the ground that it had adopted the same basis for levying the impost as the Income-tax Act and the said basis determined its character whatever may be the appearance in which the impost was purported to be levied. In repelling this argument Fazl Ali, J. observed that the crucial question to be answered was whether merely because the Income-tax Act has adopted the annual value as the standard for determining the income it must necessarily follow that if the same standard is employed as a measure for any other tax that tax becomes a tax on income. The learned judge then proceeded to add that if the answer to this question is to be given in the affirmative then certain taxes which cannot possibly be described as income-tax must be held to be so. In other words, the effect of this decision is that the adoption of the standard used in Income-tax Act for getting at the income by any other act for levying the tax authorised by it would not be enough to convert the said tax into an income-tax. During the course of this judgment Fazl Ali, J. also noticed with approval a similar view taken by the Bombay High Court in *Sir Byramjee Jeejeebhoy* v. *The Province of Bombay* (1).

This decision has been expressly approved by the Privy Council in *Governor-General in Council* v. *Province of Madras* (2). Consistently with the decision of the Federal Court their Lordships expressed the opinion that "a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods and not on sales or the proceeds of the sale of goods. The two taxes, the one levied on the manufacturer in respect of his goods and the other on the vendor in respect of his sales may in one sense overlap, but in law there is no overlapping; the taxes are separate and distinct imposts. If in fact they overlap that may be because the taxing authority imposing a duty of excise finds it convenient to impose that duty at the moment when the exciseable article

(1) I.L.R. 1940 Bom. 58.
(2) (1945) L.R. 72 I.A. 91.

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leaves the factory or workshop for the first time on the occasion of its sale". In that case the question was whether the tax authorised by the Madras General Sales Tax Act, 1939, was a tax on the sale of goods or was a duty of excise, and the Privy Council held it was the former and not the latter. Therefore, in our opinion, the mere fact that the levy imposed by the impugned Act has adopted the method of determining the rate of the levy by reference to the minerals produced by the mines would not by itself make the levy a duty of excise. The method thus adopted may be relevant in considering the character of the impost but its effect must be weighed along with and in the light of the other relevant circumstances. In this connection it is always necessary to bear in mind that where an impugned statute passed by a State Legislature is relatable to an Entry in List II it is not permissible to challenge its *vires* only on the ground that the method adopted by it for the recovery of the impost can be and is generally adopted in levying a duty of excise. Thus considered the conclusion is inevitable that the cess levied by the impugned Act is neither a tax nor a duty of excise but is a fee.

The next question which arises is, even if the cess is a fee and as such may be relatable to Entries 23 and 66 in List II its validity is still open to challenge because the legislative competence of the State Legislature under Entry 23 is subject to the provisions of List I with respect to regulation and development under the control of the Union; and that takes us to Entry 54 in List I. This Entry reads thus: "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". The effect of reading the two Entries together is clear. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to

the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act the impugned Act would be *ultra vires*, not because of any repugnance between the two statutes but because the State Legislature had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself. This position is not in dispute.

It is urged by Mr. Amin that the field covered by the impugned Act has already been covered by the Mines and Minerals (Regulation and Development) Act, 1948, (LIII of 1948) and he contends that in view of the declaration made by s. 2 of this Act the impugned Act is *ultra vires*. This Central Act was passed to provide for the regulation of mines and oil fields and for the development of minerals. It may be stated at this stage that by Act LXVII of 1957 which has been subsequently passed by Parliament, Act LIII of 1948 has now been limited only to oil fields. We are, however, concerned with the operation of the said Act in 1952, and at that time it applied to mines as well as oil fields. Section 2 of the Act contains a declaration as to the expediency and control by the Central Government. It reads thus: "It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation of mines and oil fields and the development of minerals to the extent hereinafter provided". It is common ground that at the relevant time this Act applied to coal mines. Section 4 of the Act provides that no mining lease shall be granted after the commencement of this Act otherwise than in accordance with the rules made under this Act. Section 5 empowers the Central Government to make rules by notification for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area. Sections 4 and 5 thus

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purport to prescribe necessary conditions in accordance with which mining leases have to be executed. This part of the Act has no relevance to our present purpose. Section 6 of the Act, however, empowers the Central Government to make rules by notification in the official gazette for the conservation and development of minerals. Section 6(2) lays down several matters in respect of which rules can be framed by the Central Government. This power is, however, without prejudice to the generality of powers conferred on the Central Government by s. 6(1). Amongst the matters covered by s. 6(2) is the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected. It is true that no rules have in fact been framed by the Central Government in regard to the levy and collection of any fees; but, in our opinion, that would not make any difference. If it is held that this Act contains the declaration referred to in Entry 23 there would be no difficulty in holding that the declaration covers the field of conservation and development of minerals, and the said field is indistinguishable from the field covered by the impugned Act. What Entry 23 provides is that the legislative competence of the State Legislature is subject to the provisions of List I with respect to regulation and development under the control of the Union, and Entry 54 in List I requires a declaration by Parliament by law that regulation and development of mines should be under the control of the Union in public interest. Therefore, if a Central Act has been passed for the purpose of providing for the conservation and development of minerals, and if it contains the requisite declaration, then it would not be competent to the State Legislature to pass an Act in respect of the subject-matter covered by the said declaration. In order that the declaration should be effective it is not necessary that rules should be made or enforced; all that this required is a declaration by Parliament that it is expedient in the public interest to take the regulation and development of mines under the control of the Union. In such a case the test must be whether the legislative declaration covers the field

or not. Judged by this test there can be no doubt that the field covered by the impugned Act is covered by the Central Act LIII of 1948.

It still remains to consider whether s. 2 of the said Act amounts in law to a declaration by Parliament as required by Art. 54. When the said Act was passed in 1948 the legislative powers of the Central and the Provincial Legislatures were governed by the relevant Entries in the Seventh Schedule to the Constitution Act of 1935. Entry 36 in List I corresponds to the present Entry 54 in List I. It reads thus: "Regulation of Mines and Oil Fields and mineral development to the extent to which such regulation and development under Dominion control is declared by Dominion law to be expedient in public interest". It would be noticed that the declaration required by Entry 36 is a declaration by Dominion law. Reverting then to s. 2 of the said Act it is clear that the declaration contained in the said section is put in the passive voice; but in the context there would be no difficulty in holding that the said declaration by necessary implication has been made by Dominion law. It is a declaration contained in a section passed by the Dominion Legislature, and so it is obvious that it is a declaration by a Dominion law; but the question is: Can this declaration by a Dominion law be regarded constitutionally as declaration by Parliament which is required by Entry 54 in List I.

It has been urged before us by the learned Additional Solicitor-General and Mr. Amin that in dealing with this question we should bear in mind two general considerations. The Central Act has been continued under Art. 372(1) of the Constitution as an existing law, and the effect of the said constitutional provision must be that the continuance of the existing law would be as effective and to the same extent after the Constitution came into force as before. It is urged that after the said Act was passed and before the Constitution came into force no Provincial Legislature could have validly made a law in respect of the field covered by the said Act, and it would be commonsense to assume that the effect of the continuance of the

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said law under Art. 372(1) cannot be any different. In other words, if no Provincial Legislature could have trespassed on the field covered by the said Act before the Constitution, the position would and must be the same even after the Constitution came into force.

It is also contended that for the purpose of bringing the provision of existing laws into accord with the provisions of the Constitution the President was given power to make by order appropriate adaptations and modifications of such laws, and the object of making such adaptations obviously was to make the continuance of the existing laws fully effective. It is in the light of these two general considerations, so the argument runs, must the point in question be considered.

The relevant clause in the Adaptation of Laws Order, 1950, on which reliance has been placed in support of this argument is cl. 16 in the Supplementary Part of the said Order. This clause provides that subject to the provisions of this Order any reference by whatever form of words in any existing law to any authority competent at the date of the passing of that law to exercise any powers or authorities, or to discharge any functions, in any part of India shall, where a corresponding new authority has been constituted by or under the Constitution, have effect until duly repealed or amended as if it were a reference to that new authority. The petitioners contend that as a result of this clause the declaration made by the Dominion Legislature in s. 2 of the Central Act must now be held to be the declaration made by Parliament. Is this contention justified on a fair and reasonable construction of the clause? That is the crux of the problem.

In considering this question it would be relevant to recall the scheme of the Adaptation of Laws Order, 1950. It consists of Three Parts. Part I deals with the adaptation of Central Laws and indicates the adaptation made therein; Part II deals with the adaptation of Provincial Laws and follows the same pattern; and Part III is a Supplementary Part which contains provisions in the nature of supplementary provisions. A perusal of the clauses contained in Part

I would show that though some adaptation was made in Act LIII of 1948 it was not thought necessary to make an adaptation in s. 2 of the said Act whereby the declaration implied in the said section has been expressly adapted into a declaration by Parliament.

Now, the effect of cl. 16 in substance is to equate an authority competent at the date of the passing of the existing law to exercise any powers or authorities, or to discharge any functions with a corresponding new authority which has been constituted by or under the Constitution. Reference to the authority in the context would suggest cases like reference to the Governor-General *eo nomine*, or Central Government which respectively would be equated with the President or the Union Government. Prima facie the reference to authority would not include reference to a Legislature; in this connection it may be relevant to point out that Art. 372(1) refers to a competent Legislature as distinguished from other competent authorities. That is the first difficulty in holding that cl. 16 refers to the Dominion Legislature and purports to equate it with the Parliament.

It is clear that for the application of this clause it is necessary that a reference should have been made to the authority by some words whatever may be their form. In other words it is only where the existing law refers expressly to some authority that this clause can be invoked. It is difficult to construe the first part of this clause to include authorities to which no reference is made by any words in terms, but to which such reference may be implied; and quite clearly the Dominion Legislature is not expressly referred to in s. 2. In construing the present clause we think it would be straining the language of the clause to hold that an authority to which no reference is made by words in any part of the existing law could claim the benefit of this clause.

Besides, there is no doubt that when the clause refers to any authority competent to exercise any powers or authorities, or to discharge any functions, it refers to the powers, authorities or functions attributable to the existing law itself; that is to say, authorities

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which are competent to exercise powers or to discharge functions under the existing laws are intended to be equated with corresponding new authorities. It is impossible to hold that the Dominion Legislature is an authority which was competent to exercise any power or to discharge any function under the existing law. Competence to exercise power to discharge functions to which the clause refers must inevitably be related to the existing law and not to the Constitution Act of 1935 which would be necessary if Dominion Legislature was to be included as an authority under this clause. The Constitution Act of 1935 had been repealed by the Constitution and it was not, and could not obviously be, the object of the Adaptation of Laws Order to make any adaptation in regard to the said Act. Therefore, the competence of the Dominion Legislature which flowed from the relevant provisions of the Constitution Act of 1935 is wholly outside this clause. We have carefully considered the arguments urged before us by the learned Additional Solicitor-General and Mr. Amin but we are unable to hold that cl. 16 can be pressed into service for the purpose of supporting the conclusion that the declaration by the Dominion Legislature implied in s. 2 of Act LIII of 1948 can, by virtue of cl. 16, be held to be a declaration by Parliament within the meaning of the relevant Entries in the Constitution. If that be the true position then the alternative challenge to the *vires* of the Act based on cl. 16 of the Adaptation of Laws Order must fail.

There is another possible argument which may *prima facie* lead to the same conclusion. Let us assume that the result of reading Art. 372 and cl. 16 of the Adaptation of Laws Order is that under s. 2 of Act LIII of 1948 there is a declaration by Parliament as suggested by the petitioners and the learned Additional Solicitor-General. Would that meet the requirements of Entry 54 in List I of the Seventh Schedule? It is difficult to answer this question in the affirmative because the relevant provisions of the Constitution are prospective and the declaration by Parliament specified by Entry 54 must be declaration made by

Parliament subsequent to the date when the Constitution came into force. Unless a declaration is made by Parliament after the Constitution came into force it will not satisfy the requirements of Entry 54, and that inevitably would mean that the impugned Act is validly enacted under Entry 23 in List II of the Seventh Schedule. If that be the true position then it would follow that even on the assumption that cl. 16 of the Adaptation of Laws Order and Art. 372 can be construed as suggested by the petitioners the impugned Act would be valid.

Faced with this difficulty, both the learned Additional Solicitor-General and Mr. Amin argued that cl. 21 of the said Order may be of some assistance. Clause 21 reads thus: "Any Court, Tribunal, or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day shall, notwithstanding that this Order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose". Assuming that this clause is valid we do not see how it is relevant in the present case. All that this clause purports to do is to empower the Court to construe the law with such adaptations as may be necessary for the purpose of bringing it in accord with the provisions of the Constitution. There is no occasion to make any adaptation in construing Act LIII of 1948 for bringing it into accord with the provisions of the Constitution at all. The said Act has been continued under Art. 372(1) and there is no constitutional defect in the said Act for the avoidance of which any adaptation is necessary. In fact what the petitioners seek to do is to read in s. 2 of the said Act the declaration by Parliament required by Entry 54 so as to make the impugned Act *ultra vires*. Quite clearly cl. 21 cannot be pressed into service for such a purpose. Therefore, we reach this position that the field covered by Act LIII of 1948 is substantially the same as the field covered by the

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impugned Act but the declaration made by s. 2 of the said Act does not constitutionally amount to the requisite declaration by Parliament, and so the limitation imposed by Entry 54 does not come into operation in the present case. Act LIII of 1948 continues in operation under Art. 372; with this modification that so far as the State of Orissa is concerned it is the impugned Act that governs and not the Central Act. Article 372(1) in fact provides for the continuance of the existing law until it is altered, repealed or amended by a competent Legislature or other competent authority. In the absence of the requisite parliamentary declaration the legislative competence of the Orissa Legislature under Entry 23 read with Entry 66 is not impaired, and so the said Legislature is competent either to repeal, alter or amend the existing law which is the Central Act LIII of 1948; in effect, after the impugned Act was passed, so far as Orissa is concerned the Central Act must be deemed to be repealed. This position is fully consistent with the provisions of Art. 372. The result is that the material words used in cls. 16 and 21 being unambiguous and explicit, it is difficult to give effect to the two general considerations on which reliance has been placed by the petitioners. Incidentally the present case discloses that in regard to the requisite parliamentary declaration prescribed by Entry 54 in List I in its application to the pre-Constitution Acts under corresponding Entry 36 in List I of the Constitution Act of 1935, there is a lacuna which has not been covered by any clauses of the Adaptation of Laws Order; that, however, is a matter for Parliament to consider.

There is one more point which is yet to be considered. Mr. Amin contends that Entry 23 in List II is subject to the provisions in List I with respect to regulation and development under the control of the Union, and according to him Entry 52 in List I is one of such provisions. In this connection he relies on the said Entry which deals with industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest, and Industries (Development and Regulation) Act, 1951 (LXV

of 1951). This Act has been passed to provide for the development and regulation of certain industries one of which undoubtedly is coal mining industry. Section 2 of this Act declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. This declaration is a declaration made by Parliament, and if the provisions of the Act read with the said declaration covered the same field as is covered by the impugned Act, it would undoubtedly affect the vires of the impugned Act; but in dealing with this question it is important to bear in mind the doctrine of pith and substance. We have already noticed that in pith and substance the impugned Act is concerned with the development of the mining areas notified under it. The Central Act, on the other hand, deals more directly with the control of all industries including of course the industry of coal. Chapter II of this Act provides for the constitution of the Central Advisory Council and Development Councils, chapter III deals with the regulation of scheduled industries, chapter IIIA provides for the direct management or control of industrial undertakings by Central Government in certain cases, and chapter IIIB is concerned with the topic of control of supply, distribution, price, etc., of certain articles. The last chapter deals with miscellaneous incidental matters. The functions of the Development Councils constituted under this Act prescribed by s. 6(4) bring out the real purpose and object of the Act. It is to increase the efficiency or productivity in the scheduled industry or group of scheduled industries, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically. Section 9 authorises the imposition of cess on scheduled industries in certain cases. Section 9(4) provides that the Central Government may hand over the proceeds of the cess to the Development Council there specified and that the Development Council shall utilise the said proceeds to achieve the objects mentioned in cls. (a) to (d). These

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objects include the promotion of scientific and industrial research, of improvements in design and quality, and the provision for the training of technicians and labour in such industry or group of industries. It would thus be seen that the object of the Act is to regulate the scheduled industries with a view to improvement and development of the service that they may render to the society, and thus assist the solution of the larger problem of national economy. It is difficult to hold that the field covered by the declaration made by s. 2 of this Act, considered in the light of its several provisions, is the same as the field covered by the impugned Act. That being so, it cannot be said that as a result of Entry 52 read with Act LXV of 1951 the *vires* of the impugned Act can be successfully challenged.

Our conclusion, therefore, is that the impugned Act is relatable to Entries 23 and 66 in List II of the Seventh Schedule, and its validity is not impaired or affected by Entries 52 and 54 in List I read with Act LXV of 1951 and Act LIII of 1948 respectively. In view of this conclusion it is unnecessary to consider whether the impugned Act can be justified under Entry 50 in List II, or whether it is relatable to Entry 24 in List III and as such suffers from the vice of repugnancy with the Central Act XXXII of 1947.

The result is the petition fails and is dismissed with costs.

Wanchoo J.

WANCHOO, J.—I have read the judgment just delivered by my learned brother Gajendragadkar J. and regret that I have not been able to persuade myself that the cess levied in this case on all extracted minerals from any mine in any mining area at a rate not exceeding five per centum of the value of the minerals at the pit's mouth by the Orissa State Legislature under s. 4 of the Orissa Mining Areas Development Fund Act, No. XXVII of 1952, (hereinafter called the Act) is a fee properly so called and not a duty of excise. The facts are all set out in the judgment just delivered and I need not repeat them.

The scheme of the Act, as appears from s. 3 thereof is to give power to the State Government, whenever it

thinks it necessary and expedient to provide amenities, like communications, water-supply and electricity for the better development of any area in the State wherein any mine is situated or to provide for the welfare of residents or workers in any such area within which persons employed in a mine or a group of mines reside or work, to constitute such an area to be a mining area for the purposes of the Act, to define the limits of the area, to include within such area any local area contiguous to the same and defined in the notification and to exclude from such area any local area comprised therein and defined in the notification. A notification under s. 3 is made, after hearing objections from owners or lessees of mines. After such an area is constituted under s. 3, a cess is imposed under s. 4 on all extracted minerals from any mine in any such area at the rate not exceeding five per centum of the value of the minerals at the pit's mouth. The cess so collected is credited to a fund called the Orissa Mining Area Development Fund created under s. 5 of the Act, besides other amounts with which we are not concerned in this case. The Fund is to be applied to meet expenditure incurred in connection with such measures, which in the opinion of the State Government, are necessary or expedient for providing amenities like communications, water-supply and electricity, for the better development of mining areas and to meet the welfare of labour and other persons residing or working in the mining areas. Then come other provisions for working out the above provisions including s. 8, which gives power to the State Government to frame rules to carry into effect the purposes of the Act. The Rules were framed under the Act in January, 1955.

The constitutional competence of the Orissa State Legislature to levy the cess under the Act is attacked on two main grounds. In the first place, it is urged that the cess is in pith and substance a duty of excise under item 84 of List I of the Seventh Schedule and therefore the levy of such a cess is beyond the competence of the Orissa State Legislature. In the second place, it is urged that even if the cess is a fee, in view

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of the two Acts of the Central Legislature and Parliament, namely, The Mines and Minerals (Regulation and Development) Act, No. LIII of 1948 and The Industries (Development and Regulation) Act, No. LXV of 1951, the Orissa Legislature was not competent to pass the Act.

The petition has been opposed on behalf of the State of Orissa and the main contentions urged on its behalf are that the cess is a fee properly so called and not a duty of excise and therefore the Orissa State Legislature was competent to levy it and the two Central Acts do not affect that competence. In the alternative it has been urged that even if the cess is a tax the State Legislature was competent to levy it under item 50 of List II of the Seventh Schedule.

The first question therefore that falls for consideration is whether the cess in this case is a tax or a fee. Difference between a tax properly so called and a fee properly so called came up for consideration before this Court in three cases in 1954 and was considered at length. In the first of them, namely, *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*(1), it was pointed out that—

"though levying of fees is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has given a power to the particular legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself".

It was also pointed that—

"the essence of a tax is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law. The second characteristic of a tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when

(1) [1954] S.C.R. 1005.

collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of *quid pro quo* between the tax-payer and the public authority. Another feature of taxation is that as it is a part of the common burden, quantum of imposition upon the tax-payer depends generally upon his capacity to pay."

As to fees, it was pointed out that—

"a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay."

Finally, it was pointed out that—

"the distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege.....Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives."

The consequence of these principles was that—

"if, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision be co-related to the expenses incurred by Government in rendering the services.....If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax."

Having laid down these principles, that case then considered the *vires* of s. 76 of the Madras Hindu Religious and Charitable Endowments Act, No. XIX of 1951, and it was pointed out that the material fact which negatived the theory of fees in that case was that the money raised by levy of the contribution was not ear-marked or specified for defraying the expenses

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that the Government had to incur in performing the services. All the collections went to the consolidated fund of the State and all the expenses had to be met not out of those collections but out of the general revenues by a proper method of appropriation as was done in the case of other government expenses. That in itself might not be conclusive, but in that case there was total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution under the provision of s. 76 and in those circumstances the theory of return or counter-payment or *quid pro quo* could not have any possible application to that case. Consequently, the contribution levied under s. 76 was held to be a tax and not a fee.

In the second case of *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa* (1), a similar imposition by the Orissa Legislature came up for consideration. After referring to the earlier case, it was pointed out that—

"two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes."

The Orissa imposition was held to be a fee because the collections made were not merged in the general public revenue and were meant for the purpose of meeting the expenses of the Commissioner and his office which was the machinery set up for due administration of the affairs of the religious institution. They went to constitute a fund which was contemplated by s. 50 of the Orissa Act and this fund was specifically set apart for rendering services involved in carrying out the provisions of the Act.

The third case, namely, *Ratilal Panachand Gandhi*

(1) [1954] S.C.R. 1046.

v. *The State of Bombay* (1) came from Bombay. Sec. 58 of the Bombay Act, No. XXIX of 1950, provided for an imposition in proportion to the gross annual income of the trust. This imposition was levied for the purpose of due administration of the trust property and for defraying the expenses incurred in connection with the same. After referring to the two earlier cases, the Court went on to say that—

"tax is a common burden and the only return which the taxpayer gets is participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of *quid pro quo* which is absent in a tax..... But in order that the collections made by the Government can rank as fees, there must be co-relation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services." It was then pointed out that the contributions, which were collected under s. 58, were to be credited in the Public Trusts Administration Fund as constituted under s. 57. This fund was to be applied exclusively for the payment of charges for expenses incidental to the regulation of public trusts and for carrying into effect the provisions of the Act. The imposition therefore was in that case held to be a fee.

These decisions clearly bring out the difference between a tax and a fee and generally speaking there is always an element of *quid pro quo* in a fee and the amount raised through a fee is co-related to the expenses necessary for rendering the services which are the basis of *quid pro quo*. Further, the amount collected as a fee does not go to augment the general revenues of the State and many a time a special fund is created in which fees are credited—though this is not absolutely necessary. But as I read these decisions, they cannot be held to lay down that what is in pith and substance a tax can become a fee merely

(1) [1954] S.C.R. 1055.

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because a fund is created in which collections are credited and some services may be rendered to the persons from whom collections are made. If that were so, it will be possible to convert many taxes not otherwise leviable into fees by the device of creating a special fund and attaching some service to be rendered through that fund to the persons from whom collections are made. I am therefore of opinion that one must first look at the pith and substance of the levy, and if in its pith and substance it is not essentially different from a tax it cannot be converted into a fee by creating a special fund in which the collections are credited and attaching some services to be rendered through that fund.

Let me then look at the pith and substance of the cess, which has been imposed in this case. The cess consists of a levy not exceeding five per centum of the value of the minerals at the pit's mouth on all extracted minerals. *Prima facie* such a levy is nothing more nor less than a duty of excise. Item 84 of List I gives power to levy duties of excise exclusively to the Union and is in these terms :—

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

This item gives power to Parliament to impose duties of excise on all goods manufactured or produced in India with certain exceptions mentioned therein. Taking this particular case, coal is produced from the mine and would clearly be covered by the words "other goods produced in India" and a duty of excise can be levied on it. What then exactly is meant by a duty of excise? Reference in this connection may be made to *Governor-General in Council* v. *Province of Madras* (1). In that case the point arose whether the sales-tax imposed by the Madras Legislature was a duty of excise. The Privy Council pointed out that—

(1) (1945) L.R. 72 I.A. 91.

"in a Federal constitution in which there is a division of legislative powers between Central and Provincial legislatures, it appears to be inevitable that controversy should arise whether one or other legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its 'pith and substance' as it has sometimes been said, which must determine into what category it falls."

The Privy Council went on to consider what a duty of excise was and said that—

"it is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods not on sales or the proceeds of sale of goods. Though sometimes a duty of excise may be imposed on first sales, a duty of excise and a tax on the sale of goods were separate and distinct imposts and in law do not overlap."

The Privy Council approved of the decisions of the Federal Court in *re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* (1) and *The Province of Madras* v. *Messrs. Boddu Paidanna and Sons* (2). It seems to have been urged that because in some cases a duty of excise may be levied on the occasion of the first sale and a sales tax may also be levied on the same occasion, there is really no difference between the two. It is however clear that a duty of excise is primarily a tax on goods manufactured or produced; it is not a tax on the sale of goods, though the taxing authority may as a matter of concession to the producer not charge the tax immediately the goods are produced and may postpone it, to make it easy for the producer to pay the tax, till the first sale is made by him; nevertheless the charge is still on the goods and is therefore a duty of excise. On the other hand, a sales tax can only be levied when a sale is made and there is nothing to prevent its levy on the first sale. The two concepts

(1) (1939) F.C.R. 18. (2) (1948) F.C.R. 90.

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are however different and, as the Privy Council pointed out, a sales tax and a duty of excise are separate and distinct imposts and in law do not overlap. The pith and substance of a duty of excise is that it is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced.

Let me therefore see what the Orissa Legislature has done in the present case. It has levied a cess at a rate not exceeding five per centum on the value of minerals at the pit's mouth on all extracted minerals. All the extracted minerals are nothing other than goods produced and the cess is levied on the goods produced at a rate not exceeding five per centum of the value at the pit's mouth. The cess therefore in the present case cannot be anything other than a duty of excise. The pith and substance of the cess in this case falls fairly and squarely within entry 84 of List I and is therefore a duty of excise, which cannot be levied by the Orissa State Legislature. I may in this connection refer to the cesses levied by the Central Legislature and Parliament by Act XXXII of 1947 and by the Act No. LXV of 1951. Sec. 3 of Act XXXII of 1947 lays down that there shall be levied and collected as a cess for the purposes of that Act a duty of excise on all coal and coke despatched from collieries at such rate not less than four annas and not more than eight annas per ton as may from time to time be fixed by the Central Government by notification in the Official Gazette. This is obviously a tax on the goods produced, the basis of the tax being so much per ton. Again sec. 9 of Act LXV of 1951 lays down that there may be levied and collected as a cess for the purposes of that Act on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by the Central Government by notified order a duty of excise at a rate not exceeding two annas per centum of the value of the goods. This again is clearly a tax on goods produced or manufactured and is in the nature of a duty of excise, the basis of the tax being so much of the value of the goods. If these two taxes are duties of excise,

I fail to see any difference in pith and substance between these two taxes and the cess levied under the Act.

It is however urged that the method employed in the Act for realising the cess is only a method of quantification of the fee and merely because of this quantification, the pith and substance of the impost does not change from a fee to a duty of excise. Reference in this connection was made to three cases of quantification. In *Sir Byramjee Jeejeebhoy* v. *The Province of Bombay* (1), a question arose with respect to a tax imposed on urban immovable property, whether it was a tax on lands and buildings. The challenge to the tax was on the ground that it was tax on income or capital value within items 54 and 55 of List I of the Seventh Schedule of the Government of India Act and could not therefore be imposed by the Bombay Legislature. It was held that the tax was a tax on lands and buildings within the meaning of item 42 of List II of the same Schedule and that the basis of the tax, which was the annual value, would not convert it into a tax on income or capital value. The High Court considered the pith and substance of the said Act and came to the conclusion that every tax on annual value was not necessarily a tax on income and it was held that the mode of assessment of a tax did not determine its character and one has to look to the essential character of the tax to decide whether it was a tax on income or on lands and buildings. Looking to the pith and substance of the tax it was held in that case that it was a tax on lands and buildings. That decision was in the circumstances of that case right because the intention of the legislature was not to tax the income of any one; the essential character of the tax in that case was to tax the lands and buildings and the annual value of the lands and buildings was only taken as a mode of levying the tax. In the present case, however, the very mode of the levy of the cess is nothing other than the levy of a duty of excise and therefore the principle of quantification for purposes of a fee cannot be extended to

(1) I.L.R. 1940 Bom. 58.

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such an extent as to convert what is in pith and substance a tax into a fee on that basis.

The next case to which reference was made is *Municipal Corporation, Ahmedabad* v. *Patel Gordhandas Hargovandas* (1). In that case the Ahmedabad Borough Municipality had levied a rate on open lands and the basis of the levy was one per centum of the capital value of the land. It was urged that this amounted to a capital levy within entry 54 of List I; but the court repelled that contention and held that the levy was in pith and substance a tax on lands, which came within entry 42 of List II of the Seventh Schedule to the Government of India Act. A distinction was made between a tax on land which is levied on the basis of its capital value and a tax which is on capital treating it as an asset itself. This decision also, if I may say so with respect, is correct, for the basic idea was to tax lands and some method had to be found for doing so and the method evolved, though it might look like a capital levy, was in pith and substance not so. But the theory of quantification which is the basis of these two cases cannot be stretched so far as to turn levies which are in pith and substance taxes into fees, by the process of attaching certain services and creating a fund.

The third case is *Ralla Ram* v. *The Province of East Punjab* (2). That was a case of a tax on lands and buildings and annual value was the basis on which the tax was levied. The Federal Court rightly pointed out that the pith and substance of the levy had to be seen and on that view it was not income-tax but a tax on lands and buildings and the method adopted was merely a method of quantification. The Federal Court also pointed out that "where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions and that before an Act is declared *ultra vires*, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove

(1) I.L.R. 1954 Bom. 41. (2) (1948) F.C.R. 207.

impossible, the impugned Act should be declared invalid." It may also be pointed out that in all these three cases, one source of income of an individual or one item out of the total capital of an individual was the basis of calculation while income-tax or capital levy is generally on the total income or the total capital of a person. That aspect must have gone into the decision that the method employed was merely a mode for imposing a tax on lands and buildings. In the present case, however, I see no difference between the method of imposing a duty of excise and the method employed in the Act for imposing a cess—a matter which will be clear from the cesses imposed under the two Central Acts already referred to (No. XXXII of 1947 and No. LXV of 1951). It is not as if there could be no method of imposing a fee properly so called in this case except the one employed. Two methods readily suggest themselves. A lump sum annual fee could be levied on each mine even on a graded scale depending on the size of the mine as evidenced by its share capital. Or a similar graded fee could be levied on each mine depending on its size determined by the number of men employed therein. Where therefore the result of quantification is to bring a particular impost entirely within the ambit of a tax it would not be right to say that such an impost is still a fee, because certain services have to be rendered and a fund has been created in which collections of the impost are credited. If this were permissible many taxes not otherwise leviable would be converted into fees by the simple device of creating a special fund and attaching certain services to be rendered from the amount in that fund. That would in my opinion be a colourable exercise of the power of legislation, as explained in *K. C. Gajapati Narayan Deo* v. *The State of Orissa* (1).

Let me illustrate how taxes can be turned into fees on the so-called basis of quantification with the help of the device of creating a fund and attaching certain services to be rendered out of monies in the fund. Take the case of income-tax under item 82 of List I of the Seventh Schedule, which is exclusively reserved

(1) [1954] S.C.R. 1.

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for the Union. Suppose that some State Legislature wants to impose a tax on income other than agricultural income in the garb of fees. All that it has to do is then to create a special fund out of the amounts collected and to attach rendering of certain services to the fund. All that would be necessary would be to define the services to be rendered so widely that the amount required for the purpose would be practically limitless. In that case there would be no difficulty in levying any amount of tax on income, for the amount collected would always be insufficient for the large number of services to be rendered. What has to be done is to find out a number of items in Lists II and III of the Seventh Schedule in respect of which fees can be levied by the State Legislature. These fees can be levied on a total basis for a large number of services under various entries of Lists II and III. A fund can be created, say, for rendering services of various kinds to residents of one district. In order to meet the expenses of rendering such services, suppose, the legislature imposes a tax on every one in the district at 10 per centum of the net total income (other than agricultural income); the amount so collected is put in a separate fund and ear-marked for such special services to be rendered to the residents of that district. Can it be said that such a levy is a fee justified under various entries of Lists II and III, and not a tax on income, on the ground that this is merely a mode of quantification? As an instance, take, item 6 of List II, "Public health and sanitation, hospitals and dispensaries"; item 9, "Relief of the disabled and unemployable"; item 11, Education; item 12, Libraries, museums and similar institutions"; item 13, communications, that is to say, roads, bridges and other means of communications; item 17, "Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power"; and item 25, "Gas and gas-works"; item 23 of List III, "Social security and social insurance, employment and unemployment"; item 24, "Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age

pensions and maternity benefits"; item 25, "Vocational and technical training of labour"; and item 38, "Electricity". Assume that a fund is created for rendering these services to the residents of a district. The State Legislature is entitled to impose fees for rendering these services to the residents of the district; the costs of these services would obviously be limitless and in order to meet these costs, the State legislature levies a consolidated fee for all these purposes at 10 per centum of the total net income on the residents of the district (excluding his agricultural income) as a measure of quantification of the fee. Can it be said in the circumstances that such a levy would not be income-tax, simply because a fund is created to be used in the district where collections are made and these services have to be rendered out of the fund so created to the residents of that district and to no others? The answer can only be one, viz., that the nature of the impost is to be seen in its pith and substance; and if in pith and substance it is income-tax within item 82 of List 1 of the Seventh Schedule it will still remain income-tax in spite of the creation of a fund and the attaching of certain services to the monies in that fund to be rendered in a particular area. Such an impost can never be justified as a consolidated fee on the ground that it is merely a method of quantification.

Compare what has been done in this case. Sec. 3 of the Act which refers to the services to be rendered mentions communications, that is, roads, bridges and other means of communication (barring those given in List I), water-supply and electricity, for the better development of the area. These three items themselves would mean expenditure of such large amounts that anything could be charged as a fee to meet the costs, particularly in an undeveloped State like Orissa. Further, the section goes on to mention provision for the welfare of residents or workers in any such area, which would include such things as social security and social insurance, provident-funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits and may be even employment and unemployment. Again large funds would

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be required for these purposes. Therefore, the services enumerated in s. 3 being so large and requiring such large sums, any amount can be levied as a fee and in the name of quantification any tax, even though it may be in List I, can be imposed; and that is exactly what has been done, namely, what is really a duty of excise has been imposed as a fee for these purposes which fall under items 13 and 17 of List II and 23, 24 and 38 of List III. There can be no doubt in the circumstances that the levy of a cess as a fee in this case is a colourable piece of legislation. I do not say that the Orissa State Legislature did this deliberately. The motive of the legislature in such cases is irrelevant and it is the effect of the legislation that has to be seen. Looking at that, the cess in this case is in pith and substance nothing other than a duty of excise under item 84 of List I and therefore the State legislature was incompetent to levy it as a fee.

The next contention on behalf of the State of Orissa is that if the cess is not justified as a fee, it is a tax under item 50 of List II of the Seventh Schedule. Item 50 provides for taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. This raises a question as to what are taxes on mineral rights. Obviously, taxes on mineral rights must be different from taxes on goods produced in the nature of duties of excise. If taxes on mineral rights also include taxes on minerals produced, there would be no difference between taxes on mineral rights and duties of excise under item 84 of List I. A comparison of Lists I and II of the Seventh Schedule shows that the same tax is not put in both the Lists. Therefore, taxes on mineral rights must be different from duties of excise which are taxes on minerals produced. The difference can be understood if one sees that before minerals are extracted and become liable to duties of excise somebody has got to work the mines. The usual method of working them is for the owner of the mine to grant mining leases to those who have got the capital to work the mines. There should

therefore be no difficulty in holding that taxes on mineral rights are taxes on the right to extract minerals and not taxes on the minerals actually extracted. Thus tax on mineral rights would be confined, for example, to taxes on leases of mineral rights and on premium or royalty for that. Taxes on such premium and royalty would be taxes on mineral rights while taxes on the minerals actually extracted would be duties of excise. It is said that there may be cases where the owner himself extracts minerals and does not give any right of extraction to somebody else and that in such cases in the absence of mining leases or sub-leases there would be no way of levying tax on mineral rights. It is enough to say that these cases also, rare though they are, present no difficulty. Take the case of taxes on annual value of buildings. Where there is a lease of the building, the annual value is determined by the lease-money; but there are many cases where owners themselves live in buildings. In such cases also taxes on buildings are levied on the annual value worked out according to certain rules. There would be no difficulty where an owner himself works the mine to value the mineral rights on the same principles on which leases of mineral rights are made and then to tax the royalty which, for example, the owner might have got if instead of working the mine himself he had leased it out to somebody else. There can be no doubt therefore that taxes on mineral rights are taxes of this nature and not taxes on minerals actually produced. Therefore the present cess is not a tax on mineral rights; it is a tax on the minerals actually produced and can be no different in pith and substance from a tax on goods produced which comes under Item 84 of List I, as duty of excise. The present levy therefore under s. 4 of the Act cannot be justified as a tax on mineral rights.

In the view I have taken, it is not necessary to consider the other point, raised on behalf of the petitioners, namely, that even if it is a fee, in view of the two Central Acts (mentioned earlier) the Orissa Legislature was not competent to pass the Act. I would

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therefore allow the petition, and declare that the Orissa Mining Areas Development Fund Act, 1952, is beyond the constitutional competence of the Orissa Legislature to pass it. The whole Act must be struck down because there will be very little left in the Act if s. 4 falls as it must. The legislature would never have passed the Act without s. 4.

BY COURT. In accordance with the majority Judgment of the Court, the Writ Petition is dismissed with costs.

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November 22.

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v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Distribution of new shares at half the market value—If amounts to distribution of dividend—Assessment—Re-opening of—The Indian Income-tax Act, 1922 (11 of 1922), ss. 2(6A)(a), 66(1).

The appellants were shareholders of a company known as Navjivan Mills Ltd. which held a large number of shares of the Bank of India. The Bank with the object of increasing their share capital offered some more shares to the Mills for a price including premium which was about half the market value. The Mills purchased a small number of the shares so offered with their own funds and distributed their right to acquire the remaining shares to their shareholders in the proportion of two shares of the Bank for one share held by them. The assessment of the appellant was reopened by the Income Tax Officer under s. 34(1)(a) of the Income-tax Act on the footing that the release of the right to the shares of the Bank of India amounted to distribution of dividend. Appeals against the order of the Income Tax Officer having failed, the High Court at the instance of the appellants framed the following question:—

"Whether on the facts and circumstances of the case, the distribution of the right to apply for the shares of the Bank of India by Navjivan Mills Ltd. in favour of the assessees amounted to a distribution of "dividend"?

The High Court answered the question in the affirmative. On appeal with a certificate of the High Court,

Held, that the view taken by the High Court was correct.

The distribution to the shareholders of the Mills of the right to obtain two shares of the Bank of India for each share held by them at half the market value amounted to distribution of "dividend" which was liable to be taxed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 364 of 1957.

Appeal from the judgment and order dated February 22, 1956, of the former Bombay High Court in I.T.R. No. 31/1955.

N. A. Palkhivala and *I. N. Shroff*, for the Appellants.

A. N. Kripal and *D. Gupta*, for the Respondent.

1960. November 22. The Judgment of the Court was delivered by

SHAH, J.—This is an appeal by seven appellants with leave granted by the High Court of Judicature at Bombay certifying that it involves a question of importance. *Shah J.*

The appellants held 570 out of a total issue of 800 shares of the Navjivan Mills Ltd., Kalol, a public limited company—hereinafter referred to as the Mills. Between the years 1943-47, the Mills purchased 5,000 shares of the Bank of India Ltd. At an extraordinary general meeting of the shareholders of the Bank of India held on May 6, 1948, a resolution was passed increasing the share capital of the Bank and for that purpose offering new shares to the existing shareholders in the proportion of one new share for every three shares held by the shareholders. The face value of the new shares was to be Rs. 50, but the shares were issued at a premium of Rs. 50. The shareholders had to pay Rs. 100 for each new share. The Mills as the holder of 5,000 shares became entitled to receive $1,666\frac{2}{3}$ shares of the Bank of India at the rate of Rs. 100 per share. The Bank of India communicated its resolution by letter dated May 25, 1948 and enclosed therewith three forms, form A for acceptance, form

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B for renunciation and form C which may compendiously be called a form for allotment to nominees. On receiving the circular letter, the Directors of the Mills passed the following resolution:

"Resolved that the company having a holding of 5,000 ordinary shares in the capital of the Bank of India Ltd. having now received an intimation from the said Bank that this company is entitled to get 1,666⅔ more ordinary shares on payment of Rs. 50 as capital and Rs. 50 as premium per each share and it is considered proper to invest in the said issue of the said Bank the funds of this company to the extent of 66 shares only and to distribute the right of this company to the remaining 1,600 shares of the said issue amongst the shareholders of this company in the proportion of the shares held by them in this company. IT IS HEREBY RESOLVED that the funds of this company may be invested in the 66 shares out of 1,666 shares offered by the Bank of India Ltd., and the right to the remaining 1,600 shares is hereby distributed among 800 shares of this company in the proportion of right to two shares of the Bank per one ordinary share held in this company.

The Managing Agents may take steps to intimate the shareholders to exercise the right if they like to do so."

Accordingly, the Mills exercised the right to take over only 66 shares out of the shares offered and resolved that the right to the remaining 1,600 shares be distributed amongst its 800 share holders. The seven appellants as holders of 570 shares of the Mills became entitled to 1,140 shares of the Bank of India. The appellants agreed to the allotment of these shares and ultimately transferred them to a private company —Jesinghbai Investment Co., Ltd.

The assessment of the seven appellants and of other shareholders of the Mills was reopened under s. 34(1)(a) of the Indian Income Tax Act by the Income Tax Officer on the footing that the release by the Mills of the shares of the Bank of India amounted to a distribution of "dividend" and the value of the right released in favour of the shareholders though taxable

under s. 12 of the Act, had escaped tax. The order of the Income Tax Officer reassessing the income of the seven appellants was confirmed in appeal by the Appellate Assistant Commissioner and by the Appellate Tribunal. At the instance of the appellants, the following question was submitted by the Tribunal to the High Court at Bombay under s. 66(1) of the Income Tax Act:

"Whether on the facts and circumstances of the case the distribution of the right to apply for the shares of the Bank of India by Navjivan Mills Ltd. in favour of the assessees amounted to a distribution of "dividend" within the meaning of s. 2(6A) of the Indian Income Tax Act."

The High Court re-framed the question as follows:

"Whether on the facts and circumstances of the case, the distribution of the right to apply for the shares of the Bank of India by Navjivan Mills Ltd., in favour of the assessees amounted to a distribution of "dividend"?",

and answered it in the affirmative.

The High Court observed that the definition of "dividend" in s. 2(6A) was an inclusive and not an exhaustive definition, and even if the distribution of the right to the shares of the Bank of India could not be regarded as dividend within the extended meaning of that expression in s. 2(6A), it was still dividend within the ordinary meaning of that expression and was taxable as income in the hands of the appellants.

Counsel for the appellants contended that the High Court was not justified, having regard to the form of the question which expressly related to the distribution of the right to the Bank of India shares being dividend within the meaning of the definition in s. 2(6A) of the Income Tax Act, in enlarging the scope of the question and in answering it in the light of its ordinary meaning. There is no substance in this contention. "Dividend" is defined in s. 2(6A) as inclusive of various items and exclusive of certain others which it is not necessary to set out for the purpose of this appeal. "Dividend" in its ordinary meaning is a

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distributive share of the profits or income of a company given to its shareholders. When the Legislature by s. 2(6A) sought to define the expression "dividend" it added to the normal meaning of the expression several other categories of receipts which may not otherwise be included therein. By the definition in s. 2(6A), "dividend" means dividend as normally understood and includes in its connotation several other receipts set out in the definition. The Tribunal had referred the question whether the distribution of the right to apply for the Bank of India shares amounted to distribution of dividend within the meaning of s. 2(6A) and in answering that question, the High Court had to take into account both the normal and the extended meaning of that expression. In the question framed by the Tribunal, there is nothing to indicate that the High Court was called upon to advise on the question whether the receipts by the appellants amounted to dividend only within the extended definition of that expression in s. 2(6A).

It was also urged that in nominating its shareholders to exercise the option to purchase the new issue of the Bank of India, the Mills did not distribute any dividend. The Mills were, it is true, not obliged to accept the offer made by the Bank of India, however advantageous it might have been to the Mills to accept the offer: it was open to the Mills to renounce the offer. The Mills had three options, (1) to accept the shares, (2) to decline to accept the shares, or (3) to surrender them in favour of its nominee. It is undisputed that when the shares were offered by the Bank of India to its shareholders, the right to apply for the shares had a market value of Rs. 100 per share. The face value of the new share was Rs. 50 but the shareholders had to pay a premium of Rs. 50, thus making a total payment of Rs. 100 for acquiring the new share. The new shares were quoted in the market at more than Rs. 200: and the difference between the amount payable for acquiring the shares under the right offered by the Bank of India and the market quotation of the shares was indisputably the value of the right. The Mills could not be compelled to obtain

this benefit if it did not desire to do so: it could accept the shares or decline to accept those shares or exercise the option of surrendering them in favour of its nominees. This last option could be exercised by nominating the persons who were to take over the shares and that is what the Mills did. The Mills requested the Bank of India to allot the shares to its nominees, and the request for allotment to its nominees amounted to transfer of the right. By its resolution, the Mills in truth transferred a right of the value of Rs. 200 for each share held by its shareholders. This was manifestly not distribution of the capital of the Mills. It was open to the Mills to sell the right to the shares of the Bank of India in the market, and to distribute the proceeds among the shareholders. Such a distribution would undoubtedly have been distribution of dividend. If instead of selling the right in the market and then distributing the proceeds, the Mills directly transferred the right, the benefit in the hands of the shareholders was still dividend.

Dividend need not be distributed in money; it may be distributed by delivery of property or right having monetary value. The resolution, it is true, did not purport to distribute the right amongst the shareholders as dividend. It did not also take the form of a resolution for distribution of dividend; it took the form of distribution of a right which had a monetary value. But by the form of the resolution sanctioning the distribution, the true character of the resolution could not be altered. We are therefore of the view that the High Court was right in holding that the distribution of the right to apply for and obtain two shares of the Bank of India (at half their market value) for each share held by the shareholders of the Mills amounted to distribution of dividend.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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November 22.

DELHI CLOTH AND GENERAL MILLS CO., LTD.

v.

SHRI RAMESHWAR DYAL AND ANR.

(P. B. GAJENDRAGADKAR, A. K. SARKAR, and K. N. WANCHOO, JJ.)

Industrial Dispute—Dismissed workman—Interim reinstatement by Tribunal—If valid—The Industrial Disputes Act, 1947 (14 of 1947), s. 33A.

One Sharda Singh, respondent, who was an employee of the appellant-mills was dismissed for disobeying the orders of the managing authority. He filed an application before the Industrial tribunal under s. 33-A of the Industrial Disputes Act, 1947, contesting his dismissal on various grounds, whereupon the tribunal passed an order to the effect that as an interim measure the respondent be permitted to work in the appellant mills and if the management failed to take him back his full wages be paid from the date he reported for duty. The appellant mills then filed a Writ Petition before the High Court contesting the interim order of the Tribunal and the High Court held that the interim relief granted to the respondent was justified. On appeal by a certificate of the High Court,

Held, that the interim order passed by the tribunal reinstating the respondent was erroneous. Such an interim relief could not be given by the Tribunal as it would amount to prejudging the respondents' case and granting him the whole relief at the outset without deciding the legality of his dismissal after hearing the appellant employer.

The Management, Hotel Imperial and Ors. v. *Hotel Workers' Union*, A.I.R. 1959 S. C. 1342, and *Punjab National Bank* v. *All-India Punjab National Bank Employees' Federation*, A.I.R. 1960 S. C. 160, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 353 of 1959.

Appeal from the judgment and order dated April 22, 1958, of the Punjab High Court (Circuit Bench) at Delhi in Civil Writ No. 257-D of 1957.

M. C. Setalvad, Attorney-General of India, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the Appellant.

G. S. Pathak, R. L. Anand and *Janardan Sharma*, for the respondent No. 2.

1960. November 22. The Judgment of the Court was delivered by

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Delhi Cloth & General Mills Co., Ltd.
v.
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Wanchoo J.

WANCHOO, J.—This is an appeal on a certificate granted by the Punjab High Court. Sharda Singh (hereinafter called the respondent) was in the service of the appellant-mills. On August 28, 1956, the respondent was transferred from the night shift to the day shift in accordance with para 9 of the Standing Orders governing the workmen in the appellant-mills. At that time an industrial dispute was pending between the appellant-mills and their workmen. The transfer was to take effect from August 30, 1956; but the respondent failed to report for work in the day shift and was marked absent. On September 1, 1956, he submitted an application to the General Manager to the effect that he had reported for duty on August 30, at 10-30 p.m. and had worked during the whole night, but had not been marked present. He had again gone to the mills on the night of August 31, but was not allowed to work on the ground that he had been transferred to the day shift. He complained that he had been dealt with arbitrarily in order to harass him. Though he said that he had no objection to carrying out the orders, he requested the manager to intervene and save him from the high-handed action taken against him, adding that the mills would be responsible for his wages for the days he was not allowed to work.

On September 4, 1956, he made an application to the industrial tribunal, where the previous dispute was pending, under s. 33-A of the Industrial Disputes Act, No. XIV of 1947, (hereinafter called the Act) and complained that he had been transferred without any rhyme or reason from one shift to another and that this amounted to alteration in the conditions of his service, which was prejudicial and detrimental to his interest. As this alteration was made against the provisions of s. 33 of the Act, he prayed for necessary relief from the tribunal under s. 33-A. On September 5, 1956, the General Manager replied to the letter of September 1, and told the respondent that his transfer from one shift to the other had been ordered on

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August 28, and he had been told to report for work in the day shift from August 30; but instead of obeying the order which was made in the normal course and report for work as directed he had deliberately disobeyed the order and reported for work on August 30 in the night shift. He was then ordered to leave and report for work in the day shift. He however did not even then report for work in the day shift and absented himself intentionally and thus disobeyed the order of transfer. The General Manager therefore called upon the respondent to show cause why disciplinary action should not be taken against him for wilfully refusing to obey the lawful orders of the departmental officers and he was asked to submit his explanation within 48 hours. The respondent submitted his explanation on September 7, 1956.

Soon after it appears the appellant-mills received notice of the application under s. 33-A and they submitted a reply of it on October 5, 1956. Their case was that transfer from one shift to another was within the power of the management and could not be said to be an alteration in the terms and conditions of service to the prejudice of the workman and therefore the complaint under s. 33-A was not maintainable. The appellant-mills also pointed out that a domestic inquiry was being held into the subsequent conduct of the respondent and prayed that proceedings in the application under s. 33-A should be stayed till the domestic inquiry was concluded. No action seems to have been taken on this complaint under s. 33-A, for which the appellant-mills might be partly responsible as they had prayed for stay of those proceedings. However, the domestic inquiry against the respondent continued and on February 25, 1957, the inquiry officer reported that the charge of misconduct was proved. Thereupon the General Manager passed an order on March 5, 1957, that in view of the serious misconduct of the respondent and looking into his past records, he should be dismissed; but as an industrial dispute was pending then, the General Manager ordered that the permission of the industrial tribunal should be taken before the order of dismissal was

passed and an application should be made for seeking such permission under s. 33 of the Act.

In the meantime, a notification was issued on March 1, 1957, by which 10th March, 1957, was fixed for the coming into force of certain provisions of the Central Act, No. XXXVI of 1956, by which ss. 33 and 33-A were amended. The amendment made a substantial change in s. 33 and this change came into effect from March 10, 1957. The change was that the total ban on the employer against altering any condition of service to the prejudice of workmen and against any action for misconduct was modified. The amended section provided that where an employer intended to take action in regard to any matter connected with the dispute or in regard to any misconduct connected with the dispute, he could only do so with the express permission in writing of the authority before which the dispute was pending; but where the matter in regard to which the employer wanted to take action in accordance with the Standing Orders applicable to a workman was not connected with the dispute or the misconduct for which action was proposed to be taken was not connected with the dispute, the employer could take such action as he thought proper, subject only to this that in case of discharge or dismissal one month's wages should be paid and an application should be made to the tribunal before which the dispute was pending for approval of the action taken against the employee by the employer. In view of this change in the law, the appellant-mills thought that as the misconduct of the respondent in the present case was not connected with the dispute then pending adjudication, they were entitled to dismiss him after paying him one month's wages and applying for approval of the action taken by them. Consequently, no application was made to the tribunal for permission in accordance with the order of the General Manager of March 5, 1957, already referred to. Later, on April 2, 1957, an order of dismissal was passed by the General Manager after tendering one month's wages to the respondent and an application was made to the authority concerned for approval of the action taken against the respondent.

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Thereupon the respondent filed another application under s. 33-A of the Act on April 9, 1957, in which he complained that the appellant-mills had terminated his services without the express permission of the tribunal and that this was a contravention of the provisions of s. 33 of the Act; he therefore prayed for necessary relief. On April 18, 1957, an interim order was passed by the tribunal on this application by which as a measure of interim relief, the appellant-mills were ordered to permit the respondent to work with effect from April 19 and the respondent was directed to report for duty. It was also ordered that if the management failed to take the respondent back, the respondent would be paid his full wages with effect from April 19 after he had reported for duty. On May 6, 1957, however, the application dated April 9, 1957, was dismissed as defective and therefore the interim order of April 18 also came to an end. On the same day (namely, May 6, 1957), the respondent made another application under s. 33-A in which he removed the defects and again complained that his dismissal on April 2, 1957, without the express previous permission of the tribunal was against s. 33 and prayed for proper relief.

It is this application which is pending at present and has not been disposed of, though more than three years have gone by. It is also not clear what has happened to the first application of September 4, 1956, in which the respondent complained that his conditions of service had been altered to his prejudice by his transfer from one shift to another. Applications under s. 33 and s. 33-A of the Act should be disposed of quickly and it is a matter of regret that this matter is pending for over three years, though the appellant-mills must also share the blame for this state of affairs. However, the appellant-mills gave a reply on May 14, 1957, to the last application under s. 33-A and objected that there was no breach of s. 33 of the Act, their case being that the amended s. 33 applied to the order of dismissal passed on April 2, 1957. Further, on the merits, the appellant-mills' case was that the dismissal was in the circumstances justified.

The matter came up before the tribunal on May 16, 1957. On this date, the tribunal again passed an interim order, which was to the effect that as a measure of interim relief, the respondent should be permitted to work from May 17 and the respondent was directed to report for duty. It was further ordered that in case the management failed to take him back, they would pay him his full wages with effect from the date he reported for duty.

Thereupon the appellant-mills filed a writ petition before the High Court. Their main contention before the High Court was two-fold. In the first place it was urged that the tribunal had no jurisdiction to entertain an application under s. 33-A of the Act in the circumstances of this case after the amended sections 33 and 33-A came into force from March 10, 1957. In the alternative it was contended that the tribunal had no jurisdiction to pass an interim order of reinstatement or in lieu thereof payment of full wages to the respondent even before considering the questions raised in the application under s. 33-A on the merits. The High Court held on the first point that in view of s. 30 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, No. XXXVI of 1956, the present case would be governed by s. 33 as it was before the amendment and therefore the tribunal would have jurisdiction to entertain the complaint dated May 6, 1957, under s. 33-A of the Act. On the second point, the High Court held that the order of the tribunal granting interim relief was within its jurisdiction and was justified. In consequence, the writ petition was dismissed. Thereupon the appellant-mills applied and was granted a certificate by the High Court to appeal to this Court; and that is how the matter has come up before us.

The same two points which were raised in the High Court have been urged before us. We are of opinion that it is not necessary in the present case to decide the first point because we have come to the conclusion that the interim order of May 16, 1957, is manifestly erroneous in law and cannot be supported. Apart from the question whether the tribunal had jurisdiction

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to pass an interim order like this without making an interim award, (a point which was considered and left open by this Court in *The Management of Hotel Imperial* v. *Hotel Workers' Union* (1)), we are of opinion that where the tribunal is dealing with an application under s. 33-A of the Act and the question before it is whether an order of dismissal is against the provisions of s. 33 it would be wrong in law for the tribunal to grant reinstatement or full wages in case the employer did not take the workman back in its service as an interim measure. It is clear that in case of a complaint under s. 33-A based on dismissal against the provisions of s. 33, the final order which the tribunal can pass in case it is in favour of the workman, would be for reinstatement. That final order would be passed only if the employer fails to justify the dismissal before the tribunal, either by showing that proper domestic inquiry was held which established the misconduct or in case no domestic inquiry was held by producing evidence before the tribunal to justify the dismissal: See *Punjab National Bank Ltd.* v. *All-India Punjab National Bank Employees' Federation* (2), where it was held that in an inquiry under s. 33-A, the employee would not succeed in obtaining an order of reinstatement merely by proving contravention of s. 33 by the employer. After such contravention is proved it would still be open to the employer to justify the impugned dismissal on the merits. That is a part of the dispute which the tribunal has to consider because the complaint made by the employee is to be treated as an industrial dispute and all the relevant aspects of the said dispute fall to be considered under s. 33-A. Therefore, when a tribunal is considering a complaint under s. 33-A and it has finally to decide whether an employee should be reinstated or not, it is not open to the tribunal to order reinstatement as an interim relief, for that would be giving the workman the very relief which he could get only if on a trial of the complaint the employer failed to justify the order of dismissal. The interim relief ordered in this case was that the work

(1) [1960] 1 S.C.R. 476. (2) [1960] 1 S.C.R. 806.

man should be permitted to work: in other words he was ordered to be reinstated; in the alternative it was ordered that if the management did not take him back they should pay him his full wages. We are of opinion that such an order cannot be passed in law as an interim relief, for that would amount to giving the respondent at the outset the relief to which he would be entitled only if the employer failed in the proceedings under s. 33-A. As was pointed out in *Hotel Imperial's case* (1), ordinarily, interim relief should not be the whole relief that the workmen would get if they succeeded finally. The order therefore of the tribunal in this case allowing reinstatement as an interim relief or in lieu thereof payment of full wages is manifestly erroneous and must therefore be set aside. We therefore allow the appeal, set aside the order of the High Court as well as of the tribunal dated May 16, 1957, granting interim relief.

Learned counsel for the respondent submitted to us that we should grant some interim relief in case we came to the conclusion that the order of the tribunal should be set aside. In the circumstances of this case we do not think that interim relief to the respondent is justified hereafter. As we have pointed above, applications under ss. 33 and 33-A should be dealt with expeditiously. We trust that the applications dated September 4, 1956, which appears to have been overlooked and of May 6, 1957, will now be dealt with expeditiously and finally disposed of by the tribunal, as all applications under s. 33-A should be. In the circumstances we pass no order as to costs.

Appeal allowed.

(1) [1960] 1 S.C.R. 476.

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November 23.

SRISH CHANDRA SEN (DECEASED) AND OTHERS

v.

THE COMMISSIONER OF INCOME-TAX, WEST BENGAL

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Agricultural income—Acquisition of land forming part of permanently settled estate—Redemption of liability to pay land revenue by payment of lump sum—Agricultural income from the land—Liability to income-tax—Indian Income-tax Act, 1922 (11 of 1922), s. 2(1).

By a notification dated November 2, 1864, a piece of land forming part of the Panchannagram Estate which was permanently settled under Regulation I of 1793, was acquired by the Government of Bengal at the instance of the Justices of the Peace for the Town of Calcutta, which was a corporation established under the provisions of the Calcutta Municipal Act, 1863, and the Justices were required to pay the compensation payable to the proprietor of the Estate. After the acquisition, the proprietor of the Estate was granted abatement of land revenue assessed on the Estate to the extent of Rs. 386-7-1, being the proportionate land revenue on the land acquired. On October 27, 1865, the Government called upon the Justices to pay a sum of Rs. 7,728-13-8, which represented the amount capitalised at 20 years' purchase of land revenue attributed to the area acquired. On December 5, 1870, the Secretary of State executed in favour of the Justices of the Peace a conveyance of the land acquired, which stated, inter alia, that it was "ever free and clear and for ever discharged from all Government land revenue whatever or any payment or charge in the nature thereof to the end and intent that the said land may be used for a public purpose, namely, for the conservancy of the town." On January 23, 1880, a lease of the land was granted by the Justices to the predecessors-in-title of the appellant, under which the lessee had the right to carry on cultivation with the aid of sewage.

Before the income-tax authorities the appellant claimed that the agricultural income derived by him from the land was not liable to income-tax, but the claim was rejected on the ground that on the payment of a lump-sum in 1865 the liability to pay land revenue was redeemed and no land revenue was demanded thereafter; consequently, the income derived from the land was not agricultural income within the meaning of s. 2(1) of the Indian Income-tax Act, 1922, and was not, therefore, exempt from tax. The appellant's contention was that the redemption only saved the Justices from liability for payment but did not affect the assessability of the land to revenue under Regulation I of 1793.

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Held, that by the down payment of a lump sum in 1865 the entire land revenue to be recovered from the land was redeemed and the land became free from land revenue assessment in perpetuity, as completely as if there was no assessment. Thereafter, the land could not be said to be assessed to land revenue within the meaning of s. 2(1) of the Indian Income-tax Act, 1922, and, consequently, the income derived therefrom could not be considered to be agricultural income under that section.

The Collector of Bombay v. *Nusserwanji Rattanji Mistri and Others*, [1955] 1 S.C.R. 1311, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 405 of 1957.

Appeal from the judgment and order dated May 15, 1956, of the Calcutta High Court in I.T.R. No. 20 of 1953.

S. Mitra, B. Das and *S. N. Mukherjee*, for appellants Nos. 2 to 41.

A. N. Kripal and *D. Gupta*, for the respondent.

1960. November 23. The Judgment of the Court was delivered by

Hidayatullah J.

HIDAYATULLAH, J.—The point involved in this appeal is a very short one; but it requires a long narration of facts to reach it. The appeal is against the judgment and order of the High Court of Calcutta dated May 15, 1956, arising out of an Income-tax Reference.

By the Calcutta Municipal Act VI of 1863, there was established a Corporation under the name of "The Justices of the Peace for the Town of Calcutta". By a notification issued on November 2, 1864, one square mile of land forming part of the Panchannagram Estate was acquired by the Government of Bengal at the instance of the Justices. Section CXII of the Municipal Act provided that the Justices might "agree with the owners of any land for the absolute purchase thereof.....for any other purpose whatever connected with the conservancy of the Town". Under s. CXIII, it was provided that if there was any hindrance to acquisition by private treaty, the Government of Bengal upon the representation of the Justices would compulsorily acquire the land and vest

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such land in the Justices on their paying compensation awarded to the proprietor. The action which was taken by the notification was under s. CXIII of the Municipal Act, and the acquisition was under Act VI of 1857, an Act for the acquisition of land for public purposes.

The Panchannagram Estate was permanently settled under Regulation I of 1793. After the acquisition, the proprietor of Panchannagram Estate was granted abatement of land revenue assessed on the Estate to the extent of Rs. 386-7-1. This represented the proportionate land revenue on the land acquired.

In August, 1865, the Justices were required to pay Rs. 54,685-2-10 as compensation payable to the proprietor and to other persons holding interest in the land. Another piece of land which is described as an open level sewer, was also acquired about the same time, and separate compensation was paid for it. With the amount of conveyance charges, the total compensation thus paid by the Justices was Rs. 57,965-8-10. On October 27, 1865, the Government called upon the Justices to pay a further sum of Rs. 7,728-13-8. This order has not been produced in the case; but from other correspondence, it is easy to see that the amount represented an amount capitalised at 20 years' purchase of land revenue attributed to the area acquired, which, as has been stated above, came to Rs. 386-7-1. This payment was made on or about January 12, 1866. Similarly, another amount was paid in July of the same year for redemption of the land revenue in respect of the strip of land for the open sewer.

On December 5, 1870, a conveyance was executed by the Secretary of State in favour of the Justices of the Peace. It was there stated, *inter alia*:

"Whereas the Honourable the Lieutenant Governor of Bengal hath thought fit that the said land so acquired as aforesaid would be vested in the said Justices of the Peace for the Town of Calcutta a Corporation created by and authorised to hold land under the said Act No. VI of 1863 of the Council of the Lieutenant Governor of Bengal to the end and intent

that the said land may be held by the said Justices for a public purpose, namely, for the conservancy of the Town.....and subject in every way to the same Act but free and discharged from all payment of land revenue, land tax and all and every tax or imposition in the nature of revenue derivable from land payable to Government in respect thereof; NOW THIS INDENTURE WITNESSETH..... to hold the said pieces of land, hereditaments and premises intended to be conveyed with the appurtenances except as aforesaid unto the said Justices of the Peace for the Town of Calcutta and their successors for ever free and clear and for ever discharged from all Government land revenue whatever or any payment or charge in the nature thereof to the end and intent that the said land may be used for a public purpose namely for the conservancy of the town upon the trusts and subject to the powers, provisions, terms and conditions contained in the said Act No. VI of 1863 of the Council of the Lieutenant Governor of Bengal and to the rules heretofore passed or hereafter to be passed by the Government of Bengal under the the said last mentioned Act;".

On January 23, 1880, a temporary lease of the land known as the 'Square Mile' was granted by the Justices of the Peace to the predecessors-in-title of the appellant (assessee), Srish Chandra Sen who has, since the filing of the appeal, died, leaving behind 40 legal representatives who have been shown in the cause title of the appeal. The lease was renewed for further periods, and the rent was also progressively increased. The conservancy arrangements for which the land was held were carried out; but the lessee had the right to carry on cultivation with the aid of sewage.

The assessee derived from this land various kinds of income, some being purely agricultural and some, non-agricultural. For the assessment year 1942-43, the total agricultural income was computed at Rs. 99,987-9-6, and non-agricultural income, at Rs. 12,503-8-0. Agricultural income-tax was charged by the State of Bengal under the Agricultural Income-

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tax Act, on the agricultural income less expenses. For the assessment years, 1943-44, 1944-45, 1945-46 and 1946-47, the assessments were made along similar lines. In 1947, the Income-tax Officer reassessed the income for the assessment year, 1942-43 after reopening the assessment under s. 34 of the Income-tax Act on the ground that the so-called agricultural income had escaped assessment to income-tax under the Indian Income-tax Act. Assessments for the other years, 1943-44, 1944-45, 1945-46 and 1946-47 were also reopened, and the income in those years was also similarly reassessed. The assessee appealed to the Appellate Assistant Commissioner against all these orders of the Income-tax Officer, but his appeals failed. Against the orders of the Appellate Assistant Commissioner, appeals were filed before the Income-tax Appellate Tribunal (Calcutta Bench). The Tribunal dealt with the assessment for 1942-43 separately, and allowed the appeal as regards assessment for that year. It held that the reassessment was improper under s. 34 of the Income-tax Act, because the Income-tax Officer had not proceeded on any definite information but in the course of a "roving enquiry". The Tribunal also held that the income was exempt from taxation to income-tax under s. 4(3)(viii) of the Act, inasmuch as this income was derived from land used for agricultural purposes, which continued to be assessed to land revenue.

In the appeals arising out of assessments for the subsequent years, a common order was passed by the Tribunal, remanding the appeals to the Appellate Assistant Commissioner for a rehearing. The Tribunal stated that the appellants had filed a number of documents to establish that land revenue was assessed on the land which, the Department contended, proved the contrary. The Tribunal felt that the matter should be reconsidered by the Appellate Assistant Commissioner, and hence remanded the cases. The Appellate Assistant Commissioner in the rehearing held that the land in question continued subject to land revenue, and that the lump sum payment was merely payment of revenue in advance. He accordingly allowed the appeals, and ordered exclusion of the income

from the assessments for the four years in question. On appeal by the Department, the Tribunal changed its opinion, and came to the conclusion that the payment of a lump sum was not a payment in advance of the land revenue due from year to year but was land revenue capitalised. It referred to the deed by which the proprietorship in the land was vested in the Corporation by the Secretary of State, and stated that by the document and the capitalisation of land revenue, the demand for land revenue was extinguished for ever. It accordingly allowed the appeals, and restored the orders of assessment made by the Income-tax Officer.

The assessee next moved the Tribunal for a reference setting out a number of questions which, he contended, arose out of the Tribunal's order. The Tribunal referred the following question of law for the opinion of the High Court:

"Whether on the facts and in the circumstances of this case the Tribunal's conclusion that the land was not assessed to land revenue within the meaning of s. 2(1)(a) of the Indian Income-tax Act is justified?" The reference was heard by Chakravarti, C. J., and Sarkar, J., (as he then was). In an elaborate judgment, the learned Chief Justice upheld the conclusions of the Tribunal, and answered the question in the affirmative. Sarkar, J., in an equally elaborate order expressed his doubts about the correctness of the Chief Justice's reasons, but declined to disagree with him.

The question that arises in this case, as we have stated in the opening of this judgment, is a very short one. It is an admitted fact that by payment of a lump sum the liability to pay land revenue was redeemed and no land revenue was demanded or was ever demandable from the Justices or their assigns in perpetuity. The contention of the assessee is that this redemption saved the Justices from the liability for payment but did not affect the assessability of the land to revenue under Regulation I of 1793. Unless, it is contended, there was a cancellation of the assessment, as is to be found in the

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Land Tax and Tithe Redemption Acts in England, the liability must be deemed to continue and land would still be assessed to land revenue for purposes of s. 2(1)(a) of the Indian Income-tax Act. That section reads as follows:

"2(1) 'Agricultural income' means—

(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in (the taxable territories) or subject to a local rate assessed and collected by Officers of (the Government) as such".

It is not denied that both the conditions, namely, "used for agricultural purposes" and "is either assessed to land revenue or subject to a local rate....." have to co-exist. It is admitted by the Department that there is no question of subjection to a local rate assessed and collected, in this case. The income derived from the land was from its use for agricultural purposes, and the first condition is thus satisfied. The dispute centres round the point whether the land can be said to be assessed to land revenue, in spite of the lump sum payment in 1865.

In the High Court, the matter was examined from three different points of view. The first was the effect of acquisition of the land by Government upon the continued assessability of the land to land revenue. The learned Chief Justice held that by the acquisition the assessment ceased to subsist. The second was the effect of the redemption of land revenue by the Justices by a lump sum payment. The learned Chief Justice was of opinion that it had the effect of cancelling the assessment. The last was the effect of the grant free from land revenue, about which the learned Chief Justice was of opinion that it freed the land from assessment to land revenue. Sarkar, J., agreed as to the first, but expressed doubts about the second and third propositions. According to the learned Judge, the acceptance of a lump sum payment in lieu of recurring annual payments was more a matter of agreement than a cancellation of assessment to land revenue.

The matter has been argued before us from the

same points of view; but Mr. Mitra has added an argument about the interpretation to be placed on the conveyance by the Secretary of State which, according to him, only freed the Justices from 'payment' of the assessed land revenue but did not cancel the assessment.

No Act of Legislature bearing upon the power of Government to accept a lump sum payment in lieu of the annual demands for land revenue has been brought to our notice. Counsel admitted that they were unable to find any such legislative provision. We have thus to proceed, as did the High Court, without having before us the authority of a legislative enactment. The only materials to which reference was made are: an extract from the explanatory notes in the Revenue Roll of the Touzi which shows that an abatement of land revenue *pro tanto* was granted to the proprietor of Panchannagram Estate, and a despatch from the Secretary of State for India (Lord Stanley)—No. 2 (Revenue) dated December 31, 1858—recommending redemption of land revenue by an immediate payment of a sum of equivalent value, together with a Resolution of Government (Home Department No. 3264 (Rev) dated October 17, 1861) on permission to redeem the existing land revenue by the immediate payment of one sum equal in value to the revenue redeemed. By the resolution, it was provided that such redemption would be limited to 10 per cent of the total revenue in the Collectorate and the price to be paid was to be fixed at 20 years' purchase of the existing assessment. It may be mentioned that in Despatch No. 14 dated July 9, 1862, the Secretary of State for India (Sir Charles Wood) did not agree with the earlier policy, but did not cancel it.

It may thus be assumed that what was done was under the authority of the Crown, which was then paramount, which paramountcy included the prerogative to free land from the demand of land revenue with or without conditions. We have, therefore, to examine three things: the effect of acquisition on the continuance of the assessment to land revenue, the effect of redemption by a down payment on the same,

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and the effect of the grant, free from land revenue, to the Justices.

The acquistion was under Act VI of 1857. That Act provided in s. XXVI as follows:

"When any land taken under this Act forms part of an estate paying revenue to Government, the award shall specify the net rent of the land including the Government Revenue, and the computed value of such rent: and it shall be at the discretion of the Revenue authorities either to pay over the whole of such value to the owner of the estate on the condition of his continuing to pay the jumma thereof without abatement; or to determine what proportion of the net rent shall be allowed as a remission of revenue, in which case a deduction shall be made from the said value proportionate to the value of such remission."

This provision only saved the Estate assessed to land revenue from liability to pay land revenue proportionately falling upon the land acquired compulsorily, subject to a like proportionate reduction in the amount of compensation payable to the proprietor of the estate, but the provision cannot be stretched to mean that the liability of the land actually acquired, to land revenue in the hands of grantees from the Government also ceased. Be that as it may, it is hardly necessary to view the present case from this angle at all, because, whether the land acquired continued to be subject to an assessment or must be deemed to be reassessed as a separate estate, the result would be the same if Government demand still subsisted on it, as, in fact, it did. There could have been no redemption of the liability by a down payment if no land revenue could have been demanded. The fact that the recurring liability was redeemed by a lump sum payment itself shows that in the view of Government as well as of the Justices, the 'Square Mile' was still subject to the recurring demand and was thus still assessed to land revenue. It is, therefore, not profitable to investigate the effect of acquisition on the continued liability of the land to land revenue between the time there was acquisition and the vesting of the land in the Justices.

For the above reason, we need not examine at

length the case in *Lord Colchester* v. *Kewnoy* (1), where the acquisition by the Crown was held not to make the area acquired immune from land-tax, because the burden of the tax would then have fallen upon the remaining land situated in the unit from which it was acquired and on which unit a quota of the land-tax was chargeable. Such a position does not arise here, because the Panchannagram Estate was given abatement and a lump sum was paid to free the land acquired from the liability to land revenue. Similarly, the decision of this Court in *The Collector of Bombay* v. *Nusserwanji Rattanji Mistri and Others* (2), where on the acquisition of some Foras lands held under Foras Land Act (Bombay Act VI of 1851) the Foras tenure was declared to have come to an end and on the same lands being resold by Government as freehold, they were declared not to be subject to assessment to which they were previously subject, is not very helpful.

There do not appear to be any rules prior to 1875, which were framed under the Land Acquisition Act of 1870 (Act X of 1870) and which are to be found in the Calcutta Gazette of July 7, 1875, p. 818. If there were, they have not been brought to our notice. But a practice similar to the rules seems to have obtained under s. XXVI of the Act of 1857. That Act also did not contain any provision for making rules, as are to be found in the subsequent Acts for compulsory acquisition of land. In the absence of any statutory law or rules, we must take the facts to be that after acquisition the Panchannagram Estate was given abatement of land revenue, and the demand for land revenue was transferred to the land acquired and granted to the Justices. At that stage, the liability to assessment remained, and it was that liability which was redeemed by a down payment.

We next consider the effect of redemption. Learned counsel for the appellant contends that redemption in this connection means that by a single payment, the liability for periodical payments is saved but the assessment on the land remains uncancelled. He has cited Wharton's Law Lexicon to show the meaning of

(1) (1866) L.R. 1 Exch. 368. (2) [1955] 1 S.C.R. 1311.

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the word "redemption", which is "commutation or the substitution of one lump payment for a succession of annual ones: e.g. See the Land Tax and the Tithe Redemption Acts and many other statutes". Redemption is the act of redeeming which in its ordinary meaning is equal to bringing off a charge or obligation by payment. To what extent this redemption freed the land or its holder from the obligation depends not so much upon what the obligation was before redemption as what remained of that obligation after it. Here, the payment itself was meant to be "an immediate payment of one sum equal in value to the revenue redeemed" (vide the Resolution of Government dated October 17, 1861). By the down payment, the entire land revenue to be recovered from that land was redeemed. The payment was equal to the capitalised value of the land revenue. When such a payment took place, it cannot be said that the assessment for land revenue remained. The land was freed from that assessment as completely as if there was no assessment. Thenceforward, the land would be classed as revenue-free, in fact and in law. In The Land-Law of Bengal (Tagore Law Lectures, 1895) p. 81 S. C. Mitra described these revenue-free lands as follows:

"There is another class of revenue-free lands which comes within these rules laid down in the Registration and Tenancy Acts, namely, lands of which Government has, in consideration of the payment of a capitalised sum, granted proprietary title free in perpetuity from any demand of land-revenue."

That this is what had happened here is quite apparent from the conveyance by the Secretary of State vesting the land in the Justices. It is significant that there is no mention of the payment of Rs. 7,728-13-8, nor of the assessability of the lands to land revenue. On the other hand, the deed of conveyance merely reaffirmed the position, which existed before by stating:

"...to hold the said pieces of land, hereditaments and premises intended to be conveyed with the appurtenances except as aforesaid unto the said Justices of the Peace for the Town of Calcutta and their successors for ever free and clear and for ever discharged

from all Government land revenue whatever or any payment or charge in the nature thereof."

There can be no doubt that the land revenue was for ever extinguished and the land became free from land revenue assessment in perpetuity. It cannot thereafter be said that the land was still assessed to land revenue.

Mr. Mitra made a great effort to construe the operative part quoted above with the aid of the recital in the deed, where it was stated:

"...but free and discharged from all payment of land revenue, land tax and all and every tax or imposition in the nature of revenue derivable from land payable to Government...".

He drew attention to the word 'payment', and contended that what was saved was payment of land revenue. He argued that in case of ambiguity it was permissible to construe the operative portion of a deed in the light of the recitals, and cited Halsbury's Laws of England, 3rd Edn., Vol. XI, p. 421, para. 680, *Gwyn* v. *Neath Canal Co.* (1) and *Orr* v. *Mitchell* (2). If there was any ambiguity in the operative portion of the deed, we may have taken the aid of the recitals. But there is no ambiguity in the deed. The history of redemption is a matter of record, and it is plain that Government was accepting a down payment and freeing land from land revenue. This is precisely what was done, and the result of the down payment is set out with great clarity in the deed itself, and it is that there was no land revenue assessed on or demandable from that land. In fact, no demand or payment or charge in the nature of land revenue could ever be made on it. In view of this, it is, in our judgment, quite satisfactorily established that this land was not assessed to land revenue and the income from it did not fall within s. 2(1)(a) of the Income-tax Act. The answer given by the High Court was thus correct.

In the result, the appeal fails, and will be dismissed with costs.

Appeal dismissed

(1) (1868) L R. 3 Exch. 209.

(2) [1893] A. C. 238, 254.

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November 23.

ABDUL HAKIM QURAISHI AND OTHERS

v.

THE STATE OF BIHAR
(AND CONNECTED PETITIONS)

(JAFER IMAM, S. K. DAS, J. L. KAPUR, A. K. SARKAR and K. SUBBA RAO, JJ.)

Cattle Preservation—Ban on slaguhter of cattle below 20 or 25 years of age—Whether reasonable—Bihar Preservation and Improvement of Animals (Amendment) Act, 1959 (Bihar I of 1959), s. 3—Bihar Preservation and Improvement of Animals Rules, 1960, r. 3—Uttar Pradesh Prevention of Cow Slaughter (Amendment) Act, 1958 (U. P. 33 of 1958), s. 3—Madhya Pradesh Agricultural Cattle Preservation Act, 1959 (M. P. 18 of 1959), ss. 4(2)(a) and 5.

In *Mohd. Hanif Quareshi* v. *The State of Bihar* the Supreme Court held that a total ban on the slaughter of bulls, bullocks and she-buffaloes after they had ceased to be useful was not in the interests of the general public and was invalid. Thereafter, the Bihar Legislature passed the Bihar Preservation and Improvement of Animals (Amendment) Act, 1958, the Uttar Pradesh Legislature passed the U. P. Prevention of Cow Slaughter (Amendment) Act, 1958 and the Madhya Pradesh Legislature passed a new Act, the M. P. Agricultural Cattle Preservation Act, 1959.

Section 3 of the Bihar Act prohibited the slaughter of a bull, bullock or she-buffalo except when it was over 25 years of age and had become useless. Rule 3 of the Bihar Preservation and Improvement of Animals Rules, 1960 prescribed that the certificate for slaughtering an animal could be granted only with the concurrence of the Veterinary Officer and the Chairman or Chief Officer of a District Board, Municipality etc., and if the two differed, then according to the decision of the Sub-Divisional Animal Husbandary Officer.

Section 3 of the U. P. Act permitted the slaughter of a bull or bullock only if it was over 20 years of age and was permanently unfit. It further provided that the animal could not be slaughtered within 20 days of the grant of a certificate that it was fit to be slaughtered and gave a right of appeal to any person aggrieved by the order granting the certificate.

Section 4(1)(b) of the Madhya Pradesh Act provided that no bull, bullock or buffallo could be slaughtered except upon a certificate issued by the competent authority and s. 4(2)(a) provided that no certificate could be issued unless the animal was over 20 years of age and was unfit for work or breeding. Section 4(3) gave a right of appeal to any person aggrieved by the order of the competent authority. Section 5 provided that no animal

shall be slaughtered within 10 days of the date of the issue of the certificate and where an appeal was preferred against the grant of the certificate, till the time such appeal was disposed of.

The petitioners, who carried on the profession and trade of butchers, contended that the various provisions of the three Acts set out above infringed their fundamental rights by practically putting a total ban on the slaughter of bulls, bullocks and she-buffaloes even after the animal had ceased to be useful and thus virtually put an end to their profession and trade.

Held, (i) that the ban on the slaughter of bulls, bullocks and she-buffaloes below the age of 20 or 25 years was not a reasonable restriction in the interests of the general public and was void. A bull, bullock or buffalo did not remain useful after 15 years, and whatever little use it may have then was greatly offset by the economic disadvantages of feeding and maintaining unserviceable cattle. The additional condition that the animal must, apart from being above 20 or 25 years of age, also be unfit was a further unreasonable restriction. Section 3 of the Bihar Act, s. 3 of the U. P. Act and s. 4(2)(a) of the M. P. Act were invalid.

(ii) Rule 3 of the Bihar Rules was bad as it imposed disproportionate restrictions on the rights of the petitioners. The procedure involved such expenditure of money and time as made the obtaining of the certificate not worthwhile.

(iii) The provisions in the Uttar Pradesh and Madhya Pradesh Acts providing that the animal shall not be slaughtered within 20 and 10 days respectively of the issue of the certificate and that any person aggrieved by the order of the competent authority, may appeal against it, were likely to hold up the slaughter of the animal for a long time and practically put a total ban on slaughter of bulls, bullocks and buffaloes even after they had ceased to be useful. These provisions imposed unreasonable restrictions on the fundamental rights of the petitioners and were void.

Mohd. Hanif Quareshi v. *The State of Bihar*, [1959] S.C.R. 629, *State of Madras* v. *V. G. Row*, [1952] S.C.R. 597 and *The State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga*, [1952] S.C.R. 889, referred to.

ORIGINAL JURISDICTION: Petitions Nos. 15 of 1959, 14 of 1960 and 21 of 1959.

Petitions under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

Frank Anthony and *J. B. Dadachanji*, for the petitioners (In Petns. Nos. 15 and 21 of 1959).

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H. J. Umrigar, O. P. Rana and *A. G. Ratnaparkhi*, for the petitioners (In Petn. No. 14 of 1960).

L. K. Jha and *S. P. Varma*, for the respondent (In Petn. No. 15 of 1959).

C. K. Daphtary, Solicitor-General of India, M. Adhikari, Advocate-General for the State of Madhya Pradesh and *I. N. Shroff*, for the respondent (In Petn. No. 14 of 1960).

H. N. Sanyal, Additional Solicitor-General of India and *C. P. Lal*, for the respondent (In Petn. No. 21 of 1959).

1960. November 23. The Judgment of the Court was delivered by

S. K. Das J.

S. K. DAS, J.—These three writ petitions have been heard together, as they raise common questions of law and fact. They relate, however, to three different enactments made by the Legislatures of three different States—Bihar in writ petition No. 15, Uttar Pradesh in writ petition No. 21, and Madhya Pradesh in writ petition No. 14. The petitioners in the several petitions have challenged the validity of a number of provisions of the enactments in question and, in some cases, also of the rules made thereunder. The impugned provisions are similar in nature, but are not exactly the same. Therefore, we shall first state in general terms the case of the petitioners and then consider in detail and separately the impugned provisions in each case. But before we do so, it is necessary to refer to some background history of the legislation under consideration in these cases.

In the year 1958 this Court had to consider the validity of certain provisions of three Acts:

(1) The Bihar Preservation and Improvement of Animals Act, (Bihar Act II of 1956);

(2) the Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (U. P. Act I of 1956); and

(3) the Central Provinces and Berar Animal Preservation Act, 1949 (C. P. and Berar Act LII of 1949).

The Bihar Act put a total ban on the slaughter of all

categories of animals of the species of bovine cattle. The U. P. Act put a total ban on the slaughter of cows and her progeny which included bulls, bullocks, heifers and calves. The C. P. and Berar Act placed a total ban on the slaughter of cows, male or female calves of cows, bulls, bullocks, and heifers, and the slaughter of buffaloes (male or female, adults or calves) was permitted only under a certificate granted by the proper authorities. These three Acts were enacted in pursuance of the directive principle of State policy contained in Art. 48 of the Constitution. The petitioners who challenged the various provisions of the aforesaid Acts in 1958 were engaged in the butcher's trade and its subsidiary undertakings; they challenged the constitutional validity of the Acts on the ground that they infringed their fundamental rights under Arts. 14, 19(1)(f) and (g) of the Constitution. In the decision which this Court gave in *Mohd. Hanif Quareshi* v. *The State of Bihar* (1), it held—

(i) that a total ban on the slaughter of cows of all ages and calves of cows and of she-buffaloes, male or female, was quite reasonable and valid;

(ii) that a total ban on the slaughter of she-buffaloes or breeding bulls, or working bullocks (cattle as well as buffaloes) so long as they were capable of being used as milch or draught cattle was also reasonable and valid; and

(iii) that a total ban on slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they ceased to be capable of yielding milk or of breeding or working as draught animals was not in the interests of the general public and was invalid.

In the result this Court directed the respondent States not to enforce their respective Acts in so far as they were declared void by it. This led to some amending or new legislation, and we are concerned in these three cases with the provisions of these amending or new Acts and the rules made thereunder. In Bihar (Writ Petition No. 15 of 1959) the impugned Act is called the Bihar Preservation and Improvement of Animals

(1) [1959] S.C.R. 629.

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(Amendment) Act, 1959 which received the assent of the Governor on January 13, 1959. In Uttar Pradesh (Writ Petition No. 21 of 1959) the impugned Act is called the Uttar Pradesh Prevention of Cow Slaughter (Amendment) Act, 1958 and in Madhya Pradesh (Writ Petition No. 14 of 1960) a new Act was passed called the Madhya Pradesh Agricultural Cattle Preservation Act, 1959 (Act 18 of 1959) which received the assent of the President on July 24, 1959 and came into force on January 15, 1960. The rules made thereunder are called the Madhya Pradesh Agricultural Cattle Preservation Rules, 1959.

The general case of the petitioners, who are several in number in each of the three cases, is that they are citizens of India and carry on their profession and trade of butchers; they allege that the various provisions of the impugned legislation infringe their fundamental rights in that they, for all practical purposes, have put a total ban on the slaughter of she-buffaloes, bulls or bullocks, even after such animals have ceased to be useful, and have virtually put an end to their profession and trade. It is pointed out that the age up to which the animals referred to above cannot be slaughtered (20 or 25 years) has been put so high that the practical effect is that no animals can be slaughtered, and the amending or new legislation has put in other restrictions so arbitrary and unreasonable in nature that in effect they amount to a prohibition or destruction of the petitioner's right to carry on their trade and profession. The following allegations quoted from one of the petitions (Writ Petition No. 15 of 1959) give a general idea of the nature of the case which the petitioners have put forward:

"That there is good professional authority for the view that even in countries where animal husbandry is organised on a highly progressive and scientific basis, cattle seldom live beyond 15 or 16 years.

That there is also good authority to the effect that even pedigree breeding bulls are usually discarded at the age of 12 or 14 years.

That in India bulls and bullocks and she-buffaloes rarely live even up to the age of 15 years; draught bullocks begin to age after eight years.

That the raising of the age limit from 15 to 20 years is arbitrary, unreasonable and against the general public interests and is repugnant to and infringes the fundamental rights of the petitioners under Article 19 (1)(f) and (g) of the Constitution.

That section 3 of the amending Act is a mala fide, colourable exercise of power, repugnant to the fundamental rights of the petitioners under Article 19 (1)(f) and (g).

That this arbitrary raising of the age limit will be against the public interests for the following among other reasons:

(i) That there will, in fact, be no bulls or bullocks or she-buffaloes available for slaughter as few, if any, of such animals survive in India up to the age of 15 years;

(ii) that the profession, trade and occupation of millions of Muslims will be permanently and irreparably injured;

(iii) that millions of members of the minority communities such as Christians, Scheduled Castes, Scheduled Tribes and Muslims, for whom cattle-beef is a staple item of their diet, will be deprived of this diet;

(iv) that the menace of the rapidly increasing uneconomic cattle population in such matters as the destruction of crops, being a public nuisance, will be accentuated by this arbitrary age limit, and in effect will ensure that bulls and bullocks cannot be slaughtered;

(v) that the menace of the rapidly increasing population of uneconomic cattle to the fodder and other animal food resources of the country will be accentuated.

(vi) that the competition between the rapidly increasing cattle population, a large percentage of which is uneconomic and useless, and the human population for available land will be accentuated;

(vii) that this piece of legislation will ensure the steady increase of useless bulls and bullocks and must react disastrously against any attempt to improve milk production, bullock power or animal husbandry generally."

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Similar allegations have been made in the other two petitions also.

The correctness of these allegations has been contested on behalf of the respondent States, which through some of their officers have filed affidavits in reply. We shall presently examine at greater length the averments made in these affidavits, but we may indicate here in broad outline what their general effect is. In Bihar the age below which the slaughter of she-buffaloes, bulls and bullocks is prohibited is 25 years. The respondent State has taken the plea that the usefulness or longevity of live-stock for breeding and other purposes depends to a very great extent on (a) better animal husbandry facilities like feeding and management and (b) control of animal diseases, and as these facilities are now available in a greater measure, the legislature came to the conclusion that a bull or bullock or a she-buffalo below 25 years of age continues to remain useful; if a bull, bullock or she-buffalo is permanently incapacitated below that age the impugned provision permits its slaughter and therefore the legislation which is challenged conforms to the decision of this Court and does not violate any fundamental right. In Uttar Pradesh the age is 20 years as respects bulls or bullocks, with a further restriction to be referred to later. The reply of the respondent State is that bulls or bullocks do not become unfit at the age of 12 or 14 years as alleged by the petitioners; on the contrary, they continue to be useful and at no time they become entirely useless. It is then stated in the affidavit:

"As a matter of fact, the age up to which the animals can live and are serviceable depends upon the care and attention they receive and the quality of the grass on which they are grazed. .... According to a high authority the average age of an ox under favourable conditions would be between 15 to 20 years. Even under conditions prevailing in Uttar Pradesh, bulls can live upto 20 years or more as would appear from an analysis of a survey report of the animal husbandry department."

On these averments the respondent State contends that the legislation is valid. In Madhya Pradesh also the age is 20 years. The Under-Secretary to the State Government in the Agricultural Department has made the reply affidavit in which it has been stated *inter alia* that conditions in Madhya Pradesh are different from conditions in other States. The affidavit then states:

"The State of Madhya Pradesh has a total area of 107,589,000 acres, out of which total cropped area is 43,572,000 acres. Forest area is 33,443,000 acres, area not available for cultivation is 11,555,000 acres, uncultivated land is 18,405,000 acres and fallow land is 5,834,000 acres. It will thus be seen that this State has a large forest area and plenty of grass land for pasturage. As the forests supply the greater part of the fuel needs of the human population, the dung of animals is largely available as manure. The legislature considered that bulls, bullocks and buffaloes are useful in this State till they are well past twenty years of age and that they should not be slaughtered till they are past that age and are also unfit for work or breeding. The problem of animals dying of slow starvation or of worthless animals depriving useful animals of fodder needs no consideration in this State. The agricultural community in the State benefits by the existence of animals as long as they are useful."

There are also further averments as to the shortage of breeding bulls, working bullocks and she-buffaloes in Madhya Pradesh. On these averments the contention of the respondent State is that the cattle in that State are useful up to the age of 20 years.

We have indicated above in general terms the case of the petitioners and the reply which the respondent States have given. We proceed now to a detailed consideration of the impugned legislation in each case.

(1) We take up first the Bihar Preservation and Improvement of Animals (Amendment) Act, 1959 and the rules made under the main Act of 1955. Section 3 of the Act as amended reads:

"S. 3. *Prohibition of slaughter of cow, calf, bull, bullock or she-buffalo*:

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Notwithstanding anything contained in any law for the time being in force or in any usage or custom to the contrary, no person shall slaughter or cause to be slaughtered, or offer or cause to be offered for slaughter a cow, calf, bull, bullock or she-buffalo:

Provided that the prescribed authority may, subject to such conditions as may be prescribed, allow the slaughter of—

(i) a bull or bullock which is over twenty-five years of age or which has become permanently incapable of breeding or of being used as a draught animal, as the case may be, and

(ii) a she-buffalo which is over twenty-five years of age or which has become permanently incapable of breeding or yielding milk, if the permanent incapability has not been caused deliberately;

Provided further that the State Government may, by general or special order, and subject to such conditions as it may think fit to impose, allow the slaughter of any such animal for any medicinal or research purposes."

The scheme of the section is that its substantive provision imposes a total ban on the slaughter of a cow, calf, bull, bullock or she-buffalo; the proviso then engrafts an exception as to bulls, bullocks and she-buffaloes and lays down the circumstances in which the slaughter of the aforesaid animals may be allowed. No question arises here as to cows and calves; a total ban on their slaughter has been held to be valid by this Court. The question before us is whether the section in so far as it relates to bulls, bullocks and she-buffaloes is constitutionally valid. It is worthy of note that the Bill, as originally drafted, put the age at fifteen years only; but the Select Committee on the Bill said, "The Committee feels that the words 'fifteen years' will not be sufficient for the preservation of animals. They feel that it would be better if those words are substituted by the words 'twenty-five years' ....." No other reason was given for increasing the age. After the filing of Writ Petition no. 15 of 1959 the Governor of Bihar made certain rules under s. 38

of the Act. These rules are called the Bihar Preservation and Improvement of Animals Rules, 1960. The provisions of r. 3 have also been impugned by the petitioners by an amendment petition filed by them. Rule 3 so far as it is material for our purpose is in these terms:

"3(1). For the purpose of section 3 of the Act, the Veterinary Officer and the Chairman or Chief Officer, as the case may be, shall be the prescribed authority:

Provided that where there is no Chairman or Chief Officer in respect of any area, the Veterinary Officer shall be the sole prescribed authority.

(2) Where the authority prescribed under sub-rule (1) or sub-rule (5) refuses to issue a certificate under the proviso to section 3, it shall record the reasons for the refusal and no such refusal shall be made unless the person applying for the certificate has been given a reasonable opportunity of being heard.

(3) .....

.....

(4) A bull, bullock or she-buffalo in respect of which a certificate has been issued under section 3 shall not be slaughtered at any place other than the place indicated in the certificate and it shall be slaughtered within 20 days of the date of the receipt of the certificate by the person in whose favour it is issued.

(5) In case of difference of opinion between the Veterinary Officer and the Chairman or Chief Officer, the matter shall be referred to the Sub-divisional Animal Husbandry Officer or the District Animal Husbandry Officer, as the case may be, and the certificate shall be issued or refused according to the decision of the Sub-divisional Animal Husbandry Officer or the District Animal Husbandry Officer, as the case may be.

(6) (a) Any person aggrieved by an order refusing to grant a certificate under the proviso to section 3 may, within 15 days of the communication of the order to him, prefer an appeal—

(i) where the order is passed by the District Animal Husbandry Officer under sub-rule (5) to the Deputy Director of Animal Husbandry;

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(ii) where the order is passed by the Sub-divisional Animal Husbandry Officer, under sub-rule (5), to the District Animal Husbandry Officer and

(iii) where the order is passed by the authority prescribed under sub-rule (1) to the Sub-divisional Animal Husbandry Officer, if there is one; if not, to the District Animal Husbandry Officer;

(b) The appeal shall not be decided against the appellant unless he has been given a reasonable opportunity of being heard."

The argument on behalf of the petitioners is that they are "Kassais" by profession and they earn their living by slaughtering cattle only (not goats or sheep which are slaughtered by "Chiks"); that they have the fundamental right to carry on their profession and trade; and that s. 3 of the Act read with r. 3 imposes unreasonable restrictions—restrictions not in the interests of the general public—on their fundamental right and therefore they are not saved by cl. (6) of Art. 19 of the Constitution. Some of these arguments were considered by this Court in *Md. Hanif Quareshi* v. *The State of Bihar* (1) and it was pointed out that the test of reasonableness should be applied to each individual statute impugned and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. It referred to the decision in *State of Madras* v. *V. G. Row* (2) and repeated what was said therein that "the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict." Another consideration which has to be kept in mind is that "the legislature is the best judge of what is good for the community, by whose suffrage it comes into existence....." (See *The State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga* (3)). But the ultimate responsibility for determining the validity of the law must rest with the

(1) [1959] S.C.R. 629. (2) [1952] S.C.R. 597.

(3) [1952] S.C.R. 889.

Court and the Court must not shirk that solemn duty cast on it by the Constitution. We must, therefore, approach the problem before us in the light of the principles laid down by this Court.

The most pertinent question is—having regard to all the relevant circumstances, is the age of 25 years laid down in s. 3 a reasonable restriction on the right of the petitioners in the interests of the general public? We are unable to say that it is. Apart from the affidavits made on behalf of the petitioners and the respondent State, a large volume of authoritative and expert opinion has been placed before us which shows beyond any doubt that a bull, bullock or she-buffalo does not remain useful after 14 or 15 years and only a few of them live up to the age of 25. In the Report of the Cattle Preservation and Development Committee, published by the Ministry of Agriculture, it is recommended by the Committee that the slaughter of animals over 14 years of age and unfit for work as also animals of any age permanently unable to work owing to injury or deformity, should be allowed. In the Report on the Marketing of Meat in India (published by the Ministry of Food and Agriculture) there is a reference to a draft Bill circulated by the Ministry of Agriculture (page 112 of the Report) which contains a clause that animals over 14 years of age and unfit for work may be slaughtered on a certificate from a Veterinary Officer. In the Report on the Marketing of Cattle in India, again published by the Ministry of Food and Agriculture, occurs the following passage as to the price of animals with reference to their age:

"Young draught animals up to the age of 4 years—being raw and untrained—fetch comparatively low prices. Between 4 and 8 years of age, the animals are in the prime of their youth and render best service, and fetch maximum prices. From the 8th year onwards old age sets in, and a graded decline is observed in their capacity to work and consequently prices depreciate considerably."

In a Food and Agricultural Organisation study of cattle in India and Pakistan (Zebu Cattle of India and

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Pakistan, page 94) it is stated that the active breeding life of a bull is estimated to be about 10 years. In Black's Veterinary Dictionary (edited by W. C. Miller and G. P. West, fifth edition) it is stated that pedigree bulls may reach 12 or 14 years of age before being discarded; and cattle seldom live longer than 15 or 16 years, and when they do, their age is usually of no immediate importance. In another publication of the Ministry of Agriculture called 'Problems of Cattle Insurance' under Indian conditions, it is stated that the life of cattle is comparatively much shorter, the maximum age being only about 15 years. There is an interesting chart relating to the determination of age in cattle in a publication called 'Cattle Development in Uttar Pradesh' by R. L. Kaura, Director of Animal Husbandry; that chart shows that at 11 years incisors appear smaller due to wearing out; at 12 years space appears between the teeth, and after 12 teeth wear out constantly and roots remain far apart from one another. As against all this expert opinion the respondent State has relied on the chart embodying some useful data about domestic animals, prepared by Major A. C. Aggarwala, Director of Veterinary Services, Punjab, and R. R. Gulati, Superintendent, Veterinary Department, Jullandur, which shows the sterility age of a buffalo at 15 and average age at 25, and of a cow sterility at 15 and 16 years and average life 22 years.

We are clearly of the view that the almost unanimous opinion of experts is that after the age of 15, bulls, bullocks and buffaloes are no longer useful for breeding, draught and other purposes and whatever little use they may have then is greatly offset by the economic disadvantages of feeding and maintaining unserviceable cattle—disadvantages to which we had referred in much greater detail in *Md. Hanif Quareshi's case* (1). Section 3 of the Bihar Act in so far as it has increased the age limit to 25 in respect of bulls, bullocks and she-buffaloes, imposes an unreasonable restriction on the fundamental right of the petitioners, a restriction moreover which cannot be said to be in

(1) [1959] S.C.R. 629.

the interests of the general public, and to that extent it is void. We may here repeat what we said in *Chintaman Rao* v. *The State of Madhya Pradesh* (1):

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19(1)(g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in that quality."

As to r. 3 the grievances of the petitioners are these. Under the rule the prescribed authority for the purpose of s. 3 of the Act consists of the Veterinary Officer *and* the Chairman or Chief Officer of a District Board, Municipality etc. Unless both of them concur, no certificate for slaughter can be granted. It is pointed out that the Chairman or Chief Officer would be a layman not in a position to judge the age or usefulness of cattle. The result would be that the animal in respect of which a certificate is required may have to be shown to the Veterinary Officer as also the Chairman or Chief Officer, who may not be staying at the same place as the Veterinary Officer. If the two differ, the matter has to be referred to the Sub-divisional Animal Husbandry Officer. This procedure, it is contended, will involve the expenditure of so much money and time that it will not be worthwhile for the petitioners to ask for a certificate, or having got a certificate, to slaughter the animal. An animal which is above 15 or which has become useless generally costs much less than a young, serviceable animal. If the petitioners have to incur all the expenditure which the procedure laid down by r. 3 must necessarily cost them, then they must close down their trade. As to the right of appeal from an order refusing to grant a

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certificate, it is contended that that right is also illusory for all practical purposes. To take the animal to the Deputy Director of Animal Husbandry or the District Animal Husbandry Officer or the Sub-divisional Animal Husbandry Officer, as the case may be, and to keep and feed the animal for the period of the appeal and its hearing will cost more than the price of the animal itself.

We consider that these grievances of the petitioners have substance, and judged from the practical point of view, the provisions of r. 3 impose disproportionate restrictions on their right. It is difficult to understand why the Veterinary Officer, who has the necessary technical knowledge, cannot be trusted to give the certificate and why it should be necessary to resort to a complicated procedure to resolve a possible difference of opinion between two officers, later followed by a still more expensive appeal.

We, therefore, hold r. 3 also to be bad in so far as it imposes disproportionate restrictions indicated above, on the right of the petitioners.

(2) We now proceed to consider the Uttar Pradesh Prevention of Cow Slaughter (Amendment) Act, 1958. After the decision of this Court in *Md. Hanif Quareshi* v. *The State of Bihar* (1) an Ordinance was passed called the Uttar Pradesh Prevention of Cow Slaughter (Amendment) Ordinance, 1958. This Ordinance was later repealed and replaced by the Act. The petitioners say that in the Bill as originally drafted the age limit below which slaughter was not permissible was put at 15 years; but the Select Committee increased it to 20 years. It will probably be best, for clearness sake, to set forth not the whole provisions of the Act, for that would be too lengthy, but those which form most directly the subject matter on which the controversy turns. Section 3 of the Act reads (omitting portions not relevant for our purpose)—

"S. 3(1) Except as hereinafter provided, no person shall slaughter or cause to be slaughtered or offer or cause to be offered for slaughter—

(a).....

(1) [1959] S.C.R. 629.

(b) a bull or bullock, unless he has obtained in respect thereof a certificate in writing, from the competent authority of the area in which the bull or bullock is to be slaughtered, certifying that it is fit for slaughter...

(2) No bull or bullock, in respect of which a certificate has been issued under sub-section (1)(b) shall be slaughtered at any place other than the place indicated in the certificate or within twenty days of the date of issue of the certificate.

(3) A certificate under sub-section (1)(b) shall be issued by the competent authority, only after it has, for reasons to be recorded in writing, certified that—

(a) the bull or bullock is over the age of twenty years; and

(b) in the case of a bull, it has become permanently unfit and unserviceable for the purpose of breeding and, in the case of a bullock, it has become permanently unfit and unserviceable for the purposes of draught and any kind of agricultural operation:

Provided that the permanent unfitness or unserviceability has not been caused deliberately.

(4) The competent authority shall, before issuing the certificate under sub-section (3) or refusing to issue the same, record its order in writing. Any person aggrieved by the order of the competent authority, under this section, may, within twenty days of the date of the order, appeal against it to the State Government, which may pass such orders thereon as it may deem fit.

(5) The State Government may, at any time, for the purposes of satisfying itself as to the legality or propriety of the action taken under this section, call for and examine the record of any case and may pass such orders thereon as it may deem fit.

(6) Subject to the provisions herein contained any action taken under this section, shall be final and conclusive and shall not be called in question."

On behalf of the petitioners it has been argued that s. 3 imposes a number of unreasonable restrictions. Firstly, it is urged that the age-limit with regard to bulls or bullocks is put too high, viz. at 20 years. This is an

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aspect which we have already considered in relation to the Bihar Act. What we have said about the age-limit in that connexion applies equally to the Uttar Pradesh Act. The 8th Live-stock Census, 1956 shows that in Uttar Pradesh bulls and bullocks over 3 years of age, not in use for breeding or work, numbered as many as 126,201 in 1956 as compared to 162,746 in 1951. The Municipal Manual, Uttar Pradesh, Vol. 1, contains a direction that for slaughter of animals, bullocks and male buffaloes in good state of health *below ten years of age* should be included. Secondly, it is pointed out that not being content with fixing an unreasonably high age-limit, the impugned provision imposes a double restriction. It says that the animal must be over twenty years in age *and* must also be permanently unfit and unserviceable; and in the case of a bullock, the unfitness must be for "any kind of agricultural operation" and not merely for draught purposes. The result of this double restriction, it is stated, is that even if the animal is permanently unserviceable and unfit at an earlier age, it cannot be slaughtered unless it is over twenty years in age. Before a certificate can be given, the animal must fulfil two conditions as to (1) age and (2) permanent unfitness. We consider this to be a demonstrably unreasonable restriction. In *Md. Hanif Quareshi's case* (1) this Court had said that a total ban on the slaughter of bulls and bullocks after they had ceased to be capable of breeding or working as draught animals was not in the interests of the general public. Yet this is exactly what the impugned provision does by imposing a double restriction. It lays down that even if the animal is permanently unserviceable, no certificate can be given unless it is more than 20 years in age. The restriction will in effect put an end to the trade of the petitioners.

Thirdly, the impugned provision provides (1) that the animal shall not be slaughtered within 20 days of the date of the issue of the certificate and (2) that any person aggrieved by the order of the competent authority may appeal to the State Government within 20 days. It is to be noted that the right of appeal is not

(1) [1959] S.C R. 629.

confined to a refusal to grant a certificate as in the Bihar Act, but the right is given to any person aggrieved by the order of the competent authority. In other words, even when a certificate is given, any person, even a member of the public, who feels aggrieved by it may prefer an appeal and hold up the slaughter of the animal for a long time. From the practical point of view these restrictions really put a total ban on the slaughter of bulls and bullocks even after they have ceased to be useful, and we must hold, following our decision in *Md. Hanif Quareshi's case* (1) that s. 3 of the Uttar Pradesh Act in so far as it imposes unreasonable restrictions on the right of the petitioners as to slaughter of bulls and bullocks infringes the fundamental right of the petitioners and is to that extent void.

(3) Now, we come to the Madhya Pradesh Act. Several provisions of this Act have been challenged before us as imposing unreasonable restrictions on the fundamental right of the petitioners. Section 4 deals with prohibition of slaughter of agricultural cattle. The expression 'agricultural cattle' means an animal specified in the schedule: it means cows of all ages; calves of cows and of she-buffaloes; bulls; bullocks; and male and female buffaloes. As we have stated earlier, we are concerned in these cases with the validity of the restrictions placed on the slaughter of bulls, bullocks and buffaloes. Now, s. 4 is in these terms:

"S. 4(1) Notwithstanding anything contained in any other law for the time being in force or in any usage or custom to the contrary, no person shall slaughter or cause to be slaughtered or offer or cause to be offered, for slaughter—

(a) cows, calves of cows, or calves of she-buffaloes, or

(b) any other agricultural cattle unless he has obtained in respect of such cattle a certificate in writing issued by the Competent Authority for the area in which the cattle is to be slaughtered that the cattle is fit for slaughter.

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(2) No certificate under clause (b) of sub-section (1) shall be issued by the Competent Authority unless the Veterinary Officer after examining the cattle certifies that—

(a) the cattle is over twenty years of age and is unfit for work or breeding or has become permanently incapacitated from work or breeding due to age, injury, deformity or an incurable disease; and

(b) the cattle is not suffering from any disease which makes its meat unwholesome for human consumption.

(3) The Competent Authority shall, before issuing or refusing to issue a certificate under this section, record its order in writing. Any person aggrieved by the order of the Competent Authority under this section, may, within ten days of the date of the order, prefer an appeal against such order to the Collector of the district or such other officer as may, by notification, be authorised in this behalf by the State Government, and the Collector or such other officer may pass such orders thereon as he thinks fit.

(4) Subject to the orders passed in appeal, if any, under sub-section (3), the order of the Competent Authority shall be final and shall not be called in question in any Court."

Section 5 places a restriction as to the place and time for slaughter and the objection taken before us relates to the time rather than to the place of slaughter. It says in effect that no cattle in respect of which a certificate has been issued under s. 4 shall be slaughtered within ten days of the date of issue of the certificate and where an appeal is preferred against the grant of such certificate, till the time such appeal is disposed of. The provision of appeal is contained in sub-s. (3) of s. 4 of the Act which we have quoted earlier. That sub-section lays down that any person aggrieved by the order of the Competent Authority, may, within ten days of the date of the order, prefer an appeal against the order to the Collector of the district or such other officer as may, by notification, be authorised in this behalf by the State Government.

Section 6 imposes a restriction on the transport of agricultural cattle for slaughter and reads:

"S. 6. No person shall transport or offer for transport or cause to be transported any agricultural cattle from any place within the State to any place outside the State, for the purpose of its slaughter in contravention of the provisions of this Act or with the knowledge that it will be or is likely to be, so slaughtered."

Section 7 prohibits the sale, purchase or disposal otherwise of certain kinds of animals. It reads:

"S. 7. No person shall purchase, sell or otherwise dispose of or offer to purchase, sell or otherwise dispose of or cause to be purchased, sold or otherwise disposed of cows, calves of cows or calves of she-buffaloes for slaughter or knowing or having reason to believe that such cattle shall be slaughtered."

Section 8 relates to possession of flesh of agricultural cattle and is in these terms:

"S. 8. Notwithstanding anything contained in any other law for the time being in force, no person shall have in his possession flesh of any agricultural cattle slaughtered in contravention of the provisions of this Act."

Section 10 imposes a penalty for a contravention of s. 4(1)(a) and s. 11 imposes penalty for a contravention of any of the other provisions of the Act.

On behalf of the petitioners it has been pointed out, and rightly in our opinion, that cl. (a) of sub-s. (2) of s. 4 of the Act imposes an unreasonable restriction on the right of the petitioners. That clause in its first part lays down that the cattle (other than cows and calves) must be over 20 years of age and must also be unfit for work or breeding; and in the second part it says, "or has become permanently incapacitated from work or breeding due to age, injury, deformity or an incurable disease." It is a little difficult to understand why the two parts are juxtaposed in the section. In any view the restriction that the animal must be over 20 years of age and also unfit for work or breeding is an excessive or unreasonable restriction as we have

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pointed out with regard to a similar provision in the Uttar Pradesh Act. The second part of the clause would not be open to any objection, if it stood by itself. If, however, it has to be combined with the age-limit mentioned in the first part of the clause, it will again be open to the same objection; if the animal is to be over 20 years of age and also permanently incapacitated from work or breeding etc., then the age-limit is really meaningless. Then, the expression 'due to age' in the second part of the clause also loses its meaning. It seems to us that cl. (a) of sub-s. (2) of s. 4 of the Act as drafted is bad because it imposes a disproportionate restriction on the slaughter of bulls, bullocks and buffaloes it is a restriction excessive in nature and not in the interests of the general public. The test laid down is not merely permanent incapacity or unfitness for work or breeding but the test is something more than that, a combination of age and unfitness. Learned Counsel for the petitioners has placed before us an observation contained in a reply made by the Deputy Minister in the course of the debate on the Bill in the Madhya Pradesh Assembly (see Madhya Pradesh Assembly Proceedings, Vol. 5 Serial no. 34 dated April 14, 1959, page 3201). He said that the age fixed was very much higher than the one to which any animal survived. This observation has been placed before us not with a view to an interpretation of the section, but to show what opinion was held by the Deputy Minister as to the proper age-limit. On behalf of the respondent State our attention has been drawn to a book called The Miracle of Life (Home Library Club) in which there is a statement that oxen, given good conditions, live about 40 years. Our attention has also been drawn to certain extracts from a Hindi book called Godhan by Girish Chandra Chakravarti in which there are statements to the effect that cows and bullocks may live up to 20 or 25 years. This is an aspect of the case with which we have already dealt. The question before us is not the maximum age upto which bulls, bullocks and buffaloes may live in rare cases. The question before us is what is their average longevity and at what age

they become useless. On this question we think that the opinion is almost unanimous, and the opinion which the Deputy Minister expressed was not wrong.

Section 5 in so far as it imposes a restriction as to the time for slaughter is again open to the same objection as has been discussed by us with regard to a similar provision in the Uttar Pradesh Act. A right of appeal is given to any person aggrieved by the order. In other words, a member of the public, if he feels aggrieved by the order granting a certificate for slaughter, may prefer an appeal and hold up for a long time the slaughter of the animal. We have pointed out that for all practical purposes such a restriction will really put an end to the trade of the petitioners and we are unable to accept a restriction of this kind as a reasonable restriction within the meaning of cl. (6) of Art. 19 of the Constitution.

Section 6 standing by itself, we think, is not open to any serious objection. It is ancillary in nature and tries to give effect to the provision of the Act prohibiting slaughter of cattle in contravention of the Act.

Section 7 relates to the prohibition of sale, purchase etc., of cows and calves and inasmuch as a total ban on the slaughter of cows and calves is valid, no objection can be taken to s. 7 of the Act. It merely seeks to effectuate the total ban on the slaughter of cows and calves (both of cows and she-buffaloes). Section 8 is also ancillary in character and if the other provisions are valid no objection can be taken to the provisions of s. 8. Sections 10 and 11 impose penalties and their validity cannot be seriously disputed.

However, we must say a few words about s. 12 of the Act which has also been challenged before us. Section 12 is in these terms:

"S. 12. In any trial for an offence punishable under section 11 for contravention of the provision of sections 5, 6 or 7 of this Act the burden of proving that the slaughter, transport or sale of agricultural cattle was not in contravention of the provisions of this Act shall be on the accused."

The argument is that s. 12 infringes the fundamental

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right of the petitioners inasmuch as it puts the burden of proof on an accused person not only for his own knowledge or intention but for the knowledge or intention of other persons. We do not think that this contention is correct. The accused person, so far as ss. 5 and 7 are concerned, must be the person who has slaughtered the animal or who has purchased, sold or otherwise disposed of the animal etc. Therefore, the only question will be his knowledge and the legislature was competent to place the burden of proof on him. So far as s. 6 is concerned, it specifically refers to the knowledge of the person who has transported or offered for transport or caused to be transported any agricultural cattles from any place within the State to any place outside the State. Therefore, when the section talks of knowledge, it talks of the knowledge of that person who has transported or offered for transport etc. The knowledge of no other person comes into the purview of s. 6. We are, therefore, of the view that s. 12 is not invalid on the ground suggested by the petitioners.

Therefore, the result of our examination of the various provisions of the Act is that the impugned provisions in cl. (a) of sub-s. (2) of s. 4, in sub-s. (3) of s. 4 relating to the right of appeal by any person aggrieved by the order, and in s. 5 relating to the time of slaughter, impose unreasonable and disproportionate restrictions which must be held to be unconstitutional.

As to the Madhya Pradesh Agricultural Cattle Preservation Rules, r. 3 says "that an application for a certificate under s. 4 shall be made to the competent authority," and r. 4 says that on receipt of the application, the competent authority shall by an order direct the person keeping the animal to submit it for examination by the Veterinary Officer Rule 5 reproduces the provisions of cls. (a) and (b) of sub-s. (2) of s. 4 and in so far as we have held that the provision in cl. (a) of sub-s. (2) of s. 4 is unconstitutional, the rule must also fall with it.

There is one other aspect of these cases which has been emphasized before us, to which a reference must

now be made. It is open to the legislature to enact ancillary provisions to give effect to the main object of the Act, namely, the prevention of slaughter of animals like bulls, bullocks or buffaloes which are still useful for the purposes for which they are generally used. It is pointed out that acts innocent in themselves may be prohibited and the restrictions in that regard would be reasonable, if the same were necessary to secure efficient enforcement of valid provisions. For example, it is open to the legislature, if it feels it necessary, in order to reduce the possibilities of evasion to a minimum, to enact provisions which would give effect to the main object of the legislation. We have not ignored this aspect and have kept in mind the undisputed right of the legislature to decide what provisions are necessary to give effect to the main object of the legislation. In these cases the petitioners have complained that the main object of the impugned provisions is not the prohibition of slaughter of animals which are still useful; the impugned provisions as they are worded really put a total ban on the slaughter of bulls, bullocks and buffaloes and for all practical purposes they put a stop to the profession and trade of the petitioners. We have held that this complaint is justified in respect of the main provisions in the three Acts.

We, therefore, allow the three writ petitions and direct, as we directed in *Md. Hanif Quareshi's case* (1) the respondent States not to enforce the Acts or the rules made thereunder in so far as they have been declared void by us. The petitioners will be entitled to their costs of the hearing in this Court.

Petitions allowed.

(1) [1959] S.C.R. 629.

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November 24.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY II

v.

SHRI SITALDAS TIRATHDAS

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Maintenance payable to wife and children under decree—Whether deductible from total income.

A consent decree was passed against the assessee awarding maintenance to his wife and children. The decree did not create any charge upon the income of the assessee. The assessee claimed in the assessment of income tax deduction of the amount paid under the decree from his total income.

Held, that the assessee was not entitled to the deduction. Where by the obligation income was diverted by an overriding title before it reached the assessee, it was deductible; but where the income was required to be applied to discharge an obligation after such income reached the assessee, it was not deductible. The true test was whether the amount sought to be deducted, in truth, never reached the assessee as his income. In the present case, the wife and children of the assessee received a portion of the income of the assessee, after the assessee had received the income as his own.

Bejoy Singh Dudhuria v. *Commissioner of Income-tax,* (1933) 1 I.T.R. 135, not applicable.

P. C. Mullick v. *Commissioner of Income-tax, Bengal,* (1938) 6 I.T.R. 206, applied.

Diwan Kishen Kishore v. *Commissioner of Income-tax,* (1933) 1 I.T.R. 143, *Seth Motilal Menekchand* v. *Commissioner of Income-tax,* (1957) 31 I.T R. 735, *Prince Khanderao Gaekwar* v. *Commissioner of Income-tax,* (1948) 16 I.T.R. 294, *Commissioner of Income-tax, Bombay* v. *Makanji Lalji,* (1937) 5 I.T.R. 539, *Commissioner of Income-tax, Bombay* v. *D. R. Naik,* (1939) 7 I.T.R. 362, *D. C. Aich, In re,* (1940) 9 I.T.R. 236, *Hira Lal, In re,* (1945) 13 I.T.R. 512 and *V. M. Raghavalu Naidu & Sons* v. *Commissioner of Income-tax,* (1950) 18 I.T.R. 787, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 528 of 1959.

Appeal from the judgment and order dated September 20, 1957, of the former Bombay High Court in I.T.R. No. 15 of 1957.

Hardayal Hardy and *D. Gupta,* for the appellant.

R. J. Kolah, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra,* for the respondent.

1960. November 24. The Judgment of the Court was delivered by

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The Commissioner of Income-tax, Bombay City II v. Shri Sitaldas Tirathdas

Hidayatullah J.

HIDAYATULLAH, J.—The Commissioner of Income-tax, Bombay City II, has filed this appeal with a certificate under s. 66A(2) of the Income-tax Act, against the judgment and order of the High Court of Bombay dated September 20, 1957, in Income-tax Reference No. 15 of 1957.

The question referred to the High Court for its opinion by the Income-tax Appellate Tribunal, Bombay was:

"Whether the assessee is entitled to a deduction of Rs. 1,350 and Rs. 18,000 from his total income of the previous year relevant to the assessment years, 1953-54, 1954-55?"

The assessee, Sitaldas Tirathdas of Bombay, has many sources of income, chief among them being property, stocks and shares, bank deposits and share in a firm known as Messrs. Sitaldas Tirathdas. He follows the financial year as his accounting year. For the assessment years 1953-54 and 1954-55, his total income was respectively computed at Rs. 50,375 and Rs. 55,160. This computation was not disputed by him, but he sought to deduct therefrom a sum of Rs. 1,350 in the first assessment year and a sum of Rs. 18,000 in the second assessment year on the ground that under a decree he was required to pay these sums as maintenance to his wife, Bai Deviben and his children. The suit was filed in the Bombay High Court (Suit No. 102 of 1951) for maintenance allowance, separate residence and marriage expenses for the daughters and for arrears of maintenance, etc. A decree by consent was passed on March 11, 1953, and maintenance allowance of Rs. 1,500 per month was decreed against him. For the account year ending March 31, 1953 only one payment was made, and deducting Rs. 150 per month as the rent for the flat occupied by his wife and children, the amount paid as maintenance under the decree came to Rs. 1,350. For the second year, the maintenance at Rs. 1,500 per month came to Rs. 18,000 which was claimed as a deduction.

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No charge on the property was created, and the matter does not fall to be considered under s. 9(1)(iv) of the Income-tax Act. The assessee, however, claimed this deduction on the strength of a ruling of the Privy Council in *Bejoy Singh Dudhuria* v. *Commissioner of Income-tax* (1). This contention of the assessee was disallowed by the Income-tax Officer, whose decision was affirmed on appeal by the Appellate Assistant Commissioner. On further appeal, the Tribunal observed:

"This is a case, pure and simple, where an assessee is compelled to apply a portion of his income for the maintenance of persons whom he is under a personal and legal obligation to maintain. The Income-tax Act does not permit of any deduction from the total income in such circumstances."

The Tribunal mentioned in the statement of the case that counsel for the assessee put his contention in the following words:

"I claim a deduction of this amount from my total income because my real total income is whatever that is computed, which I do not dispute, less the maintenance amount paid under the decree."

The assessee appears to have relied also upon a decision of the Lahore High Court in *Diwan Kishen Kishore* v. *Commissioner of Income-tax*(2). The Tribunal, however, referred the above question for the opinion of the High Court.

The High Court followed two earlier decisions of the same Court reported in *Seth Motilal Manekchand* v. *Commissioner of Income-tax* (3) and *Prince Khanderao Gaekwar* v. *Commissioner of Income-tax* (4), and held that, as observed in those two cases, the test was the same, even though there was no specific charge upon property so long as there was an obligation upon the assessee to pay, which could be enforced in a Court of law. In *Bejoy Singh Dudhuria's case* (1), there was a charge for maintenance created against the assessee, and the Privy Council had observed that the income must be deemed to have never reached that assessee,

(1) (1933) 1 I.T.R. 135.
(2) (1933) 1 I.T.R. 143.
(3) (1957) 31 I.T.R. 735.
(4) (1948) 16 I.T.R. 294.

having been diverted to the maintenance-holders. In the judgment under appeal, it was held that the income to the extent of the decree must be taken to have been diverted to the wife and children, and never became income in the hands of the assessee.

The Commissioner of Income-tax questions the correctness of this decision and also of the two earlier decisions of the Bombay High Court. We are of opinion that the contention raised by the Department is correct.

Before we state the principle on which this and similar cases are to be decided, we may refer to certain rulings, which illustrate the aspects the problem takes. The leading case on the subject is the decision of the Judicial Committee in *Bejoy Singh Dudhuria's case*(1). There, the stepmother of the Raja had brought a suit for maintenance and a compromise decree was passed under which the stepmother was to be paid Rs. 1,100 per month, which amount was declared a charge upon the properties in the hands of the Raja, by the Court. The Raja sought to deduct this amount from his assessable income, which was disallowed by the High Court at Calcutta. On appeal to the Privy Council, Lord Macmillan observed as follows:

"But their Lordships do not agree with the learned Chief Justice in his rejection of the view that the sums paid by the appellant to his step-mother were not 'income' of the appellant at all. This in their Lordships' opinion is the true view of the matter.

When the Act by Section 3 subjects to charge 'all income' of an individual, it is what reaches the individual as income which it is intended to charge. In the present case the decree of the court by charging the appellant's whole resources with a specific payment to his step-mother has to that extent diverted his income from him and has directed it to his step-mother; to that extent what he receives for her is not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands."

(1) (1933) 1 I.T.R. 135.

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Another case of the Privy Council may well be seen in this connection. That case is reported in *P. C. Mullick* v. *Commissioner of Income-tax, Bengal* (1). There, a testator appointed the appellants as executors and directed them to pay Rs. 10,000 out of the income on the occasion of his *addya sradh.* The executors paid Rs. 5,537 for such expenses, and sought to deduct the amount from the assessable income. The Judicial Committee confirmed the decision of the Calcutta High Court disallowing the deduction, and observed that the payments were made out of the income of the estate coming to the hands of the executors and in pursuance of an obligation imposed upon them by the testator. It observed that it was not a case in which a portion of the income had been diverted by an overriding title from the person who would have received it otherwise, and distinguished the case in *Bejoy Singh Dudhuria's case* (2).

These cases have been diversely applied in India, but the facts of some of the cases bring out the distinction clearly. In *Diwan Kishen Kishore* v. *Commissioner of Income-tax* (3), there was an impartible estate governed by the law of primogeniture, and under the custom applicable to the family, an allowance was payable to the junior member. Under an award given by the Deputy Commissioner acting as arbitrator and according to the will of the father of the holder of the estate and the junior member, a sum of Rs. 7,200 per year was payable to the junior member. This amount was sought to be deducted on the ground that it was a necessary and obligatory payment, and that the assessable income must, therefore, be taken to be *pro tanto* diminished. It was held that the income never became a part of the income of the family or of the eldest member but was a kind of a charge on the estate. The allowance given to the junior member, it was held, in the case of an impartible estate was the separate property of the younger member upon which he could be assessed and the rule that an allowance given by the head of a Hindu coparcenary to its members by way of maintenance was liable to be assessed

(1) (1938) 6 I.T.R. 206. (2) (1933) 1 I.T.R. 135.

(3) (1933) 1 I.T.R. 143.

as the income of the family, had no application. It was also observed that if the estate had been partible and partition could have taken place, the payment to the junior member out of the coparcenary funds would have stood on a different footing. In that case, the payment to the junior member was a kind of a charge which diverted a portion of the income from the assessee to the junior member in such a way that it could not be said that it became the income of the assessee.

In *Commissioner of Income-tax, Bombay* v. *Makanji Lalji* (1), it was stated that in computing the income of a Hindu undivided family monies paid to the widow of a deceased coparcener of the family as maintenance could not be deducted, even though the amount of maintenance had been decreed by the Court and had been made a charge on the properties belonging to the family. This case is open to serious doubt, because it falls within the rule stated in *Bejoy Singh Dudhuria's case* (2); and though the High Court distinguished the case of the Judicial Committee, it appears that it was distinguished on a ground not truly relevant, namely, that in *Bejoy Singh Dudhuria's case* (2) the Advocate-General had abandoned the plea that the stepmother was still a member of the undivided Hindu family. It was also pointed out that this was a case of assessment as an individual and not an assessment of a Hindu undivided family.

In *Commissioner of Income-tax, Bombay* v. *D. R. Naik* (3), the assessee was the sole surviving member of a Hindu undivided family. There was a decree of Court by which the assessee was entitled to receive properties as a residuary legatee, subject, however, to certain payments of maintenance to widows. The widows continued to be members of the family. It was held that though s. 9 of the Income-tax Act did not apply, the assessee's assessable income was only the balance left after payment of the maintenance charges. It appears from the facts of the case, however, that there was a charge for the maintenance

(1) (1937) 5 I.T.R. 539. (2) (1933) 1 I.T.R. 135.
(3) (1939) 7 I.T.R. 362.

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upon the properties of the assessee. This case also brings out correctly the principles laid down by the Judicial Committee that if there be an overriding obligation which creates a charge and diverts the income to some one else, a deduction can be made of the amounts so paid.

The last case may be contrasted with the case reported in *P. C. Mullick and D. C. Aich, In re* (1). There, under a will certain payments had to be made to the beneficiaries. These payments were to be made gradually together with certain other annuities. It was held that the payments could only be made out of the income received by the executors and trustees from the property, and the sum was assessable to income-tax in the hands of the executors. It was pointed out that under the will it was stated that the amounts were to be paid "out of the income of my property", and thus, what had been charged was the income of the assessees, the executors. The case is in line with the decision of the Privy Council in *P. C. Mullick* v. *Commissioner of Income-tax, Bengal*(2).

In *Hira Lal, In re,* (3) there was a joint Hindu family, and under two awards made by arbitrators which were made into a rule of the Court, certain maintenance allowances were payable to the widows. These payments were also made a charge upon the property. It was held that inasmuch as the payments were obligatory and subject to an overriding charge they must be excluded. Here too, the amount payable to the widows was diverted from the family to them by an overriding obligation in the nature of a charge, and the income could not be said to accrue to the joint Hindu family at all.

In *Prince Khanderao Gaekwar* v. *Commissioner of Income-tax* (4), there was a family trust out of which two grandsons of the settlor had to be paid a portion of the income. It was provided that if their mother lived separately, then the trustees were to pay her Rs. 18,000 per year. The mother lived separately, and two deeds were executed by which the two grandsons agreed to pay Rs. 15,000 per year to the mother,

(1) (1940) 8 I.T.R. 236.
(2) (1938) 6 I.T.R. 206.
(3) (1945) 13 I.T.R. 512.
(4) (1948) 16 I.T.R. 294.

and created a charge on the property. The sons having paid Rs. 6,000 in excess of their obligations, sought to deduct the amount from their assessable income, and it was allowed by the Bombay High Court, observing that though the payment was a voluntary payment, it was subject to a valid and legal charge which could be enforced in a Court of law and the amount was thus deductible under s. 9(1)(iv). There is no distinction between a charge created by a decree of Court and one created by agreement of parties, provided that by that charge the income from property can be said to be diverted so as to bring the matter within s. 9(1)(iv) of the Act. The case was one of application of the particular section of the Act and not one of an obligation created by a money decree, whether income accrued or not. The case is, therefore, distinguishable from the present, and we need not consider whether in the special circumstances of that case it was correctly decided.

In *V. M. Raghavalu Naidu & Sons* v. *Commissioner of Income-tax* (1), the assessees were the executors and trustees of a will, who were required to pay maintenance allowances to the mother and widow of the testator. The amount of these allowances was sought to be deducted, but the claim was disallowed. Satyanarayana Rao and Viswanatha Sastri, JJ. distinguished the case from that of the Privy Council in *Bejoy Singh Dudhuria* (2). Viswanatha Sastri, J. observed that the testator was under a personal obligation under the Hindu law to maintain his wife and mother, and if he had spent a portion of his income on such maintenance, he could not have deducted the amount from his assessable income, and that the position of the executor was no better. Satyanarayana Rao, J. added that the amount was not an allowance which was charged upon the estate by a decree of Court or otherwise and which the testator himself had no right or title to receive. The income which was received by the executors included the amount paid as maintenance, and a portion of it was thus applied in discharging the obligation.

(1) (1950) 18 I.T.R. 787. (2) (1933) 1 I.T.R. 135.

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The last cited case is again of the Bombay High Court, which seems to have influenced the decision in the instant case. That is reported in *Seth Motilal Manekchand* v. *Commissioner of Income-tax* (1). In that case, there was a managing agency, which belonged to a Hindu joint family consisting of A, his son B and A's wife. A partition took place, and it was agreed that the managing agency should be divided, A and B taking a moiety each of the managing agency remuneration but each of them paying A's wife 2 as. 8 pies out of their respective 8 as. share in the managing agency remuneration. Chagla, C. J. and Tendolkar, J. held that under the deed of partition A and B had really intended that they were to receive only a portion of the managing agency commission and that the amount paid to A's wife was diverted before it became the income of A and B and could be deducted. The learned Judge observed at p. 741 as follows:

"We are inclined to accept the submission of Mr. Kolah that it does constitute a charge, but in our opinion, it is unnecessary to decide this question because this question can only have relevance and significance if we were considering a claim made for deduction under section 9(1)(iv) of the Income-tax Act where a claim is made in respect of immovable property where the immovable property is charged or mortgaged to pay a certain amount. It is sufficient for the purpose of this reference if we come to the conclusion that Bhagirathibai had a legal enforceable right against the partner in respect of her 2 annas and 8 pies share and that the partner was under a legal obligation to pay that amount."

These are the cases which have considered the problem from various angles. Some of them appear to have applied the principle correctly and some, not. But we do not propose to examine the correctness of the decisions in the light of the facts in them. In our opinion, the true test is whether the amount sought to be deducted, in truth, never reaches the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the

(1) (1957) 31 I.T.R. 735.

decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income. The matter in the present case would have been different, if such an overriding charge had existed either upon the property or upon its income, which is not the case. In our opinion, the case falls outside the rule in *Bejoy Singh Dudhuria's case* (1) and rather falls within the rule stated by the Judicial Committee in *P. C. Mullick's case* (2).

For these reasons, we hold that the question referred to the High Court ought to have been answered in the negative. We, accordingly, discharge the answer given by the High Court, and the question will be answered in the negative. The appeal is thus allowed with costs here and in the High Court.

Appeal allowed.

(1) (1933) 1 I.T.R. 135. (2) (1938) 6 I.T.R. 206.

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THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I

v.

M/S. JAGANNATH KISSONLAL, BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Money borrowed by two persons for business purposes on joint and several liability—One failing to pay his share—Whole paid by another—Unpaid sum by Co-borrower—If deductible as business loss—Commercial custom of joint borrowing—Mutuality—Indian Income Tax Act, 1922 (11 of 1922), s. 10(2)(xv).

For the purposes of its business the respondent borrowed a certain sum of money from the Bank of India on a pronote executed jointly by him and one Kishorilal in accordance with a commercial practice of carrying on business by borrowing money from Banks on joint and several liability. The money was divided half and half between the respondent and Kishorilal but Kishorilal failed to pay off his liability as he became a bankrupt and the respondent had to pay the whole amount to the Bank. The respondent, however, received from the Official Assignee a part of the sum taken by the Kishorilal leaving a balance still unpaid. The respondent's claim to deduct this unpaid balance under s. 10(2)(xv) of the Income-tax Act was refused by the Income-tax Officer and the Appellate Assistant Commissioner but was allowed by the Income-tax Appellate Tribunal on appeal. On a reference made at the instance of the appellant the High Court decided the question in favour of the respondent assessee. On appeal by the appellant by special leave,

Held, that the view taken by the High Court was correct. On the finding that there was a well establised Commercial practice of financing business by borrowing money on joint and several liability and by so doing the respondent could borrow at a lower rate of interest, and that there was mutuality between the borrowers for standing surety for each other for loans taken for business purposes, the respondent assessee in computing his business profits was entitled to deduct the loss suffered by him in paying the sum not paid by his co-borrower.

Commissioner of Income-tax v. *Ramaswami Chettiar*, [1946] 14 I.T.R. 236, applied.

Madan Gopal Bagla v. *Commissioner of Income-tax, West Bengal*, [1956] S. C. R. 551, *Commissioner or Income-tax* v. *S. R. Subramanya Pillai*, [1950] 18 I T. R. 85 distinguished.

Montreal Coke and Manufacturing Co. v. *Minister of National Revenue*, [1945] 13 I.T.R. Supp. 1, not applicable.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 358 of 1958.

Appeal by special leave from the judgment and order dated 8th March, 1956, of the former Bombay High Court in I.T.R. No. 55 of 1955.

A. N. Kripal and *D. Gupta*, for the appellant.

N. A. Palkhivala and *B. P. Maheshwari*, for the respondents.

1960. November 24. The Judgment of the Court was delivered by

KAPUR, J. — This is an appeal by special leave against the judgment and order of the High Court of Bombay in Income-tax Reference No. 55 of 1955, in which two questions of law were stated for opinion and both were answered in favour of the assessee and against the Commissioner of Income-tax who is the appellant before us and the assessee is the respondent.

The facts of this case are these:

The respondent is a registered firm carrying on business as commission agents in Bombay. For purposes of its business it borrowed money from time to time from Banks on joint promissory notes executed by it and by others with joint and several liability. On September 26, 1949, the respondent borrowed Rs. 1,00,000 from the Bank of India on a pronote executed jointly with one Kishorilal. Out of this amount a sum of Rs. 50,000 was taken by the respondent for purposes of its business and the rest by Kishorilal. Kishorilal however failed to meet his liability and became a bankrupt. The respondent had therefore to pay the Bank the whole amount, i.e., Rs. 1,00,000 with interest. Out of the amount taken by Kishorilal the respondent received in the accounting year, from the Official Assignee, a sum of Rs. 18,805 and claimed the balance, i.e., Rs. 31,740 as deduction. The accounting year was from August 26, 1949 to July 17, 1950, the assessment year being 1951-52. This claim was disallowed both by the Income-tax Officer as well as the Appellate Assistant Commissioner. On Appeal to the Income-tax Appellate Tribunal this sum was allowed as an allowable deduction under s. 10(2)(xv) of the Income-tax Act and as business loss.

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At the instance of the Commissioner a case was stated to the High Court of Bombay by the Income-tax Appellate Tribunal. In the statement of the case which was agreed to by both parties the Tribunal said:

"For the purpose of his business, he borrows from time to time money on joint and several liability from banks. The Commercial practice is to borrow money from banks on joint and several liability. An illustration will explain what we mean. A and B require Rs. 50,000 each. They find that the Bank would not advance Rs. 50,000 to each on his individual security. They however, find that the Bank would be prepared to advance Rupees one lac on their joint and several liability. They take Rupees one lac on joint and several liability and then divide the money equally between themselves."

It also found that the Banks advanced monies to some constituents on their personal security also but they had to pay a higher rate of interest than when the money was borrowed on joint and several responsibility; that Rs. 1,00,000 borrowed from the Bank was in accordance with the commercial practice of Bombay.

On these facts the following two questions of law were referred to the High Court:—

"(1) Whether the assessee's claim is sustainable under Section 10(2)(xv) of the Act?

(2) Whether the assessee's claim that the loss was a business loss and, therefore, allowable as a deduction in computing the profits of the assessee's business is sustainable under law?"

Both these questions were answered in favour of the respondent and against the appellant.

Counsel for the Commissioner challenged the findings of the Tribunal in regard to the existence of commercial practice in Bombay but this ground of attack is not available to him because not only did the Tribunal give this finding in its Order, but in the agreed statement of the case also this finding was repeated as is shown by the passage quoted above. The High Court also has proceeded on the basis of this commercial practice. In the judgment under appeal the learned Chief Justice said:

"The finding of the Tribunal is clear and explicit that what the assessee was doing was not something out of the ordinary, but in borrowing this money on joint and several liability he was following a practice which was established as a commercial practice. Therefore, the transaction was clearly in the course of the business and incidental to the business and it is this transaction which resulted in a loss to the assessee, he having to pay the liability of the surety."

Therefore this appeal has to be decided on the basis that a commercial practice of financing business by borrowing money on joint and several liability was established.

It was argued on behalf of the appellant that this court in *Madan Gopal Bagla* v. *Commissioner of Income Tax, West Bengal* (1) had decided against the allowability of such losses. But the facts of that case when carefully scrutinised are distinguishable and the decision does not support the contentions of the appellant. No doubt certain features of that case and the present one are similar but they differ in essential features. In that case the assessee was a timber merchant who obtained a loan of Rs. 1 lac from the Bank of India on the joint security of himself and one Mamraj, which the assessee paid off. Mamraj also obtained a loan of Rs. 1 lac on the joint security of himself and the assessee. Mamraj became an insolvent and the assessee had to pay the whole of the amount borrowed with interest thereon. The assessee there received a certain amount of money by way of dividends from the Receiver and the balance he wrote off as bad debt in the assessment year and claimed it as an allowable deduction under s. 10. The High Court there held that the debt could not be said to be a debt in respect of the business of the assessee as he was not carrying on the business of standing surety for other persons nor was he a money-lender, he being simply a timber merchant; that it had not been established nor was it alleged that he was in the habit of standing surety for other persons "along with them for purposes of securing loans for their use and benefit" and even if money

(1) [1956] S.C.R. 551.

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had been so borrowed and there had been a loss the loss would have been a capital loss and not a business loss to the assessee. This statement of the law was approved by this Court but there mutuality, as an essential ingredient of the custom established, was found to be lacking as is shown by the following passage from the judgment of the court.

"The custom stated before the Appellate Assistant Commissioner was that persons carrying on business in Bombay used to borrow monies on joint security from the Banks in order to facilitate getting financial assistance from the Banks and that too at lower rates of interest. A businessman could procure financial assistance from the Banks on his own, but he would in that case have to pay a higher rate of interest. He would have to pay a lower rate of interest if he could procure as surety another businessman, who would be approved by the Bank. This, however, did not mean that mutual accommodation by businessmen was necessarily an ingredient part of that custom. A could procure B, C or D to join him as surety in order to achieve this objective, but it did not necessarily follow that if A wanted to procure B, C or D to thus join him as surety he could only do so if he in his own turn joined B, C or D as surety in the loans which B, C or D procured in their turns from the Banks for financing their respective businesses. Unless that factor was established, the mere procurement by A of B, C or D as surety would not be sufficient to establish the custom sought to be relied upon by the appellant so as to make the transaction of his having joined Mumraj Rambhagat as surety in the loan procured by Mumraj Rambhagat from Imperial Bank of India, a transaction in the course of carrying on his own timber business and to make the loss in the transaction a trading loss or a bad debt of the timber business of the appellant."

Continuing at page 558 it was observed:

"There were thus elements of mutuality and the essential ingredient in the carrying on of the money lending business, which were elements of the custom

proved in that case, both of which are wanting in the present case before us."

Mr. Palkhivala for the respondent rightly argued that *Madan Gopal Bagla's case* (1) was decided against the assessee because the custom of persons standing surety for each other for borrowing money and the element of mutuality which was an essential ingredient in the case of *Commissioner of Income Tax, Madras* v. *S. A. S. Ramaswamy Chettiar* (2) was not proved. In the latter case it was established that there was a well recognised custom amongst Chettiars of raising funds for their business of money lenders by the execution of joint pronotes and that if a loss was sustained by one of the executants having to pay the whole on account of inability of the other it was a deductible loss.

The appellant also relied on a judgment of the Madras High Court in *Commissioner of Income Tax* v. *S. R. Subramanya Pillai* (3). In that case the assessee was a book-seller who from time to time jointly with another person borrowed money out of which he employed a portion in his business. One of such amounts borrowed was Rs. 16,200 out of which the assessee took Rs. 10,450 for his business needs and the other debtor took the balance. The latter became insolvent and the assessee had to pay the whole of the money borrowed and claimed it as allowable deduction under s. 10(2)(xi) or s. 10(2)(xv) of the Act or as business loss and it was held that he was not entitled, because the loss sustained by the assessee was too remote from the business of book-selling carried on by him and was not sufficiently connected with the trade and therefore fell outside the range of those amounts which could properly be brought into profit and loss account of the business. The decision in *Commissioner of Income Tax* v. *S. A. S. Ramaswamy Chettiar* (2) was there distinguished on the ground that the decision must be confined to its own peculiar facts and did not apply to business as the one in *Subramanya Pillai's Case* (3). The following passage from

(1) (1956) S.C.R. 551. (2) (1946) 14 I.T.R. 236.
(3) [1950] 18 I.T.R. 85.

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the judgment of Viswanatha Sastri, J., in that case is relevant:—

"But there the business was one of money lending and the Court found that according to the well-known and well-recognised mercantile custom of Nattukottai bankers, they were in the habit of raising funds which formed the stock-in-trade of their money lending business by the execution of joint promissory notes in favour of bankers. That was apparently the usual technique of obtaining credit adopted by the Nattukottai Chetti community money-lenders. In the context this Court held that where a Nattukottai Chetti money-lender paid off in their entirety the debts jointly due by him and another as a result of the latter's inability to pay, the loss sustained as a result of this transaction was a loss of the money-lending business itself and therefore a deductible item in computing profits."

In the instant case it has been found that there was a well recognised commercial practice in Bombay of carrying on business by borrowing money from Banks on joint and several liability. It was also found that by so doing the borrower could borrow money at a lower rate of interest than he otherwise would have paid; that the respondent had, in accordance with the commercial practice, borrowed the money, the whole of which he had to return because the joint promisor Kishori Lal had become bankrupt; mutuality was also held proved. It cannot be said that the essential feature of the case now before us is in principle different from that of the *Commissioner of Income-tax* v. *Ramaswamy Chettiar* (1). In both cases the finding is that there is mutuality and custom of borrowing money on joint pronotes for the carrying on of business. In our opinion in the circumstances proved in the present case, and on the facts established and on the findings given, the respondent was rightly held to be entitled to deduct the loss which was suffered by him in the transaction in dispute.

Counsel for the assessee drew our attention to a

(1) (1946) 14 I.T.R. 236.

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Privy Council judgment *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1) but that case can have no application to the facts of the present case because it was found there as a fact that the assessees's financial arrangements were quite distinct from the activities by which they earned their income and expenditure incurred in relation to the financing of their business was not expenditure in the earning of their income within the statute.

It was then contended that the loss of the respondent was a capital loss and for this again reliance was placed on the judgment of this Court in *Madan Gopal Bagla's case* (2) and particularly on the observation at page 559 where Bhagwati, J., quoted with approval the observations of the High Court in the judgment but as we have pointed out the facts of that case are distinguishable and what was said there has no application to the facts and circumstances proved in the present case.

In our view the judgment of the High Court is right and we therefore dismiss this appeal with costs.

Appeal dismissed.

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November 24.

M/S. HAJI AZIZ AND ABDUL SHAKOOR BROS.

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY II

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Business deduction—Import of goods by steamer—Government notification prohibiting import by steamer—Payment of penalty in lieu of confiscation—Allowable expenditure—Commercial expense—Sea Customs Act, 1878 (8 of 1878), s. 167(8)—Indian Income-tax Act, 1922 (11 of 1922), s. 10(2)(xv).

The appellant firm imported dates from abroad partly by steamer and partly by country craft. At the relevant time import of dates by steamers had been prohibited by Government

(1) [1945] 13 I.T.R. Supp. 1. (2) [1956] S.C.R. 551.

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notification, and the consignments which were imported by steamer were, therefore, confiscated by the customs authorities under s. 167, item 8, of the Sea Customs Act, 1878, but under s. 183 of the Act the appellant was given an option to pay Rs. 82,250 as penalty in lieu of confiscation. The appellant paid the amount and got the dates released. Before the Income-tax authorities it claimed to deduct the amount paid as penalty as an allowable expenditure under s. 10(2)(xv) of the Indian Income-tax Act, 1922, but the claim was rejected. It was contended that the order of confiscation was against the stock-in-trade and not against the person of the appellant firm and as the amount paid was expended for the release of the stock-in-trade, it was an allowable expenditure.

Held, that the amount paid by the appellant by way of penalty for a breach of the law could not be considered to be an expenditure laid out wholly and exclusively for the purpose of the business and was not an allowable deduction under s. 10(2)(xv) of the Indian Income-tax Act, 1922.

Expenses which are permitted as deductions are such as are made in order to enable a person to carry on and earn profit in the business. It is not enough that the disbursements are made in the course of or arise out of or are concerned with or made out of the profits of the business but they must also be for the purpose of earning the profits of the business. An expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of trade cannot on grounds of public policy be said to be a commercial expense for the purpose of a business or disbursement made for the purpose of earning the profits of such business.

Case law reviewed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 110 of 1957.

Appeal by special leave from the judgment and order dated February 25, 1955, of the former Bombay High Court in I.T.R. No. 57/X of 1954.

N. A. Palkhivala and *I. N. Shroff*, for the Appellant.

A. N. Kripal and *D. Gupta*, for the Respondent.

1960. November 24. The Judgment of the Court was delivered by

Kapur J.

KAPUR, J.—This is an appeal by special leave against the judgment and order of the High Court of Bombay answering the question submitted to it against the assessee firm who is the appellant before

us, the respondent being the Commissioner of Income-tax.

The appeal relates to the assessment year 1949-50, the accounting year ended on July 25, 1948. The appellant is a firm doing the business of importing dates from abroad and selling them in India. During the accounting year the appellant imported dates from Iraq. At the relevant time the import of dates by steamers was prohibited by two notifications dated December 12, 1946, and June 4, 1947, but they were permitted to be brought by country craft. Goods which had been ordered by the appellant were received partly by steamer and partly by country craft. Consignments, which were imported by steamer and were valued at Rs. 5 lacs were confiscated by the Customs Authorities under s. 167, item 8 of the Sea Customs Act but under s. 183 of that Act the appellant was given an option to pay fines aggregating Rs. 1,63,950 which sum on appeal was reduced to Rs. 82,250. This sum was paid and the dates were released. On the sale of the goods certain profits accrued out of which it sought to deduct Rs. 82,250 paid as penalty on ordinary principles of commercial accounting. The Income-tax Officer disallowed this claim which was also disallowed by the Appellate Assistant Commissioner. On appeal to the Income-tax Appellate Tribunal this sum was held to be allowable by a majority of two to one. At the instance of the respondent the Tribunal referred the following question to the High Court for its opinion:—

"Whether on the facts and in the circumstances of the case, the payment of Rs. 82,250 is an allowable expenditure under Section 10(2) (xv) of the Indian Income-tax Act?"

The High Court held that the above amount of Rs. 82,250 could not be said to have been paid for salvaging the goods but was paid as a penalty incurred in consequence of an illegal act on the part of the appellant and was therefore not an allowable item under s. 10(2)(xv) of the Income-tax Act. Against this judgment the appellant firm has come in appeal to this Court by special leave.

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It was argued on behalf of the appellant firm that it had specifically instructed the shippers in Iraq to send the goods by country craft and we have been referred to certain correspondence but it does not appear that that correspondence in any way helps the appellant firm and the Income-tax authorities and the High Court have rightly proceeded on the basis that the appellant firm imported the goods contrary to the regulations.

Three questions were raised by counsel for the appellant; (1) that an expenditure does not become inadmissible because it is occasioned by an infraction of the law not involving moral turpitude; (2) in any event the expenditure incurred was as the result of an order in *rem* against the stock-in-trade of the appellant firm and was therefore allowable as a deduction; (3) on the facts of this case there was no infraction by the appellant firm. The last question was not seriously pressed and it is without substance. The correspondence which has been placed on the record does not support the contention of the appellant firm. It was really the second point which was pressed by counsel although the first point was not given up.

It was argued that the order of confiscation, as a consequence of which the amount was paid to get the goods released, was an order in *rem* without any liability on the appellant firm or on the person of the partners; that it was not sufficient that there should be mere infraction of the law because the allowability of expense item depended on the nature of the proceedings and not on the consequence that followed. The consequences of the breach of the law, it was contended, can be three; (1) confiscation or a fine in lieu of confiscation; (2) personal penalty; (3) prosecution in a criminal court or it may be all three of them. It was submitted that if the purpose of the expenditure is to save or salvage the goods then it is an allowable item of expenditure but if it is for the purpose of saving the person of the assessee then it is ot. Therefore as the order passed was against the : ock-in-trade and not against the person of the appellant firm it was an item expended for the release of the stock-in-trade

of the appellant firm and it would be an allowable expenditure.

The action taken against the appellants was one under s. 167, item 8, which is in Ch. XVI dealing with offences and penalties and provides:—

S. 167—"The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences	Section of this Act to which offence has reference.	Penalties
8. If any goods, the importation or exporation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from (India) contrary to such prohibition or restriction; or	18 & 19	Such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees."

Option is given in cases governed by this section under s. 183 which provides:—

S. 183 "Whenever confiscation is authorised by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit."

Enforcement of the payment of penalty is provided in s. 193 the second clause of which is relevant to the case and is as follows:—

S. 193 cl. (2) "When an officer of Customs who has adjudged a penalty or increased rate of duty against any person under this Act is unable to realize the unpaid amount thereof from such goods, such officer may notify in writing to any Magistrate within the local limits of whose jurisdiction such person or any goods

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belonging to him may be, the name and residence of the said person and the amount of penalty or increased rate of duty unrecovered; and such Magistrate shall thereupon proceed to enforce payment of the said amount in like manner as if such penalty or increased rate had been a fine inflicted by himself."

These sections show the punishments provided for the breach of the prohibitions in regard to importation or exportation of goods under ss. 18 and 19; the power of the Customs Authorities to give an option to pay in lieu of confiscation and how the penalties are to be imposed. Therefore when the appellants incurred the liability they did so as a penalty for an infraction of the law; but it cannot be said that the money which they had to pay was not paid as a penalty and in fact under s. 167(8) it was a penalty.

In support of his argument counsel for the appellant firm referred to *Maqbool Hussain etc.* v. *The State of Bombay etc.* (1) and to the following passage at p. 742 where Bhagwati, J., said:—

"Confiscation is no doubt one of the penalties which the Customs Authorities can impose but that is more in the nature of proceedings in rem than proceedings in personam, the object being to confiscate the offending goods which have been dealt with contrary to the provisions of the law and in respect of the confiscation also an option is given to the owner of the goods to pay in lieu of confiscation such fine as the officer thinks fit. All this is for the enforcement of the levy of and safeguarding the recovery of the sea customs duties."

Similar observations were made by S. K. Das, J., in *Shewpujanrai Indrasanrai Ltd.* v. *The Collector of Customs & Ors.* (2) where it was said that a distinction must be drawn between an action in *rem* and proceeding in *personam* and that confiscation of the goods is a proceeding in *rem* and the penalties are enforced against the goods whether the offender is known or not. The view taken by this Court in the other two cases cited by counsel for the appellants, i.e., *Leo Roy*

(1) [1953] S.C.R. 730. (2) [1959] S.C.R. 821, 836.

Frey v. *The Superintendent, District Jail, Amritsar* (1) and *Thomas Dana* v. *The State of Punjab* (2) is the same. In *Dana case* (2) Subba Rao, J., said at p. 298:—

"If the authority concerned makes an order of confiscation it is only a proceeding in *rem* and the penalty is enforced against the goods. On the other hand, if it imposes a penalty against the person concerned, it is a proceeding against the person and he is punished for committing the offence. It follows that in the case of confiscation there is no prosecution against the person or imposition of a penalty on him."

In *Maqbool Hussain's case* (3) the question for decision was whether after proceedings had been taken under the Sea Customs Act an accused person could be prosecuted and could or could not rely upon the plea of double jeopardy, it was held that he could not. In *Shewpujanrai's case* (4) the contention raised was that after proceedings had been taken under the Foreign Exchange Regulation Act it was not open to the Customs Authorities to take any action under the Sea Customs Act. The other two cases were similar to *Maqbool Hussain's case* (3). The contention now raised before us is quite different. What is to be decided in the present case is whether the penalty which was paid by the appellant firm was an allowable deduction within s. 10(2)(xv) of the Income-tax Act which provides:

S. 10(2)(xv) "any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

The words "for the purpose of such business" have been construed in *Inland Revenue* v. *Anglo Brewing Co. Ltd.* (5) to mean "for the purpose of keeping the trade going and of making it pay". The essential condition of allowance is that the expenditure should have been laid out or expended wholly and exclusively for the purpose of such business.

(1) [1958] S.C.R. 822.
(2) [1959] Supp. 1 S.C.R. 274, 298.
(3) [1953] S.C.R. 730.
(4) [1959] S.C.R. 821, 836.
(5) (1925) 12 T.C. 803, 813.

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In deciding this case, reference to decisions in some English cases will be fruitful. In *Commissioners of Inland Revenue* v. *Warnes & Co.* (1), the assessee who carried on the business of oil exporters were sued for a penalty on an information exhibited by the Attorney-General under the Sea Customs Consolidation Act for breach of orders and proclamations. The matter was settled by consent on the assessee agreeing to pay a mitigated penalty of £ 2,000. All imputations on the moral culpability of the assessees were withdrawn. The provisions of the Act under which this information was lodged and penalty paid was similar to the provisions of the Indian Sea Customs Act. This amount was held not to be a proper deduction because in order to be within the provision similar to s. 10(2) (xv) of the Indian Act the loss had to be something within commercial contemplation and in the nature of a commercial loss. Rowlatt, J., relying on the observation of Lord Loreburn, L. C., in *Strong & Co.* v. *Woodifield* (2) said at p. 452:—

"but it seems to me that a penal liability of this kind cannot be regarded as a loss connected with or arising out of a trade. I think that a loss connected with or arising out of a trade must, at any rate, amount to something in the nature of a loss which is contemplable and in the nature of a commercial loss. I do not intend that to be an exhaustive definition, but I do not think it is possible to say that when a fine—which is what the penalty in the present case amounted to—has been inflicted upon a trading body, it can be said that that is a "loss connected with or arising out of" the trade within the meaning of this rule."

This statement of the law was approved in the *Commissioners of Inland Revenue* v. *Alexander Von Glehn & Co. Ltd.* (3) where also in similar circumstances by consent of the assessee penalty of £ 3,000 was paid and the penalty plus the costs were claimed as deduction in arriving at the profits. The Special Commissioners had found that the penalty and costs were incurred by the assessee in the course of carrying on

(1) [1919] 2 K.B. 444. (2) [1906] A.C. 448.
(3) [1920] 2 K.B. 553.

their trade and so incidental thereto and were admissible deductions. Rowlatt, J., on a reference held it to be a non-deductible item. This judgment was affirmed on appeal by the Court of Appeal. Lord Sterndale, M. R., was of the opinion that it was immaterial whether technically the proceedings were criminal or not. The money that was paid was paid as a penalty and it did not matter if in the information it was called a forfeiture.

It was argued by the assessee in that case that no moral obliquity was attributed to them and that it did not matter whether the expense was incurred in consequence of an infraction of the law or whether it was a penalty for doing an illegal act. At p. 565 Lord Sterndale said:—

"Now what is the position here? This business could perfectly well be carried on without any infraction of the law. This penalty was imposed because of an infraction of the law, and that does not seem to me to be, any more than the expense which had to be paid in *Strong & Co.* v. *Woodifield* (1) appeared to Lord Davey to be, a disbursement or expense which was laid out or expended for the purpose of such trade... ....."

Warrington L. J. said at p. 569:—

"It is a sum which the persons conducting the trade have had to pay because in conducting it they have so acted as to render themselves liable to this penalty. It is not a commercial loss, and I think when the Act speaks of a loss connected with or arising out of such trade it means a commercial loss, connected with or arising out of the trade."

In *Strong & Co.* v. *Woodifield* (1) a brewing company owned a licensed house in which they carried on the business of inn-keepers. They incurred a liability to pay damages on account of injuries caused to a visitor, by the falling in of a chimney. This sum was held not to be allowable as a deduction in computing the profits. Lord Loreburn, L. C., in his speech said no sum could be deducted unless it be money wholly and exclusively laid out or expended for the purpose of such

(1) (1906) A.C. 448.

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trade and that only such losses could be deducted as were connected with it in the sense that they were really incidental to the trade itself and they could not be deducted if they were mainly incidental to some other vocation or fell on the trader in some character other than that of a trader. Lord Davey observed:—

"I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arise out of, or is connected with the trade or is made out of the profits of the trade. It must be made for the purpose of earning profits."

The following passage from Lord Sterndale's judgment at p. 566 in *Von Glehn's case* (1) from which we have already quoted shows the effect of incurring a penalty as a result of a breach of the law:

"During the course of the trading this company committed a breach of the law. As I say, it has been agreed that they did not intend to do anything wrong in the sense that they were willingly and knowingly sending these goods to an enemy destination; but they committed a breach of the law, and for that breach of the law, they were fined. That, as it seems to me, was not a loss connected with the business, but was a fine imposed upon the company personally, so far as a company can be considered to be a person, for a breach of the law which it had committed. It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading. For that reason I think that both the decision of Rowlatt, J., in this case, and his former decision in *Inland Revenue Commissioners* v. *Warnes & Co.* (2) which he followed were right, and that this appeal should be dismissed with costs."

In *Spofforth and Prince* v. *Glider* (3) the assessee was a firm of chartered accountants, who claimed a deduction for certain legal costs paid in connection with a

(1) [1920] 2 K.B. 553. (2) [1919] 2 K.B. 444.
(3) (1945) 26 T.C. 310.

successful defence of one of the partners in a Police Court. The assessee firm also sought legal advice in regard to matters connected with some proceedings. Summons were issued against the assessee firm but were eventually dismissed. The assessee contended that the whole of the costs incurred in connection with the proceedings were "wholly and exclusively" laid out or expended for the appellant's profession and were therefore allowable deductions. The Special Commissioner had held against the assessee which was upheld by the Court. The test laid down by Lord Davey in *Strong & Co.* v. *Woodifield* (1) was applied and applying that test it was held that except the expenses for obtaining legal advice the other expenses were not admissible.

In *Farrie* v. *Hall* (2) F, a sugar broker was sued in the High Court for libel and the Court held that F had acted maliciously and that the defence of privilege could not prevail and awarded damages against him. F sought to claim the amount of damages as an allowable deduction contending that it was an expenditure laid out wholly and exclusively for the purposes of his trade or was a loss connected with or arising out of the trade. Relying on the cases above mentioned this amount was disallowed because it fell on the assessee in his character of a calumniator of a rival sugar broker and it was only remotely connected with his trade as a sugar broker. Therefore it was not laid out exclusively and wholly for the purpose of his business. We were also referred to the observations of Danckwerts, J. in *Newson* v. *Robertson* (3) where it was said that if the expenditure is incurred by the tax-payer for more than one purpose including the commercial purposes in the sense that it is incurred for the purposes of earning profits of the trade and also some outside purpose then the expenses cannot be claimed at all as not being wholly and exclusively laid out or expended for the purpose of the trade. In that case expenses claimed by a Barrister for

(1) [1906] A.C. 448. (2) [1947] 28 T.C. 200.
(3) [1952] 33 T.C. 452, 459.

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travelling between his house and his chambers were disallowed because his object and purpose in travelling was mixed and not wholly and exclusively for the purpose of the profession.

Coming now to Indian cases; In *Mask & Co.* v. *Commissioner of Income-tax, Madras* (1) the assessee in breach of his contract sold crackers at a lower rate and a decree was passed against him for damages for breach of contract which he claimed as an allowable deduction. It was held that as the assessee had disregarded the undertaking given and his conduct was palpably dishonest it did not constitute an allowable expenditure. Sir Lionel Leach, C. J., after referring to *Warne's case* (2) and *Von Glehn's case* (3) held that the amount did not constitute an expenditure falling within s. 10(2)(xii). The Madras High Court in *Senthikumara Nadar & Sons* v. *Commissioner of Income-tax, Madras* (4) held that payments of penalty for an infraction of the law fell outside the scope of permissible deductions under s. 10(2)(xv). In that case the assessee had to pay liquidated damages which was akin to penalty incurred for an act opposed to public policy a policy underlying the Coffee Market Expansion Act, 1942, and which was left to the Coffee Board to enforce.

Reference was also made during the course of arguments to *Commissioner of Income-tax* v. *Hirjee* (5). In that case the assessee was prosecuted under the Hoarding and Profiteering Ordinance but was finally acquitted and claimed the amount spent in defending himself under s. 10(2)(xv) in his assessment. It was held that the distinction between the legal expenses on a successful and unsuccessful defence was not sound and that the deductibility of such expenses under s. 10(2)(xv) must depend on the nature and purpose of the legal proceedings in relation to the business whose profits are in computation and are unaffected by the final outcome of the proceedings.

A review of these cases shows that expenses which

(1) [1943] 11 I.T.R. 454.
(2) [1919] 2 K.B 444.
(3) [1920] 2 K.B. 553.
(4) [1957] 32 I.T.R. 138.
(5) [1953] S.C.R. 714.

are permitted as deductions are such as are made for the purpose of carrying on the business, i.e., to enable a person to carry on and earn profit in that business. It is not enough that the disbursements are made in the course of or arise out of or are concerned with or made out of the profits of the business but they must also be for the purpose of earning the profits of the business. As was pointed out in *Von Glehn's case* (1) an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of trade cannot be described as such. If a sum is paid by an assessee conducting his business, because in conducting it he has acted in a manner, which has rendered him liable to penalty it cannot be claimed as a deductible expense. It must be a commercial loss and in its nature must be contemplable as such. Such penalties which are incurred by an assessee in proceedings launched against him for an infraction of the law cannot be called commercial losses incurred by an assessee in carrying on his business. Infraction of the law is not a normal incident of business and therefore only such disbursements can be deducted as are really incidental to the business itself. They cannot be deducted if they fall on the assessee in some character other than that of a trader. Therefore where a penalty is incurred for the contravention of any specific statutory provision, it cannot be said to be a commercial loss falling on the assessee as a trader the test being that the expenses which are for the purpose of enabling a person to carry on trade for making profits in the business are permitted but not if they are merely connected with the business.

It was argued that unless the penalty is of a nature which is personal to the assessee and if it is merely ordered against the goods imported it is an allowable deduction. That, in our opinion, is an erroneous distinction because disbursement is deductible only if it falls within s. 10(2)(xv) of the Income-tax Act and no such deduction can be made unless it falls within the test laid down in the cases discussed above and it can be said to be expenditure wholly and exclusively laid for the purpose of the business. Can it be said

(1) (1920) 2 K.B. 553.

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that a penalty paid for an infraction of the law, even though it may involve no personal liability in the sense of a fine imposed for an offence committed, is wholly and exclusively laid for the business in the sense as those words are used in the cases that have been discussed above. In our opinion, no expense which is paid by way of penalty for a breach of the law can be said to be an amount wholly and exclusively laid for the purpose of the business. The distinction sought to be drawn between a personal liability and a liability of the kind now before us is not sustainable because anything done which is an infraction of the law and is visited with a penalty cannot on grounds of public policy be said to be a commercial expense for the purpose of a business or a disbursement made for the purposes of earning the profits of such business.

In our opinion the High Court rightly held that the amount claimed was not deductible and we therefore dismiss this appeal with costs.

Appeal dismissed.

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M/S. MADAN MOHAN DAMMA MAL LTD. AND ANR.

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THE STATE OF WEST BENGAL AND ANR.

(JAFER IMAM, A. K. SARKAR and RAGHUBAR DAYAL, JJ.)

Food Adulteration—Storing adulterated oil for sale—Presumption, rebuttal of—Calcutta Municipal Act, 1951 (W.B. XXXIII of 1951), s. 462.

The first appellant No. 1 sent a consignment of mustard oil in a tank wagon from Firozabad, U. P. to itself at Calcutta where it took delivery of the wagon from the railway authorities. The Food Inspector took samples of the oil from the wagon which on analysis were found to be adulterated. The appellants were prosecuted under s. 462 of the Calcutta Municipal Act, 1951, for storing adulterated mustard oil for sale. The

appellants contended that the presumption under sub-s. (4) of s. 462 that the mustard oil was stored for sale was rebutted in view of certain arrangements between the U. P. Oil Millers Association and the Deputy Commissioner of Police and of a letter written by the appellants to the Association asking that a sample may be taken and tested so that the appellants "may take the delivery of oil only if it is found pure on analysis."

Held, that this was not sufficient to rebut the presumption that the oil was stored for sale. The letter did not say that the oil would not be sold; it was not stated as to what would be done if the oil was found to be impure. There was no arrangement between the Association and the Corporation which was the sole authority to take action. The arrangement and the letter were a device to make detection difficult.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 118 of 1959.

Appeal by special leave from the judgment and order dated July 2, 1957, of the Calcutta High Court in Criminal Appeal No. 101 of 1956 arising out of the judgment and order dated January 16, 1956, of the Second Court of the Municipal Magistrate, Calcutta, in case No. 208B of 1955.

C. B. Aggarwala, B. B. Tawakley and *B. P. Maheshwari*, for the appellant.

Nalin Chandra Bannerjee, Sunil K. Basu, S. N. Mukherjee for *P. K. Bose*, for the respondent No. 2.

1960. November 24. The Judgment of the Court was delivered by

Raghubar Dayal, J.

RAGHUBAR DAYAL, J.—This is an appeal by special leave against the order of the Calcutta High Court affirming the conviction of the appellants Messrs. Madan Mohan Damma Mal Ltd., and Om Prokash Manglik, its Manager, under s. 462 of the Calcutta Municipal Act, 1951 (W. B. XXXIII of 1951) hereinafter called the Act.

The facts leading to this appeal are that Messrs. Madan Mohan Damma Mal Ltd., (hereinafter called appellant No. 1) sent a consignment of mustard oil, about 499 maunds in weight, from Firozabad, the place of manufacture, to itself, at Calcutta, on December 25, 1954, in tank wagon No. 75612. This wagon was placed at the Pathuriaghat siding at Calcutta at

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about 8.45 a.m., on January 3, 1955. Dr. Nityananda Bagui, Food Inspector of the Calcutta Corporation, accompanied by certain police officers, went to that siding and took three samples of mustard oil contained in this wagon, after arranging with Om Prokash Manglik, appellant No. 2, who was found near the wagon, the purchase of 12 ounces of oil for annas eight. He took the sample of oil in three phials. They were properly sealed. One of them was given to appellant No. 2. The other two were kept by Dr. Bagui. He sent one of them to the Public Analyst for examination, the same day. Ashit Ranjan Sen, the Public Analyst, examined the oil contained in that phial on January 3, 1955, but could not come to any positive opinion about its purity. Dr. Bagui, however, seized the tank wagon that evening, sealed it with the Corporation's seal and left it in the custody of appellant No. 2. The oil in the tank was allowed to be removed to the godown of the appellants on January 6, 1955. The lock of the godown was then sealed with the seal of the Corporation. Mr. Sen reported on January 4, 1955, that the oil was adulterated. He sent a detailed report about the result of the examination on January 24, 1955. On receipt of the report about the mustard oil being adulterated, Dr. Bagui filed a complaint against the appellants on February 4, 1955, with respect to their selling and keeping for sale mustard oil, a sample of which was found on analysis to be mustard oil which was adulterated with groundnut oil.

During the course of the trial, the trial Court, on an application on behalf of the appellants, ordered the despatch of the third sample phial of the oil in the custody of the Corporation's Health Officer, to the Director of Health Services, Government of West Bengal, for analysis and report. This sample was analysed by Dulal Chandra Dey, Court Witness no. 1, and found to be adulterated with groundnut oil. The report of the Analyst was, however, sent to the Court under the signature of Dr. S. K. Chatterjee, D. W. 2, Deputy Director of Health Services, Government of West Bengal.

The appellants appear to have sent the sample of oil in their possession to Om Prakash, Oil Expert to the U.P. Government, who reported on July 27, 1955, that the sample 'conforms to Agmark Specification for Mustard Oil and is considered to be free from adulterants such as sesame, groundnut and linseed oil'. This report, however, has not been proved.

The Deputy Commissioner of Police, Enforcement Branch, Calcutta, sent a sample of mustard oil on January 10, 1955, to the Public Analyst, Food & Water, West Bengal Public Health Laboratory. Sri S. N. Mitra, D. W. 7, examined this sample and reported, on the basis of its saponification value to be 173.3, and iodine value to be 105, that the sample approximated to the standards of genuine mustard oil. This report does not establish that the sample was of pure mustard oil. Sri Mitra's reply to the query from the Deputy Commissioner of Police for clarification, makes this very clear. It is:

"But, unless conclusive evidence of the presence of a foreign oil, corroborated in some instances by the figures of the usual oil contents, is obtained, the sample is not and cannot be declared adulterated. In the present case the sample of mustard oil has already been examined exhaustively and has been certified as 'approximating to standards' but not as genuine. The legal implication of the expression is that the sample will have the benefit of doubt."

Further, there is no good evidence on the record to establish that the sample sent to Sri Mitra was a sample from the appellants' tank wagon.

Dr. Bagui does not depose about the police people taking a sample of oil. He was not questioned about the police taking any sample of the oil. There seems to be no good reason for the police taking a sample of oil for the purpose of analysis and finding out whether the mustard oil was pure or not. The case put to Dr. Bagui during his cross-examination, on behalf of the appellants, appears to have been that he himself had taken four samples of the mustard oil in question and that one of those samples was sent to the Enforcement Branch. Dr. Bagui denied that he had taken

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four samples of the mustard oil, His statement is fully corroborated by the statement of Kalidas Ganguli, Sub-Inspector, Calcutta Enforcement Branch, Police Department, who had accompanied Dr. Bagui on the occasion. He stated that the Corporation Food Inspector took three samples and the police took the one sample which was sealed with the Corporation seal. We are not satisfied that the police actually took one sample of the oil and had it sealed with the Corporation seal as deposed to by Kalidas Ganguli.

The Courts below found on the evidence that the mustard oil in the appellants' tank wagon was adulterated with groundnut oil, that the appellants were in possession of that oil and had stored that oil for sale, in view of the presumption arising under sub-s. (4) of s. 462 of the Act, and which had not been rebutted on behalf of the appellants. Learned counsel for the appellants has questioned the correctness of these findings.

We have considered the evidence in connection with the analysis of the samples of mustard oil by the Chemists. Ashit Ranjan Sen, P.W. 2, Public Analyst, who examined the first sample sent by Dr. Bagui on January 3-4, 1955, found it adulterated, on the basis of the data that the B. R. Index at 40° C was 60.4 and the Bellier's test for groundnut oil was positive inasmuch as it gave turbidity at 28°C. Court Witness no. 1, Dulal Chand Dey, who actually analysed the sample sent by the Court, also found it adulterated, on the basis of his obtaining the saponification value to be 175.5, iodine value to be 106·8 and the appearance of turbidity at 27°C. He also found indication of the presence of a small amount of linseed oil. The correctness of his opinion on these data is admitted by Sri Mitra, D.W. 7. In these circumstances, the finding of the Courts below that the mustard oil in the appellants' tank wagon was adulterated is correct. It is not established that the sample of mustard oil sent to Sri Mitra by the Deputy Commissioner of the Enforcement Branch contained mustard oil from this tank wagon. The opinion of Sri Mitra about the nature of that sample therefore does not go against the opinion

of Sri Sen and Sri Dey that the mustard oil analysed by them was adulterated with groundnut oil.

The other contention for the appellants is that they were not in possession of the oil when the sample of mustard oil was taken by Dr. Bagui and that therefore no presumption under sub-s. (4) of s. 462 of the Act can be raised against them for holding that the oil was stored for sale. It appears from the judgment of the High Court under appeal that it was not disputed at the hearing before it that the appellants were in possession of the mustard oil whose sample had been taken. On the evidence on the record we are of opinion that they were in possession of the mustard oil. The consignment of oil was from the manufacturing firm, appellant no. 1, to itself at Calcutta. Its manager, appellant no. 2, took delivery of the wagon from the railway authorities on January 3, 1955. There is no direct evidence to the effect that such delivery was taken prior to Dr. Bagui's taking sample of the mustard oil. But the circumstances, in our opinion, conclusively establish that appellant no. 2 had taken delivery of the wagon prior to Dr. Bagui's visit and taking samples of oil from the wagon. Appellant no. 2 is not expected to and could not have got the wagon opened for the purpose of taking samples of oil, if he had not taken delivery of the wagon from the railway authorities. The railway authorities themselves would have seen to it that nobody tampers with the contents of the wagon in its charge. Appellant no. 2 must have therefore paid the freight for the wagon prior to Dr. Bagui's visit and thus obtained delivery of the wagon. It was thereafter that he got control over the wagon and was in a position to take out oil from it or to permit anyone else to take out oil. We therefore hold that the appellants were in possession of the oil in the tank wagon when Dr. Bagui took samples of the oil from it.

The main contention, however, for the appellants is that the presumption that the mustard oil was stored for sale by the appellants, under sub-s. (4) of s. 462 of the Act, is rebuttable and has been fully rebutted in view of certain arrangements between the

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U. P. Oil Millers Association and the Deputy Commissioner of Police, Enforcement Branch, and the letter of the appellants to the Secretary of the Association (Exhibit R) on January 3, 1955. We have considered the various documents which have been referred to in support of the arrangement between the Association and the Deputy Commissioner, Enforcement Branch, but do not find therein anything which would restrain legally the appellants from selling the oil even if it is found to be adulterated. The proceedings of the meeting of the U. P. Oil Millers Association held on June 9, 1954, and attended by the Deputy Commissioner and Assistant Commissioner of the Enforcement Branch show that no such agreement has been arrived at. Even the suggestion of the Deputy Commissioner that all the members of the Association should write to their respective mills that all the quantity of oil which would be imported should at first be passed and then made delivery of, was not fully accepted, the members simply stating that they always and invariably imported pure mustard oil. It was, however, decided that the samples of oil be taken from the next morning, i.e., June 10, 1954. We however find that in November 1954 the U. P. Oil Millers Association wrote to appellant no. 1 that according to the decision of the Deputy Commissioner of Police, Enforcement Branch, every application to draw sample and test it should be accompanied by a certificate signed by the Chemist or the Manager or the Proprietor of the Mills to the effect that the mustard oil in the tank wagon was pure mustard oil free from Argemoni, linseed or any other adulteration, and that in February 1955 and April 1955, the Deputy Commissioner of Police, Enforcement Branch had to remind the U. P. Oil Millers Association that it should advise all its members that whenever they indent any mustard oil from outside Bengal, they would see that the railway receipts be accompanied by a clear certificate of examination from the Chemist of the factory who examined the same. Such directions from the Deputy Commissioner of Police, Enforcement Branch, do not appear to have

had any great effect, as the consignment of oil received by the appellants was without any such certificate. Mahendra Kumar Gupta, D.W. 1, Chemist of the appellants' mill, deposed however that he had taken the sample of the oil sent in that wagon and found it to be genuine mustard oil, free from any adulteration. Any such certificate about the purity of the mustard oil sent is not proved to have accompanied the railway receipt and to have been shown or made over to Dr. Bagui, or to the Police Officers who had accompanied him at the time. Letter Exhibit R was sent on behalf of appellant no. 1 to the Secretary of the U. P. Oil Millers Association at 10 a.m., on January 3, 1955. The letter said:

"Please arrange for sample and test through the proper authorities concerned, so that we may take the delivery of oil only if it is found pure on analysis."

Any such statement can hardly be sufficient to rebut the presumption that the oil which was consigned by appellant no. 1 to itself at Calcutta was stored for sale. The letter itself does not say that the oil will not be sold. It simply says that they may take the delivery of the oil only if it is found pure on analysis. What would be done to the oil if it is found to be impure, is not stated. The Association was not in any arrangement with the Corporation which had the sole authority to take action with respect to the adulterated mustard oil. The Enforcement Branch of the Police had nothing to do with it. In the circumstances, all the so-called arrangement with the Enforcement Branch of the Police and the consequent letters, similar to letter Exhibit R, seem to be a subtle device to make things difficult for the proper authorities responsible to see that mustard oil fit for sale be pure.

It is obvious in this case itself, how this sort of arrangement has provided an occasion for the coming into existence of the alleged fourth sample of mustard oil from the appellants' tank wagon and the non-committal report about its purity. We are therefore of opinion that this letter Exhibit R, or the arrangement which led to such communication, does not establish

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that the mustard oil in the wagon which will be otherwise presumed to be stored for sale by the appellants, was not stored for sale.

We are therefore of opinion that the conviction of the appellants of the offence under s. 462 of the Act is correct. The appeal therefore stands dismissed.

Appeal dismissed.

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November 25.

THE STATE OF UTTAR PRADESH & OTHERS

v.

AJODHYA PRASAD

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Public Servant—Complaint of taking bribes against Police Officer—Magisterial enquiry into complaints—Departmental trial—Validity of—Police Act, 1861 (V of 1861), s. 7—U. P. Police Regulations, paras. 486, 489.

The respondent was posted as officer incharge of a police station when complaints were received by the District Magistrate that the respondent was receiving bribes. The District Magistrate got an enquiry made by the Sub-Divisional Magistrate and forwarded the report toghether with his own endorsement to the Superintendent of Police. The respondent was forced to go on 2 months leave and was reverted to his substantive post of Head Constable, but later he was promoted to the rank of officiating Sub-Inspector and posted at another police station. Meanwhile on further complaints an investigation was made and it was reported that the respondent was a habitual bribe taker. He was charged under s. 7 Police Act for 9 charges of bribery and after departmental trial was dismissed by the Superintendent of Police. He filed a Writ Petition before the High Court challenging the order of dismissal *inter alia* on the ground that the offences charged being cognizable offences the Superintendent of Police had no jurisdiction to hold the departmental trial without first complying with the provisions of para. 486(1) of the U. P. Police Regulations. The High Court accepted this contention and quashed the order of dismissal.

Held (*per* Sarkar, Subba Rao and Mudholkar, JJ.) that the subject matter of the magisterial enquiry and of the departmental trial was substantially the same and that the departmental trial was validly held. The fact that there was an interregnum between the magisterial enquiry and the departmental trial did not affect the question. Paragraph 486 did not apply to a case where a magisterial enquiry was ordered and a police officer could be departmentally tried under s. 7 Police Act after such magisterial enquiry.

Per Gajendragadkar and Wanchoo, JJ.—The provisions of para. 486 were merely directory and even if there was non-compliance therewith the order of dismissal was not invalidated.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 270 of 1959.

Appeal by special leave from the judgment and order dated December 23, 1957, of the Allahabad High Court (Lucknow Bench) at Lucknow in Civil Miscellaneous Application (O. J.) No. 86 of 1954.

C. B. Aggarwala, G. C. Mathur and *C. P. Lal*, for the appellants.

Achhru Ram, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the respondent.

1960. November, 25. The Judgment of Sarkar, Subba Rao and Mudholkar, JJ., was delivered by Subba Rao, J., and that of Gajendragadkar and Wanchoo, JJ., was delivered by Wanchoo, J.

Subba Rao J.

SUBBA RAO, J.—This is an appeal by special leave against the judgment and order of the High Court of Judicature at Allahabad, Lucknow Bench, allowing the petition filed by the respondent under Art. 226 of the Constitution.

The facts are in a small compass and may be briefly stated. In the year 1933 the respondent was appointed a constable in U. P. Police Force; on December 1, 1945, he was promoted to the rank of head constable and in May, 1952 he was posted as officer incharge of Police Station, Intiathok, District Gonda. Complaints were received by the District Magistrate, Gonda, to the effect that the respondent was receiving bribes in the discharge of his duties. On September 16, 1952, the District Magistrate, Gonda, directed the Sub-Divisional Magistrate to make an enquiry in respect of the

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said complaints. On November 3, 1952, the Sub-Divisional Magistrate, after making the necessary enquiries, submitted a report to the District Magistrate recommending the transfer of the respondent to some other station. On November 17, 1952, the District Magistrate sent an endorsement to the Superintendent of Police to the effect that the Sub-Divisional Magistrate had found substantial complaints against the integrity of the respondent, that he had also received such complaints and that his general reputation for integrity was not good, but that his transfer should, however, come after sometime and that in the meantime his work might be closely watched. On being called upon by the Superintendent of Police to submit an explanation for his conduct, the respondent submitted his explanation on November 29, 1952. On December 17, 1952, the respondent was forced to go on leave for two months. Before the expiry of his leave, he was reverted to his substantive post of head constable and transferred to Sitapur. On February 17, 1953, he was promoted to the rank of officiating Sub-Inspector and posted as Station Officer at Sidholi. On February 27, 1953, the Superintendent of Police made the following endorsement in his character roll:

"A strong officer with plenty of push in him and met with a strong opposition in this new charge. Crime control was very good but complaints of corruption were received which could not be substantiated. Integrity certified."

Meanwhile on further complaints, the C.I.D. probed the matter further and on July 26, 1953, the Superintendent of Police, Investigation Branch, C.I.D., reported that the respondent was a habitual bribe-taker. On July 28, 1953, he was placed under suspension and on August 18, 1953, he was charged under s. 7 of the Police Act with remissness in the discharge of his duty and unfitness for the same inasmuch as while posted as a Station Officer, Police Station, Intiathok, he had been guilty of dishonesty, corruption and misbehaviour in that he had on nine occasions, particulars of which were given in the charge, accepted bribes. It may be mentioned that the magisterial inquiry

related to seven of the nine charges alleged against the respondent. The trial was conducted by the Superintendent of Police and the respondent submitted his explanation on September 12, 1953. The Superintendent of Police, who conducted the trial, examined many witnesses and found that seven out of the nine charges had been established. Thereafter he issued a notice to the respondent calling upon him to show cause why he should not be dismissed from the police force. On February 20, 1954, the respondent submitted his explanation and the Superintendent of Police, by his order dated February 22, 1954, dismissed the respondent from service with effect from the said date. The appeal preferred by the respondent to the Deputy Inspector General of Police was dismissed by his order dated June 2, 1954. Thereafter the respondent on August 5, 1954, filed a petition under Art. 226 of the Constitution before the High Court of Judicature at Allahabad, Lucknow Bench, for quashing the order of dismissal.

Before the High Court three points were raised, namely, (1) as the petitioner was officiating as Sub-Inspector of Police at the time of the departmental trial the Suprintendent of Police had no power to dismiss him, since an order in such circumstances could only be made by a police officer senior in rank to a Superintendent; (2) the trial was vitiated by a number of serious irregularities; and (3) the specific acts with which the petitioner was charged were cognizable offences and, therefore, the Superintendent of Police had no jurisdiction to proceed with a departmental trial without complying with the provisions of sub-paragraph (1) of para. 486 of the Police Regulations. The learned Judges of the High Court held that the respondent was charged with committing cognizable offences and therefore sub-paragraph (1) of para. 486 governed the situation and that, as no case, as required by the said sub-paragraph, was registered against the respondent in the police station, the order of dismissal was invalid. They further held that the case was not covered by the first proviso to sub-paragraph (1) of para. 486, as, in their opinion, the information

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about the commission of the offences was not in the first instance received by the Magistrate and forwarded to the police for inquiry. In view of that finding they found it unnecessary for them to express any opinion upon other arguments which had been advanced on behalf of the respondent. In the result they issued a writ in the nature of *certiorari* quashing the impugned orders. Hence the appeal.

Mr. C. B. Agarwala, learned counsel appearing for the appellants, raised before us the following points: (1) The Governor exercised his pleasure through the Superintendent of Police, and, as the Police Regulations were only administrative directions, the non-compliance therewith would not in any way affect the validity of the order of dismissal. (2) If the order of dismissal was held to have been made under the statutory power conferred upon the Superintendent of Police, the regulations providing for investigation in the first place under chapter XIV of the Criminal Procedure Code were only directory in nature, and inasmuch as no prejudice was caused to the respondent the non-compliance with the said regulations would not affect the validity of the order of dismissal. (3) The Superintendent of Police was authorized to follow the alternative procedure prescribed by sub-paragraph (3) of para. 486 and, therefore, the inquiry held without following the procedure prescribed by rule I was not bad. (4) As the magisterial inquiry was held in regard to practically all the charges, the subject matter of the departmental trial, the case is not covered by the provisions of para. 486 of the Police Regulations.

In the case of *The State of U. P.* v. *Babu Ram Upadhya* (1) in which we have just delivered the judgment, we have considered the first three points and for the reasons mentioned therein we reject the first three contentions.

The appellants must succeed on the fourth contention. From the facts already narrated, the conduct of the respondent, when he was officer incharge of the Police Station, Intiathok, was the subject-matter of

(1) Civil Appeal No. 119 of 1959; [1961] 2 S.C.R. 679.

magisterial inquiry. The Sub-Divisional Magistrate made inquiry in respect of seven of the charges which were the subject-matter of the departmental trial and submitted a report to the District Magistrate. The District Magistrate, in his turn, made an endorsement on the report and communicated the same to the Superintendent of Police recommending the transfer of the respondent and suggesting that in the meanwhile the work of the respondent might be closely watched. Though the Superintendent of Police gave at first a good certificate to the respondent, in respect of the same a further probe was made through the C.I.D. Thereafter the Superintendent of Police conducted a departmental trial in respect of the aforesaid seven charges and two other new charges of the same nature. The inquiry ended in the dismissal of the respondent. In the circumstances it would be hypertechnical to hold that there was no magisterial inquiry in respect of the matter which was the subject-matter of the departmental trial. On the said facts we hold that the departmental inquiry was only a further step in respect of the misconduct of the respondent in regard whereto the magisterial inquiry was held at an earlier stage. If so, the question is whether para. 486 would govern the present inquiry or it would fall outside its scope.

The relevant provisions of the Police Regulations read:

Paragraph 486: "When the offence alleged against a police officer amounts to an offence only under s. 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of the Superintendent of Police in accordance with the following rules;"

.....

Paragraph 489: "A police officer may be departmentally tried under section 7 of the Police Act—

(1) after he has been tried judicially;

(2) after a magisterial inquiry under the Criminal Procedure Code;

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(3) after a police investigation under the Criminal Procedure Code or a departmental enquiry under paragraph 486 III above."

A combined reading of these provisions indicates that para. 486 does not apply to a case where a magisterial inquiry is ordered; and that a police officer can be departmentally tried under s. 7 of the Police Act after such a magisterial inquiry. In this case the departmental trial was held subsequent to the completion of the magisterial inquiry and therefore it falls within the express terms of para. 489(2). The fact that in the interregnum the police received further complaints or that the C.I.D. made further enquiries do not affect the question, if substantially the subject-matter of the magisterial inquiry and the departmental trial is the same. In this case we have held that it was substantially the same and therefore the departmental trial was validly held. We, therefore, set aside the order made by the High Court. As we have pointed out earlier, the High Court, in the view taken by it, did not express its opinion on the other questions raised and argued before it. In the circumstances, we remand the matter to the High Court for disposal in accordance with law.

The costs of this appeal will abide the result.

WANCHOO, J.—We have read the judgment just delivered by our learned brother Subba Rao J. We agree with the order proposed by him. Our reasons for coming to this conclusion are, however, the same which we have given in C.A. 119 of 1959, *The State of Uttar Pradesh* v. *Babu Ram Upadhya.*

Appeal allowed. Case remanded.

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THE STATE OF UTTAR PRADESH AND OTHERS

v.

BABU RAM UPADHYA

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Public Servant—Police Officer, dismissal of—Police Regulations, whether mandatory—Disregard of, if invalidates disciplinary action—Authorities empowered to take action—If exercise powers of Governor—Police Act, 1861 (V of 1861), s. 7—U. P. Police Regulations, para. 486—Constitution of India, Arts. 154, 309, 310, 311.

The respondent was a sub-Inspector of Police. A complaint was received by the Superintendent of Police that the complainant was carrying currency notes of Rs. 650 in a bundle when he was stopped by the respondent and his person was searched, that the respondent opened the bundle of notes and handed over the notes one by one to one Lalji, who was with him and that Lalji returned the notes to him but on reaching home he found the notes short by Rs. 250. Proceedings under s. 7 of the Police Act were taken against the respondent on the charge of misappropriation of Rs. 250 and he was dismissed from service by an order of the Deputy Inspector General of Police. The respondent filed a writ petition before the High Court challenging the order of the dismissal on the ground that the authorities had acted in violation of Rule I of Para. 486 of the U. P. Police Regulation. This rule required that every information received by the police relating to the commission of a cognizable offence by a Police Officer shall be dealt with in the first place under Ch. XIV, Code of Criminal Procedure. The High Court held that the provisions of para. 486 of the Police Regulations had not been observed and that the proceedings taken under s. 7 of the Police Act were invalid and illegal and accordingly quashed the order of dismissal. The appellant contended (i) that the complaint did not make out any cognizable offence against the respondent and r. I of Para. 486 was not applicable in this case, (ii) that r. III of Para. 486 enabled the authorities to initiate departmental proceedings without complying with the provisions of r. I, (iii) that the Police Regulations made in exercise of the power conferred on the Government under the Police Act delegating the power of the Governor to dismiss at pleasure to a subordinate officer were only administrative directions for the exercise of the pleasure in a reasonable manner and any breach of the regulations did not confer any right or give a cause of action to the public servant, and (iv) that the regulations were only directory and the non-compliance with the rules did not invalidate the order of dismissal.

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Held, (per Sarkar, Subba Rao and Mudholkar, JJ.) that the order of dismissal was illegal as it was based upon an enquiry held in violation of r. I of Para 486 of the Police Regulations.

The facts alleged in the complaint made out a cognizable offence under s. 405 Indian Penal Code against the respondent, and the provisions of r. I of Para. 486 were applicable to it. A Police Officer making a search of a person was 'entrusted' with the money handed over by the person searched.

Rule III of Para. 486 did not deal with cognizable offences, it dealt with offences falling *only* under s. 7 Police Act and to non-cognizable offences. Rule III did not provide an alternative procedure to that prescribed under r. I.

The position with regard to the tenure of public servants and to the taking of disciplinary action against them under the present Constitution was as follows:

(i) Every person who was a member of a public service described in Art. 310 of the Constitution held office during the pleasure of the President or the Governor.

(ii) The power to dismiss a public servant at pleasure was outside the scope of Art. 154 and, therefore, could not be delegated by the Governor to a subordinate officer, and could be exercised by him only in the manner prescribed by the Constitution.

(iii) This tenure was subject to the limitations or qualifications mentioned in Art. 311.

(iv) Parliament or the Legislature of States could not make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Art. 310, as qualified by Art. 311.

(v) Parliament or the Legislatures of States could make a law regulating the conditions of service of such a member which included proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Art. 310 read with Art. 311.

(vi) Parliament and the Legislatures also could make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Art. 311 but the said law was subject to judicial review.

(vii) If a statute could be made by Legislatures within the foregoing permissible limits, the rules made by an authority in exercise of the power conferred thereunder would likewise be efficacious within the said limits.

N. W. F. Province v. *Suraj Narain*, A.I.R. 1949 P. C. 112, *Shenton* v. *Smith*, (1895) A.C. 229, *Gould* v. *Stuart*, (1896) A.C. 575, *Reilly* v. *The King*, (1934) A.C. 176, *Terrell* v. *Secretary of State*, (1953) 2 All E.R. 490, *State of Bihar* v. *Abdul Majid*, [1954] S.C.R. 786, *Parshotam Lal Dhingra* v. *Union of India*, [1958]

S.C.R. 828, *R. T. Rangachari* v. *Secretary of State for India*, (1936) L.R. 64 I.A. 40 and *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lall*, (1948) L.R. 75 I.A. 225, referred to.

The Police Act and the rules made thereunder constituted a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal. Any authority taking action under the Police Act or the rules made thereunder must conform to the provisions thereof and if there was any violation of those provisions the public servant had a right to challenge the order of the authority if the rules were mandatory. Paragraph 486 of the Police Regulations was mandatory and not directory. The rules were made in the interests of both the department and the police officers. The word used in para 486 was "shall" and in the context it could not be read as "may".

Hari Vishnu Kamath v. *Syed Ahmed Ishaque*, [1958] S.C.R. 1104, *State of U. P.* v. *Manbodhan Lal Srivastava*, [1958] S.C.R. 533 and *Montreal Street Railway Company* v. *Normandin*, L.R. (1917) A.C. 170, referred to.

Subject to the overriding power of the President or the Governor under Art. 310, as qualified by Art. 311, rules governing disciplinary proceeding could not be treated as administrative directions, but had the same effect as the provisions of the statute whereunder they were made, in so far as they were not inconsistent with the provisions thereof. The Governor did not exercise his pleasure through the officers specified in s. 7 of the Police Act, and the Governor's pleasure could not be equated with the statutory power of the officers specified. An inquiry under the Act had to be made in accordance with the provisions of the Act and the rules made thereunder.

R. T. Rangachari v. *Secretary of State for India*, L.R. 64 I.A. 40, *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lall*, (1948) L.R. 75 I.A. 225, *R. Venkata Rao* v. *Secretary of State for India*, (1936) L.R. 64 I.A. 55, *S. A. Venkataraman* v. *Union of India*, [1954] S.C.R. 1150 and *Khem Chand* v. *The Union of India*, [1958] S.C.R. 1080, referred to.

Per Gajendragadkar and Wanchoo, JJ.—The provisions of para 486 were merely directory and a non-compliance therewith did not invalidate the disciplinary action taken against the respondent.

All public servants, other than those excepted expressly by the Constitution, held office during the pleasure of the President or the Governor, and no law or rule framed under Art. 309 or Art. 154(2)(b) could cut down the content of the pleasure tenure in Art. 310 subject to Art. 311. The Police Act could not stand higher than a law passed under Art. 309 or Art. 154(2)(b) and could not cut down the content of the pleasure tenure in Art. 310.

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The Police officers held office during the pleasure of the Governor and the only protection they could claim was the two guarantees contained in Art. 311.

The rules framed under s. 7 Police Act would be of two kinds, namely (1) those which defined the jurisdiction of the four grades of officers specified in s. 7 to inflict particular kind of punishment on particular police officers of the subordinate ranks—such rules would be mandatory but they could not go against the provisions of Art. 311, and (2) procedural rules. The procedural rules could be of two kinds: (i) those that prescribed the manner in which the guarantee contained in Art. 311(2) may be carried out—such rules would be mandatory, and (ii) other merely procedural rules—they could only be directory.

The power of the Governor to dismiss was executive power of the State and could be exercised under Art. 154(1) by the Governor himself directly or indirectly through officers subordinate to him.

The officers specified in s. 7 of the Police Act were exercising the powers of the Governor to dismiss at pleasure and their powers were subject to the same limitations to which the Governor was subject. Whether it was delegation by the Governor himself or whether it was delegation by law under Art. 154(2)(b) or by the existing law, which must be treated as analogous to a law under Art. 154(2)(b), the officer exercising the power of dismissal was only indirectly exercising the Governor's power to dismiss at pleasure. His order also was subject to the two fetters under Art. 311 and could not be subjected to any more fetters by procedural rules other than those framed for carrying out the objects of Art. 311(2).

R. Venkata Rao v. *Secretary of State for India in Council*, [1936] 64 I.A. 55, referred to.

Paragraph 486 was not meant for the purpose of carrying out the object of Art. 311(2) and could not be mandatory and could not add a further fetter on the exercise of the power to dismiss at the pleasure of the Governor over and above the fetters contained in Art. 311. This rule was only meant to gather materials for the satisfaction of the authority concerned, whether to take action or not. As such para 486 was merely directory and a failure to comply therewith strictly or otherwise did not vitiate the disciplinary action.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 119 of 1959.

Appeal by special leave from the judgment and order dated January 9, 1958, of the Allahabad High Court (Lucknow Bench), Lucknow, in Civil Misc. Application No. 115 of 1955.

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C. B. Agarwala and *C. P. Lal*, for the appellants.

G. S. Pathak, Achru Ram, S. N. Andley, Rameshwar Nath, J. B. Dadachanji and *P. L. Vohra* for the respondent.

1960. November, 25. The Judgment of Sarkar, Subba Rao and Mudholkar, JJ., was delivered by Subba Rao, J., and that of Gajendragadkar and Wanchoo, JJ., was delivered by Wanchoo, J.

Subba Rao J.

SUBBA RAO, J.—This is an appeal by special leave against the judgment of the High Court of Judicature at Allahabad, Lucknow Bench, allowing the petition filed by the respondent under Art. 226 of the Constitution.

The respondent was appointed a Sub-Inspector of Police in December, 1948, and was posted at Sitapur in June, 1953. On September 6, 1953, the respondent went to village Madhwapur in connection with an investigation of a case of theft. On the evening of the said date when he was returning, accompanied by one Lalji, an ex-patwari of Mohiuddinpur, he saw one Tika Ram coming from the side of a canal and going hurriedly towards a field. As the movements of Tika Ram appeared to be suspicious and as he was carrying something in the folds of his dhoti, the respondent searched him and found a bundle containing currency notes. The respondent counted the currency notes and handed them over to Lalji for being returned to Tika Ram, who subsequently got them and went his way. Subsequently when Tika Ram counted the currency notes at his house, he found that they were short by Rs. 250. Tika Ram's case is that the bundle when taken by the respondent contained notes of the value of Rs. 650, but when he counted them in his house they were only of the value of Rs. 400. On September 9, 1953 Tika Ram filed a complaint to the Superintendent of Police, Sitapur, to the effect that the respondent and one Lalji had misappropriated a sum of Rs. 250. There is dispute in regard to the interpretation of the complaint. On receipt of the said complaint, the Superintendent of Police made enquiries

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and issued a notice to the respondent to show cause why his integrity certificate should not be withheld, upon which the respondent submitted his explanation on October 3, 1953. Thereafter the Superintendent of Police forwarded the file of the case to the Deputy Inspector General of Police, Central Range, U. P., who directed the Superintendent of Police to take proceedings under s. 7 of the Police Act against the respondent. The departmental proceedings were started against the respondent; on November 2, 1953, a charge-sheet was served upon the respondent under s. 7 of the Police Act stating that there were strong reasons to suspect that the respondent misappropriated a sum of Rs. 250 from the purse of Tika Ram; the respondent filed his explanation to the charge made against him; and ultimately the Superintendent of Police held an enquiry and found on the evidence that the respondent was guilty of the offence with which he was charged. On January 2, 1954, the Superintendent of Police issued another notice to the respondent to show cause why he should not be reduced to the lowest grade of Sub-Inspector for a period of three years. In due course the respondent showed cause against the action proposed to be taken against him on a consideration of which the Superintendent of Police, Sitapur, by his order dated January 16, 1954 reduced the respondent to the lowest grade of Sub-Inspector for a period of three years. When this order came to the notice of the D. I. G., U. P., on a consideration of the entire record, he came to the conclusion that the respondent should be dismissed from service and on October 19, 1954 he made an order to that effect. On February 28, 1955 the Inspector General of Police confirmed that order; and the revision filed by the respondent against that order to the State Government was also dismissed in August 1955. Thereafter the respondent filed a petition under Art. 226 of the Constitution before the High Court of Judicature at Allahabad, Lucknow Bench, for quashing the said orders and the same was heard by a division bench consisting of Randhir Singh and Bhargava, JJ. The learned judges held that the provisions of para.

486 of the Police Regulations had not been observed and, therefore, the proceedings taken under s. 7 of the Police Act were invalid and illegal. On that finding, they quashed the impugned orders; with the result that the order dismissing the respondent from service was set aside. The State Government, the Deputy Inspector General of Police, Lucknow, and the Inspector General of Police, Uttar Pradesh, Lucknow, have preferred the present appeal against the said order of the High Court.

We shall now proceed to consider the various contentions raised by learned counsel in the order they were raised and argued before us.

At the outset Mr. C. B. Agarwala, learned counsel for the appellants, contended that there was no breach of the provisions of para. 486 of the Police Regulations. If this contention be accepted, no other question arises in this case; therefore, we shall deal with the same.

The material part of para. 486 of the Police Regulations reads thus:

"When the offence alleged against a police officer amounts to an offence only under section 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of the Superintendent of Police in accordance with the following rules:

I. Every information received by the police relating to the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XIV, Criminal Procedure Code, according to law, a case under the appropriate section being registered in the police station concerned....."

This provision expressly lays down that every information received by the police relating to the commission of a cognizable offence by a police officer shall be dealt with in the first place under Ch. XIV of the Criminal Procedure Code. This provision will not apply if the information received by the police does not

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relate to the commission of a cognizable offence. Learned counsel contends that the information received in the present case does not relate to any offence committed by the respondent, much less to a cognizable offence. This is a point raised before us for the first time. This does not find a place even in the statement of case filed by the appellants. In the High Court it was not contended that the information did not disclose any offence committed by the respondent. Indeed, it was common case that the information disclosed an offence committed by the respondent, but it had been contended by the appellants that the misappropriation of the part of the money amounted to an offence under s. 403 of the Indian Penal Code, which is not a cognizable offence; and it was argued on behalf of the respondent that it amounted to an offence under s. 409 of the Indian Penal Code. The learned judges accepted the contention of the respondent. Even so, it is said that whatever might have been the contentions of the parties, the information given by Tika Ram to the Superintendent of Police clearly disclosed that no offence was alleged to have been committed by the respondent and that this Court would, therefore, be justified, even at this very late stage, to accept the contention of the appellants. But the contents of the said information do not in any way support the assertion. Paragraph 3 of the application given by Tika Ram to the Superintendent of Police, Sitapur, reads thus:

"That on Sunday last dated 6th September, 1953 the applicant had with him the currency notes of Rs. 650. The opposite party as well as Shri Babu Ram met the applicant on the west of Rampur near the Canal. The opposite-party said to the Sub-Inspector "This man appears to be clad in rags but is possessed of considerable money." After saying this the person of the applicant was searched. The Sub-Inspector, having opened the bundle of notes, handed over the (notes) one by one to the opposite party."

This statement clearly indicates that either the Sub-Inspector or both the Sub-Inspector and Lalji searched the person of Tika Ram, that the Sub-Inspector took

the bundle of notes and handed the same over, one by one, to Lalji for being returned to the applicant, and that out of Rs. 650 a sum of Rs. 250 was not returned to him. The facts alleged make out an offence against both the Sub-Inspector as well as Lalji. The mere fact that the respondent is not shown as one of the opposite parties in the application does not affect the question, for the information given in the application imputed the commission of an offence to both the respondent and Lalji. The notice issued by the Superintendent of Police on November 2, 1953 to the respondent also charges him with an offence of misappropriation. It is stated that the said notice only says that the Superintendent of Police had good reasons to suspect that the respondent misappropriated the sum of money and that it does not aver that he committed the offence of misappropriation. But what matters is that the Superintendent of Police also understood from the information given and the enquiry conducted by him that the respondent had committed the offence. Reliance is placed upon paragraph 3 of the writ petition wherein the respondent herein stated that Tika Ram filed a complaint against Lalji and not against the respondent. As a fact that is correct in the sense that the respondent was not shown in that application as the opposite-party though in the body of that application definite allegations were made against the respondent. In the counter-affidavit filed by the Superintendent of Police on behalf of the State it was clearly averred that on September 9, 1953 Tika Ram appeared before him and filed a petition to the effect that one Lalji and the respondent had misappropriated a sum of Rs. 250. Whatever ambiguity there might have been in the information —we do not find any—this allegation dispels it and it is not open to the appellants at this stage to contend that the petition did not disclose any offence against the respondent. In the circumstances, we must hold that the information received by the police related to the commission of an offence by the respondent.

Even so, it is contended that the said offence is not a cognizable offence. It is said that there was no

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entrustment made by Tika Ram to the respondent and that, therefore, the offence did not fall under s. 409 of the Indian Penal Code, which is a cognizable offence, but only under s. 403 of the Indian Penal Code, which is not a cognizable offence. Section 405 of the Indian Penal Code defines "criminal breach of trust" and s. 409 thereof prescribes the punishment for the criminal breach of trust by a public servant. Under s. 405 of the Indian Penal Code, "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any person so to do, commits "criminal breach of trust". To constitute an offence under this section, there must be an entrustment of property and dishonest misappropriation of it. The person entrusted may misappropriate it himself, or he may wilfully suffer another person to do so. In the instant case the respondent, being a police officer, was legally entitled to search a person found under suspicious circumstances; and Tika Ram in handing over the bundle of notes to the police officer must have done so in the confidence that he would get back the notes from him when the suspicion was cleared. In these circumstances, there cannot be any difficulty in holding that the currency notes were alleged to have been handed over by Tika Ram to the respondent for a specific purpose, but were dishonestly misappropriated by the respondent or at any rate he wilfully suffered Lalji to misappropriate the same. We, therefore, hold that if the currency notes were taken by the respondent in discharge of his duty for inspection and return, he was certainly entrusted with the notes within the meaning of s. 405 of the Indian Penal Code. If so, the information discloses a cognizable offence. We reject the first contention.

The second objection of learned counsel for the appellants is that sub-para. (3) of para. 486 of the

Police Regulations enables the appropriate police authority to initiate the departmental proceeding without complying with the provisions of sub-para. (1) of para. 486. The relevant portion of para. 486 of the Police Regulations reads:

"When the offence alleged against a police officer amounts to an offence only under section 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of the Superintendent of Police in accordance with the following rules:....."

Rule I relates to a cognizable offence, r. II to a non-cognizable offence, including an offence under s. 29 of the Police Act, and r. III to an offence under s. 7 of the Police Act or a non-cognizable offence, including an offence under s. 29 of the Police Act. Rule III says:

"When a Superintendent of Police sees reason to take action on information given to him, or on his own knowledge or suspicion, that a police officer subordinate to him has committed an offence under section 7 of the Police Act or a non-cognizable offence (including an offence under section 29 of the Police Act) of which he considers it unnecessary at that stage to forward a report in writing to the District Magistrate under rule II above, he will make or cause to be made by an officer senior in rank to the officer charged, a departmental inquiry sufficient to test the truth of the charge. On the conclusion of this inquiry he will decide whether further action is necessary, and if so, whether the officer charged should be departmentally tried, or whether the District Magistrate should be moved to take cognizance of the case under the Criminal Procedure Code..."

The argument is that the words "an offence under s. 7 of the Police Act" take in a cognizable offence and that, therefore, this rule provides for a procedure alternative to that prescribed under r. I. We do not think that this contention is sound. Section 7 of the Police Act empowers certain officers to dismiss, suspend

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or reduce any police officer of the subordinate rank whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same. The grounds for punishment are comprehensive: they may take in offences under the Indian Penal Code or other penal statutes. The commission of such offences may also be a ground to hold that an officer is unfit to hold his office. Action under this section can, therefore, be taken in respect of, (i) offences only under s. 7 of the Police Act without involving any cognizable or non-cognizable offences, that is, simple remissness or negligence in the discharge of duty, (ii) cognizable offences, and (iii) non-cognizable offences. Paragraph 486 of the Police Regulations makes this clear. It says that when the offence alleged against a police officer amounts to an offence *only* under s. 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. This part of the rule applies to an offence only under s. 7 of the Police Act i. e., the first category mentioned above. Rule I refers to a cognizable offence i. e., the second category, rule II to a non-cognizable offence i. e., the third category, and rule III applies to an offence under s. 7 of the Police Act and to a non-cognizable offence. Though the word "only" is not mentioned in rule III, the offence under s. 7 of the Police Act can, in the context, mean an offence only under s. 7 of the said Act i.e., an offence falling under the first category. So understood, the three rules can be reconciled. We, therefore, hold that, as the offence complained of in the present case is a cognizable offence, it falls under rule I and not under rule III. We, therefore, reject this contention.

The third contention advanced by learned counsel for the appellants raises a constitutional point of considerable importance. The gist of the argument may be stated thus: In England, the service under the Crown is held at the Crown's pleasure, unless the employment is for good behaviour or for a cause. But if there is a statute prescribing the terms of service and the mode of dismissal of the servant of the Crown, the statute would control the pleasure of the Crown. In India, the Constitution as well as the

earlier Constitution Acts of 1915, as amended in 1919, and 1935 embodied the incidents of "tenure at pleasure" of His Majesty, or the President or the Governor, as the case may be, but did not empower the Legislatures under the earlier Acts and the Parliament and the Legislatures under the Constitution to make a law abrogating or modifying the said tenure; therefore, any law made by appropriate authorities conferring a power on any subordinate officer to dismiss a servant must be construed not to limit the power of His Majesty, the President or the Governor, as the case may be, but only to indicate that they would express their pleasure only through the said officers. The rules made in exercise of a power conferred on a Government under a statute so delegating the power to a subordinate officer can only be administrative directions to enable the exercise of the pleasure by the concerned authorities in a reasonable manner and that any breach of those regulations cannot possibly confer any right on, or give a cause of action to, the aggrieved Government servant to go to a court of law and vindicate his rights.

Mr. Pathak, learned counsel for the respondent, in countering this argument contends that the constitution Acts in India embodied the incidents of the tenure of the Crown's pleasure in the relevant provisions and what the Parliament can do in England, the appropriate Legislatures in India also can do, that is, "the tenure at pleasure" created by the Constitution Acts can be abrogated, limited or modified by law enacted by the appropriate legislative bodies. Alternatively he contends that even if the Police Act does not curtail the tenure at pleasure, the Legislature validly made that law and the Government validly made statutory rules in exercise of the powers conferred under that Act and that, therefore, the appropriate authorities can only dismiss the respondent in strict compliance with the provisions of the Act and the Rules made thereunder.

To appreciate the problem presented and to afford a satisfactory answer it would be convenient to consider the relevant provisions. The Act we are concerned with in this case is the Police Act, 1861 (Act V

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of 1861). Its constitutional validity at the time it was made was not questioned. Under s. 7 of the Police Act, as it originally stood, "the appointment of all police officers other than those mentioned in s. 4 of this Act shall, under such rules as the local Government shall from time to time sanction, rest with the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police, who may, under such rules as aforesaid, at any time, dismiss, suspend or reduce any police-officer." That section was substituted by the present section in 1937 and later on some appropriate amendments were made to bring it in conformity with the Constitution. Under the amended section, "Subject to such rules as the State Government may from time to time make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendent of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same". In exercise of the powers conferred on the Government by s. 46 of the Act, the Government made the U. P. Police Regulations prescribing the procedure for investigation and inquiry. We shall deal with the Regulations at a later stage.

In the Government of India Act, 1915, as amended by the Act of 1919, for the first time, the doctrine of "tenure at pleasure" was introduced by s. 96-B. In exercise of the power conferred under sub-s. (2) certain classification rules were framed by the local Government. This Act was repealed by the Government of India Act, 1935, and the section corresponding to s. 96-B was s. 240(1) in the latter Act. Section 241(2) empowered, except as expressly provided by the Act, the Governor-General and the Governor to prescribe the conditions of service of the servants they were empowered to appoint.

The main difference between the Act of 1919 and that of 1935 was that in the former Act there was only one limitation on the Crown's pleasure, namely, that no person in the service might be dismissed by

an authority subordinate to that by which he was appointed, whereas in the latter Act a second limitation was imposed, namely, that no such person should be dismissed or reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him: see s. 240, sub-ss. (2) and (3). Another difference between the said two Acts was that while under the former Act all the services were placed in the same position, under the latter Act special provision was made for the police force prescribing that the conditions of service of the subordinate ranks of the various police forces should be such as might be determined by or under the Acts relating to those forces respectively—vide s. 243. By the Constitution, the Act of 1935 was repealed, and, with certain changes in phraseology, cls. (1) and (2) of Art. 310 took the place of sub-ss. (1) and (4) of s. 240 respectively, and Art. 309 took the place of s. 241(2). Under Art. 313, "Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution". The result is that the Police Act and the Police Regulations, made in exercise of the powers conferred on the Government under that Act, which were preserved under s. 243 of the Government of India Act, 1935, continue to be in force after the Constitution so far as they are consistent with the provisions of the Constitution.

It is common case, as the contentions of learned counsel disclose, that the Act and the Regulations framed thereunder were constitutionally valid at the inception and that they are also consistent with the provisions of the Constitution. The difference between the two contentions lies in the fact that according to one His Majesty's pleasure cannot be modified

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by a statute, according to the other it is subject to statutory provisions. The relevant provisions of the Constitution read thus:

Article 309: "Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

Article 310: "Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State."

Under Art. 309 the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services. Under Art. 310 every person who is a member of a public service described therein holds office during the pleasure of the President or the Governor, as the case may be. The words "conditions of service" in Art. 309 in their comprehensive sense take in the tenure of a civil servant: see *N. W. F. Province* v. *Suraj Narain* (1). Therefore, "the tenure at pleasure" is also one of the conditions of service. But Art. 309 opens out with a

(1) A.I.R. (1949) P.C. 112.

restrictive clause, namely, "Subject to the provisions of this Constitution", and if there is no restrictive clause in Art. 310, there cannot be any difficulty in holding that Art. 309 is subject to the provisions of Art 310; with the result that the power of the Legislature to lay down the conditions of service of persons appointed to public services would be subject to "the tenure at pleasure" under Art. 310. In that event, any law made by the Legislature could not affect the over-riding power of the President or the Governor, as the case may be, in putting an end to the tenure at their pleasure. Would the opening words of the clause in Art. 310, namely, "Except as expressly provided by this Constitution", make any difference in the matter of interpretation? It should be noticed that the phraseology of the said clause in Art. 310 is different from that in Art. 309. If there is a specific provision in some part of the Constitution giving to a Government servant a tenure different from that provided for in Art. 310, that Government servant is excluded from the operation of Art. 310. The said words refer, *inter alia*, to Arts. 124, 148, 218 and 324 which provide that the Judges of the Supreme Court, the Auditor General, the Judges of the High Courts and the Chief Election Commissioner shall not be removed from their offices except in the manner laid down in those Articles. If the provisions of the Constitution specifically prescribing different tenures were excluded from Art. 310, the purpose of that clause would be exhausted and thereafter the Article would be free from any other restrictive operation. In that event, Arts. 309 and 310 should be read together, excluding the opening words in the latter Article, namely, "Except as expressly provided by this Constitution". Learned counsel seeks to confine the operation of the opening words in Art. 309 to the provisions of the Constitution which empower other authorities to make rules relating to the conditions of service of certain classes of public servants, namely, Arts. 146(2), 148(5) and 229(2). That may be so, but there is no reason why Art. 310 should be excluded therefrom. It follows that while Art. 310 provides for a tenure at pleasure

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of the President or the Governor, Art. 309 enables the Legislature or the executive, as the case may be, to make any law or rule in regard, *inter alia*, to conditions of service without impinging upon the overriding power recognized under Art. 310.

Learned counsel for the respondent contends that this construction is inconsistent with that prevailing in the English law and that the intention of the framers of the Constitution could not have been to make a radical departure from the law of England. The law of England on the doctrine of "tenure at pleasure" has now become fairly crystallized. In England, all servants of the Crown hold office during the pleasure of the Crown; the right to dismiss at pleasure is an implied term in every contract of employment of the Crown, this doctrine is not based upon any prerogative of the Crown, but on public policy; if the terms of appointment definitely prescribe a tenure for good behaviour or expressly provide for a power, to determine for a cause, such an implication of a power to dismiss at pleasure is excluded, and an Act of Parliament can abrogate or amend the said doctrine of public policy in the same way as it can do in respect of any other part of common law. The said propositions are illustrated in the following decisions: *Shenton* v. *Smith* (1), *Gould* v. *Stuart* (2), *Reilly* v. *The King* (3), *Terrell* v. *Secretary of State* (4). This English doctrine was not incorporated in its entirety in the Indian enactments—vide *State of Bihar* v. *Abdul Majid* (5), *Parshotam Lal Dhingra* v. *Union of India* (6). Section 96-B of the Government of India Act, 1915, for the first time in 1919, by amendment, statutorily recognized this doctrine, but it was made subject to a condition or a qualification, namely, that no person in that service might be dismissed by any authority subordinate to that by which he was appointed. Section 240 of the Act of 1935 imposed another limitation, namely, that a reasonable opportunity of showing cause against the action proposed to be taken in

(1) [1895] A.C. 229.
(2) [1896] A.C. 575.
(3) [1934] A.C. 176.
(4) (1953) 2 All E R. 490.
(5) [1954] S.C.R. 786.
(6) [1958] S.C.R. 828.

regard to a person must be given to him. But neither of the two Acts empowered the appropriate Legislature to make a law abolishing or amending the said doctrine. The Constitution of India practically incorporated the provisions of ss. 240 and 241 of the Act of 1935 in Arts. 309 and 310. But the Constitution has not made "the tenure at pleasure" subject to any law made by the appropriate Legislature. On the other hand, as we have pointed out, Art. 309 is expressly made subject to "the tenure at pleasure" in Art. 310.

Nor the attempt of learned counsel for the respondent to discover such a power in the Legislature in the Entries of the appropriate Lists of the Seventh Schedule to the Constitution can be legally sustained. He referred, *inter alia*, to Entry 70 of List I and Entry 41 of List II. It is not disputed that Parliament can make law for the organization of the police and for the prevention and detection of crime. But under Art. 245 of the Constitution such a power is subject to the provisions of the Constitution and, therefore, is subject to the provisions of Art. 310.

Nor can we imply such a power in Parliament or the Legislatures from Art. 154(2)(b) of the Constitution. Under Art. 154, "the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution", and under cl. 2(b) thereof, "nothing in this Article shall prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor." The argument is that a power to terminate the service at pleasure under Art. 310 is a part of the executive power of the State, that power under Art. 154 can be exercised by the Governor directly or through officers subordinate to him, and that under Art. 154(2)(b) the Parliament or the Legislature of the State can confer the same power on any authority subordinate to the Governor or, at any rate, can make a law prescribing that the Governor shall exercise the said pleasure through a particular officer.

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We cannot agree either with the premises or the conclusion sought to be based on it. The first question is whether the power of the Governor under Art. 310 to terminate the services of a Government servant at pleasure is part of the executive power of the State under Art. 154 of the Constitution. Article 154 speaks of the executive power of the State vesting in the Governor; it does not deal with the constitutional powers of the Governor which do not form part of the executive power of the State. Article 162 says that, subject to the provisions of the Constitution, the executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws. If the Legislature of the State has no power to make a law affecting the tenure at pleasure of the Governor, the said power must necessarily fall outside the scope of the executive power of the State. As we will presently show, the Legislature has no such power and, therefore, it cannot be a part of the executive power of the State. That apart, if the said power is part of the executive power in its general sense, Art. 162 imposes another limitation on that power, namely, that the said executive power is subject to the provisions of the Constitution and therefore, subject to Art. 310 of the Constitution. In either view, Art. 310 falls outside the scope of Art. 154 of the Constitution. That power may be analogous to that conferred on the Governor under Arts. 174, 175 and 176. Doubtless the Governor may have to exercise the said power, whenever an occasion arises, in the manner prescribed by the Constitution, but that in itself does not make it a part of the executive power of the State or enable him to delegate his power.

Even on the assumption that the power under Art. 310 is executive power within the meaning of Art. 154, it does not make any difference in the legal position so far as the present case is concerned. Article 310 of the Constitution says that unless expresssly provided by the Constitution to the contrary, every civil servant holds office during the pleasure of the Governor subject to the limitations prescribed under

Art. 311. Can it be said that Art. 154(2)(b) expressly provides for a different tenure? Can it be said that the said Article confers on the Parliament or the Legislature a power higher than that conferred on them under Art. 245 of the Constitution? It only preserves the power of the Legislature, which it has under the Constitution, to make a law conferring functions on an authority subordinate to the Governor. That power under Art. 245 is not unlimited, but is subject to the provisions of the Constitution and therefore subject to Art. 310 thereof.

It is then said that if the appellants' contention were not accepted, it would lead to conflict of jurisdiction: while the Governor has the power under Art. 310 to dismiss a public servant at his pleasure, a statute may confer a power on a subordinate officer to dismiss a servant only subject to conditions; a subordinate officer functioning under an Act may not be able to dismiss a servant, but the Governor may be able to do so under similar circumstances; a subordinate officer may dismiss a servant, but the Governor may order his continuance in office.

This argument is based upon the misapprehension of the scope of Art. 309 of the Constitution. A law made by the appropriate Legislature or the rules made by the President or the Governor, as the case may be, under the said Article may confer a power upon a particular authority to remove a public servant from service; but the conferment of such a power does not amount to a delegation of the Governor's pleasure. Whatever the said authority does is by virtue of express power conferred on it by a statute or rules made by competent authorities and not by virtue of any delegation by the Governor of his power. There cannot be conflict between the exercise of the Governor's pleasure under Art. 310 and that of an authority under a statute, for the statutory power would be always subject to the overriding pleasure of the Governor.

This conclusion, the argument proceeds, would throw a public servant in India to the mercy of the executive Government while their compeers in England

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can be protected by legislation against arbitrary actions of the State. This apprehension has no real basis, for, unlike in England, a member of the public service in India is constitutionally protected at least in two directions: (i) he cannot be dismissed by an authority subordinate to that by which he was appointed; (ii) he cannot be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. A condition similar to the first condition in Art. 311 found in s. 96-B of the Government of India Act, 1919, was held by the Judicial Committee in *R. T. Rangachari* v. *Secretary of State for India* (1) to have a statutory force, and the second condition, which is only a reproduction of that found in sub-section (2) of s. 240 of the Government of India Act, 1935, was held in *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lall* (2) as mandatory qualifying the right of the employer recognized in sub-section (1) thereof. These two statutory protections to the Government servant are now incorporated in Art. 311 of the Constitution. This Article imposes two qualifications on the exercise of the pleasure of the President or the Governor and they quite clearly restrict the operation of the rule embodied in Art. 310(1)—vide the observations of Das, C.J., in *Dhingra's case* (3). The most important of these two limitations is the provision prescribing that a civil servant shall be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. As this condition is a limitation on the "tenure at pleasure", a law can certainly be made by Parliament defining the content of "reasonable opportunity" and prescribing the procedure for giving the said opportunity. The appropriate High Court and the Supreme Court can test the validity of such a law on the basis whether the provisions prescribed provide for such an opportunity, and, if it is valid, to ascertain whether the reasonable opportunity so prescribed is really given to a particular officer. It may be that the

(1) (1936) L.R. 64 I.A. 40. (2) (1948) L.R. 75 I.A. 225.
(3) [1958] S.C.R. 828, 839.

framers of the Constitution, having incorporated in our Constitution the "tenure at pleasure" unhampered by legislative interference, thought that the said limitations and qualifications would reasonably protect the interests of the civil servants against arbitrary actions.

The discussion yields the following results: (1) In India every person who is a member of a public service described in Art. 310 of the Constitution holds office during the pleasure of the President or the Governor, as the case may be, subject to the express provisions therein. (2) The power to dismiss a public servant at pleasure is outside the scope of Art. 154 and, therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him only in the manner prescribed by the Constitution. (3) This tenure is subject to the limitations or qualifications mentioned in Art. 311 of the Constitution. (4) The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Art. 310, as qualified by Art. 311. (5) The Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Art. 310 of the Constitution read with Art. 311 thereof. (6) The Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Art. 311 of the Constitution; but the said law would be subject to judicial review. (7) If a statute could be made by Legislatures within the foregoing permissible limits, the rules made by an authority in exercise of the power conferred thereunder would likewise be efficacious within the said limits.

What then is the effect of the said propositions in their application to the provisions of the Police Act and the rules made thereunder? The Police Act of

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1861 continues to be good law under the Constitution. Paragraph 477 of the Police Regulations shows that the rules in Chapter XXXII thereof have been framed under s. 7 of the Police Act. Presumably, they were also made by the Government in exercise of its power under s. 46(2) of the Police Act. Under para. 479(a) the Governor's power of punishment with reference to all officers is preserved; that is to say, this provision expressly saves the power of the Governor under Art. 310 of the Constitution. "Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation": see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal. It follows that where the appropriate authority takes disciplinary action under the Police Act or the rules made thereunder, it must conform to the provisions of the statute or the rules which have conferred upon it the power to take the said action. If there is any violation of the said provisions, subject to the question which we will presently consider whether the rules are directory or mandatory, the public servant would have a right to challenge the decision of that authority.

Learned counsel for the appellants relied upon the following decisions of the Privy Council and this Court in support of his contention that the said rules are administrative directions: *R. T. Rangachari* v. *Secretary of State for India* (1), *R. Venkata Rao* v. *Secretary of State for India* (2), *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lall* (3), *S. A. Venkataraman* v. *The Union of India* (4), and *Khem Chand* v. *The Union of India* (5). In *Venkata Rao's*

(1) (1936) L.R. 64 I.A. 40. (2) (1936) L.R. 64 I.A. 55.
(3) (1948) L.R. 75 I.A. 225. (4) [1954] S.C.R. 1150.
(5) [1958] S.C.R. 1080.

case (1) a reader of the Government Press was dismissed and in the suit filed by him against the Secretary of State for India he complained, *inter alia*, that the dismissal was contrary to the statute inasmuch as it was not preceded by any such inquiry as was prescribed by rule XIV of the Civil Services Classification Rules made under s. 96B(2) of the Government of India Act. Under s. 96B of the said Act, every person in civil service holds office during the pleasure of His Majesty. Sub-section (2) of that section empowers the Secretary of State for India to make rules laying down, among others, the conditions of service, and sub-s. (5) declares that no rules so made shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown in India in such manner as may appear to him to be just and equitable. On a construction of these provisions the Judicial Committee held that His Majesty's pleasure was paramount and could not legally be controlled or limited by the rules. Two reasons were given for the conclusion, namely, (i) s. 96B in express terms stated that the office was held during the pleasure and there was no room for the implication of a contractual term that the rules were to be observed; and (ii) sub-s. (2) of s. 96B and the rules made careful provisions for redress of grievances by administrative process and that sub-s. (5) reaffirmed the superior authority of the Secretary of State in Council over the civil service. It may be noticed that the rules framed in exercise of the power conferred by the Act was to regulate the exercise of His Majesty's pleasure. The observations were presumably coloured by the doctrine of "tenure at pleasure" obtaining in England, namely, that it could only be modified by statute, influenced by the principle that the rules made under a statute shall be consistent with its provisions and, what is more, based upon a construction of the express provisions of the Act. These observations cannot, in our opinion, be taken out of their context and applied to the provisions of our Constitution and the Acts of our Legislatures in derogation of the well settled principles of

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statutory construction. In *Rangachari's case* (1) a police officer was dismissed by an authority subordinate to that by which he had been appointed. The appeal was heard along with that in *Venkata Rao's case* (2) and the judgments in both the appeals were delivered on the same day. The Judicial Committee distinguished *Venkata Rao's case* (2) with the following observations at p. 53:

"It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time."

These observations do not carry the matter further and our remarks made in connection with *Venkata Rao's case* (2) would equally apply to this case. *I.M. Lall's case* (3) turns upon sub-s. (3) of s. 240 of the Government of India Act, 1935. Again the Judicial Committee made a distinction between the rules and the provisions of the Act and ruled that sub-ss. (2) and (3) of s. 240 indicated a qualification or exception to the antecedent provisions in sub-s. (1) of s. 240. This decision only adopted the reasoning in the earlier decision. The remarks made by us in connection with *Venkata Rao's case* (2) would equally apply to this decision. This Court in *S. A. Venkataraman's case* (4) incidentally noticed the observations of the Judicial Committee in *Venkata Rao's case* (2) and observed that the rules, which were not incorporated in a statute, did not impose any legal restriction upon the right of the Crown to dismiss its servants at pleasure. This Court was not laying down any general proposition, but was only stating the gist of the reasoning in *Venkata Rao's case* (2). Das, C.J., if we may say so, correctly stated the scope of the rule in *Venkata Rao's case* (2) in the decision in *Khem Chand's case* (5), when he stated at p. 1091—

"The position of the Government servant was, therefore, rather insecure, for his office being held during the pleasure of the Crown under the Government of India Act, 1915, the rules could not override

(1) (1936) L.R. 64 I.A. 40.
(2) (1936) L.R. 64 I.A. 55.
(3) (1948) L.R. 75 I.A. 225.
(4) [1954] S.C.R. 1150.
(5) [1958] S.C.R. 1080.

or derogate from the statute and the protection of the rules could not be enforced by action so as to nullify the statute itself."

To state it differently, the Government of India Act, 1915, as amended in 1919, and that of 1935 expressly and clearly laid down that the tenure was at pleasure and therefore the rules framed under that Act must be consistent with the Act and not in derogation of it. These decisions and the observations made therein could not be understood to mark a radical departure from the fundamental principle of construction that rules made under a statute must be treated as exactly as if they were in the Act and are of the same effect as if contained in the Act. There is another principle equally fundamental to the rules of construction, namely, that the rules shall be consistent with the provisions of the Act. The decisions of the Judicial Committee on the provisions of the earlier Constitution Acts can be sustained on the ground that the rules made in exercise of power conferred under the Acts cannot override or modify the tenure at pleasure provided by s. 96B or s. 240 of the said Acts, as the case may be. Therefore, when the paramountcy of the doctrine was conceded or declared by the statute, there might have been justification for sustaining the rules made under that statute in derogation thereof on the ground that they were only administrative directions, for otherwise the rules would have to be struck down as inconsistent with the Act. In such a situation, if the statute was valid—it would be valid in so far as it did not derogate from the provisions of Art. 310, read with Art. 311—the rules made thereunder would be as efficacious as the Act itself. So long as the statute and the rules made thereunder do not affect the power of the Governor—in the present case the Governor's pleasure is expressly preserved—they should be legally enforceable. In this context the decisions of the different High Courts in India are cited at the Bar. It would not serve any purpose to consider every one of them in detail. It would suffice if their general trend be noticed. They express two divergent views: one line relies upon the observations

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of the Privy Council in *Venkata Rao's case* (1) and lays down that all statutory rules vis-a-vis the disciplinary proceedings taken against a Government servant are administrative directions, and the other applies the well settled rules of construction and holds that the appropriate authority is bound to comply with the mandatory provisions of the rules in making an inquiry under a particular statute. A close scrutiny of some of the decisions discloses a distinction implied, though not expressed, between statutory rules defining the scope of reasonable opportunity and those governing other procedural steps in the disciplinary process. In our view, subject to the overriding power of the President or the Governor under Art. 310, as qualified by the provisions of Art. 311, the rules governing disciplinary proceedings cannot be treated as administrative directions, but shall have the same effect as the provisions of the statute whereunder they are made, in so far as they are not inconsistent with the provisions thereof. We have already negatived the contention of learned counsel that the Governor exercises his pleasure through the officers specified in s. 7 of the Police Act, and therefore, it is not possible to equate the Governor's pleasure with that of the specified officers' statutory power. If so, it follows that the inquiry under the Act shall be made in accordance with its provisions and the rules made thereunder.

Then learned counsel contends that even if the said rules have statutory force, they are only directory and the non-compliance with the rules will not invalidate the order of dismissal made by the appropriate authority.

Before we consider the principles governing the question whether the rules are mandatory or directory, it would be convenient at this stage to notice broadly the scope and the purpose of the inquiry contemplated by the rules.

Section 2 of the Police Act constitutes the police establishment; s. 7 empowers specified officers to

(1) [1936] L.R. 64 I.A. 55.

punish specified subordinate officers who are remiss or negligent in discharge of their duties or unfit for the same; s. 46 enables the Government to make rules to regulate the procedure to be followed by the magistrate and police officers in discharge of any duty imposed on them by or under the Act; under s. 7, read with s. 46 of the Police Act, the Police Regulations embodied in chapter XXXII were framed. Paragraph 477 of the Regulations says that the rules in that chapter have been made under s. 7 of the Police Act and apply only to officers appointed under s. 2 of the Police Act and that no officer appointed under that section shall be punished by executive order otherwise than in the manner provided in that chapter. Paragraph 478 prescribes the nature of the punishment that can be imposed on the delinquent officers. Paragraph 479 empowers specified officers to punish specified subordinate officers. Paragraph 483 gives the procedure to be followed in the matter of the inquiry against a police officer. It reads:

"Subject to the special provision contained in paragraph 500 and to any special orders which may be passed by the Governor in particular cases a proceeding against a police officer will consist of—

A—A magisterial or police inquiry, followed, if this inquiry shows the need for further action, by

B—A judicial trial, or

C—A departmental trial, or both, consecutively."

Paragraph 484 declares that the nature of the inquiry in any particular case will vary according to the nature of the offence. If the offence is cognizable or non-cognizable, the inquiry will be according to Schedule II of the Criminal Procedure Code. If the information is received by the District Magistrate, he may in exercise of his powers under the Criminal Procedure Code either, (1) make or order a magisterial inquiry; or (2) order an investigation by the Police. Paragraph 485 reads:

"When a magisterial inquiry is ordered it will be made in accordance with the Criminal Procedure Code and the Superintendent of Police will have no direct

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concern with it until the conclusion of judicial proceedings or until and unless the case is referred to him for further disposal, but he must give any assistance to the inquiring magistrate that he may legally be called upon to give and he must suspend the accused should this become necessary under paragraph 496." Paragraph 486 says that there can be no magisterial inquiry under the Criminal Procedure Code when the offence alleged against a police officer amounts to an offence *only* under s. 7 of the Police Act, and it provides further that in such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of the Superintendent of Police in accordance with the rules given thereunder. Under rule I thereof, "Every information received by the police relating to the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XIV, Criminal Procedure Code, according to law, a case under the appropriate section being registered in the police station concerned". There are six provisos to that rule. Rule II provides for the inquiry of a non-cognizable offence; and rule III prescribes the procedure in regard to an offence only under s. 7 of the Police Act or a non-cognizable offence of which the Superintendent of Police considers unnecessary at that stage to forward a report in writing to the District Magistrate. Paragraph 488 deals with a judicial trial and para. 489 with a departmental trial. Paragraph 489 says:

"A police officer may be departmentally tried under section 7 of the Police Act—

(1) after he has been tried judicially;

(2) after a magisterial inquiry under the Criminal Procedure Code;

(3) after a police investigation under the Criminal Procedure Code or a departmental enquiry under paragraph 486 III above."

There are other provisions dealing with the manner of conducting the inquiries and other connected matters. The rules provide for the magisterial and police inquiry followed, if the inquiry showed the need for further action, by a judicial trial or a departmental

trial, or both, consecutively. In the case of cognizable offences the Superintendent of Police is directed to investigate under chapter XIV of the Criminal Procedure Code and in the case of non-cognizable offences in the manner provided in rule II of para. 486, and in the case of an offence *only* under s. 7 of the Police Act or a non-cognizable offence in the manner provided under rule III of para. 486. After one or other of the relevant procedure is followed, the Superintendent of Police is empowered to try a police officer departmentally.

The question is whether rule I of para. 486 is directory. The relevant rule says that the police officer shall be tried in the first place under chapter XIV of the Criminal Procedure Code. The word "shall" in its ordinary import is "obligatory"; but there are many decisions wherein the courts under different situations construed the word to mean "may". This Court in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque* (1) dealt with this problem at p. 1125 thus:

"It is well established that an enactment in form mandatory might in substance be directory and that the use of the word "shall" does not conclude the matter."

It is then observed:

"They (the rules) are well-known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context."

The following quotation from Crawford "On the Construction of Statutes", at p. 516, is also helpful in this connection:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the

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consequences which would follow from construing it the one way or the other...".

This passage was approved by this Court in *State of U. P.* v. *Manbodhan Lal Srivastava* (1). In Craies on Statute Law, 5th edition, the following passage appears at p. 242:

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

A valuable guide for ascertaining the intention of the Legislature is found in Maxwell on "The Interpretation of Statutes", 10th edition, at p. 381 and it is:

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

This passage was accepted by the Judicial Committee of the Privy Council in the case of *Montreal Street Railway Company* v. *Normandin* (2) and by this Court in *State of U. P.* v. *Manbodhan Lal Srivastava* (1).

The relevant rules of interpretation may be briefly stated thus: When a statute uses the word "shall", *prima facie*, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, *inter alia*, the nature and the design of the statute, and the consequences which

(1) [1958] S.C.R. 533, 545. (2) L.R. [1917] A.C. 170.

would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

Now what is the object of rule I of para. 486 of the Police Regulations? In our opinion, it is conceived not only to enable the Superintendent of Police to gather information but also to protect the interests of subordinate officers against whom departmental trial is sought to be held. After making the necessary investigation under chapter XIV of the Criminal Procedure Code, the Superintendent of Police may as well come to the conclusion that the officer concerned is innocent, and on that basis drop the entire proceedings. He may also hold that it is a fit case for criminal prosecution, which, under certain circumstances, an honest officer against whom false charges are framed may prefer to face than to submit himself to a departmental trial. Therefore, the rules are conceived in the interest of the department as well as the officer. From the stand point of the department as well as the officer against whom departmental inquiry is sought to be intiated, the preliminary inquiry is very important and it serves a real purpose. Here the setting aside of the order of dismissal will not affect the public in general and the only consequence will be that the officer will have to be proceeded against in the manner prescribed by the rules. What is more, para. 487 and para. 489 make it abundantly clear that the police investigation under the Criminal Procedure Code is a condition precedent for the departmental trial. Paragraph 477 emphasizes that no officer appointed under s. 2 of the Police Act shall be punished by executive order otherwise than in the manner provided under chapter XXXII of the Police Regulations. This is an imperative injunction prohibiting

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inquiry in non-compliance with the rules. Paragraph 489 only empowers the holding of a departmental trial in regard to a police officer only after a police investigation under the Criminal Procedure Code. When a rule says that a departmental trial can be held only after a police investigation, it is not permissible to hold that it can be held without such investigation. For all the foregoing reasons, we hold that para. 486 is mandatory and that, as the investigation has not been held under chapter XIV of the Criminal Procedure Code, the subsequent inquiry and the order of dismissal are illegal.

For the foregoing reasons we hold that, as the respondent was dismissed without complying with the provisions of para. 486(1), the order of dismissal is illegal and that the High Court is right in setting aside the order of dismissal.

In the result, the appeal fails and is dismissed with costs.

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WANCHOO, J.—We regret we are unable to agree that the appeal be dismissed.

Babu Ram Upadhya (respondent) was a sub-inspector of police who was appointed in December, 1948. In 1953, he was posted at Sitapur. On September 6, 1953, he was returning from a village called Madhwapur, when he saw a man who was subsequently found to be Tika Ram coming from the side of a canal and going hurriedly into a field. The movements of Tika Ram roused his suspicion. One Lalji, an ex-patwari, was also with the sub-inspector. Tika Ram was called and searched, and a bundle containing currency-notes was found on him. The sub-inspector took the bundle and counted the notes and handed them over to Lalji. Lalji in his turn handed over the notes to Tika Ram. Thereafter Tika Ram, who is an old-man, almost blind, went away. When he reached his house, he found that there was a shortage of Rs. 250. He then made a complaint to the Superintendent of Police on September 9, 1953, in which he gave the above facts. An inquiry was made by the Superintendent of Police and ultimately, departmental proceedings under s. 7 of the Police Act were taken

against the respondent. These proceedings resulted in his dismissal and thereupon the respondent applied to the High Court under Art. 226 of the Constitution.

The main contention of the respondent was that r. 486 of the Police Regulations framed under s. 7 of the Police Act was not observed and therefore the departmental proceedings taken against him were illegal. The reply of the appellant was two-fold: in the first place, it was urged that r. 486 did not apply as there was no report of a cognizable offence against the sub-inspector; and in the next place, it was urged that the rules contained in the Police Regulations were only administrative rules and even if there was non-compliance with any of them, it would not affect the departmental proceedings taken against the respondent, provided there was no breach of the guarantees contained in Art. 311 of the Constitution.

The High Court held that there was a report of a cognizable offence under s. 409 of the Indian Penal Code against the respondent and therefore the procedure provided by r. 486 ought to have been followed. It further held that r. 486 had been framed under s. 7 of the Police Act and was a statutory provision, which had the force of law. As such, following the earlier view taken by the High Court in two other cases it held that a dismissal as a result of departmental proceedings which took place without complying with r. 486 would be illegal. In consequence, the writ petition was allowed. The appellant then applied for a certificate to enable it to appeal to this Court, which was refused. Thereupon special leave was prayed for from this Court, which was granted; and that is how the matter has come up before us.

Mr. C. B. Aggarwala on behalf of the appellant urges the same two points before us. So far as the first point is concerned, we are of opinion that there is no force in it. There is no doubt that in the complaint made by Tika Ram, the name of the respondent was not shown in the heading; but from the facts disclosed in the body of the complaint it is clear that the sub-inspector searched the person of Tika Ram and recovered a bundle containing currency-notes. He

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did so obviously under the authority vested in him as a police officer. When therefore he was satisfied that there was no reason to take any further action against Tika Ram, it was his duty to see that the entire amount taken by him from Tika Ram on search was returned to him (Tika Ram). The High Court was right in the view that where property is taken away with the intention that it will continue to be the property of the person from whose possession it has been taken away, there will be an entrustment of the property to the person taking it away, and if subsequently the person taking it away converts it to his own use or suffers some other person to do so, there will be criminal breach of trust and not merely criminal misappropriation. Thus an offence under s. 409 of the Indian Penal Code appears to have been committed *prima facie* on the facts of this case. As an offence under s. 409 is a cognizable offence, r. 486 of the Police Regulations would apply. This brings us to the main point in the present appeal.

Sec. 7 of the Police Act under which r. 486 has been framed is in these terms:—

"Subject to such rules as the State Government may from time to time make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police-officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty or unfit for the same;

or may award any one or more of the following punishments to any police-officer of the subordinate ranks, who shall discharge his duty in a careless or negligent manner, or who, by any act of his own shall render himself unfit for the discharge thereof, namely:—

(a) fine to any amount not exceeding one month's pay;

(b) confinement to quarters for a term not exceeding fifteen days, with or without punishment, drill, extra guard, fatigue or other duty;

(c) deprivation of good-conduct pay;

(d) removal from any office of distinction or special emolument;".

It gives power to four grades of police officers to dismiss, suspend or reduce any police officer of the subordinate ranks whom they think remiss or negligent in the discharge of his duty or unfit for the same. It also provides for infliction of four other kinds of punishment by these four grades of officers on any police officer of the subordinate ranks who discharges his duty in a careless or negligent manner or who by any act of his own renders himself unfit for the discharge thereof. In the present case we are concerned with dismissal and what we shall say hereafter should be taken to be confined to a case of dismissal. Section 7 shows that the power of dismissal conferred by it on the four grades of police officers is to be exercised subject to such rules as the State Government may from time to time make under the Police Act. The contention on behalf of the respondent is that the power of dismissal has to be exercised subject to rules and therefore, when r. 486 of the Police Regulations (framed under s. 7) provided a certain procedure to be followed with respect to cases in which a cognizable offence was involved it was not open to the authority concerned to disregard that procedure. In effect, it is urged that r. 486 is a mandatory provision and non-compliance with it would invalidate the departmental proceedings. It is not in dispute in this case that the procedure provided by r. 486 was not followed. That procedural provision is that where a report of a cognizable crime is made against a police officer belonging to the subordinate ranks, it has to be registered as provided in Chapter XIV of the Code of Criminal Procedure and investigated as provided thereunder. Thereafter the authority concerned has to decide whether to send the case for trial before a court of law or to take departmental proceedings. In this case no report was registered as provided under Chapter XIV of the Code of Criminal Procedure and no investigation was made as provided in that Chapter. All that happened was that the Superintendent of Police to whom Tika Ram had complained inquired into the

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complaint of Tika Ram and thereafter decided to hold a departmental inquiry under s. 7 of the Police Act against the respondent.

The main contention on behalf of the appellant is that the Rules framed under s. 7 of the Police Act are administrative rules and in any case they are only directory and non-compliance with them would not vitiate the subsequent proceedings unless there is a breach of the guarantee contained in Art. 311 of the Constitution, as all public servants hold their office at the pleasure of the President or the Governor, as the case may be, other than those expressly excepted under the Constitution. Reliance in this connection is placed on the case of *R. Venkata Rao* v. *Secretary of State for India in Council* (1).

This brings us to a consideration of the tenure on which public servants hold office. The position in England is that all public servants hold office at the pleasure of His Majesty, that is to say, their service was terminable at any time without amuse: (see *Shenton* v. *Smith* (2)). By law, however, it is open to Parliament to prescribe a different tenure and the King being a party to every Act of Parliament is understood to have accepted the change in the tenure when he gives assent to such law: (see *Gould* v. *Stuart* (3)). This principle applied in India also before the Government of India Act, 1915, was amended by the addition of s. 96-B therein. Section 96-B for the first time provided by statute that every person in the civil service of the Crown held office during His Majesty's pleasure, subject to the provisions of the Government of India Act and the rules made thereunder and the only protection to a public servant against the exercise of pleasure was that he could not be dismissed by any authority subordinate to that by which he was appointed. It was this section, which came for consideration before the Privy Council in *Venkata Rao's case* (1) and the Privy Council held that in spite of the words "subject to the rules made under the Government of India Act," Venkata Rao's employment was not of a

(1) (1936) L.R. 64 I.A. 55 (2) [1895] A.C. 229.
(3) [1896] A.C. 575.

limited and special kind during pleasure with an added contractual term that the procedure prescribed by the Rules must be observed; it was by the express terms of s. 96-B held "during His Majesty's pleasure" and no right of action as claimed by Venkata Rao existed. The Privy Council further held that the terms of s. 96-B assured that the tenure of office, though at pleasure, would not be subject to capricious or arbitrary action but would be regulated by the rules which were manifold in number, most minute in particularity and all capable of change; but there was no right in the public servant enforceable by action to hold his office in accordance with those rules and he could therefore be dismissed notwithstanding the failure to observe the procedure prescribed by them. The main point which was urged in *Venkata Rao's case* (1) was that under r. XIV of the Civil Services Classification Rules no public servant could be dismissed, removed or reduced in rank except after a properly recorded departmental inquiry. In *Venkata Rao's case* (1) the departmental inquiry prescribed by the rules was found not to have been held. Even so, the Privy Council held that the words used in s. 96-B could not and did not cut down the pleasure of His Majesty by rules, though it was observed that the terms of the section contained a statutory and solemn assurance that the tenure of office, though at pleasure, would not be subject to capricious or arbitrary action, but would be regulated by rule. It was further added that supreme care should be taken that this assurance is carried out in the letter and in the spirit. The Privy Council further held that in the case before it, there had been a serious and complete failure to adhere to important and indeed fundamental rules, and mistakes of a serious kind had been made and wrongs had been done which called for redress; even so, they were of the view that as a matter of law that redress was not obtainable from courts by action.

This was the position under the Government of India Act 1915. There was however a material change in the Government of India Act, 1935. So far, there

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was one protection to a public servant, namely, that he could not be dismissed by an authority subordinate to that by which he was appointed. In the Government of India Act, 1935, s. 240(1) laid down that—

"except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India.....holds office during His Majesty's pleasure."

The words of this section are different from those of s. 96-B and the tenure of all public servnnts other than those expressly provided for was to be during His Majesty's pleasure. There were, however, two safeguards provided by sub-ss. (2) and (3) of s. 240. The first was the same (namely, that no public servant will be dismissed by an officer subordinate to that who appointed him); but a further exception was added to the pleasure tenure, namely, no public servant shall be dismissed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. This protection came to be considered by the Privy Council in *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lall* (1) and it was held that it was a mandatory provision and qualified the pleasure tenure and provided a condition precedent to the exercise of power by His Majesty provided by sub-s. (1) of s. 240. Thus by the Government of India Act, 1935, there were two statutory guarantees to public servants against the exercise of the pleasure of his Majesty; but it is clear from s. 240 of the Government of India Act, 1935, that the pleasure of His Majesty to dismiss was not otherwise subject to rules framed under the subsequent provisions of the Government of India Act appearing in Chapter II of Part X dealing with public services.

This position continued till we come to the Constitution. Article 310(1) of the Constitution provides for what was contained in s. 240(1) of the Government of India Act, 1935, and is in these terms:

"(1) Except as expressly provided by this Constitution, every person who is a member of a defence

(1) (1948) L.R. 75 I.A. 225.

service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State."

It will be clear therefore that all public servants except as expressly provided by the Constitution hold their office during the pleasure of the President or the Governor, as the case may be. Article 311 then provides for two guarantees and is similar in terms to s. 240(2) and (3) of the Government of India Act, 1935 and the two guarantees are the same, (namely, (i) that no person shall be dismissed or removed by an authority subordinate to that by which he was appointed, and (ii) no such person shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him). In *Parshotam Lal Dhingra* v. *Union of India* (1), this Court held that Art. 311 was in the nature of a proviso to Art. 310, that it provides two constitutional guarantees cutting down the pleasure of the President or the Governor, as the case may be, and that it was a mandatory provision which had to be complied with before the pleasure provided in Art. 310 can be exercised.

Mr. Pathak for the respondent urges that in view of the words of Art. 310 statute or statutory rules can also cut down the nature of the pleasure tenure provided by Art. 310 in the same way as in England an Act of Parliament cuts down the ambit of His Majesty's pleasure in the matter of dismissal. He relies on the words "as expressly provided by this Constitution" and urges that it is open to the legislature to cut down the pleasure tenure by law or to provide for its being affected by statutory rules. In this connection he relies on Art. 309 as well as Art. 154 of the Constitution. Now, Art. 309 begins with the words "subject to the provisions of this Constitution" and lays down that "Acts of the appropriate Legislature may regulate the recruitment, and conditions of

(1) [1958] S.C.R. 828.

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service of person appointed, to public services and posts in connection with the affairs of the Union or of any State". The proviso to Art. 309 lays down that "it shall be competent for the President or the Governor as the case may be to make rules relating to recruitment and conditions of service until provision in that behalf is made by or under an Act of the appropriate Legislature". It will be clear immediately that Art. 309 is subject to the provisions of the Constitution and therefore subject to Art. 310 and therefore, any law passed or rules framed under Art. 309 must be subject to Art. 310 and cannot in any way affect the pleasure-tenure laid down in Art. 310. The words "except as expressly provided by this Constitution" appearing in Art. 310 clearly show that the only exceptions to the pleasure tenure are those expressly contained in the Constitution and no more. These exceptions, for example, are contained *inter alia* in Arts. 124, 148, 280 and 324 and also in Art. 310 (2). Therefore, unless there is an express provision in the Constitution cutting down the pleasure tenure, every public servant holds office during the pleasure of the President or the Governor, as the case may be. We cannot accept the argument that a law passed under Art. 309 prescribing conditions of service would become an express provision of the Constitution and would thus cut down the pleasure tenure contained in Art. 310. As the Privy Council pointed in *Venkata Rao's case* (1), the rules framed under Art. 309 or the laws passed thereunder amount to a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. But if the rules or the law define the content of the guarantee contained in Art. 311 (2) they may to that extent be mandatory but only because they carry out the guarantee contained in Art. 311 (2). Excepting this, any law or rule framed under Art. 309 cannot cut down the pleasure tenure as provided in Art. 310.

The same in our opinion applies to a law passed under Art. 154 (2)(b) which authorises Parliament or the legislature of a State to confer functions on any

(1) (1936) L.R. 64 I.A. 55.

authority subordinate to the Governor. If any law is passed conferring on any authority the power to dismiss or remove or reduce in rank, that law cannot cut down the content of the pleasure tenure as contained in Art. 310; that law would be passed under Art. 245 and that article also begins with the words "subject to the provisions of this Constitution". Therefore, the law passed under Art. 154 (2) (b) would also in the same way as the law under Art. 309 be subject to the pleasure tenure contained in Art. 310 and cannot cut down the content of that tenure or impose any further fetters on it except those contained in Art. 311. The position therefore that emerges from the examination of the relevant Articles of the Constitution is that all public servants other than those who are excepted expressly by the provisions of the Constitution hold office during the pleasure of the President or the Governor, as the case may be, and that no law or rule passed or framed under Art. 309 or Art. 154 (2) (b) can cut down the content of the pleasure tenure as contained in Art. 310 subject to Art. 311.

With this basic position in our Constitution, let us turn to the Police Act with which we are concerned. Section 7 thereof lays down that four grades of officers will have power to dismiss, suspend or reduce any police-officer of the subordinate ranks subject to such rules as the State Government may from time to time make under the Police Act. Though the Police Act is a pre-constitutional law which has continued under Art. 372 of the Constitution, it cannot in our opinion stand higher than a law passed under Art. 309 or Art. 154 (2) (b) and cut down the content of the pleasure tenure as contained in Art. 310. The police officers of the subordinate ranks are not expressly excluded from the operation of the pleasure tenure by any provision of the Constitution; they, therefore, hold office during the pleasure of the Governor and the only protection that they can claim are the two guarantees contained in Art. 311. It is true that s. 7 lays down that the four grades of officers empowered to dismiss will act according to rules framed by the State Government; but that does not in our opinion mean that

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these rules could introduce any further fetter on the pleasure tenure under which the police officers of the subordinate ranks are in service. It was necessary to provide for the framing of rules because the section envisages conferment of powers of punishment of various kinds on four grades of officers relating to various cadres of police officers in the subordinate ranks. It was left to the rules to provide which four grades of officers would dismiss police officers of which subordinate rank or would give which punishment to a police officer of which subordinate rank. Such rules would in our opinion be mandatory as they go to the root of the jurisdiction of the four grades of police officers empowered to act under s. 7. But further rules may be framed under s. 7 to guide these police officers how to act when they proceed to dismiss or inflict any other punishment on police officers of the subordinate ranks. These rules of procedure, however, cannot all be mandatory, for if they were so they would be putting further fetters than those provided in Art. 311 on the pleasure of the Governor to dismiss a public servant. Of course, if any of the rules framed under s. 7 carry out the purposes of Art. 311(2), to that extent they will be mandatory and in that sense their contravention would in substance amount to contravention of Art. 311 itself. If this were not so, it would be possible to forge further fetters on the pleasure of the Governor to dismiss a public servant and this in the light of what we have said above is clearly not possible in view of the provisions of the Constitution. On the other hand, it will not be possible by means of rules framed under s. 7 to take away the guarantee provided by Art. 311(1), which lays down that no public servant shall be dismissed by an authority subordinate to that by which he was appointed. If any rule under s. 7, for example, lays down otherwise it will clearly be *ultra vires* in view of Art. 311(1). The rules therefore that are framed under s. 7 would thus be of two kinds, namely (1) those which define the jurisdiction of four grades of officers to inflict a particular kind of punishment on a particular police officer of the subordinate rank—they will be mandatory

for they go to the root of the jurisdiction of the officer exercising the power, but even these rules cannot go against the provisions of Art. 311(1); and (2) procedural rules, which again may be of two kinds. Some of them may prescribe the manner in which the guarantee contained in Art. 311 (2) may be carried out and if there are any such rules they will be mandatory. The rest will be merely procedural and can only be directory as otherwise if they are also mandatory further fetters on the power of the Governor to dismiss at his pleasure contained in Art. 310 would be forged and this is not permissible under the Constitution. It is from this angle that we shall have to consider r. 486.

Before, however, we come to r. 486 itself, we may dispose of another argument, namely, that the four grades of officers who have the power to dismss under s. 7 are exercising the statutory authority vested in them and are not exercising the Governor's pleasure of dismissal under Art. 310 and therefore their action in dismissing an officer is subject to all the rules framed for their guidance. We are of opinion that this argument is fallacious. Article 310 defines the pleasure tenure and by necessary implication gives power to the Governor to dismiss at pleasure any public servant subject to the exceptions contained in Art. 310 and also subject to the guarantees contained in Art. 311. This power of the Governor to dismiss is executive power of the State and can be exercised under Art. 154(1) by the Governor himself directly or indirectly through officers subordinate to him. Thus it is open to the Governor to delegate his power of dismissal to officers subordinate to him; but even when those officers exercise the power of dismissal, the Governor is indirectly exercising it through those to whom he has delegated it and it is still the pleasure of the Governor to dismiss, which is being exercised by the subordinate officers to whom it may be delegated. Further though the Governor may delegate his executive power of dismissal at pleasure to subordinate officers he still retains in himself the power to dismiss at pleasure if he thinks fit in a particular case in spite

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of the delegation. There can be no question that where a delegation is made, the authority making the delegation retains in itself what has been delegated. Therefore, even where a subordinate officer is exercising the power to dismiss he is indirectly exercising the power of the Governor to dismiss at pleasure and so his power of dismissal can only be subject to the same limitations to which the power of the Governor would be subject if he exercised it directly.

But it is said that in the present case the power has not been delegated by the Governor under Art. 154(1) and that it had been conferred on those police officers by law. In our opinion, that makes no difference to the nature of the power, which is being exercised by these four grades of officers under the Police Act. As we have already said Art. 154(2)(b) gives power to Parliament or the legislature of a State by law to confer functions on any authority subordinate to the Governor. When the function of dismissal is conferred by law on any authority subordinate to the Governor it is nothing more than delegation of the Governor's executive power to dismiss at pleasure by means of law and stands in no better position than a delegation by the Governor himself under Art. 154(1). Whether it is delegation by the Governor himself or whether it is delegation by law under Art. 154(2)(b) or by an existing law, which must be treated as analogous to a law under Art. 154(2)(b), the officer exercising the power of dismissal is only indirectly exercising the Governor's power to dismiss at pleasure and his order of dismissal has the same effect as the order of the Governor to dismiss at pleasure. Therefore, his order also is only subject to the two fetters provided in Art. 311 of the Constitution and cannot be subjected to any more fetters by procedural rules other than those framed for carrying out the object of Art. 311(2). Therefore, when the four grades of officers proceed to dismiss any police officer of the subordinate rank under s. 7 of the Police Act, they are merely exercising the power of the Governor to dismiss at pleasure indirectly; and the only fetters that can be placed on that power are those contained in the Constitution, namely, Art. 311.

We may in this connection refer once again to the *case of Venkata Rao* (1) where the dismissal was by an officer subordinate to the Governor of Madras; but that dismissal was also held to be an indirect exercise of His Majesty's pleasure to dismiss, and that is why it was held that if r. XIV of the Classification Rules was not complied with, a public servant had no right of action against an order dismissing him at His Majesty's pleasure. Therefore, whenever a subordinate officer exercises the power to dismiss, whether that power is delegated by the Governor, or is delegated under a law made under Art. 154(2)(b) or under an existing law analogous to that, he is merely exercising indirectly the power of the Governor to dismiss at pleasure and his action is subject only to the two guarantees contained in Art. 311. The fact therefore that the police officer in this case made the order of dismissal by virtue of s. 7 will make no difference and he will be deemed to be exercising the power of the Governor to dismiss at pleasure by delegation to him by law of that power. We may add that even where there is delegation by law of the power of the Governor to dismiss at pleasure, the power of the Governor himself to act directly and dismiss at pleasure cannot be taken away by that law, for that power he derives from Art. 310 of the Constitution. The present case therefore must be judged on the same basis as any case of dismissal directly by the Governor and would only be subject to the two limitations contained in Art. 311.

We now come to r. 486. This rule, as we have already indicated, provides that if there is any complaint of the commission of any cognizable crime by a police officer, it must be registered in the relevant police station, under Chapter XIV of the Code of Criminal Procedure and investigated in the manner provided by that Chapter. After the investigation is complete, it is open to the authority concerned, be it the Superintendent of Police or the District Magistrate, to decide whether to proceed in a court of law

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or to hold a departmental inquiry or do both, though in the last case the departmental inquiry must take place only after the judicial trial is over. The first question then that arises is whether r. 486 is meant to carry out the purpose of Art. 311(2). As we read r. 486, we cannot see that it is meant for that purpose; it only provides for a police investigation under Chapter XIV of the Code of Criminal Procedure. The police officer making an investigation under Chapter XIV is not bound to examine the person against whom he is investigating, though there is nothing to prevent him from doing so. Nor is the person against whom an investigation is going on under Chapter XIV bound to make a statement to the police officer. In these circumstances, the purpose of an investigation under Chapter XIV is not relevant under Art. 311(2) which says that a public servant shall not be dismissed without giving him a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Therefore, r. 486 not being meant for the purpose of carrying out the object of Art. 311 (2) cannot be mandatory and cannot add a further fetter on the exercise of the power to dismiss or remove at the pleasure of the Governor over and above the guarantees contained in Art. 311.

It appears to us that the object of r. 486 is that the authority concerned should first make a preliminary inquiry to find out if there is a case against the officer complained against either to proceed in a court or to take departmental action. The investigation prescribed by r. 486 is only for this purpose. Incidentally it may be that after such an investigation, the authority concerned may come to the conclusion that there in no case either to send the case to court or to hold a departmental inquiry. But that in our opinion is what would happen in any case of complaint against a public servant in any department of Government. No authority entitled to take action against a public servant would straightaway proceed to put the case in court or to hold a departmental inquiry. It seems to us axiomatic if a complaint is received against any public servant of any department, that the authority

concerned would first always make some kind of a preliminary inquiry to satisfy itself whether there is any case for taking action at all; but that is in our opinion for the satisfaction of the authority and has nothing to do with the protection afforded to a public servant under Art. 311. Rule 486 of the Police Regulations also in our opinion is meant for this purpose only and not meant to carry out the object contained in Art. 311(2). The opportunity envisaged by Art. 311(2) will be given to the public servant after the the authority has satisfied itself by preliminary inquiry that there is a case for taking action. Therefore, r. 486 which is only meant to gather materials for the satisfaction of the authority concerned, whether to take action or not, even though a statutory rule cannot be considered to be mandatory as that would be forging a further fetter than those contained in Art. 311 on the power of the Governor to dismiss at pleasure. We are therefore of opinion that r. 486 is only directory and failure to comply with it strictly or otherwise will not vitiate the subsequent proceedings.

We may incidentally indicate two further aspects of the matter. In the first place, if the argument is that the Governor must exercise the pleasure himself so that only the two limitations provided in Art. 311 may come into play; it appears that the Governor has exercised his pleasure in this case inasmuch as he dismissed the revisional application made to him by the respondent. There appears no reason to hold that the Governor exercises his pleasure only when he passes the original order of dismissal but not otherwise. Secondly the fact that r. 486 contains the word "shall" is not decisive on the point that it is mandatory: (see Crawford on Statutory Construction, p. 519, para. 262). In view of what we have said already, the context shows that r. 486 can only be directory. If so, failure to observe it strictly or otherwise will not invalidate the subsequent departmental proceedings.

This brings us to the last point which has been urged in this case; and that is whether there was substantial compliance with r. 486. We have already

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pointed out that there was no strict compliance with r. 486 as no case was registered on the complaint of Tika Ram and no investigation was made under Chapter XIV of the Code of Criminal Procedure. But there is no doubt in this case that before the Superintendent of Police gave the charge-sheet to the respondent in November, 1953, which was the beginning of the departmental proceedings against the respondent, he made a preliminary inquiry into the complaint of Tika Ram and was satisfied that there was a case for proceeding against the respondent departmentally. In these circumstances it appears to us that the spirit of r. 486 was substantially complied with and action was only taken against the respondent when on a preliminary inquiry the Superintendent of Police was satisfied that departmental action was necessary. Even if r. 486 had been strictly complied with, this is all that could have happened. In these circumstances we are of opinion that r. 486 which in our opinion is directory was substantially complied with in spirit and therefore the subsequent departmental proceedings cannot be held to be illegal, simply because there was no strict compliance with r. 486. The High Court therefore in our opinion was wrong in holding that the subsequent departmental inquiry was illegal and its order quashing the order of dismissal on this ground alone cannot be sustained. We would therefore allow the appeal.

BY COURT—In accordance with the opinion of the majority, this appeal is dismissed with costs.

THE COMMISSIONER OF INCOME-TAX, WEST BENGAL

v.

ROYAL CALCUTTA TURF CLUB

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November 28.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Expenditure for preservation of business—If wholly and exclusively laid out for the purpose of business—Indian Income Tax Act, 1922 (XI of 1922), s. 10 (2)(xv).

The business of the respondent club was to run race meetings on a commercial scale. The club did not own any horse and therefore did not employ jockeys. It was a matter of some importance to the club that there were jockeys of requisite skill and experience in sufficient numbers who would be available to the owners and trainers because otherwise the running of the race meetings would not be commercially profitable and its interest would suffer and it might have had to abandon its business if it did not take steps to make jockeys of the necessary calibre available. Therefore it established a school for the training of Indian boys as jockeys and claimed the sums spent on the running of the school as deductable amount under s. 10 (2)(xv) of the Indian Income Tax Act.

The question was whether in the circumstances of the case the expenditure claimed was one which was wholly and exclusively laid out for the purpose of the respondent's business.

Held, that any expenditure which was incurred for preventing the extinction of a business would be expenditure wholly and exclusively laid out for the purpose of the business of the assessee and would be an allowable deduction.

In the instant case the amount in dispute was laid out wholly and exclusively for the purpose of the respondent's business, because if the supply of jockeys of requisite efficiency and skill failed, the business of the respondent would no longer be possible.

Eastern Investments Ltd. v. *Commissioner of Income-tax, West Bengal*, [1951] S. C. R. 594 and *Commissioner of Income-tax* v. *Chandulal Keshavlal & Co.*, [1960] 38 I.T.R. 601, relied on.

British Insulated and Helsby Cables v. *Atherton*, [1926] A. C. 205, *Morgan* v. *Tate & Lyle Ltd.*, [1955] A. C. 21 and *Boarland* v. *Kramat Pulai Ltd.*, [1953] 2 All. E. R. 1122, discussed.

Strong & Co. v. *Woodifield*, [1906] A. C. 448 and *Smith* v. *Incorporated Council of Law Reporting*, [1914] 3 K.B. 674, referred to.

Ward & Co. Ltd. v. *Commissioner of Taxes*, [1923] A. C. 145, distinguished.

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The Commissioner of Income-tax, West Bengal v. Royal Calcutta Turf Club

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 419 of 1958.

Appeal by special leave from the judgment and order dated August 20, 1957, of the Calcutta High Court in Income-tax Reference No. 1 of 1956.

Hardyal Hardy and *D. Gupta*, for the appellant.

N. C. Chatterjee, Dipak Choudhri and *B. N. Ghosh*, for the respondent.

1960. November 28. The Judgment of the Court was delivered by

Kapur J.

KAPUR, J.— This is an appeal by special leave against the judgment and order of the High Court of Judicature at Calcutta in a reference made by the Income-tax Appellate Tribunal under s. 66(1) of the Income-tax Act. The following question was referred:

"Whether in the facts and circumstances of this case, the Appellate Tribunal was right in holding that Rs. 61,818 spent by the assessee to train Indian boys as jockeys, did not constitute expenses of the business of the assessee allowable under s. 10(2)(xv)?"

which was answered in favour of the respondent. The Commissioner is the appellant before us and the assessee is the respondent.

The respondent is an association of persons whose business is to hold race meetings in Calcutta on a commercial basis. It holds two series of race meetings during the two seasons of the year. The respondent does not own any horses and therefore does not employ jockeys but they are employed by owners and trainers of horses which are run in the races. It is a matter of some importance to the respondent that there should be jockeys available to the owners with sufficient skill and experience because the success of races to a considerable extent depends upon the experience and skill of a jockey who rides a horse in a race.. Because it was of the opinion that there was a risk of the jockeys becoming unavailable and that such unavailability would seriously affect its business which might result in its closing

down the business, the respondent considered it expedient to remedy that defect. Therefore in 1948, it established a school for the training of Indian boys as jockeys so that after their training they might be available for purposes of race meetings held under its auspices. The school, however, did not prove a success and after having been in existence for three years it was closed down.

During the year ending March 31, 1949, the respondent spent a sum of Rs. 62,818 on the running of its school and claimed that amount as a deduction under s. 10(2)(xv) of the Income-tax Act and also in the assessment under the Business Profits Tax for the chargeable accounting period ending March 31, 1949. This claim was disallowed by the Income Tax Officer and on appeal by Appellate Assistant Commissioner and also by the Income-tax Appellate Tribunal. At the instance of the respondent the question already quoted was referred to the High Court and was answered in favour of the respondent. This appeal is brought by special leave against that judgment.

The decision under the Business Profits Tax Act will be consequential upon the decision of the deduction under the Income-tax Act. The Tribunal found that it was not the business of the respondent to provide jockeys to owners and trainers, that the jockeys trained in the respondent's school were not bound to ride only in the races run by the respondent and that the benefit, if any, which accrued was of an enduring nature. It also found that the respondent had been conducting race meetings since long, that it was not the case of the assessee that if it did not train jockeys they would become unavailable and that the mere policy of producing efficient Indian jockeys was not a sufficient consideration for treating the expenditure as one incurred for the business of the respondent. For these reasons the expenditure was disallowed.

Before the Appellate Assistant Commissioner, it was contended by the respondent, that the reason for incurring the expenditure was "to promote efficient Indian jockeys" and it was in the interest of the respondent to see that the races are not abandoned on

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account of the scarcity of jockeys. In the order of the Tribunal it is stated that this was not the case of the respondent, and therefore when the respondent wanted paragraph 5 of the statement to be substituted by the following:

"It was the case of the assessee that unless it trained Indian Jockeys, time may come when there may not be sufficient number of trained jockeys to ride horses in the races conducted by the assessee."

the Tribunal did not agree to do so.

Counsel for the appellant raised three points before us; (1) The question as to whether an item of expenditure is wholly and exclusively laid out for the purposes of business or not is a question of fact; (2) the connection between an expenditure and profit-earning of the assessee should be direct and substantial and not remote and (3) to be admissible as revenue expenditure it should not be in the nature of a capital expense, i.e., it should not bring into existence an asset of an enduring nature.

As to the first question this court has held in *Eastern Investments Ltd.* v. *Commissioner of Income-tax, West Bengal* (1) that "though the question must be decided on the facts of each case, the final conclusion is one of law". In *Commissioner of Income Tax* v. *Chandulal Keshavlal & Co.* (2), this Court said:—

"Another test is whether the transaction is properly entered into as a part of the assessee's legitimate commercial undertaking in order to facilitate the carrying on of its business; and it is immaterial that a third party also benefits thereby. (*Eastern Investment Ltd.* v. *Commissioner of Income-Tax*, (1951) 20 I.T.R. 1). But in every case it is a question of fact whether the expenditure was expended wholly and exclusively for the purpose of trade or business of the assessee. In the present case the finding is that it was laid out for the purpose of the assessee's business and there is evidence to support this finding."

But those observations must be read in the context. In that case the assessee firm was the Managing Agent of a Company and at the request of the Directors of

(1) [1951] S.C.R. 594, 598. (2) [1960] 38 I.T.R. 601, 610.

the latter agreed to accept a lesser commission for the year of account than it was entitled to. It was found by the Appellate Tribunal there that the amount was expended for reasons of commercial expediency and was not given as a bounty but to strengthen the managed company so that if its financial position became strong the assessee would benefit thereby, and on the evidence the Tribunal came to the conclusion that the amount was wholly and exclusively for the purpose of such business. It was on this evidence that the expense was held to be wholly and exclusively laid out for the purpose of the assessee's business and this was the finding referred to. In that case the Tribunal had not misdirected itself as to the true scope and meaning of the words "wholly and exclusively laid out for the purpose of the assessee's business". In the present case the Income-tax Appellate Tribunal had misdirected itself as to the true scope and meaning of these words. In our opinion, in the circumstances of this case, it cannot be said that the finding of the Tribunal was one of fact.

The question as to whether the expenses of running the school for jockeys is deductible has to be decided taking into consideration the circumstances of this case. The business of the respondent was to run race meetings on a commercial scale for which it is necessary to have races of as high an order as possible. For the popularity of the races run by the respondent and to make its business profitable it was necessary that there were jockeys of requisite skill and experience in sufficient numbers who would be available to the owners and trainers because without such efficient jockeys the running of race meetings would not be commercially profitable. It was for this purpose that the respondent started the school for training Indian jockeys. If there were not sufficient number of efficient Indian jockeys to ride horses its interest would have suffered, and it might have had to abandon its business if it did not take steps to make jockeys of the necessary calibre available. Therefore any expenditure which was incurred for preventing the extinction

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of the respondent's business would, in our opinion, be expenditure wholly and exclusively laid out for the purpose of the business of the assessee and would be an allowable deduction. This finds support from decided cases. In *Commissioner of Income-tax* v. *Chandulal Keshavlal & Co.* (1), this Court held that in order to justify a deduction the disbursement must be for reasons of commercial expediency; it may be voluntary but incurred for the assessee's business; and if the expense is incurred for the purpose of the business of the assessee it does not matter that the payment also enures to the benefit of a third party. Another test laid down was that if the transaction is properly entered into as a part of the assessee's legitimate commercial undertaking in order to facilitate the carrying on of its business it is immaterial that a third party also benefits thereby. In *British Insulated and Helsby Cables* v. *Atherton* (2), Viscount Cave L. C. held that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expended wholly and exclusively for the purpose of the trade. In a case more recently decided *Morgan* v. *Tate & Lyle Ltd.* (3) the assessee company was engaged in sugar refining business and it incurred expenses in a propaganda campaign to oppose the threatened nationalisation of the industry. It was held by the House of Lords by a majority that the object of the expenditure being to preserve the assets of the company from seizure and so to enable it to carry on its business and earning profits, the expense was an admissible deduction being wholly and exclusively laid out for the purpose of the company's trade. Lord Morton of Henryton said:

"Looking simply at the words of the rule I would ask: "If money so spent is not spent for the purpose of the company's trade, for what purpose is it spent?" If the assets are seized, the company can no longer

(1) (1960) 38 I.T.R. 601, 610. (2) [1926] A.C. 205.
(3) [1955] A.C. 21.

carry on the trade which has been carried on by the use of these assets. Thus the money is spent to preserve the very existence of the company's trade". See also *Strong & Co.* v. *Woodifield*(1), the observations of Lord Davey; and *Smith* v. *Incorporated Council of Law Reporting* (2).

Counsel for the appellant relied upon the judgment of the Privy Council in *Ward & Co. Ltd.* v. *Commissioner of Taxes* (3), but that decision proceeds on a different statute where the words were of a very restrictive character, the words being:

".....Expenditure or loss of any kind not exclusively incurred in the production of the assessable income derived from that source.....".

This case was distinguished in *Morgan* v. *Tate & Lyle*(4) on the ground that the language of the New Zealand statute was much narrower than the language of r. 3A in England.

Reference was also made by the appellant to *Boarland* v. *Kramat Pulai Ltd.* (5). In that case Directors of three Companies engaged in tin mining in Malaya incurred expenditure on printing and circulating to shareholders a pamphlet containing remarks of the Chairman of the Company. The pamphlet was an attack on the policy and acts of the Socialist Government and it was held that the question whether the money was wholly and exclusively laid out or expended for the purpose of trade within the meaning of rules applicable to the question was one of law but on a consideration of the question it was held that the expenditure was not solely incurred with that object. It is not necessary to discuss that case at any length because what was held in that case was that the pamphlet was not wholly and exclusively for the purpose of the company's trade.

Applying the law, as laid down in those cases, to the present case the conclusion is that the amount in dispute was laid out wholly and exclusively for the purpose of the respondent's business because if the

(1) [1906] A C. 448.
(2) [1914] 3 K.B. 674.
(3) [1923)] A.C 145.
(4) [1955] A.C. 21.
(5) [1953] 2 All E.R. 1122.

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supply of jockeys of efficiency and skill failed the business of the respondent would no longer be possible. Thus the money was spent for the preservation of the respondent's business.

As to the third point there is no substance in the submission that the expenditure was in the nature of a capital expense because no asset of enduring nature was being created by this expense.

In our opinion the High Court has rightly held that the expenditure claimed was one which was wholly and exclusively laid out for the purpose of the respondent's business. It was to prevent the threatened extinction of the business of the respondent. In the result this appeal is dismissed with costs.

Appeal dismissed.

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November 29.

K. R. C. S. BALAKRISHNA CHETTY & SONS & CO.

v.

THE STATE OF MADRAS

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Sales Tax — Claim of exemption by licensee—If conditional upon observance of conditions and restrictions—Madras General Sales Tax Act, 1939 (Mad. IX of 1939), s. 5.

The appellants, who were dealers in Cotton yarn, obtained a license under the Madras General Sales Tax Act, 1939 (IX of 1939). Section 5 of that Act exempted such dealers from payment of sales tax under s. 3 of the Act subject to such restrictions and conditions as might be prescribed, including the conditions as to licenses and license fees. Section 13 required a licensee to keep and maintain true and correct accounts of the value of the goods sold and paid by him. Rule 5 of the General Sales Tax Rules provided that any person seeking exemption under s. 5 of the Act must apply for license in Form 1 which made the license subject to the provisions of the Act and the rules made thereunder. The appellants on surprise inspection were found to maintain two separate sets of accounts, on the basis of one of which they submitted their returns and the other

showed black-market activities. The question for determination in the appeal was whether the appellants who had been refused exemption and were assessed to tax, could claim exemption under the Act.

Held, that the question must be answered in the negative.

Section 5 of the Madras General Sales Tax Act, 1939, properly construed, leaves no manner of doubt that an exemption from assessment thereunder is clearly conditional upon the observance by the assessee of the conditions and restrictions imposed by the Act, either in the rules or in the license itself, and the words 'subject to' used by the section means "conditional upon".

It was not correct to say that licensee was exempt from assessment so long as he held the license notwithstanding any breach of the provision of the law and that the only penalty he could be subjected to was the cancellation of his license or criminal prosecution.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 490 and 491 of 1958.

Appeals from the judgment and decree dated February 18, 1955, of the Madras High Court in Second Appeals Nos. 2038 and 2039 of 1950.

N. R. Raghavachariar, *M. R. Krishnaswami* and *T. V. R. Tatachari*, for the appellant.

R. Ganapathi Iyer and *D. Gupta*, for the respondent.

1960. November 29. The Judgment of the Court was delivered by

KAPUR, J.—Two suits were brought by the appellants for a declaration against the levy of sales tax by the State of Madras and an injunction was also prayed for. Both the suits were decreed by the Subordinate Judge of Salem and the decrees were confirmed on appeal by the District Judge of Salem. Two appeals were taken to the High Court by the State of Madras against those decrees and by a judgment dated February 18, 1955, the decrees were set aside by a common judgment. Against these decrees the appellants have brought these appeals by a certificate of that Court.

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The appellants are merchants dealing in cotton yarn. They obtained a license under s. 5 of the Madras General Sales Tax Act (Act IX of 1939), hereinafter referred to as the 'Act'. This license exempted

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them from assessment to sales tax under s. 3 of the Act on the sale of cotton yarn and on handloom cloth "subject to such restrictions and conditions as may be prescribed including conditions as to license and license fees". The license was issued on March 31, 1941, and was renewed for the following years. On September 20, 1944, the Commercial Tax Authorities made a surprise inspection of the premises of the appellants and discovered that they were maintaining two separate sets of account on the basis of one of which the appellants submitted their returns to the Department. Because the other set of account books showed black-market activities of the firm Balakrishna Chetty was prosecuted and sentenced to six months' imprisonment for an offence connected with the breach of Cotton Yarn Control Order. During the pendency of those proceedings the Deputy Commercial Tax Officer made assessments for the years 1943-44 and 1944-45, the tax for the former was Rs. 37,039 and for the latter Rs. 3,140. The appellants unsuccessfully appealed against these assessments and their revisions also failed. On August 24, 1945, the appellants brought a suit for a declaration and injunction in regard to the first assessment alleging that the assessment was against the Act. On September 2, 1946, a similar suit was brought in regard to the second assessment. It is out of these suits that the present appeal has arisen.

The controversy between the parties centres round the interpretation of the words "subject to" in s. 5 of the Act. The High Court has held that on a true interpretation of the provisions of the Act and the rules made thereunder, the observance of conditions of the license was necessary for the availability of exemption under s. 5; that as the appellants had contravened those conditions they were liable to pay tax for both the years notwithstanding the license which had been issued to them under s. 5 of the Act.

It will be convenient at this stage to refer to the provisions of the Act which are relevant for the purpose of this appeal.

S. 2(b) " "dealer" means any person who carries on the business of buying or selling goods;"

S. 2(f) " "prescribed" means prescribed by rules made under this Act;".

S. 3(1) "Subject to the provisions of this Act, every dealer shall pay in each year a tax in accordance with the scale specified below:—

(a) .....

(b) if his turnover exceeds twenty thousand rupees.	One half of 1 per cent of such turnover".

S. 5 "Subject to such restrictions and conditions as may be prescribed, including the conditions as to licenses and license fees, the sale of bullion and specie, of cotton, of cotton yarn and of any cloth woven on handlooms and sold by persons dealing exclusively in such cloth shall be exempt from taxation under Section 3".

S. 13 "Every dealer and every person licensed under section 8 shall keep and maintain a true and correct account showing the value of the goods sold and paid by them; and in case the accounts maintained in the ordinary course, do not show the same in an intelligible form, he shall maintain a true and correct account in such form as may be prescribed in this behalf:".

The following rules are relevant for the purpose of this appeal and we quote the relevant portions:

R. 5 "(1) Every person who—

(a) .....

(b) deals with cotton and/or cotton yarn,

(c) .....,.....

(d) .....

(e) .....,shall if he desires to avail himself of the exemption provided in sections 5 and 8 or of the concession of single point taxation provided in section 6, submit an application in Form-I for a licence....."

and the relevant portion of Form III is as follows:

"Form III

Licence to a dealer in { Cotton / Cotton yarn / cloth woven on handlooms

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See rule 6(5).

Licence No. dated
having paid a licence fee of Rs.
(in words)
hereby licensed as a dealer in Cotton/Cotton yarn Cotton woven on handlooms for the year ending at (place of business) subject to the provisions of the Madras General Sales Tax Act, 1939, and the rules made thereunder and to the following conditions:".

R. 8 "Every licence granted or renewed under these rules shall be liable to cancellation by the Deputy Commercial Tax Officer in the event of a breach of any of the provisions of the Act, or of the Rules made thereunder or of the conditions of the licence."

The contention raised on behalf of the appellants was that as long as they held the licence it was immaterial if they were guilty of any infraction of the law and that they were not liable to any assessment of sales-tax under the provisions of the Act and the only penalty they incurred was to have their licence cancelled and/or be liable to the penalty which under the criminal law they had already suffered. The contention comes to this that in spite of the breaches of the terms and conditions of the licence, having a licence was sufficient for the purpose of exemption under the Act. This contention, in our opinion, is wholly untenable. Section 3 is the charging section and s. 5 gives exemption from taxation but that section clearly makes the holding of a licence subject to restrictions and conditions prescribed under the provisions of the Act and the rules made thereunder because the opening words of that section are "subject to such restrictions and conditions as may be prescribed."

Under s. 13 an important condition imposed under the Act is the keeping by the dealer and every person licensed of true and correct accounts showing the value of the goods sold and paid by him. Next there is r. 5 of the General Sales Tax Rules which provided

that if any person desired to avail himself of the exemption provided in s. 5, he had to submit an application in Form I for a licence and the Form of the licence shows that the licence was subject to the provisions of the Act and the rules made thereunder which required the licensee to submit returns as required and also to keep true accounts under s. 13. This shows that the giving of the licence was subject to certain conditions being observed by the licensee and the licence itself was issued subject to the Act and the rules. But it was contended that the words "subject to" do not mean "conditional upon" but "liable to the rules and the provisions" of the Act. So construed s. 5 will become not only inelegant but wholly meaningless. On a proper interpretation of the section it only means that the exemption under the licence is conditional upon the observance of the conditions prescribed and upon the restrictions which are imposed by and under the Act whether in the rules or in the licence itself; that is, a licensee is exempt from assessment as long as he conforms to the conditions of the licence and not that he is entitled to exemption whether the conditions upon which the licence is given are fulfilled or not. The use of the words "subject to" has reference to effectuating the intention of the law and the correct meaning, in our opinion, is "conditional upon".

The appellants have been found to have contravened the provisions of the Act as well as the rules and therefore it cannot be said that they have observed the conditions upon which the exemption under the licence is available. In that view of the matter, it was rightly held that they were not exempt from assessment under the Act. The appeals are therefore dismissed with costs.

Appeals dismissed.

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MAHESH ANANTRAI PATTANI AND ANOTHER

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, AHMEDABAD

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Gift or Remuneration for past services—Payment to retired Dewan of Indian State by Ex-Ruler—Liability to tax—Indian Income-tax Act, 1922 (11 of 1922), s.7(1), Explanation (2).

A who was the Dewan of the State of Bhavnagar before responsible government was introduced in the State, was granted a monthly pension of Rs. 2,000 by the Maharaja of the State by an order dated January 15, 1948. On March 1, 1948 the State of Bhavnagar was merged in the United States of Saurashtra and the Maharajah ceased to be the Ruler of the State. Subsequently on May 31, 1950, the Maharaja directed his banker in Bombay to pay A a sum of Rs. 5 lakhs out of the amount lying to his credit and when he was asked for instructions as to how that sum was to be entered in the books of account he passed an order on December 27, 1950, to the effect that in consideration of A having rendered loyal and meritorious services the said sum was given to him as a gift and that the amount should be debited to his personal expense account. The liability of the above sum for income-tax was raised during the course of the assessment proceedings of A for the year 1951-52, and the assessee produced a letter dated March 10, 1953, written by the Maharajah at the request of the former, as follows: "I confirm that in June 1950, I gave you a sum of Rs. 5 lakhs which was a gift as a token of my affection and regard for you and your family.....". The Income-tax Officer held that the amount was liable to income-tax under s. 7(1), read with explanation (2), of the Indian Income-tax Act, 1922. The Appellate Tribunal took into account the two documents dated December 27, 1950, and March 10, 1953, written by the Maharajah and considered that the first which clearly mentioned why the said sum was paid to the assessee, was more reliable for the reason that it was contemporaneous, than the second which was written more than 2 years later and the correctness of which they were not inclined to accept. The Tribunal agreed with the Income-tax Officer that the amount was a taxable receipt.

Held, (*per* Kapur and Shah, JJ.; Hidayatullah, J., *dissenting*), that on the facts of the case the sum of Rs. 5 lakhs was given to the assessee not as a payment in consideration of the services already rendered by him as the Dewan of the State, but merely as a gift in token of the Maharajah's affection and regard for the assessee, and, therefore, was not liable to be assessed to tax

under s. 7(1), explanation (2), of the Indian Income-tax Act, 1922.

The Tribunal was in error in treating the document dated December 27, 1950, as a contemporaneous document while as a matter of fact it was written six months after the fact of payment, and because of this erroneous approach as a result of which the second letter had been rejected, the finding given by the Tribunal could not be treated as binding on the Court.

P. Krishna Menon v. *The Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore,* [1959] Supp. 1 S.C.R. 133, distinguished.

Per Hidayatullah, J.—The use of the word "contemporaneous" to describe the order to the banker meant no more than this that it was earlier in time and very soon after the amount was given. The word "gift" did not alter the nature of payment; the Maharaja indeed made a gift, as he had stated over again, but the order disclosed that it was by way of remuneration for past services.

The Tribunal was within its rights in accepting one piece of evidence in preference to another, and the finding on the evidentiary value of the letter of the Maharaja was a matter essentially for the Tribunal to decide finally. The decision in *P. Krishna Menon* v. *The Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore,* [1959] Supp. 1 S.C.R. 133, was applicable and concluded the present case.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 232 of 1960.

Appeal from the Judgment and Order dated October 6, 1958, of the Bombay High Court in Income Tax Reference No. 10 of 1958.

R. J. Kolah, Dwaraka Das, S. N. Andley, Rameshwar Nath, J. B. Dadachanji and *P. L. Vohra* for the Appellants.

Hardyal Hardy and *D. Gupta* for the Respondent.

1960. November 29. The Judgment of J. L. Kapur and J. C. Shah, JJ., was delivered by Kapur, J. M. Hidayatullah, J., delivered a separate Judgment.

Kapur J.

KAPUR, J.—This is an appeal pursuant to a certificate of the High Court of Bombay against the judgment and order of that Court in Income-tax Reference No. 10 of 1958, answering the question referred to it against the assessee whose legal representatives are

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the appellants before us, the respondent being the Commissioner of Income-tax.

The facts which have given rise to the appeal are that the late Mr. Annantrai P. Pattani, hereinafter called the assessee was, by Hazur Order dated December 10, 1937, appointed the Chief Dewan of Bhavnagar State. On January 15, 1948, the Maharaja of Bhavnagar introduced responsible Government in his State and appointed the assessee as the Chairman of the Bhavnagar Durbar Bank but he received no salary for that post. On the same date by another Hazur Order the Maharaja granted a monthly pension of Rs. 2,000 to the assessee. The order was in the following terms:—

"He looked after us well in our childhood and rendered valuable services sincerely and with single-minded loyalty to us and our State during extremely difficult period of the last war and thereafter, which has enhanced the prestige and prosperity of the State and given the State and the people a place of pride in India. In appreciation of this, it is (hereby) decided to grant him a monthly pension of Rs. 2,000 two thousand which is the monthly salary he is drawing at present. Date 22-1-1948."

On May 31, 1950, the Maharaja directed Messrs. Premchand Roychand & Sons, Bombay, with whom he had an account "to pay by cheque to Mr. A.P. Pattani Rs. 5 lacs out of the amount lying to the credit of my account with you." This sum was paid to the assessee on June 12, 1950. It is stated that the accountant of the Maharaja asked for instructions as to how that amount of Rs. 5 lacs was to be adjusted in the accounts and on December 27, 1950, the Maharaja made the following order:—

"In consideration of Shri Annantrai P. Pattani the Ex-Diwan of our Bhavnagar State having rendered loyal and meritorious services Rs. 5,00,000 (Rupees Five Lacs) are given to him as gift. Therefore, it is ordered that the said amount should be debited to our Personal Expense Account."

On March 1, 1948, Bhavnagar State was merged in the United States of Saurashtra and the Maharaja ceased to be the ruler of the said State as from that

date. The assessability of this sum of Rs. 5 lacs was raised in the course of the assessment proceedings for the assessment year 1951-52 and at the request of the assessee which is stated to be oral the Maharaja wrote on March 10, 1953, the following:

"I confirm that in June 1950, I gave you a sum of rupees five lacs (Rs. 5,00,000) which was a gift as a token of my affection and regard for you and your family. This amount was paid to you by Premchand Roychand & Sons according to my letter of 31st May, 1950, from moneys in my account with them."

On these facts the Income-tax Officer held that Rs. 5,00,000 received on June 12, 1950, was liable to income-tax under s. 7(1) read with explanation (2) of that section as it stood before the amendment by the Finance Act, 1955. The assessee took an appeal to the Appellate Assistant Commissioner which was dismissed. Against that order an appeal was taken to the Income-tax Appellate Tribunal but the Tribunal also dismissed the appeal. The Tribunal held that looking to the circumstances they would attach more importance to the "contemporaneous document, i.e., the order of the 27th December, 1950"; which clearly mentioned why the sum of Rs. 5,00,000 was paid to the assessee. The Tribunal was not inclined to "believe in the contents of that letter and would leave the matter at that." The reference is to the letter of the Maharaja dated March 10, 1953. The Tribunal further held that there was no distinction between the Maharaja and the State and

"assuming for a moment that this view of ours is not found to be correct, still it is clear from the Huzur Order No. 13 dated 22-1-1948 (vide para 2 above) that the assessee rendered services not only to the State, if it is distinct from the Maharaja but to the Maharaja as well; for that Huzur Order clearly refers to assessee rendering "valuable services sincerely and conscientiously to us and our State". We would, therefore, hold that the amount of Rs. 5 lacs is a taxable receipt falling under Section 7(1) read with Explanation 2."

At the instance of the assessee the following question of law was referred to the High Court:

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"Whether the sum of Rs. 5 lacs has been properly brought to tax in the hands of the assessee for the assessment year 1951-52?"

and a further question as to the applicability of s. 4(3) (vii) of the Income-tax Act was not referred on the ground that it did not arise out of the order of the Tribunal.

The High Court, on the findings given by the Tribunal came to the conclusion that s. 7(1) explanation (2) of the Income-tax Act applied. It held that it was not possible to regard the receipt of this sum of money by the assessee as a windfall nor as a personal gift of the nature of a testimonial; that the gift was not made in appreciation of the personality or character of the assessee nor was it symbolical of its appreciation of his personal qualities; that the consideration for the gift was in terms stated to be past services and therefore it could not be treated as a mere gift by an employer to an employee when the Court did not know what motivated the making of that gift. On the facts of the case the High Court reached the conclusion, though with some reluctance, that the case fell within the ambit of s. 7(1), Explanation (2). The High Court also held that this sum could not be exempted from tax on the ground that it was merely a casual or non-recurring receipt because once connection with the employment was established there was no question of considering the recurring or the casual nature of the receipt.

During the pendency of the proceedings in the High Court the assessee died and his heirs and legal representatives were brought on the record and hence they are the appellants.

It was argued on behalf of the appellants that the facts showed that the sum paid cannot fall within s. 7(1), Explanation (2), of the Income-tax Act. By Hazur Order dated January 22, 1948, the Maharaja had compensated the assessee for valuable services rendered and single-minded loyalty to the Maharaja and to his State during the difficult period of the war and thereafter, which had added to the prestige and prosperity of the State and in appreciation of that the

Maharaja had granted to the assessee a monthly pension of Rs. 2,000, which was paid to the assessee even after the merger and of the establishment of the United States of Saurashtra from out of the public revenue. At the time when Rs. 5,00,000 were paid, the State of Bhavnagar as such had ceased to exist. The Maharaja was no longer a Ruling Chief but was the Governor of the State of Madras. The order by which Messrs. Premchand Roychand & Sons, Bombay, were directed to pay the sum of Rs. 5,00,000 out of the account of the Maharaja does not mention any reason for payment. When as is alleged an accountant of the Maharaja asked as to how that amount of Rs. 5,00,000 was to be adjusted in the accounts, the Maharaja wrote on December 27, 1950, what is described as an order and directed that the sum should be debited to his Personal Expense Account. It also stated, why it is not clear, that that sum was to be given to the assessee in consideration of the assessee's loyal and meritorious services as a gift. When asked later to clarify the reasons for making this gift the Maharaja made it clear that the gift was as a token of affection and regard for the assessee and his family and that the amount was paid by Messrs. Premchand Roychand & Sons from out of the private monies of the Maharaja with that firm.

The Income-tax Appellate Tribunal took into account the two documents the first of which has been described as an order of December 27, 1950, which was treated as a "contemporaneous document" and the other the letter of March 10, 1953, which was about two years later. The Tribunal did not accept the correctness of what was stated in the letter but attached a great deal of importance to the document of December 27, 1950, which the Tribunal thought was a contemporaneous document.

It appears to us that the Tribunal was in error in treating the document of December 27, 1950, as a contemporaneous document and because of this erroneous approach the finding that it has given cannot be treated as a finding of fact which should bind the court in its decision. It is obvious that the reason why the

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Tribunal attached all this importance to the document of December 27, 1950, was that it was contemporaneous. It would be difficult to accept that a document written six months after the fact of payment could be termed as contemporaneous document particularly when the object of that document was only to instruct an accountant as to how he should make a particular entry. The letter which was written by the Maharaja on March 10, 1953, was rejected because of the circumstances of the case one of which was the contemporaneous document. It does not appear to us that the Tribunal gave sufficient or any consideration to the fact that the Maharaja had already passed an order of a liberal and almost generous grant of a pension of Rs. 2,000 per mensem which was in lieu of the services rendered by the assessee both to the State as well as to the Maharaja and his family and that pension was ordered before the merger of the State and when the employment of the assessee as the Dewan terminated.

According to what was stated in the letter of the Maharaja dated March 10, 1953, the sum of Rs. 5,00,000 was given as a gift in token of Maharaja's affection and regard for the assessee and the assessee's family. There is no reason shown why the Maharaja should have aided and abetted the assessee in escaping income-tax. The only reason stated by the Tribunal is based on a wrong assumption as to the nature of the document of December 27, 1950.

The payment of Rs. 5,00,000 was sought to be brought within the purview of s. 7(1) of the Act read with explanation (2). This section at the relevant time provided:—

S. 7(1) "The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity and any fees, commissions, perquisites or profits in lieu of, or in addition to, any salary or wages, which are due to him from, whether paid or not or are paid by or on behalf of.....any private employer.....

Explanation 2: A payment due to or received by

an assessee from an employer or former employer or from a provident or other fund, is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purpose of this sub-section, unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services;.....".

Counsel for the appellants contended that the payment did not fall within this section because it was a gift made on account of personal qualifications and was a testimonial unconnected with any service rendered. The submission was that the assessee had already been compensated for his services to the Maharaja personally and the State and this sum of Rs. 5 lacs was a gift in token of affection and regard and not as a payment in consideration of the services already rendered to the State or the Maharaja or both. It will not be inappropriate to mention that in the document dated December 27, 1950, it is stated that Rs. 5,00,000 was paid to the assessee as ex-Dewan of Bhavnagar State in consideration of his having rendered loyal and meritorious services to Bhavnagar State. There is no mention in the document of December, 1950, of any services rendered to the Maharaja and it does not seem to have been considered by the Tribunal as to why the Maharaja should make out of his personal account the gift of such a large amount for something which was not done for the Maharaja specifically, particularly when the services to the State and to the Maharaja and his family had already been well compensated. This lends support to the submission of the appellants that the amount was paid merely as a gift in token of Maharaja's affection and regard for the assessee.

Mr. Kolah for the appellants relied on several cases in support of his contention that the amount was not liable to tax under s. 7. In *Beynon* v. *Thorpe* (1) the assessee resigned his position as a Managing Director of the Company; did no work for the company; did

(1) [1928] 14 T.C. 1.

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not attend any Board meetings and received no remuneration as a Director of the Company. It was, however, a custom of the company to give to its retiring employees voluntary pension or allowance and the company voted a pension of £ 5,000 a year to the assessee but this resolution was rescinded and by another resolution £ 5,000 was voted to the assessee" not as or because he is a Director but as a personal gift". The assessee was assessed under Schedule 'E' in respect of both the pension and the final payment but these assessments were discharged on appeal by the Special Commissioners who decided that the allowances were gifts of personal nature only. It was held that the payments were not income assessable to income-tax in the hands of the assessee. Rowlatt, J., said at p. 14:

"Now the question is whether this ceases to be a mere gift because what has led to it is a past employment, an employment which has ceased. It has been made abundantly clear by the Court in Scotland in *Duncan's case* (1) that this sort of sums received by a person cannot possibly be put as receipts from his office or in respect of his office or employment, and they said in terms of that kind in a case like this that these emoluments cannot be taxed under Schedule 'E', and I am bound to say I think that goes a very long way to conclude this case. But it is said that nevertheless they are in respect of the employment. Well, it seems to me that is a complete fallacy. It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please: it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small, but in all the cases it seems to me, whether it is large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another; and as the

(1) [1909] 5 T.C. 417

Lord President in Scotland points out it is only a matter of history that the feeling between the parties which has generated the gift arises out of an employment."

Mr. Kolah also relied on *Reed* v. *Seymour* (1). In that case a committee of a Cricket Club granted a benefit match to a professional cricketer in their service. Out of the profits of the benefit match the beneficiary, who was the assessee purchased a farm and assessment was made on him under Schedule 'E' in respect of the proceeds of the benefit match but this was discharged by the General Commissioner on appeal. This sum was held to be in the nature of a personal gift and not assessable to income-tax. Viscount Cave in his speech posed the question which Rowlatt, J., put, i.e., "is it in the end a personal gift or is it remuneration"; if the latter it is subject to tax, if the former it is not. In that case the test applied by Viscount Cave was that the terms of the assessee's employment did not entitle him to a benefit; the purpose for which the amount was paid was to express gratitude of the employers and of the cricket-loving public for what he had done and in their appreciation of his personal qualities. It was also stated that if the benefit had taken place after Seymour's retirement no one would have sought to tax the proceeds as his income and the circumstance that it was given before but in contemplation of, retirement does not alter its quality and the whole sum was a testimonial and not a perquisite and therefore it was not a remuneration for services but a personal gift.

Counsel also relied on *Moorehouse* v. *Dooland* (2). In that case a cricket professional was employed under a contract in which it was provided that collections shall be made for any meritorious performance by him in accordance with the rules for the time being of the employing Cricket League Club. The assessee played twenty matches and on eleven occasions collections were made on his behalf under the rules of the Club and a total sum of £48 15s. was collected. This was sought to be taxed as fees, wages perquisites or profits

(1) [1927] 11 T.C. 625. (2) [1955] 28 I.T.R. 86.

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arising from his employment. It was held that (1) the test of liability to tax on voluntary payments from the standpoint of the person who receives it was that it accrued to him by virtue of his office or employment, i.e., by way of remuneration of his services; (2) that if the assessee's contract of employment entitled him to receive voluntary payments and (3) that the payment was of a periodic and recurring character. On the other hand if a voluntary payment was made in circumstances which showed that it was given by way of a present or a testimonial on grounds personal to the recipient, the proper conclusion was that the payment was not profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual paid and received by reason of his personal needs or by reason of his personal qualities. Applying these principles the proceeds were by the terms of the contract of employment received by way of remuneration and were liable to tax. In that case the payment was treated as being subject to tax because it was substantially in respect of services and accrued to the assessee by reason of his office. It is quite clear that had the gift been as a testimonial or a contribution for specific performance peculiarly due to the personal qualities of the recipient, it would have been treated as a mere present.

The next case relied upon was *David Mitchell* v. *Commissioner of Income-tax* (1) where the test laid was whether the payment was made in appreciation of the personality and character of the assessee or in appreciation of the professional services rendered by him in order to give him an extra profit over and above the share of profit he might get from the firm for the services rendered.

Counsel for the respondent argued that the gift made by the Maharaja was not in respect of personal qualities of the recipient but was relatable to his office although made by an ex-employer and was therefore taxable; that the gift was voluntary is clear but it is not quite clear how the amount can be said to be relatable to the office held by the recipient. Even

(1) [1956] 30 I.T.R. 701.

according to the case of the respondent the amount was paid about two years after the assessee had ceased to be an employee of the Maharaja or the State and immediately on his ceasing to be the Dewan of Bhavnagar State, the Maharaja had granted him a pension from out of the public funds for his services to the State as Dewan and for services rendered to the Maharaja and his family a handsome and a generous monthly pension of Rs. 2,000 per mensem. Apart from the fact that the Tribunal relied upon a document which was not contemporaneous, it seems to have overlooked the fact that there was a gap of two years before the amount of Rs. 5,00,000 was paid by the Maharaja out of his personal funds.

Counsel for the respondent relied upon a judgment of this Court in *P. Krishna Menon* v. *The Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore* (1). In that case the assessee was a teacher who taught his disciples Vedanta philosophy without any motive or intention of making any profit. One of the disciples made gifts of money to him on several occasions and it was contended by the assessee that he was not liable to tax on the amounts received from his disciple as he was not carrying on any vocation. But it was held that in teaching Vedanta philosophy the assessee was carrying on a vocation and that the payments made by the disciple were received by the recipient from his vocation. It was also held that if the voluntary payments had been made for reasons purely personal to the donee and not connected with his office or vocation, they would not be taxable but if they were made because of the office they would be taxable. The question was not what the donor thought he was doing but why the donee received it. The first thing to notice about that case is that those gifts were not made by the disciple as a gift to mark his esteem and affection for his preceptor but as was stated by the disciple in his affidavit he had paid those amounts because he had obtained the benefit of the teachings by the preceptor on Vedanta. It was found in that case and the disciple admitted

(1) [1959] Supp. 1 S.C.R. 133.

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that he had received benefit from the teaching of his preceptor and that the gifts that he had made, even though as a mark of esteem and affection, were the result of teaching imparted by the preceptor and because the amounts were paid to the preceptor as preceptor and the imparting of the teaching was the *causa causans* of the making of the gift; it was not merely *causa sine qua non*. The payments were repeated and came with some regularity as the disciple visited the preceptor for receiving instructions. It was in these circumstances that this court held the payments to the preceptor as payments because of the imparting of the teaching and therefore they were income arising from the vocation of the recipient as a teacher of Vedanta philosophy.

In our opinion the sum of Rs. 5,00,000 was not paid to the assessee in token of appreciation for the services rendered as a Dewan of Bhavnagar State but as a personal gift for the personal qualities of the assessee and as a token of personal esteem.

The appeal is therefore allowed and the order of the High Court set aside and the reference is answered against the Commissioner of Income-tax. The appellants will have their costs throughout.

Hidayatullah J.

HIDAYATULLAH, J.—I have had the advantage of reading the judgment just delivered by my brother, Kapur, J. I regret very much my inability to agree that the appeal should be allowed and the order of the High Court set aside. In my opinion, the High Court had correctly answered the question referred to it.

The facts of the case have been stated in detail in the judgment of my learned brother, and I need not repeat them but refer only to some of them briefly. On June 12, 1950, a sum of Rs. 5 lakhs was given by the Maharaja of Bhavnagar to the predecessor of the appellants, who was an ex-Dewan of the State. This was paid by Messrs. Premchand Roychand & Sons, Bombay, with whom the Maharaja had an account. There is no contemporaneous record to show why this payment was made; but it appears that when the accountant of the Maharaja enquired how the amount

was to be entered in the books of account, the Maharaja issued an order on December 27, 1950, to the following effect:

"In consideration of Shri Annantrai P. Pattani the Ex-Diwan of our Bhavnagar State having rendered loyal and meritorious services Rs. 5,00,000 (Rupees Five lacs) are given to him as gift. Therefore, it is ordered that the said amount should be debited to our Personal Expense Account."

After the assessment proceedings had commenced in this case, the original assessee produced a letter written by the Maharaja on March 10, 1953, as follows:

"I confirm that in June, 1950, I gave you a sum of rupees five lacs (Rs. 5,00,000) which was a gift as a token of my affection and regard for you and your family. This amount was paid to you by Premchand Roychand & Sons according to my letter of 31st May, 1950, from moneys in my account with them."

The question in this case was whether s. 7(1) of the Income-tax Act read with Explanation 2 to that section as it stood prior to the amendment in 1955, applied to this payment. That section, so far as it is material, is as follows:

"7(1). The tax shall be payable by an assessee under the head 'Salaries' in respect of any salary or wages, any annuity, pension or gratuity and any fees, commissions, perquisites or profits in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of any private employer;

.....

Explanation 2.—A payment due to or received by an assessee from an employer or former employer or from a provident or other fund, is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purpose of this subsection, unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services;.....".

To determine whether the second Explanation applies

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to the facts in this case, it has to be found if this payment was received by the assessee from a former employer by way of remuneration for past services. The Tribunal did not accept the letter of the Maharaja, and observed as follows:

"In support of the latter view Mr. Tricumdas strongly relied upon the letter dated 10-3-1953 addressed by the Maharaja to the assessee, vide para 2 above. We have already indicated the circumstances in which that letter came to be written and would merely observe that we find it difficult to bring ourselves to believe in (sic) the contents of that letter and would leave the matter at that."

This, in my opinion, is a finding upon the evidentiary value of the letter of the Maharaja, and though the order of the Tribunal is worded mellifluously, the Tribunal's decision is quite clearly that it was not persuaded to accept it. Indeed, of the two documents, greater worth has to be attached to one which was issued before the controversy started and was written not to the assessee but to the Maharaja's accountant who enquired how the account was to be adjusted. The use of the word 'contemporaneous' to describe the order to the accountant meant no more than this that it was earlier in time and very soon after the amount was given. The Tribunal did not rely on any extraneous evidence in reaching its conclusion, but on something which had proceeded from the Maharaja himself. The motive of the Maharaja may be irrelevant, because what has to be seen is not why the payment was made but for what the assessee had received it. The Maharaja no doubt had been generous in fixing the pension at Rs. 2,000 per month. But the payment of such a large sum was not just bounty but to reward the past services, which judged from the scale of the pension had not adequately been paid for in the past. In this connection, the words of the Maharaja himself (and what better evidence can there be?) were that the amount was paid "in consideration of Shri Annantrai P. Pattani the Ex-Dewan of our Bhavnagar State having rendered loyal and meritorious services Rs. 5,00,000 are given to him as gift".

The word 'gift' does not alter the nature of the payment. The Maharaja indeed made a gift, as he had stated over again; but this order quite clearly discloses that it was by way of remuneration for past services. The case, therefore, falls within the ruling of the Supreme Court reported in *P. Krishna Menon* v. *The Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore* (1), and is indistinguishable from it. In the earlier case of this Court, the person who gave the money did not even mention any past services; but this Court found that because the recipient had taught him Vedanta philosophy, the payment was really in the nature of remuneration for past services.

The facts in *P. Krishna Menon's case* (1) were that the assessee was teaching his disciples Vedanta philosophy without any motive or intention of making a profit out of such activity. One J. H. Levy who used to go to Travancore from England at intervals attended his teachings. Levy had an account with Lloyd's Bank at Bombay, and on December 31, 1944, Levy transferred the entire amount of Rs. 2,41,103-11-3 to the credit of an account which Levy got the assessee to open in his own name. Levy made further remittances and by August 19, 1951, had paid about Rs. 4,50,000. It was held by this Court that the assessee was carrying on a vocation. In deciding the question whether the amounts were assessable to tax, this Court observed as follows:—

"...it seems to us that the present case is too plain to require any authority. The only point is, whether the moneys were received by the appellant by virtue of his vocation. Mr. Sastri contended that the facts showed that the payments were purely personal gifts. He drew our attention to the affidavit of Levy where it is stated 'all sums of money paid into his account by me have been gifts to mark my esteem and affection for him and for no other reason'. But Levy also there said, 'I have had the benefit of his teachings on Vedanta'. It is important to remember however that the point is not what the donor

(1) [1959] Supp. 1 S.C.R. 133.

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thought he was doing but why the donee received it".

Sarkar, J., then referred to the dictum of Collins, M. R., in *Herbert* v. *McQuade* (1), which may be quoted here:

"Now that judgment, whether or not the particular facts justified it, is certainly an affirmation of a principle of law that a payment may be liable to income-tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to or accrued to, a person by virtue of his office—it seems to me that the liability to income-tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

The learned Judge also referred to the observations of Rowlatt, J., in *Reed* v. *Seymour* (2) and of Viscount Cave, L. C., in *Seymour* v. *Reed* (3), and observed that the real question was, is the payment in the nature of a personal gift or is it a remuneration?, and quoted as the reply the words of the Lord Chancellor—"If the latter, it is subject to the tax; if the former, it is not." Sarkar, J., also referred to the observations of Lord Ashbourne in *Blakiston* v. *Cooper* (4), which were:

"It was suggested that the offerings were made as personal gifts to the Vicar as marks of esteem and respect. Such reasons no doubt played their part in obtaining and increasing the amount of the offerings, but I cannot doubt that they were given to the vicar as vicar and that they formed part of the profits accruing by reason of his office.",

and concluded as follows:

"We have no doubt in this case that the imparting

(1) [1902] 2 K.B. 631.
(2) [1926] 1 K.B. 588.
(3) [1927] A.C. 554.
(4) [1909] A.C. 104.

of the teaching was the *causa causans* of the making of the gift; it was not merely a *causa sine qua non.* The payments were repeated and came with the same regularity as Levy's visits to the appellant for receiving instructions in Vedanta. We do not feel impressed by Mr. Sastri's contention that the first payment of Rs. 2,41,103-11-3 was too large a sum to be paid as consideration. In any case, we are not concerned in this case with that payment. We are concerned with payments which are of much smaller amounts and as to which it has not been said that they were too large to be a consideration for the teaching. And one must not forget that these are cases of voluntary payments and the question of the appraisement of the value of the teaching received in terms of money is not very material. If the first payment was too big to have been paid for the teaching received, it was too big to have been given purely by way of gift."

In my opinion, the case of this Court concludes the matter, and the Tribunal was within its rights in accepting one piece of evidence in preference to another, and the finding on the evidentiary value of the letter of the Maharaja was a matter essentially for the Tribunal to decide finally. I thus agree with the High Court in the answer which it gave, in agreement on facts with the Tribunal, and the reasons for which the answer was given.

I would, therefore, dismiss the appeal with costs.

BY COURT: In view of the majority judgment of the Court, the appeal is allowed with costs throughout.

Appeal allowed.

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November 29.

THE COMMISSIONER OF INCOME-TAX, BIHAR & ORISSA.

v.

MAHARAJA PRATAPSINGH BAHADUR OF GIDHAUR.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Escaped income—Notice issued by Income-tax Officer without approval of Commissioner—Subsequent amendment of enactment providing for Commissioner's approval—Assessment based on original notice—Validity—General Clauses Act, 1897 (10 of 1897), s. 6—Income-tax and Business Profits Tax (Amendment) Act, 1948 (48 of 1948), ss. 1, 8—Indian Income-tax Act, 1922 (11 of 1922), s. 34, as amended by Act 48 of 1948.

The appellant who had agricultural income from his Zamindari was assessed to income-tax for the four assessment years, 1944-45, to 1947-48. The income-tax authorities did not include in his assessable income, interest received by him on arrears of rent, in view of a decision of the Patna High Court, but subsequently this view of law was reversed by the Privy Council. On August 8, 1948, the Income-tax Officer issued notices under s. 34 of the Indian Income-tax Act, 1922, for assessing the escaped income. Before the notices were issued the Income-tax Officer had not put the matter before the Commissioner for his approval as the section then did not require it and the assessments were completed on those notices. In the meantime, certain amendments were made to the Indian Income-tax Act by Act 48 of 1948, which received the assent of the Governor-General on September 8, 1948. The Amending Act substituted a new section in place of s. 34, which among other changes, added a proviso to the effect that "the Income-tax Officer shall not issue a notice.....unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons that it is a fit case for the issue of such notice", and also made it retrospective by providing that the new section "shall be deemed to have come into force on the 30th day of March, 1948". The question was whether the notices issued by the Income-tax Officer on August 8, 1948, without the approval of the Commissioner, were rendered void by reason of the operation of the amended s. 34. The Commissioner claimed that s. 6 of the General Clauses Act, 1897, saved the assessments as well as the notices.

Held, that s. 6 of the General Clauses Act, 1897, was inapplicable as the Amending Act of 1948 indicated a different intention within the meaning of that section, inasmuch as the amended s. 34 of the Indian Income-tax Act, 1922, provided that it shall be deemed to have come into force on March 30, 1948.

Lemm v. *Mitchell*, [1912] A.C. 400, distinguished.

Held, further, that the notices issued by the Income-tax Officer on August 8, 1948, and the assessments based on them were invalid.

Venkatachalam v. *Bombay Dyeing & Mfg. Co., Ltd.*, [1959] S.C.R. 703, applied.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 650 of 1957.

Appeal from the judgment dated July 13, 1956, of the Patna High Court in Miscellaneous Judicial Case No. 665 of 1954.

R. Ganapathy Iyer and *R. H. Dhebar*, for the appellant.

A. V. Viswanatha Sastri and *R. C. Prasad*, for the respondent.

1960. November 29. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—This is an appeal by the Commissioner of Income-tax with a certificate against the judgment and order of the High Court at Patna answering two questions of law referred to it under s. 66(1) of the Income-tax Act by the Tribunal, in the negative. Those questions were: *Hidayatullah J.*

"(1) Whether in the circumstances of the case assessment proceedings were validly initiated under s. 34 of the Indian Income-tax Act?

(2) If so, whether in the circumstances of the case the amount received from interest on arrears of agricultural rent was rightly included in the income of the assessee?"

The assessee, the Maharaja Pratapsingh Bahadur of Gidhaur, had agricultural income from his zamindari for the four assessment years 1944-45 to 1947-48. In assessing his income to income-tax, the authorities did not include in his assessable income interest received by him on arrears of rent. This was presumably so in view of the decision of the Patna High Court. When the Privy Council reversed the view of law taken by the Patna High Court in *Commissioner of Income-tax* v. *Kamakhya Narayan Singh* (1), the Income-tax Officer issued notices under s. 34 of the

(1) [1948] 16 I.T.R. 325.

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Indian Income-tax Act for assessing the escaped income. These notices were issued on August 8, 1948. The assessments after the returns were filed, were completed on August 26, 1948. Before the notices were issued, the Income-tax Officer had not put the matter before the Commissioner for his approval, as the section then did not require it, and the assessments were completed on those notices. Section 34 was amended by the Income-tax and Business Profits Tax (Amendment) Act, 1948 (No. 48 of 1948), which received the assent of the Governor-General on September 8, 1948. The appeals filed by the assessee were disposed of on September 14 and 15, 1951, by the Appellate Assistant Commissioner, before whom no question as regards the validity of the notices under s. 34 was raised. The question of the validity of the notices without the approval of the Commissioner appears to have been raised before the Tribunal for the first time. In that appeal, the Accountant Member and the Judicial Member differed, one holding that the notices were invalid and the other, to the contrary. The President agreed with the Accountant Member that the notices were invalid, and the assessments were ordered to be set aside.

The Tribunal then stated a case and raised and referred the two questions, which have been quoted above. The High Court agreed with the conclusions of the majority, and the present appeal has been filed on a certificate granted by the High Court.

Section 34, as it stood prior to the amendment Act No. 48 of 1948, did not lay any duty upon the Income-tax Officer to seek the approval of the Commissioner before issuing a notice under s. 34. The amending Act by its first section made ss. 3 to 12 of the amending Act retrospective by providing "sections 3 to 12 shall be deemed to have come into force on the 30th day of March, 1948....." Section 8 of the amending Act substituted a new section in place of s. 34, and in addition to textual changes with which we are not concerned, also added a proviso to the following effect:

"Provided that—

(1) the Income-tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons that it is a fit case for the issue of such notice."

The question is whether the notices which were issued were rendered void by the operation of this proviso. The Commissioner contends that s. 6 of the General Clauses Act, particularly cls. (b) and (c) saved the assessments as well as the notices. He relies upon a decision of the Privy Council in *Lemm* v. *Mitchell* (1), *Eyre* v. *Wynn-Mackenzie* (2) and *Butcher* v. *Henderson* (3) in support of his proposition. The last two cases have no bearing upon this matter; but strong reliance is placed upon the Privy Council case. In that case, the earlier action which had been commenced when the Ordinance had abrogated the right of action for criminal conversation, had already ended in favour of the defendant and no appeal therefrom was pending, and it was held that the revival of the right of action for criminal conversation did not invest the plaintiff with a right to begin an action again and thus expose the defendant to a double jeopardy for the same act, unless the statute expressly and by definite words gave him that right. The Privy Council case is thus entirely different.

No doubt, under s. 6 of the General Clauses Act it is provided that where any Act repeals any enactment, then unless a different intention appears, the repeal shall not affect the previous operation of any enactment so repealed or anything duly done thereunder or affect any right, obligation or liability acquired, accrued or incurred under any enactment so repealed. It further provides that any legal proceedings may be continued or enforced as if the repealing Act had not been passed. Now, if the amending Act had repealed the original s. 34, and merely enacted a new section in its place, the repeal might not have affected the operation of the original section by virtue of s. 6. But the amending Act goes further than this. It

(1) [1912] A.C. 400. (2) (1896) 1 Ch. 135.
(3) (1868) L.R. 3 Q. B. 335.

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repeals the original s. 34, not from the day on which the Act received the assent of the Governor-General but from a stated day, viz., March 30, 1948, and substitutes in its place another section containing the proviso above mentioned. The amending Act provides that the amending section shall be deemed to have come into force on March 30, 1948, and thus by this retrospectivity, indicates a different intention which excludes the application of s. 6. It is to be noticed that the notices were all issued on August 8, 1948, when on the statute book must be deemed to be existing an enactment enjoining a duty upon the Income-tax Officer to obtain prior approval of the Commissioner, and unless that approval was obtained, the notices could not be issued. The notices were thus invalid. The principle which was applied by this Court in *Venkatachalam* v. *Bombay Dyeing & Mfg. Co. Ltd.* (1) is equally applicable here.

No question of law was raised before us, as it could not be in view of the decision of this Court in *Narayana Chetty* v. *Income-tax Officer* (2), that the proviso was not mandatory in character. Indeed, there was time enough for fresh notices to have been issued, and we fail to see why the old notices were not recalled and fresh ones issued.

For these reasons, we are in agreement with the High Court in the answers given, and dismiss this appeal with costs.

Appeal dismissed.

(1) [1959] S.C.R. 703.

(2) [1959] 35 I.T.R. 388.

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November 29.

C. A. ABRAHAM, UPPOOTTIL, KOTTAYAM

v.

THE INCOME-TAX OFFICER, KOTTAYAM AND ANOTHER

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Suppression of income of partnership firm—Penalty, if can be imposed after dissolution of partnership—Income-tax Act, 1922 (11 of 1922), ss. 28(1)(c), 44.

The appellant who was carrying on business in food grains in partnership with another person submitted the returns of the income of the firm for the accounting years even after his partner's death. It was found that certain income of the firm was concealed and the Income-tax Officer not only assessed the firm to tax for the suppressed income but also imposed penalties for concealing the said income. Appeals to the higher income tax authorities failed and the appellant then applied to the High Court for a writ of certiorari quashing the orders of assessment and imposition of penalty on the ground inter alia that the firm was dissolved by his partner's death and no penalty could be imposed after dissolution of the firm, The High Court rejected the petition. On appeal with the certificate of the High Court,

Held, that by virtue of s. 44 and other provisions of the Income Tax Act a partner of a dissolved partnership firm may not only be made liable to assessment for income tax for the accounting years but despite dissolution of the firm he may be made liable to pay penalty for concealing the income of the firm under s. 28(1)(c) of the Act. The analogy of dissolution of a Hindu Joint Family does not apply to dissolution of a partnership.

Mareddi Krishna Reddy v. *Income-tax Officer, Tenali,* [1957] 31 I.T.R. 678, approved.

Commissioner of Income-tax v. *Rayalaseema Oil Mills,* [1959] 37 I.T.R. 208 and *S. V. Veerappan Chettiar* v. *Commissioner of Income-tax, Madras,* [1957] 32 I.T.R. 411, disapproved.

Mahankali Subbarao v. *Commissioner of Income-tax,* [1957] 31 I.T.R. 867, distinguished.

The Legislature intended that the provisions of Ch. IV of the Act shall apply to a firm even after discontinuance of its business. In interpreting a fiscal statute the Court cannot proceed to make good deficiencies if there be any. In case of doubt it should be interpreted in favour of the tax payer.

The expression "assessment" has different connotations and has been used in its widest connotation in Ch. IV and s. 44 of

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the Act. It is not restricted only to computation of tax but includes imposition of penalty on tax payers found in the process of assessment guilty of concealing income.

Commissioner of Income-tax, Bombay Presidency and Aden v. *Khemchand Ramdas*, [1938] 6 I.T.R. 414, referred to.

The Income-tax Act provided a complete machinery for obtaining relief against improper orders passed by the Income-tax Authorities and the appellant could not be permitted to abandon that machinery, and invoke the jurisdiction of the High Court under Art. 226 of the Constitution against the orders of the taxing authorities.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 517 of 1958.

Appeal from the judgment and order dated October 31, 1957, of the Kerala High Court in O. P. No. 215 of 1957.

G. B. Pai and *Sardar Bahadur*, for the appellant.

Hardyal Hardy and *D. Gupta*, for the respondents.

1960. November 29. The Judgment of the Court was delivered by

Shah J.

SHAH, J.—C. A. Abraham hereinafter referred to as the appellant and one M. P. Thomas carried on business in food grains in partnership in the name and style of M. P. Thomas & Company at Kottayam. M. P. Thomas died on October 11, 1949. For the account years 1123, 1124 and 1125 M.E. corresponding to August 1947-July 1948, August 1948-July 1949 and August 1949-July 1950, the appellant submitted as a partner returns of the income of the firm as an unregistered firm. In the course of the assessment proceedings, it was discovered that the firm had carried on transactions in different commodities in fictitious names and had failed to disclose substantial income earned therein. By order dated November 29, 1954, the Income Tax Officer assessed the suppressed income of the firm in respect of the assessment year 1124 M.E. under the Travancore Income Tax Act and in respect of assessment years 1949-50 and 1950-51 under the Indian Income Tax Act and on the same day issued notices under s. 28 of the Indian Income Tax Act in respect of the years 1949-50 and 1950-51 and

under s. 41 of the Travancore Income Tax Act for the year 1124 M.E., requiring the firm to show cause why penalty should not be imposed. These notices were served upon the appellant.

The Income Tax Officer after considering the explanation of the appellant imposed penalty upon the firm of Rs. 5,000 in respect of the year 1124 M.E., Rs. 2,000 in respect of the year 1950-51 and Rs. 22,000 in respect of the year 1951-52. Appeals against the orders passed by the Income Tax Officer were dismissed by the Appellate Assistant Commissioner. The appellant then applied to the High Court of Judicature of Kerala praying for a writ of certiorari quashing the orders of assessment and imposition of penalty. It was claimed by the appellant inter alia that after the dissolution of the firm by the death of M. P. Thomas in October, 1949, no order imposing a penalty could be passed against the firm. The High Court rejected the application following the judgment of the Andhra Pradesh High Court in *Mareddi Krishna Reddy* v. *Income Tax Officer, Tenali* (1). Against the order dismissing the petition, this appeal is preferred with certificate of the High Court.

In our view the petition filed by the appellant should not have been entertained. The Income Tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income Tax authorities, and the appellant could not be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under Art. 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal. But the High Court did entertain the petition and has also granted leave to the appellant to appeal to this court. The petition having been entertained and leave having been granted, we do not think that we will be justified at this stage in dismissing the appeal in limine. On the merits, the appellant is not entitled to relief. The Income Tax Officer found that the appellant had, with a view to evade payment of tax,

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deliberately concealed material particulars of his income. Even though the firm was carrying on transactions in food grains in diverse names, no entries in respect of those transactions in the books of account were posted and false credit entries of loans alleged to have been borrowed from several persons were made. The conditions prescribed by s. 28(1)(c) for imposing penalty were therefore fulfilled. But says the appellant, the assessee firm had ceased to exist on the death of M. P. Thomas, and in the absence of a provision in the Indian Income Tax Act whereby liability to pay penalty may be imposed after dissolution against the firm under s. 28(1)(c) of the Act, the order was illegal. Section 44 of the Act at the material time stood as follows:

"Where any business,...carried on by a firm..... has been discontinued...every person who was at the time of such discontinuance...a partner of such firm,... shall in respect of the income, profits and gain of the firm be jointly and severally liable to assessment under Chapter IV for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

That the business of the firm was discontinued because of the dissolution of the partnership is not disputed. It is urged however that a proceeding for imposition of penalty and a proceeding for assessment of income-tax are matters distinct, and s. 44 may be resorted to for assessing tax due and payable by a firm business whereof has been discontinued, but an order imposing penalty under s. 28 of the Act cannot by virtue of s. 44 be passed. Section 44 sets up machinery for assessing the tax liability of firms which have discontinued their business and provides for three consequences, (1) that on the discontinuance of the business of a firm, every person who was at the time of its discontinuance a partner is liable in respect of income, profits and gains of the firm to be assessed jointly and severally, (2) each partner is liable to pay the amount of tax payable by the firm, and (3) that the provisions of Chapter, so far as may be, apply to such assessment. The liability declared by s. 44 is

undoubtedly to assessment under Chapter IV, but the expression "assessment" used therein does not merely mean computation of income. The expression "assessment" as has often been said is used in the Income Tax Act with different connotations. In *Commissioner of Income Tax, Bombay Presidency & Aden* v. *Khemchand Ramdas* (1), the Judicial Committee of the Privy Council observed:

"One of the peculiarities of most Income-tax Acts is that the word "assessment" is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. The Indian Income-tax Act is no exception in this respect.....".

A review of the provisions of Chapter IV of the Act sufficiently discloses that the word "assessment" has been used in its widest connotation in that chapter. The title of the chapter is "Deductions and Assessment". The section which deals with assessment merely as computation of income is s. 23; but several sections deal not with computation of income, but determination of liability, machinery for imposing liability and the procedure in that behalf. Section 18A deals with advance payment of tax and imposition of penalties for failure to carry out the provisions therein. Section 23A deals with power to assess individual members of certain companies on the income deemed to have been distributed as dividend, s. 23B deals with assessment in case of departure from taxable territories, s. 24B deals with collection of tax out of the estate of deceased persons; s. 25 deals with assessment in case of discontinued business, s. 25A with assessment after partition of Hindu Undivided families and ss. 29, 31, 33 and 35 deal with the issue of demand notices and the filing of appeals and for reviewing assessment and s. 34 deals with assessment of incomes which have escaped assessment. The expression "assessment" used in these sections is not used merely in the sense of computation of income and there is in our judgment no ground for holding

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that when by s. 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under s. 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, "all the provisions of Chapter IV shall so far as may be apply to such assessment" a restricted content: in terms it says that all the provisions of Chapter IV shall apply so far as may be to assessment of firms which have discontinued their business. By s. 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. It is true that this liability arises only if the Income-tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the Taxing authorities; but it is imposed as a part of the machinery for assessment of tax liability. The use of the expression "so far as may be" in the last clause of s. 44 also does not restrict the application of the provisions of Chapter IV only to those which provide for computation of income. By the use of the expression "so far as may be" it is merely intended to enact that the provisions in Ch. IV which from their nature have no application to firms will not apply thereto by virtue of s. 44. In effect, the Legislature has enacted by s. 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV.

The Legislature has expressly enacted that the provisions of Chapter IV shall apply to the assessment of

a business carried on by a firm even after discontinuance of its business, and if the process of assessment includes taking steps for imposing penalties, the plea that the Legislature has inadvertently left a lacuna in the Act stands refuted. It is implicit in the contention of the appellant that it is open to the partners of a firm guilty of conduct exposing them to penalty under s. 28 to evade penalty by the simple expedient of discontinuing the firm. This plea may be accepted only if the court is compelled, in view of unambiguous language, to hold that such was the intention of the Legislature. Here the language used does not even tend to such an interpretation. In interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any: the court must interpret the statute as it stands and in case of doubt in a manner favourable to the tax-payer. But where as in the present case, by the use of words capable of comprehensive import, provision is made for imposing liability for penalty upon tax-payers guilty of fraud, gross negligence or contumacious conduct, an assumption that the words were used in a restricted sense so as to defeat the avowed object of the Legislature qua a certain class will not be lightly made.

Counsel for the appellant relying upon *Mahankali Subbarao* v. *Commissioner of Income Tax* (1), in which it was held that an order imposing penalty under s. 28(1)(c) of the Indian Income Tax Act upon a Hindu Joint Family after it had disrupted, and the disruption was accepted under s. 25A(1) is invalid, because there is a lacuna in the Act, submitted that a similar lacuna exists in the Act in relation to dissolved firms. But whether on the dissolution of a Hindu Joint Family the liability for penalty under s. 28 which may be incurred during the subsistence of the family cannot be imposed does not fall for decision in this case: it may be sufficient to observe that the provisions of s. 25A and s. 44 are not in pari materia. In the absence of any such phraseology in s. 25A as is used in s. 44, no real analogy between the content of that section and s. 44 may be assumed. Undoubtedly,

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by s. 44, the joint and several liability which is declared is liability to assessment in respect of income, profits or gains of a firm which has discontinued its business, but if in the process of assessment of income, profits or gains, any other liability such as payment of penalty or liability to pay penal interest as is provided under s. 25, sub-s. (2) or under s. 18A sub-ss. (4), (6), (7), (8) and (9) is incurred, it may also be imposed, discontinuation of the business notwithstanding.

In our view, Chief Justice Subba Rao has correctly stated in Mareddi Krishna Reddy's case (supra) that:

"Section 28 is one of the sections in Chapter IV. It imposes a penalty for the concealment of income or the improper distribution of profits. The defaults made in furnishing a return of the total income, in complying with a notice under sub-s. (4) of s. 22 or sub-s. (2) of s. 23 and in concealing the particulars of income or deliberately furnishing inadequate particulars of such income are penalised under that section. The defaults enumerated therein relate to the process of assessment. Section 28, therefore, is a provision enacted for facilitating the proper assessment of taxable income and can properly be said to apply to an assessment made under Chapter IV. We cannot say that there is a lacuna in s. 44 such as that found in s. 25A of the Act.

We are unable to agree with the view expressed by the Andhra Pradesh High Court in the later Full Bench decision in *Commissioner of Income Tax* v. *Rayalaseema Oil Mills* (1), which purported to overrule the judgment in Mareddi Krishna Reddy's case (supra). We are also unable to agree with the view expressed by the Madras High Court in *S. V. Veerappan Chettiar* v. *Commissioner of Income Tax, Madras* (2).

In the view taken by us, the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1959] 37 I.T.R. 208. (2) [1957] 32 I.T.R. 411.

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ALL INDIA REPORTER LTD., NAGPUR

v.

RAMACHANDRA DHONDO DATAR

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Decree for compensation for wrongful termination of service—Arrears of salary, interest and costs, if amount to salary—Power of employer to deduct income-tax from salary—Indian Income Tax Act, 1922 (11 of 1922), ss. 18(2), 46(5).

In a civil suit the respondent obtained a decree against his employer the appellant company for a sum which included compensation for wrongful termination of his service, arrears of salary, interest and costs of the suit, and then applied for execution of the decree. The Income-tax Officer served a notice upon the respondent under s. 46 of the Indian Income-tax Act and applied to the District Judge that the appellant be permitted to deduct at source the income-tax, surcharge and super tax on the sum awarded to the respondent and pay the same in the Government Treasury. The appellant-company also moved the executing court for a declaration that they were entitled and bound to deduct the tax due on the amount. The District Judge directed the appellant company to pay the income-tax and super-tax to the Income Tax Department and pay the balance in Court together with a receipt for the income tax paid. In appeal the High Court reversed the order of the District Judge and directed the execution of the decree as claimed by the respondent. On appeal by the appellant company,

Held, that as no tax was assessed against the respondent the Income Tax Officer could not issue a notice under s. 46(5) requiring the appellant company to deduct tax from the decretal amount.

A substantial part of the decretal amount did not represent "salary" of the respondent: it consisted of compensation for wrongful termination of the respondent's service, salary in lieu of six months' notice, interest and costs of the suit. It was a judgment-debt and no provision for payment of income tax was made in the decree which was liable to be executed as prayed by the respondent. The appellant company was not therefore entitled or bound to deduct income tax under s. 18 sub-s. (2) of the Act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 327 of 1959.

Appeal from the order dated June 28, 1956, of the Bombay High Court at Nagpur in Misc. First Appeal No. 15 of 1954.

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A. V. Viswanatha Sastri, Shankar Anand and *A. G. Ratnaparkhi*, for the appellant.

K. N. Rajagopal Sastri, as amicus curiae.

1960. November 29. The Judgment of the Court was delivered by

SHAH, J.—Ramachandra Dhondo Datar—hereinafter referred to as the respondent—was employed by the appellant company in its publications branch. By agreement dated March 23, 1943, the appellant company agreed to pay to the respondent as from April 1, 1943, remuneration per annum equal to $3\frac{1}{2}\%$ of the gross sales or Rs. 12,000 whichever was greater. The agreement was to remain in operation for ten years from April 1, 1943, in the first instance and was renewable at the option of the respondent for such period as he desired. By notice dated April 19, 1948, served on the respondent on April 22, 1948, the appellant company terminated the employment of the respondent. The respondent then filed a civil suit in the court of the Fifth Additional District Judge, Nagpur, for a decree for Rs. 1,30,000 being the amount of compensation for wrongful termination of employment, arrears of salary and interest. On July 17, 1953, the court after giving credit for the amount received by the respondent passed a decree for Rs. 42,359 (which was inclusive of Rs. 36,000 as compensation for termination of employment and Rs. 6,000 as salary in lieu of six months' notice and interest) and costs and interest on judgment. The respondent then applied for execution of the decree and claimed Rs. 54,893-12-0 less Rs. 18,501-10-0 decreed against him in a cross suit filed by the appellant company. The Income Tax Officer, Nagpur, served a notice under s. 46 of the Indian Income Tax Act upon the respondent and also gave intimation to the District Judge, Nagpur, that the appellant company be permitted to deduct at source and to pay into the Government Treasury Rs. 15,956-13-0 as income-tax, surcharge and super-tax due on the sum of Rs. 50,972-2-0 awarded to the respondent. The appellant company also applied that the

executing Court do declare that the appellant company was entitled and in law bound to deduct the tax due on the amount. The learned Judge directed the appellant company to pay to the Income Tax Department Rs. 15,956-13-0 on account of income-tax and super-tax on the amount due to the respondent and directed it to pay the balance in court after filing a receipt for payment of tax from the Income Tax department. In appeal to the High Court of Judicature at Nagpur, the order passed by the District Judge was reversed and execution as claimed by the respondent was directed.

The appellant company contends that under s. 18(2) of the Income Tax Act, it was bound to deduct the tax computed at the appropriate rate on the salary payable to the respondent as the amount due under the decree represented salary. Section 18 sub-s. (2) of the Income Tax Act in so far as it is material provides that any person paying any amount chargeable under the head "salaries" shall at the time of payment deduct income-tax and super-tax at the rate representing the average of the rates applicable to the estimated total income of the assessee under the head "salary". Sub-s. (7) declares that a person failing to deduct the taxes required by the section shall be deemed to be an assessee in default in respect of such tax. The Legislature has, it is manifest, imposed upon the employer the duty to deduct tax at the appropriate rate on salary payable to the employee and if he fails to do so, the tax not deducted may be recovered from him. But the liability to deduct arises in law, if the amount is due and payable as salary. In this case, there has been no assessment of tax due by the Income Tax Officer on the amount payable to the respondent. Under s. 46(5), any person paying salary to an assessee may be required by the Income Tax Officer to deduct arrears of tax due from the latter and the employer is bound to comply with such a requisition and to pay the amount deducted to the credit of the Government. But this order can only be passed if income-tax has been assessed and has remained unpaid. It is undisputed that at the material

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time, no tax was assessed against the respondent; the Income Tax Officer had accordingly no authority to issue a notice under s. 46(5). Nor could the Income Tax Officer claim to recover tax due by a proceeding in the nature of a garnishee proceeding by applying to the civil court to attach the Judgment-debt payable by the company. The application submitted by the Income Tax Officer must therefore be ignored. Undoubtedly, the employer is by s. 18 of the Act liable to deduct from the salary payable by him to his employee the amount of tax at the average rate applicable to the estimated total income; but can it be said that as between the appellant company and the respondent the decretal amount represented salary? The respondent had filed a suit for a decree for arrears of salary, compensation for wrongful termination of employment and interest. The court having passed a decree on that claim, it became a judgment-debt. It may have been open to the appellant company in the suit to apply to the court for making a provision in the decree for payment of income-tax due by the respondent, but no such provision was made.

We are not concerned to decide in this appeal whether in the hands of the respondent the amount due to him under the decree, when paid, will be liable to tax; that question does not fall to be determined in this appeal. The question to be determined is whether as between the appellant company and the respondent the amount decreed is due as salary payment of which attracts the statutory liability imposed by s. 18. The claim decreed by the civil court was for compensation, for wrongful termination of employment, arrears of salary, salary due for the period of notice and interest and costs, less withdrawals on salary account. The amount for which execution was sought to be levied was the amount decreed against which was set off the claim under the cross-decree. A substantial part of the claim decreed represented compensation for wrongful termination of employment and it would be difficult to predicate of the claim sought to be enforced what part thereof if any represented salary due. Granting that compensation payable to an

employee by an employer for wrongful termination of employment be regarded as in the nature of salary, when the claim is merged in the decree of the court, the claim assumes the character of a judgment-debt and to judgment-debts s. 18 has not been made applicable. The decree passed by the civil court must be executed subject to the deductions and adjustments permissible under the Code of Civil Procedure. The judgment-debtor may, if he has a cross-decree for money, claim to set off the amount due thereunder. If there be any adjustment of the decree, the decree may be executed for the amount due as a result of the adjustment. A third person who has obtained a decree against the judgment-creditor may apply for attachment of the decree and such decree may be executed subject to the claim of the third person: but the judgment-debtor cannot claim to satisfy, in the absence of a direction in the decree to that effect the claim of a third person against the judgment-creditor, and pay only the balance. The rule that the decree must be executed according to its tenor may be modified by a statutory provision. But there is nothing in the Income Tax Act which supports the plea that in respect of the amount payable under a judgment-debt of the nature sought to be enforced, the debtor is entitled to deduct income-tax which may become due and payable by the judgment-creditor on the plea that the cause of action on which the decree was passed was the contract of employment and a part of the claim decreed represented amount due to the employee as salary or damages in lieu of salary.

Counsel for the appellant company strongly relied upon the decision of the House of Lords in *Westminster Bank Ltd.* v. *Riches* (1). That was a case in which in an action brought by one R against the Westminster Bank trustee of the estate of one X—R was awarded a decree for £ 36,255 principal and £ 10,028 as interest. The Bank thereafter brought an action for a declaration that it had satisfied the judgment in the action by R by paying him the amount

(1) 18 Tax Cases 159.

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due less £ 5,014, the latter sum representing income-tax on the interest awarded by the judgment. It was held by the House of Lords that £ 10,028 was "interest of money" within Schedule D and General Rule 21 of the Income Tax Act, 1918, and that income-tax was deductible therefrom. In that case, the only argument advanced on behalf of the Bank is set out in the speech of Viscount Simon, L. C. at p. 187:

"The appellant contends that the additional sum of £ 10,028 though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, is not really interest such as attracts Income Tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purposes of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest."

The House of Lords in that case by a majority held that £ 10,028 awarded under the judgment represented not capital but interest and was liable to tax. In our view, this case has no application to the facts of the present case. In the case before us, there is a decree passed in favour of the respondent: under the scheme of the Civil Procedure Code, that decree has to be executed as it stands, subject to such deductions or adjustments as are permissible under the Code. There was no tax liability which the respondent was assessed to pay in respect of this amount till the date on which the appellant company sought to satisfy the alleged tax liability of the respondent. As between the appellant company and the respondent, the amount did not represent salary; it represented a judgment-debt and for payment of income-tax thereon, no provision was made in the decree. The Civil Procedure Code bars an action of the nature which was filed in Westminster Bank's case (supra). The defence to the execution if any must be raised in the execution proceeding and not by a separate action. The amount payable by the appellant company to the respondent was not salary but a judgment-debt, and before paying that debt the appellant company could not claim

to deduct at source tax payable by the respondent. Nor could the appellant company seek to justify its plea on the ground that the judgment-creditor was indebted to a third person.

The principle of the case in *Manickam Chettiar* v. *Income Tax Officer, Madura* (1), on which reliance was also sought to be placed by the appellant company has no application to this case. In *Manickam Chettiar's* case (1), in execution of a money decree certain properties belonging to a judgment-debtor were attached and sold and the sale proceeds were received by the court. The Income Tax Officer who had assessed the decree-holder to tax payable by him on his other income applied to the court for an order directing payment to him out of the sale proceeds the amount of income-tax due by the decree-holder. It was held that the claim for income-tax was entitled to priority in payment and the court had inherent power to make an order on the application for payment of money due as income-tax. Tax had admittedly been assessed, and proceedings substantially for recovery of the tax so assessed were adopted by the Income Tax Officer. It was held in the circumstances that the court had jurisdiction to direct recovery of tax out of the amount standing to the credit of the decree-holder. The principle of that case can have no application to the facts of the present case.

The respondent had not appeared before us, but we have been assisted by Mr. Rajagopala Sastri and we are indebted to him for placing the evidence and the various aspects of the case on a true appreciation of which the question in issue fell to be determined.

The appeal fails and is dismissed. As there was no appearance for the respondent, there will be no order for costs.

Appeal dismissed.

(1) VI I.T.R. 180.

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MESSRS. BASANT LAL BANARSI LAL

v.

BANSI LAL DAGDULAL

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO and J. R. MUDHOLKAR, JJ.)

Forward Contracts in Oilseeds—If illegal in Greater Bombay—Bombay Forward Contracts Control Act, 1947 (Bom. LXIV of 1947), s. 3—Essential Supplies (Temporary Powers) Act, 1946 (XXIV of 1946), s. 8.

Various contracts for sale of goods had been made between the parties in Bombay each of which contained an arbitration clause. Disputes having arisen in March, 1952, in respect of these contracts, they were referred to arbitration and a composite award was made on October 7, 1952, against the respondent. One of these disputes had arisen out of a forward contract in groundnuts. The respondent applied to have the award set aside on the ground that the forward contract in groundnuts was illegal as such a contract was prohibited by the Oilseeds (Forward Contract Prohibition) Order, 1943, issued under the Essential Supplies (Temporary Powers) Act, 1946, passed by the Central Legislature. The appellant contended that the Essential Supplies (Temporary Powers) Act, 1946, was repugnant to the Bombay Forward Contracts Control Act, 1947, passed by the Provincial Legislature of Bombay which had received the assent of the Governor-General of India and therefore under s. 107(2) of the Government of India Act, 1935, which applied, the Bombay Act prevailed in Bombay in preference to the Central Act and under the Bombay Act Forward Contract in groundnut was valid. The High Court accepted the contention of the respondent and set aside the award.

Section 8 of the Bombay Act provided: "Every forward contract for the sale or purchase of, or relating to, any goods specified in the notification under sub-section (3) of section 1 which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed" and thereafter, set out the manner in which and the persons between whom such contracts could be made and also made punishable a person making a contract declared illegal.

Section 3 of the Central Act provided, "The Central Government.....may by notified order provide for.....prohibiting..... trade and commerce" in any essential commodity. Under this section the Oilseeds (Forward Contract Prohibition) Order was passed prohibiting forward contracts in groundnuts, which was one of the essential commodities specified in the Central Act.

Held, The Bombay Act did not make any contract legal. Its only effect was to render certain forward contracts illegal if not

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made in compliance with its terms while the Central Act made the contracts to which it applied, illegal. There was, therefore, no repugnancy between the Bombay Act and the Central Act and both of them applied to Bombay.

Article 372 of the Constitution continued both these Acts, and so there is no provision in the Constitution under which any one of them may be said to apply to the exclusion of the other.

A composite award in respect of more than one dispute which is not severable, must be set aside as a whole if any of the disputes had been illegally referred.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 264 of 1956.

Appeal by special leave from the Judgment and Order dated June 29, 1954, of the Bombay High Court in Appeal No. 127 of 1953.

A. V. Viswanatha Sastri, Hemendra Shah, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the Appellant.

J. C. Bhatt, C. J. Shah and *Naunit Lal*, for the Respondent.

1960. November 30. The Judgment of the Court was delivered by

Sarkar J.

SARKAR, J.—The appellant is a commission agent and pucca aratiya and has been acting as such for the respondent since November 7, 1951, in the course of which various contracts were made between them in Greater Bombay. On February 26, 1952, two of such contracts were outstanding, one of which was in respect of groundnuts and was a forward contract.

In March 1952, disputes arose between the parties as to whether these contracts had been closed, each side making a claim on the other on the basis of its own contention. Eventually, on March 18, 1952, the appellant referred the disputes to arbitration under the arbitration clause contained in the contracts. On October 7, 1952, the arbitrators made one composite award for Rs. 22,529-15-9 against the respondent in respect of the said disputes. It is not very clear whether this award covered other disputes also.

This award was duly filed in the Bombay City Civil

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Court under the Arbitration Act, 1940, for a judgment being passed on it. Thereafter, on July 17, 1953, the respondent made an application to the Bombay City Civil Court for setting aside the award contending that forward contracts in groundnuts were illegal as the making of such contracts was prohibited by the Oilseeds (Forward Contract Prohibition) Order, 1943, issued under the Essential Supplies (Temporary Powers) Act, 1946, and hence the arbitration clause contained in the forward contract in groundnuts between the parties was null and void. It was said that the award based on that arbitration clause was therefore a nullity. The appellant's answer to this contention was that the Essential Supplies (Temporary Powers) Act did not apply to Greater Bombay where forward contracts were governed by the Bombay Forward Contracts Control Act, 1947, hereafter called the Bombay Act, and as the contract in groundnuts had been made in terms of that Act, it was legal, and, therefore, the award in terms of the arbitration clause contained in it was a valid and enforceable award. The learned Principal Judge of the Bombay City Civil Court accepted the respondent's contention and set aside the award. An appeal by the appellant to the High Court at Bombay against the judgment of the City Civil Court failed. The appellant has now come to this Court in further appeal.

The only question in this appeal is whether the Essential Supplies (Temporary Powers) Act, which was passed by the Central Legislature in 1946, applied to Bombay? If it did, then the Oilseeds (Forward Contract Prohibition) Order, 1943, hereafter called the Oilseeds Order, issued under it would make the contract in groundnuts illegal and no award could be made under the arbitration clause contained in it. This is not in dispute.

Now, the Oilseeds Order was first passed in 1943 under r. 83 of the Defence of India Rules. The Defence of India Rules ceased to be in force on September 30, 1946. In the meantime however, as the situation had not quite returned to normal in spite of the termination of the war, the British Parliament passed

an Act on March 26, 1946, called the India (Central Government and Legislature) Act, 1946 (9 & 10 Geo. VI, Ch. 39), hereafter called the British Act. Section 2 of this Act provided that the Central Legislature of India would have power to make laws with respect to various matters therein mentioned notwithstanding anything in the Government of India Act, 1935, and that that power could be exercised during the period mentioned in s. 4 and further that the laws so made to the extent they could not have been otherwise made, would cease to have effect at the expiration of that period. The Governor General under the powers reserved in s. 4 and subsequently, the Constituent Assembly of India, under the powers conferred on it under the Indian Independence Act, 1947, extended the period mentioned in s. 4 of the British Act from time to time and eventually up to March 31, 1951. It would be unprofitable for our purposes to refer to the various statutory provisions and orders under which this was done for, the extension is not in dispute.

Under the powers conferred by the British Act, the Governor-General promulgated the Essential Supplies (Temporary Powers) Ordinance, 1946, which came into force on October 1, 1946. On November 19, 1946, the Central Legislature under the same powers, passed the Essential Supplies (Temporary Powers) Act, 1946, hereafter called the Central Act, repealing the Ordinance and substantially incorporating its terms. The Central Act originally provided that it would cease to have effect on the expiration of the period mentioned is s. 4 of the British Act. As the life of the British Act was extended from time to time, suitable amendments were made in the Central Act extending its life also. Our Constitution came into force on January 26, 1950 and by virtue of Art. 372 the Central Act was continued as one of the existing laws. On August 16, 1950, under powers conferred by Art. 369 of the Constitution, Parliament passed the Essential Supplies (Temporary Powers) Amendment Act, 1950, Act LII of 1950, amending the Central Act in various respects and extending its life up to December 31, 1952. By another amendment made by Act LXV of 1952, the

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life of the Central Act was extended till January 26, 1955.

Section 3(1) of the Central Act is in these terms:

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein."

Section 2 of the Act provides that foodstuffs would be an essential commodity within the meaning of the Act and would include edible oilseeds. We have earlier stated that the Oilseeds Order was originally passed under the Defence of India Rules, which expired on September 30, 1946. The Ordinance of 1946 continued in force, orders issued under the Defence of India Rules in so far as they were consistent with it and provided that such orders would be deemed to be orders made under it. Section 17(2) of the Central Act provided that an order deemed to be made under the Ordinance and in force immediately before its commencement would continue in force and be deemed to be an order made under it. As a result of the Ordinance and the Central Act replacing it and the extension of the life of the latter from time to time, the Oilseeds Order so far as it related to edible oilseeds including groundnuts, continued in force after the expiry of the Defence of India Rules till January 26, 1955. That Order, as so continued, prohibited the making of forward contracts, that is to say, contracts providing for delivery at a future date, in respect of certain specified oilseeds including groundnuts. It is the respondent's contention that it is because of this order, read with the Central Act, that the contract in groundnuts between the parties was illegal and therefore the award made under the arbitration clause contained in it was void.

Now the British Act under which the Central Act was passed, provided in sub-sec. (4) of s. 2 that,

"Sub-section (2) of section 107 of the Government of India Act, 1935, and sub-section (2) of section 126

of that Act shall apply in relation to a law enacted by virtue of this section with respect to any matter being a matter with respect to which a Province has power to make laws as if that matter were a matter specified in Part II of the Concurrent Legislative List."

Section 107(2) of the Government of India Act, 1935, laid down that,

"Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law.....then if the Provincial law, having been reserved for the consideration of the Governor-General.....has received the assent of the Governor-General.....the Provincial law shall in that Province prevail.....". It would follow from these provisions that if a Provincial Act which had received the assent of the Governor-General, contained anything repugnant to a Central Act passed under the powers conferred by the British Act, then in the Province concerned, the Provincial Act would apply and not the Central Act.

Now, the Bombay Act which had been passed by the Provincial Legislature of Bombay in 1947, came into operation in 1948. That Legislature had power to pass the Act and the Act had received the assent of the Governor-General. At that time the Central Act deriving its force from the British Act, was in operation. If, therefore, the Bombay Act was repugnant to the Central Act, in Bombay, the Bombay Act would apply and not the Central Act. This is not in dispute. The appellant contends that the Bombay Act is so repugnant and therefore the Central Act cannot render the forward contract in groundnuts made in Greater Bombay, illegal and void.

The question, therefore, is whether the Bombay Act contains any provision repugnant to the Central Act. The preamble of the Bombay Act states that it was enacted as it was thought expedient to regulate and control forward contracts and for certain other matters. Section 1 of this Act came into force at once and gave power to the Government to bring into force by notification the remaining sections of the Act in the

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whole of the Province of Bombay or parts thereof on such date and in respect of such goods as might be specified. The Government of Bombay issued notifications under this section on December 19, 1950, applying the remaining provisions of the Act to the area called Greater Bombay in respect of all varieties of oilseeds as from the said date. Section 8 of the Bombay Act provides as follows:

S. 8.—(1) Every forward contract for the sale or purchase of, or relating to, any goods specified in the notification under sub-section (3) of section 1 which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed—

(a) In accordance with such bye-laws, made under section 6 or 7 relating to the entering into, making or performance of such contracts, as may be specified in the bye-laws, or

(b) (i) between members of a recognised association,

(ii) through a member of a recognised association, or

(iii) with a member of a recognised association, provided that such member has previously secured the written authority or consent, which shall be in writing if the bye-laws so provide, of the person entering into or making the contract, and no claim of any description in respect of such contract shall be entertained in any civil court.

(2) Any person entering into or making such illegal contract shall, on conviction, be punishable with imprisonment for a term which may extend to six months or with fine or with both.

"Recognised association" is defined in the Bombay Act as an association recognised by the Provincial Government and on December 19, 1950, the Bombay Oilseeds Exchange Limited was recognised as such an association by the Government of Bombay. The appellant is a member of this association. The contracts between the parties were all expressly made subject to the rules and regulations of this Association. The case before us has proceeded on the basis that the impugned contract in groundnut had been made in compliance

with the requirements of s. 8 and there is no finding to the contrary by the Courts below. We have hence to proceed on the same basis.

The appellant contends that s. 8 of the Bombay Act and s. 3 of the Central Act are repugnant to each other. Now s. 8 of the Bombay Act, it will be noticed, does not purport to make any contract legal. Its only effect is to render forward contracts in all varieties of oilseeds illegal if not made in compliance with its terms. The learned Advocate for the appellant says that the effect of s. 8 was to render a forward contract in all oilseeds made in terms of it, legal and, therefore, a repugnancy arose between its terms and the terms of the Oilseeds Order issued under the Central Act which made forward contracts in edible oilseeds illegal. The learned Advocate referred to various other provisions of the Bombay Act and the bye-laws of the Association made in terms of the Act to show that the Bombay Act was intended to cover the entire field of forward contracts with respect to all varieties of oilseeds and was therefore intended to oust the operation of the Central Act in Greater Bombay with regard to the forward contracts covered by the former. It does not seem to us that a reference to the other provisions in the Bombay Act or to the bye-laws, is relevant in deciding the question. If the effect of s. 8 of the Bombay Act was not to render forward contracts made in terms of it legal, then no question of repugnancy with the Central Act can arise whatever may be the scope of the Bombay Act and the provisions in the bye-laws.

Therefore, it seems to us that the question is whether s. 8 of the Bombay Act by its terms makes any forward contract legal. Section 3 of the Central Act, as already seen, gives power to the Central Government to prohibit trade and commerce in oilseeds. That Act, therefore, enables the Central Government to make forward contracts in essential commodities as defined in it, illegal. That is what the Central Government did by the Oilseeds Order in so far as edible oilseeds are concerned.

We find nothing in s. 8 from which it can be said

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that it rendered any contract legal. Its only intent and effect is to declare certain forward contracts illegal. We think that the matter was very correctly put by Chagla, C. J., who delivered the judgment of the High Court. He said, "All that Sec. 8 does is to declare that forward contracts will be illegal unless they comply with the procedure laid down in Sec. 8. But it is one thing to declare a certain contract illegal. It is entirely another thing to declare an illegal contract legal. Sec. 8 does not even make an attempt to declare that forward contracts declared illegal by the Central legislation shall be legal if they comply with the technicalities laid down in Sec. 8. The assumption underlying Sec. 8, it seems to us, is that forward contracts which the Legislature is dealing with are legal contracts, but even if they are legal they are declared to be illegal unless they are performed or made or entered into in the manner laid down in Sec. 8". With these observations we fully agree.

In regard to the contention that s. 8 of the Bombay Act necessarily implies that contracts made in terms of it would be legal, it seems to us that there is no such necessity indicated in the Act. The Act clearly intends only to create an illegality, that is to say, as Chagla, C. J. said, it takes a legal contract and imposes on it certain conditions and makes it illegal if those conditions are not fulfilled. If a contract is already illegal, there is no scope for applying the Bombay Act. Furthermore, the Bombay Act deals with all kinds of goods. Sub-section (4) of s. 2 of this Act defines goods as any kind of movable property including securities but not including money or actionable claims. Now the Central Act only applies to essential commodities as defined in it. Therefore, there would be many contracts to which the Central Act would not apply and such contracts may be rendered illegal by the Bombay Act if they come within its scope and are made in disregard of the conditions laid down in s. 8.

We, therefore, come to the conclusion that there is no repugnancy between the Bombay Act and the Central Act. It follows that there is no scope for

applying the provisions of s. 107(2) of the Government of India Act, 1935. That would be the position in 1948, when the Bombay Act came into force and the Central Act was already in existence. Both the Acts would then be applying to Greater Bombay as there is no inconsistency between them. Article 372 of the Constitution continued both these Acts after the Constitution came into force and there is nothing in the Constitution which provides that any one of two existing laws, both of which had applied up to the coming into force of the Constitution, would apply to the exclusion of the other. It follows that in 1951 or 1952, when the contract in groundnuts—which it is not disputed, was a forward contract within the meaning of both the Acts—was made, both the Acts applied to it. The Constitution had not affected such application. That being the position, the contract in groundnuts must be held to be illegal under the Central Act which clearly prohibited the making of it. The Bombay Act could not make it legal for, as we have said, it was not intended to make any contract legal. It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts, one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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November 30.

MAHARAJA CHINTAMANI SARAN NATH SAH DEO

v.

THE COMMISSIONER OF INCOME-TAX, BIHAR & ORISSA

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Capital or Revenue receipt—Prospecting licence for bauxite—Licensee's right to appropriate samples in reasonable quantities—Grant of right to a portion of capital—Payments to licensor—Liability to tax.

In 1945 the appellant who was a Zamindar granted licences to different parties to prospect bauxite. Under the licence the licensee had the right to enter upon the land to prospect, dig and prove all bauxite lying in or within the land and to take away and appropriate samples of bauxite in reasonable quantities not exceeding 100 tons in the aggregate. In consideration of the premium paid, the licensees could, at their option, after giving necessary notice and on payment of a further sum, get a mining lease for a term of thirty years. The income-tax authorities were of the view that the licensees were not granted any interest in land and that the amounts received by the appellant from the licensees were revenue receipts and, therefore, assessable to income-tax.

Held, that on its true construction the transaction of 1945 did not amount merely to a grant of the use of the capital of the licensor but was really a grant of a right to a portion of the capital. Accordingly, the amounts received by the appellant were capital receipts and, therefore, not liable to income-tax.

Raja Bahadur Kamakshya Narain Singh of Ramgarh v. *Commissioner of Income-tax, Bihar and Orissa*, (1943) L.R. 70 I.A. 180, *The Member for the Board of Agricultural Income-tax, Assam* v. *Smt. Sindurani Chaudhurani*, [1957] S C.R. 1019 and *Commissioner of Income-tax, Bihar and Orissa* v. *Raja Bahadur Kamakshya Narain Singh*, [1946] 14 I.T.R. 738, considered.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 424 of 1957.

Appeal by special leave from the judgment and order dated January 25, 1955, of the Patna High Court in Misc. Judicial Case No. 621 of 1953.

N. C. Chatterjee and *R. C. Prasad*, for the appellant.

K. N. Rajagopal Sastri and *D. Gupta*, for the respondent.

1960. November 30. The Judgment of the Court was delivered by

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Maharaja Chintamani Saran Nath Sah Deo v. The Commissioner of Income-tax, Bihar & Orissa

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KAPUR, J.—This is an appeal by special leave against the judgment and order of the High Court at Patna answering the question referred to it by the Income-tax Appellate Tribunal against the assessee who is the appellant before us. The appeal relates to three assessments made on the appellant for the respective assessment years 1945-46, 1946-47 and 1947-48.

The appellant is a Zamindar and owns considerable properties. In the accounting years he granted licences to different parties to prospect for Bauxite. The particulars of the licences are:

	Received from	Date of the Licence	Period of Licence	Assessment year	Amount Received. Rs.
1.	Aluminium Corporation of India Ltd.	20-1-1945	6 months	1945/46	15,290/-.
2.	Indian Aluminium Co. Ltd.	26-5-1945	1 year	1946/47	1,24,789/-.
3.	Dayanand Modi.	7-5-1945	6 months	1947/48	1,500/-.
4.	Indian Aluminium Co. Ltd.	14-8-1945	1 year	1947/48	70,146/-.

The Income-tax Officer held that these amounts were received as revenue payments and were therefore taxable. On appeal to the Appellate Assistant Commissioner the amounts were held to be capital receipts but this order was set aside by the Income-tax Appellate Tribunal which held the amounts to be revenue receipts and taxable as such. At the instance of the appellant the case was referred to the High Court under s. 66(1) of the Income-tax Act and the following question was stated for the opinion of the Court :—

"Whether in the facts and circumstances of these cases the sums of Rs. 15,209, Rs. 1,24,789, Rs. 1,500 and Rs. 70,146 received by the assessee are income assessable to tax under the Indian Income-tax Act?"

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The question was answered in the affirmative and the High Court held that there was material to support the finding of the Tribunal, and it was a finding of fact; that the amounts received by the appellant were revenue receipts and not capital receipts. Against this judgment the appellant has come in appeal to this court by special leave.

The question that falls for decision is whether the amounts received by the assessee are capital or revenue receipts and for that purpose it is necessary to investigate the nature of the grants made by the appellant. Under the licence the licensee was granted the sole and exclusive right and liberty to

(a) to enter into and upon, to prospect, search for, mine quarry, bore, dig and prove all Bauxite lying and being in, under or within the said lands.

(b) For the purposes aforesaid and all other purposes incidental thereto dig, drive, make and maintain such pits, shafts, borings, inclines, admits levels, drifts, air courses drains, water courses, roads and ways and to set up, erect and construct such temporary engines, machinery sheds and things as may be reasonably necessary for effectually carrying on the prospecting operations hereby licenced.

(c) To remove, take away and appropriate samples and specimens of Bauxite of every quality, kind and description and in reasonable quantities not exceeding one hundred tons in all during the terms of this grant.

(d) For the purposes aforesaid to clear undergrowth brushwood and to make use of any drains or water courses on the lands or for clearing sites of working from any water which may flow or accumulate thereon or therein.

The periods of the licences were comparatively short 6 months in two cases and a year each in the other two. Under the covenants the licensees were to cause as little damage as possible to the surface of the land. They were to give full information regarding the progress of the operations and true copies of all borings to the licensor. The licensees were also

required to plug all holes made by them. The licensor convenanted to give a reasonable right of passage through and over the adjoining lands and properties and in consideration of the premium paid, the licensees could, at their option, after giving necessary notice and on payment of a further sum, get a mining lease for a term of thirty years on the terms and conditions set out in the indenture attached as schedule 2 to the licence. The Income-tax Appellate Tribunal found that the licensees were not granted any interest in land and the amounts received were revenue receipts and therefore, assessable to income-tax

A reference to some of the cases would assist in determining the nature of the transaction which was evidenced by the documents placed on the record. In *Raja Bahadur Kamakshya Narain Singh of Ramgarh* v. *Commissioner of Income-tax, Bihar & Orissa* (1) the payments by way of premium were held to be capital receipts. In that case large payments by way of royalty for granting various mining leases were received by the assessee. The leases were for a period of 999 years for mining coal with liberty to search for, work, make merchantable and carry away the coal there found and with power to dig and sink pits. In consideration of these rights the lessees paid a sum by way of *salami* (premium) and an annual sum as royalty on the amount of coal raised subject to minimum annual royalty. The lessor had the right to reenter in case of failure to pay the royalty. It was contended by the assessee there that the sums received as *salami* and royalty were capital receipts representing the price of the minerals removed. It was held that *salami* was a single payment paid for the acquisition of the right to enjoy the benefits granted by the lease and was a capital asset and that the two other forms of royalty—both minimum and per ton—flowing from the covenants in the lease were not on capital account and fell within the meaning of other income under s. 12 of the Act. Lord Wright said at p. 190:—

"The *salami*, has been, rightly in their Lordships' opinion, treated as a capital receipt. It is a single

(1) (1943) L.R. 70 I.A. 186.

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payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing."

This case was sought to be distinguished by counsel for the respondent on the ground that the lease was for a long period of 999 years but the observations above quoted were not based on this consideration but on the nature of the right which was conveyed. In *Commissioner of Income-tax, Bihar & Orissa* v. *Raja Bahadur Kamakshya Narain Singh* (1) a coal company had been given by the Court of Wards a prospecting licence in respect of certain coal bearing lands with the option of renewal and also to take a mining lease on certain terms and conditions. The prospecting licence was subsequently extended on four occasions. When the assessee attained majority he claimed that the giving of the licence was *ultra vires* the Court of Wards but there was a settlement between the licencee and the assessee by which the latter agreed to accept the various prospecting licences, their extensions and leases in consideration of which he received by way of *salami* Rs. 5,25,000 and capital lump sum of Rs. 40,000 and some other payments in lieu of cesses. The question arose whether the amounts were capital or revenue and it was held that the amount of Rs. 5,25,000 received as *salami* and the amounts received as cesses were capital receipts and therefore not taxable. Manohar Lal, A. C. J., held that the amount was received by way of settlement and not by way of *salami* but S. K. Das, J. (as he then was) held that *salami* was a lump sum payment for rights which were being given to the licensee, namely, the right to prospect for a certain number of years and also the right to get mining leases and therefore *salami* in question was undoubtedly a capital receipt.

In *The Province of Bihar* v. *Maharaja Pratap Udai Nath Sahi Deo of Ratugarh* (2) it was contended that payments in the nature of premium or *salami* were

(1) [1946] 14 I.T.R. 738. (2) [1941] 9 I.T.R. 313.

not part of the income of the assessee and were therefore not taxable and it was held that *salami* may, in certain cases, be regarded as a payment of rent in advance and it would in those cases be regarded as income but where it could not be so regarded it would not be income and therefore not taxable. It was also held that *prima facie salami* is not income.

In *The Member for the Board of Agricultural Income Tax, Assam* v. *Smt. Sindurani Chaudhurani* (1) this Court defined as *salami* as follows:

> The indicia of *salami* are (1) its single non-recurring character and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor revenue but is a capital receipt in the hands of the landlord.

Thus if it is a consideration paid by the tenant or the licensee for being let into possession with the object of obtaining a tenancy or as in this case with the object of obtaining a right to remove minerals, it cannot be termed rent or revenue but is a capital receipt. In *Sindurani's case* (1) *salami* was a lump sum payment as consideration for what the landlord was transferring to the tenant, i.e., parting with his right, under the lease, of a holding. In the instant case the terms of the covenant quoted above show that the payment has a close analogy to the payment in *Sindhurani's case*(1). That case was sought to be distinguished by the respondent on the ground that there was a transfer of a tenancy which was capable of ripening into an occupancy holding but that was not the ground on which this court decided the case of *salami*. The definition of *salami* was a general one, in that it was a consideration paid by a tenant for being let into possession for the purpose of creating a new tenancy. In *Raja Bahadur Kamakshya Narain Singh's case* (2) also the Privy Council laid the definition of *salami* in general terms and described the characteristics of a payment by way of *salami* without any reference to the nature of the lease.

In reply to the argument of counsel for the appellant, Mr. Rajagopal Sastri for the respondent argued

(1) [1957] S.C.R. 1019. (2) (1943) L.R. 70 I.A. 180.

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that the question was whether the licensor had allowed the licensee to take his capital or he had allowed him to use the capital. If it was the former, the receipts were in the nature of capital receipts and if latter they were in the nature of revenue. His contention was that it was really the latter because all that the licensee was allowed to do was to enter on the lands and make use of the assets belonging to the appellant. This, in our opinion, is not a correct approach to the question. What the licence gave to the licensee was the right to enter upon the land to prospect, search and mine quarry, bore, dig and prove all Bauxite lying in or within the land and for that purpose the licensee had the right to dig pits, shafts, borings and to remove, take away and appropriate samples and specimens of Bauxite in reasonable quantities not exceeding 100 tons in the aggregate. It cannot be said that this amounts merely to a grant of the use of the capital of the licensor but it was really a grant of a right to a portion of the capital in the shape of a general right to the capital asset.

In support of this distinction between the use of capital and the taking away of capital, counsel relied upon the following observation of Lawrence, J., in *Greyhound's case*(1):

"The question as to what receipts are revenue and what are capital has given rise to much difference of opinion; but it is clear, in my opinion, that, if the sum in question is received for what is in truth the user of capital assets and not for their realisation, it is a revenue receipt, not capital."

That may be so but the question has to be decided on the nature of the grant. The terms of the covenant in the present case which have been quoted above show that the transaction was not one merely of the user of capital assets but of their realisation. By this test therefore the receipts were on capital account and not revenue. Counsel then referred to a judgment of the Patna High Court in *R. B. H. P. Bannerji* v. *Commissioner of Income-tax, Bihar & Orissa* (2) where it was held that compensation received by the assessee

(1) (1936) 20 T.C 373. (2) [1951] 19 I.T.R. 596.

for use by the military of his lands for a short period was a revenue receipt. In that case the assessee purchased 13 bighas of land for purposes of setting up a market. That plot was requisitioned by the military authorities under the Defence of India Rules and the assessee received compensation for the use of the land. It was held to be a revenue receipt because it was really profit derived from the land for the use of a capital asset.

Another case upon which counsel for the respondent placed reliance is *Smethurst* v. *Davy* (1). That was a case which was decided on the wording of s. 31(1)(d) of the Finance Act of 1948, and therefore is not of much assistance.

Reference was also made to *Stow Bardolph Gravel Co., Ltd.* v. *Poole* (2). There the assessee company, which carried on business in sand and gravel, purchased two unworked deposits. The company contended that the payments made to acquire the deposits were deductible being expenditure which was incurred in the acquisition of trading stock or otherwise of revenue character. It was held that the company had acquired a capital asset and not stock-in-trade. The case turned upon a finding by the Special Commissioners and is not helpful. Reliance was also placed on *Rajah Nanyam Meenakshamma* v. *Commissioner of Income-tax, Hyderabad* (3). In that case certain fixed sums of money were paid as royalty for the whole period of the lease which were held to be revenue receipts as consolidated advance payments of the amount which would otherwise have been payable periodically.

None of these cases is of any assistance to the respondent's case. The question which has to be decided is what was the nature of the transaction. The covenants in the licence show that the licensee had a right to enter upon the land and take away and appropriate samples of all Bauxite of every kind up to 100 tons and therefore there was a transfer of the right the consideration for which would be a capital payment.

(1) [1957] 37 T.C. 593. (2) (1954) 35 T.C. 459.
(3) [1956] 30 I.T.R. 286.

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In our opinion the High Court was in error and the question referred should have been decided in favour of the appellant. We therefore allow the appeal, set aside the judgment and order of the High Court and answer the question in favour of the appellant who will have his costs in this Court and the High Court.

Appeal allowed.

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November 30.

DELHI STOCK EXCHANGE ASSOCIATION LTD.

v.

COMMISSIONER OF INCOME TAX, DELHI

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Assessment—Company running a Stock Exchange and dealing in shares—Admission fees of Members and Authorised Assistants—If taxable income.

The object with which the appellant company was formed was to promote and regulate the business in shares, stocks and securities etc., and to establish and conduct a Stock Exchange in order to facilitate the transaction of such business. Its capital was divided into shares on which dividend could be earned. It provided a building wherein business was to be transacted under its supervision and control. It made rules for the conduct of business of sale and purchase of shares in the Exchange premises. During the assessment year in question the company's receipts consisted of certain amounts received as admission fee from Members and Authorised Assistants and the question stated to the High Court for its opinion was whether these fees in the hands of the appellant were taxable income. The High Court answered the question in the affirmative. It held that the appellant was not a mutual society, that dividends could be earned on its share capital, that any person could become a share-holder but every share-holder was not a member unless he paid the admission fee and the real object of the company was to carry on business of exchange of stocks and earn profits. The case of the appellant, inter alia, was that as the amount received as membership fee was shown as capital in the books of the company and there was no periodicity, it should be treated as capital receipt exempt from assessment.

Held, that the High Court was right in its decision and the appeals must be dismissed.

It was wholly immaterial how the appellant treated the amounts in question. It is the nature of the receipt and not how the assessee treated it that must determine its taxability.

Since the fee received on account of Authorised Assisstants fall within the decision of this Court in *Commissioner of Income-tax* v. *Calcutta Stock Exchange Association Ltd.*, (1959) 36 I.T.R. 222, it must be held to be taxable income.

The question as to whether the Members' admission fee was taxable income was to be determined by the nature of the business of the company, its profits and the distribution thereof as disclosed by its Memorandum and Articles of Association and the rules made for the conduct of business. They showed that the income of the company was distributable amongst its share-holders as in any other joint stock company, and the body of trading members who paid the entrance fees and share-holders were not identical. The element of mutuality was, therefore, lacking.

Liverpool Corn Trade Associatian v. *Monks*, (1926) 2 K. B. 110, applied.

Commissioner of Income-tax, Bombay City v. *Royal Western India Turf Club Ltd.*, [1954] S.C.R. 289 and *Styles* v. *New York Life Insurance Co.*, (1889) 2 T.C. 460, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 187 and 190 of 1960.

Appeals from the judgment dated 22nd January, 1957, of the Punjab High Court (Circuit Bench), Delhi, in Civil Reference No. 6 of 1953.

Veda Vyasa, *S. K. Kapur* and *K. K. Jain*, for the appellant.

R. Ganapathi Iyer and *D. Gupta*, for the respondent.

1960. November 30. The Judgment of the Court was delivered by

Kapur J.

KAPUR, J.—These appeals are brought by the assessee company against a common judgment and order of the Punjab High Court by which four appeals were decided in Civil Reference No. 6 of 1953. The appeals relate to four assessment years, 1947-48, 1948-49, 1949-50 and 1950-51. Two of these assessments, i.e., for the years 1947-48 and 1948-49 were made on the

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appellant as successor to the two limited companies hereinafter mentioned.

Briefly stated the facts of the case are that the appellant company was incorporated in the year 1947. Its objects *inter alia* were to acquire as a going concern activities, functions and business of the Delhi Stock & Share Exchange Limited and the Delhi Stock and Share Brokers Association Limited and to promote and regulate the business of exchange of stocks and shares, debentures and debenture stocks, Government securities, bonds and equities of any description and with a view thereto, to establish and conduct Stock Exchange in Delhi and/or elsewhere. Its capital is Rs. 5,00,000 divided into 250 shares of Rs. 2,000 each on which dividend could be earned. The appellant company provided a building and a hall wherein the business was to be transacted under the supervision and control of the appellant. The appellant company also made rules for the conduct of business of sale and purchase of shares in the Exchange premises. The total income for the year 1947-48 was Rs. 29,363 out of which a sum of Rs. 15,975 shown as admission fees was deducted and the income returned was Rs. 13,388. In the profit and loss account of that year Members' admission fees were shown as Rs. 9,000 and on account of Authorised Assistants admission fees Rs. 6,875. The Income-tax Officer who made the assessment for the year 1947-48 disallowed this deduction. The return for the following year also was made on a similar basis but the return for the years 1949-50 and 1950-51 did not take into account the admission fees received but in the Director's report the amounts so received were shown as having been taken directly into the balance sheet. The Income-tax Officer, however, disallowed and added back the amount so received to the income returned by the appellant.

Against these orders appeals were taken to the Appellate Assistant Commissioner who set aside the additional assessments made under s. 34 in regard to the assessment years 1947-48, 1948-49 and 1949-50 and the 4th appeal in regard to the year 1950-51 was decided against the appellant. Both sides appealed

to the Income-tax Appellate Tribunal against the respective orders of the Appellate Assistant Commissioner and the Tribunal decided all the appeals in favour of the appellant. It was held by one of the members of the Tribunal that the amounts received as entrance fees were intended to be and were in fact treated as capital receipts and were therefore excluded from assessment and by the other that as there was no requisite periodicity, those amounts were not taxable. At the instance of the respondent a case was stated to the High Court on the following question:—

"Whether the admission fees of Members or Authorised Assistants received by the assessee is taxable income in its hands?"

The High Court answered the question in favour of the respondent. The High Court held that the appellant was not a mutual society and therefore was not exempt from the payment of income-tax; that it had a share capital on which dividend could be earned and any person could become a shareholder of the company by purchasing a share but every shareholder could not become a member unless he was enrolled, admitted or elected as a member and paid a sum of Rs. 250 as admission fee. On becoming a member he was entitled to exercise all rights and privileges of membership. It also found that the real object of the company was to carry on business as a Stock Exchange and the earning of profits. It was held therefore that the admission fees fell within the ambit of the expression "profits and gains of business, profession or vocation". The further alternative argument which was raised, i.e., that the income fell under s. 10(6) of the Act, was therefore not decided.

Mr. Veda Vyasa contended on behalf of the appellant that there were only 250 members of the appellant company; that the amount received as membership fees was shown as capital in the books of the company and there was no periodicity and therefore the amounts which had been treated as income should have been treated as capital receipts and therefore exempt from assessment. It was firstly contended that the question did not arise out of the order of the

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Tribunal and that a new question had been raised but the objection is futile not only because of the absence of any such objection at the stage of the drawing up the statement of the case but also because of failure to object in the High Court; nor do we see any validity in the objection raised. That was the only matter in controversy requiring the decision of the court and was properly referred by the Tribunal. It was then contended that the question had to be answered in the light of facts admitted or found by the Tribunal and that the nature of the appellant's business or the rules in regard to membership could not be taken into consideration in answering the question. That again is an unsustainable argument. The statement of the case itself shows that all these matters were taken into consideration by one of the members of the Tribunal and the learned judges of the High Court also decided the matter on that material which had been placed before the Income tax authorities and which was expressly referred to in their orders and which again was placed before the High Court in the argument presented there on behalf of the appellant company.

It is wholly immaterial in the circumstances of the present case to take into consideration as to how the appellant treated the amounts in question. It is not how an assessee treats any monies received but what is the nature of the receipts which is decisive of its being taxable. These amounts were received by the appellant as membership admission fees and as admission fees paid by the members on account of Authorised Assistants. As far as the latter payment is concerned that would fall within the decision of this Court in *Commissioner of Income-tax* v. *Calcutta Stock Exchange Association Ltd.* (1) and therefore is taxable income. The former, i.e., members admission fees has to be decided in accordance with the nature of the business of the appellant company, its Memorandum and Articles of Association and the Rules made for the conduct of business. The appellant company was an association which carried on a trade and its profits were divisible as dividend amongst the shareholders.

(1) (1959) 36 I.T.R. 222.

The object with which the company was formed was to promote and regulate the business in shares, stocks and securities etc., and to establish and conduct the business of a Stock Exchange in Delhi and to facilitate the transaction of such business. The business was more like that in *Liverpool Corn Trade Association* v. *Monks* (1). In that case an association was formed with the object of promoting the interest of corn trade with a share capital upon which the association was empowered to declare a dividend. The Association provided a Corn Exchange market, newsroom and facilities for carrying on business and membership was confined to persons engaged in the corn trade and every member was required to be a shareholder and had to pay an entrance fee. The Association also charged the members and every person making use of facilities a subscription which varied according to the use made by them. The bulk of the receipts of the Association was derived from entrance fees and subscriptions. It was therefore contended that the Association did not carry on a trade and that it was a mutual association and entrance fees and subscriptions should be disregarded in computing assessment of the assessable profits. It was held that it was not a mutual association whose transactions were incapable of producing a profit; that it carried on a trade and the entrance fee paid by members ought to be included in the association's receipts for purposes of computing the profit. Rowlatt, J. said at p. 121:

"I do not see why that amount is not a profit. The company has a capital upon which dividends may be earned, and the company has assets which can be used for the purpose of obtaining payments from its members for the advantages of such use, and one is tempted to ask why a profit is not so made exactly on the same footing as a profit is made by a railway company who issues a travelling ticket at a price to one of its own shareholders, or at any rate as much a profit as a profit made by a company from a dealing with its own shareholders in a line of business which is restricted to the shareholders."

(1) (1926) 2 K.B. 110.

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In *Commissioner of Income-tax, Bombay City* v. *Royal Western India Turf Club Ltd.* (1) this Court rejected the applicability of the principle of mutuality because there was no mutual dealing between members *inter se*. There was no putting up a common fund for discharging a common obligation undertaken by the contributors for their mutual benefit and for this reason the case decided by the House of Lords in *Styles* v. *New York Life Insurance Company* (2) was held not applicable.

In the present case the Memorandum of Association shows that the object with which the company was formed was to promote and regulate the business of exchange of stocks, shares, debentures, debenture stocks etc. The income, if any, which accrued from the business of the appellant company was distributable amongst the shareholders like in every joint stock company. According to the Articles of Association the members included shareholders and members of the Exchange and according to the rules and bye-laws of the appellant company 'member' means an individual, body of individuals, firms, companies, corporations or any corporate body as may be on the list of working members of the Stock Exchange for the time being. In the Articles of Association cls. 7 & 8, provision was made for the election of members by the Board of Directors and Rules 9 & 10 laid down the procedure for the election of these members. The entrance fees were payable by the trading members elected under the Rules and Bye-Laws of the Association, who alone with their Associates, could transact business in stocks and shares in the Association. Therefore, the body of trading members who paid the entrance fees, and the shareholders among whom the profits were distributed were not identical and thus the element of mutuality was lacking. It is the nature of the business of the company and the profits and the distribution thereof which are the determining factors and in this case it has not been shown that the appellant's business was in any way difierent from that which was carried on in the

(1) [1954] S.C.R. 289, 308. (2) (1889) 2 T.C. 460.

case reported as *Liverpool Corn Trade Association* v. *Monks* (1).

In our opinion the judgment of the High Court is right and the appeals are therefore dismissed with costs. One hearing fee.

Appeals dismissed.

M/S. S. C. CAMBATTA & CO. PRIVATE LTD., BOMBAY

v.

THE COMMISSIONER OF EXCESS PROFITS TAX, BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Excess Profits Tax—Assessment—Sale of theatre and restaurant —Goodwill—Value of—Principle of computation—Excess Profits Tax Act, 1940 (XV of 1940).

The appellant carried on various businesses and one such was the running of a Theatre and Restaurant. In October, 1943, a subsidiary company was formed which was using the premises of the Theatre under a lease granted to it from April, 1944. In working out the capital of the two companies for excess profits tax, a claim of rupees five lakhs for goodwill as part of the capital of the subsidiary company was not taken into account.

On reference to the High Court it held that the Tribunal should have allowed the value of the goodwill whatever it thought was reasonable at the date of transfer. Thereafter the Tribunal took into account only the value of the lease-hold of the site to the subsidiary company, and came to the conclusion that no goodwill had been acquired by the business of the Theatre as such and whatever goodwill there was related to the site of building itself, and estimated the value of goodwill at rupees two lakhs. Petition under ss. 66(1) and 66(2) read with s. 21 of the Excess Profits Tax Act being rejected by the Tribunal and the High Court, the appellants came in appeal by special leave.

Held, that the goodwill of a business needed to be considered in a broader way. It depended upon a variety of circumstances or a combination of them. The nature, the location, the

(1) (1959) 36 I.T.R. 222.

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service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors went individually or together to make up the goodwill, though the locality always played a considerable part. Shift the locality, and the goodwill may be lost but it was not everything. The power to attract custom depended on one or more of the other factors as well.

In the instant case a question of law did arise, whether the goodwill of the Eros Theatre and Restaurant Ltd. was calculated in accordance with law.

Cruttwell v. *Lye*, (1810) 17 ves. 335, *Trego* v. *Hunt*, (1896) A. C. 7 (H. L.), *Inland Revenue Commissioners* v. *Muller & Co.'s Margarin, Ltd.*, 1901 A. C. 217 (H. L.), *Daniell* v. *Federal Commissioner of Taxation*, (1928) 42 C. L. R. 296 and *Federal Commissioner of Taxation* v. *Williamson*, (1943) 67 C.L.R. 561, discussed.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 776 and 777 of 1957.

Appeals by special leave from the judgment and order dated September 25, 1956, of the Bombay High Court in Income-tax Application No. 48 of 1956; and from the judgment and order dated March 17, 1954, of the Income-tax Appellate Tribunal, Bombay, in E.P.T.A. Nos. 757, 903 and 944 of 1948-49, respectively.

A. V. Viswanatha Sastri and *G. Gopalakrishnan*, for the appellants.

A. N. Kripal and *D. Gupta*, for the respondent.

1960. November 30. The Judgment of the Court was delivered by

Hidayatullah J.

HIDAYATULLAH, J.—These are two appeals, with special leave, against an order of the High Court of Bombay rejecting a petition under s. 66(2) of the Indian Income-tax Act and the order of the Income-tax Appellate Tribunal, Bombay, in respect of which the petition to the High Court was made. Messrs. S. C. Cambatta & Co. (Private) Ltd., Bombay, have filed these appeals, and the Commissioner of Excess Profits Tax, Bombay, is the respondent.

We are concerned in these appeals with three chargeable accounting periods, each ending respectively on December 31, beginning with the year, 1943 and ending with the year, 1945.

The appellants carry on various businesses, and one such business was the running of a theatre and restaurant, called the Eros Theatre and Restaurant. In October, 1943, a subsidiary Company called the Eros Theatre and Restaurant, Ltd. was formed. The paid-up capital of the subsidiary Company was Rs. 7,91,100 divided into 7,911 shares of Rs. 100 each. 7,901 shares were allotted to the appellant Company as consideration for assets, goodwill, stock-in-trade and book debts which were taken over by the subsidiary Company, and the remaining 10 shares were held by the Cambatta family. The assets which were transferred were as follows:

Assets:

Assets transferred	...	Rs.	1,28,968
Stock-in-trade	...	Rs.	40,000
Book debts	...	Rs.	100
		Rs.	1,69,068

They together with the capital reserve of Rs. 6,21,032 made up the amount of Rs. 7,90,100. In the books of the subsidiary Company, the share capital account was shown separately as follows:

Rs. 2,50,000 debited to the various assets account.
Rs. 5,00,000 debited to the goodwill account.
Rs. 40,000 debited to the stock-in-trade account.
Rs. 100 debited to the book debts account.

It will thus appear that goodwill was not shown separately in the appellants' account books, but only in the accounts of the subsidiary Company. In working out the capital of the two Companies for excess profits tax, a sum of Rs. 5,00,000 was claimed as goodwill as part of the capital of the subsidiary Company. Both the Department as well as the Tribunal held that s. 8(3) of the Excess Profits Tax Act applied; and the goodwill was not taken into account in working out the capital. The Tribunal declined to state a case, but the High Court directed that a reference be made on two questions, which were framed as follows:

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"(1) Whether on the facts of the case, the Appellate Tribunal was right in applying section 8(3) of the Excess Profits Tax Act?

(2) Whether in the computation of the capital employed in the business of the assessee, the Tribunal erred in not including the value of the goodwill or any portion thereof?"

The High Court by its judgment and order answered the first question in the negative and the second, in the affirmative. It held that sub-s. (5) and not sub-s. (3) of s. 8 of the Excess Profits Tax Act was applicable. It, therefore, held that "the Tribunal should have allowed for the value of the goodwill whatever it thought was reasonable at the date of the transfer."

When the matter went before the Tribunal again, three affidavits and a valuation report by a firm of architects were filed. The goodwill, according to the report of the architects, amounted to Rs. 25 lakhs. It may be mentioned here that the subsidiary Company was using the premises under a lease granted on November 20, 1944, for three years beginning from April 1, 1944, on a rental of Rs. 9,500 per month. The Tribunal came to the conclusion that no goodwill had been acquired by the business of the Theatre as such, and that whatever goodwill there was, related to the site and building itself. They then proceeded to consider what value should be set upon the goodwill on the date of the transfer of the subsidiary Company as directed by the High Court. They took into account certain factors in reaching their conclusions. They first considered the earning capacity of the business, and held that prior to 1942 the business had not made profits, and that the name of Eros Theatre and Restaurant thus by itself had no goodwill at all. They, therefore, considered that the only goodwill which had been acquired attached to the lease, which the trustees had given to the Eros Theatre and Restaurant Ltd., and computing the goodwill as the value of the lease to the subsidiary Company, they felt that Rs. 2 lakhs was a liberal estimate of the value of the goodwill in the hands of Eros Theatre and Restaurant, Ltd. at the material time.

Petitions under ss. 66(1) and 66(2) read with s. 21 of the Excess Profits Tax Act were respectively rejected by the Tribunal and the High Court; but the appellants obtained special leave from this Court, and filed these appeals.

In our opinion, a question of law did arise in the case whether the goodwill of the Eros Theatre and Restaurant, Ltd., was calculated in accordance with law. The Tribunal seems to have taken into account only the value of the leasehold of the site to the subsidiary Company, and rejected other considerations which go to make up the goodwill of a business. No doubt, in *Cruttwell* v. *Lye* (1), Lord Eldon, L. C. observed that goodwill was "nothing more than the probability that the old customers would resort to the old place". The description given by Lord Eldon has been considered always to be exceedingly narrow. The matter has to be considered from the nature of the business, because the goodwill of a public inn and the goodwill of a huge departmental stores cannot be calculated on identical principles. The matter has been considered in two cases by the House of Lords. The first case is *Trego* v. *Hunt* (2), where all the definitions previously given were considered, and Lord Macnaghten observed that goodwill is "the whole advantage, whatever it may be of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money". In a subsequent case reported in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarin, Ltd.* (3), Lord Macnaghten at pp. 223 and 224 made the following observations:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good-name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.....If there is one attribute common to all cases of goodwill it is the attribute

(1) (1810) 17 Ves. 335, 346. (2) (1896) A. C. 7 (H.L.).
(3) (1901) A.C. 217 (H.L.).

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of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again".

These two cases and others were considered in two Australian cases. The first is *Daniell* v. *Federal Commissioner of Taxation* (1), where, Knox, C. J. observed:

"My opinion is that while it cannot be said to be absolutely and necessarily inseparable from the premises or to have no separate value, *prima facie* at any rate it may be treated as attached to the premises and whatever its value may be, should be treated as an enhancement of the value of the premises".

In the second case reported in *Federal Commissioner of Taxation* v. *Williamson* (2), Rich, J., observed at p. 564 as follows:

"Hence to determine the nature of the goodwill in any given case, it is necessary to consider the type of business and the type of customer which such a business is inherently likely to attract as well as the surrounding circumstances.....The goodwill of a business is a composite thing referable in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt actuated by mixed motives in conferring their custom".

In Earl Jowitt's Dictionary of English Law, 1959 Edn., "goodwill" is defined thus:

"The goodwill of a business is the benefit which arises from its having been carried on for some time in a particular house, or by a particular person or firm, or from the use of a particular trade mark or trade name".

It will thus be seen that the goowill of a business depends upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill,

(1) (1928) 42 C.L.R. 296. (2) (1943) 67 C.L.R. 561.

though locality always plays a considerable part. Shift the locality, and the goodwill may be lost. At the same time, locality is not everything. The power to attract custom depends on one or more of the other factors as well. In the case of a theatre or restaurant, what is catered, how the service is run and what the competition is, contribute also to the goodwill.

From the above, it is manifest that the matter of goodwill needs to be considered in a much broader way than what the Tribunal has done. A question of law did arise in the case, and, in our opinion, the High Court should have directed the Tribunal to state a case upon it.

Civil Appeal No. 776 of 1957 is allowed. The High Court will frame a suitable question, and ask for a statement of the case from the Tribunal, and decide the question in accordance with law. The costs of this appeal shall be borne by the respondent; but the costs in the High Court shall abide the result. There will be no order in Civil Appeal No. 777 of 1957.

C. A. No. 776 of 1957 allowed.

JESTAMANI GULABRAI DHOLKIA AND OTHERS

v.

THE SCINDIA STEAM NAVIGATION COMPANY, BOMBAY AND OTHERS

(P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Industrial Dispute—Employee loaned to existing air company, if and when its employee—Air Corporations Act, 1953 (XXVII of 1953), s. 20(1).

Section 20(1) of the Air Corporations Act, 1953 (XXVII of 1953), read with the proviso, is a perfectly reasonable provision and in the interest of the employees and it is not correct to say that it can apply only to the direct recruits of the existing air

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companies and not at all to loaned employees working under them.

The two conditions of its applications are (i) that the officer or employee was employed by the existing air company on July 1, 1952, and (ii) that he was still in its employment on August 1, 1953, the appointed day.

In the instant case where the appellants who had been recruited by the Scindia Steam Navigation Co., Ltd, and on purchase by it of the Air Services of India Ltd., loaned to the latter, and were working under its direction and control on and between the said dates and being paid by it,

Held, that in law they were the employees of the Air Services of India from the appointed day, notwithstanding the existence of certain special features of their employment, and as such governed by s. 20(1) of the Act and since they did not exercise the option given to them under the proviso, they became employees of the Corporation established under the Act and ceased to have any rights against the original employers.

Nokes v. *Doncaster Amalgamated Collieries Ltd.*, [1940] A.C. 1014, considered.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 395 of 1959.

Appeal by special leave from the Award dated November 25, 1957 of the Industrial Tribunal, Bombay, in Reference (I. T.) No. 24 of 1956.

N. C. Chatterjee, D. H. Buch and *K. L. Hathi*, for the appellants.

M. C. Setalvad, Attorney-General for India, J. B. Dadachanji and *S. N. Andley*, for the respondent Nos. 1 and 2.

M. C. Setalvad, Attorney-General for India, Dewan Chaman Lal Pandhi and *I. N. Shroff*, for the respondent No. 3.

1960. November 30. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO, J.—This is an appeal by special leave in an industrial matter. It appears that the appellants were originally in the service of the Scindia Steam Navigation Co. Ltd. (hereinafter called the Scindias). Their services were transferred by way of loan to the Air Services of India Limited (hereinafter referred to as the ASI). The ASI was formed in 1937 and was

purchased by the Scindias in 1943 and by 1946 was a full subsidiary of the Scindias. Therefore from 1946 to about 1951, a large number of employees of the Scindias were transferred to the ASI for indefinite periods. The Scindias had a number of subsidiaries and it was usual for the Scindias to transfer their employees to their subsidiary companies and take them back whenever they found necessary to do so. The appellants who were thus transferred to the ASI were to get the same scale of pay as the employees of the Scindias and the same terms and conditions of service (including bonus whenever the Scindias paid it) were to apply. The Scindias retained the right to recall these loaned employees and it is the case of the appellants that they were entitled to go back to the Scindias if they so desired. Thus the terms and conditions of service of these loaned employees of the ASI were different from those employees of the ASI who were recruited by the ASI itself.

This state of affairs continued till 1952 when the Government of India contemplated nationalisation of the existing air lines operating in India with effect from June 1953 or thereabouts. When legislation for this purpose was on the anvil the appellants felt perturbed about their status in the ASI which was going to be taken over by the Indian Air Lines Corporation (hereinafter called the Corporation), which was expected to be established after the Air Corporations Act, No. XXVII of 1953, (hereinafter called the Act) came into force. They therefore addressed a letter to the Scindias on April 6, 1953, requesting that as the Government of India intended to nationalise all the air lines in India with effect from June, 1953, or subsequent thereto, they wanted to be taken back by the Scindias.

On April 24, the Scindias sent a reply to this letter in which they pointed out that all persons working in the ASI would be governed by cl. 20 of the Air Corporation Bill of 1953, when the Bill was enacted into law. It was also pointed out that this clause would apply to all those actually working with the ASI on

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the appointed day irrespective of whether they were recruited by the ASI directly or transferred to the ASI from the Scindias or other associated concerns. It was further pointed out that if the loaned employees or others, employed under the ASI, did not want to join the proposed Corporation they would have the option not to do so under the proviso to cl. 20(1) of the Bill; but in case any employee of the ASI whether loaned or otherwise made the option not to join the proposed Corporation, the Scindias would treat them as having resigned from service, as the Scindias could not absorb them. In that case such employees would be entitled only to the usual retirement benefits and would not be entitled to retrenchment compensation. Finally, it was hoped that all those in the employ of the ASI, whether loaned or otherwise, having been guaranteed continuity of employment in the new set-up would see that the Scindias would not be burdened with surplus staff, requiring consequential retrenchment of the same or more junior personnel by the Scindias.

On April 29, 1953, a reply was sent by the union on behalf of the appellants to the Scindias. It was pointed out that the loaned staff should not be forced to go to the proposed Corporation without any consideration of their claim for re-absorption into the Scindias. It was suggested that the matter might be taken up with the Government of India and the persons directly recruited by the ASI who were with other subsidiary companies might be taken by the proposed Corporation in place of the appellants. It seems that this suggestion was taken up with the Government of India but nothing came out of it, particularly because the persons directly recruited by the ASI who were employed in other subsidiary companies did not want to go back to the ASI.

In the meantime, the Scindias issued a circular on May 6, 1953, to all the employees under the ASI including the loaned employees, in which they pointed out that all the persons working with the ASI would be governed by cl. 20(1) when the Bill became law and would be absorbed in the proposed Corporation, unless

they took advantage of the proviso to cl. 20(1). It was also pointed out that such employees as took advantage of the proviso to cl. 20(1) would be treated as having resigned from service and would be entitled to usual retirement benefits as on voluntary retirement, and to nothing more. It was also said that their conditions of service would be the same until duly altered or amended by the proposed Corporation. The circular then dealt with certain matters relating to provident fund with which we are however not concerned.

It appears that the Act was passed on May 28, 1953. Sec. 20(1) of the Act, with which we are concerned, is in these terms:—

"(1) Every officer or other employee of an existing air company (except a director, managing agent, manager or any other person entitled to manage the whole or a substantial part of the business and affairs of the company under a special agreement) employed by that company prior to the first day of July, 1952, and still in its employment immediately before the appointed day shall, in so far as such officer or other employee is employed in connection with the undertaking which has vested in either of the Corporations by virtue of this Act, become as from the appointed date an officer or other employee, as the case may be, of the Corporation in which the undertaking has vested and shall hold his office or service therein by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity and other matters as he would have held the same under the existing air company if its undertaking had not vested in the Corporation and shall continue to do so unless and until his employment in the Corporation is terminated or until his remuneration, terms or conditions are duly altered by the Corporation :

Provided nothing contained in this section shall apply to any officer or other employee who has, by notice in writing given to the Corporation concerned prior to such date as may be fixed by the Central Government by notification in the official gazette

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intimated his intention of not becoming an officer or other employee of the Corporation."

After the Act was passed, notice was sent on June 17, 1953, to each employee of all the air companies which were being taken over by the proposed Corporation and he was asked to inform the officer on special duty by July 10, 1953, if he desired to give the notice contemplated by the proviso to s. 20(1). A form was sent in which the notice was to be given and it was ordered that it should reach the Chairman of the Corporation by registered post by July 10. The appellants admittedly did not give this notice as required by the proviso to s. 20(1).

In the meantime on June 8, 1953, a demand was made on behalf of the appellants in which the Scindias were asked to give an assurance to them that in the event of retrenchment of any loaned staff by the proposed Corporation within the first five years without any fault, the said staff would be taken back by the Scindias. Certain other demands were also made. The Scindias replied to this letter on July 3 and pointed out that they could not agree to give an assurance to take back the loaned staff in case it was retrenched by the proposed Corporation within the next five years. We are not concerned with the other demands and the replies thereto. On July 8, a letter was written on behalf of the appellants to the Scindias in which it was said that the appellants could not accept the contention contained in the circular of May 6, 1953. Though the appellants were carrying on this correspondence with the Scindias, they did not exercise the option which was given to them under the proviso to s. 20(1) of the Act, by July 10, 1953. First of August, 1953, was notified the appointed day under s. 16 of the Act and from that date the undertakings of the "existing air companies" vested in the Corporation established under the Act (except the Air India International). So on August 1, 1953, the ASI vested in the Corporation and s. 20(1) of the Act came into force. Hence as none of the appellants had exercised the option given to them under the proviso, they would also be governed by the said provision,

unless the contention raised on their behalf that they could in no case be governed by s. 20(1), is accepted.

The tribunal came to the conclusion that, whatever the position of the appellants as loaned staff from the Scindias to the ASI, as they were informed on May 6, 1953, of the exact position by the Scindias and they did not ask for a reference of an industrial dispute immediately thereafter with the Scindias and as they did not exercise the option given to them by the proviso to s. 20(1) before July 10, 1953, they would be governed by s. 20(1) of the Act. In conseqnence, they became the employees of the Corporation as from August 1, 1953 and would thus have no right thereafter to claim that they were still the employees of the Scindias and had a right to revert to them. The consequence of all this was that they were held not to be entitled to any of the benefits which they claimed in the alternative according to the order of reference. It is this order of the tribunal rejecting the reference which has been impugned before us in the present appeal.

The main contention of Mr. Chatterjee on behalf of the appellants is that they are not governed by s. 20 (1) of the Act and in any case the contract of service between the appellants and the Scindias was not assignable and transferable even by law and finally that even if s. 20(1) applied, the Scindias were bound to take back the appellants.

We are of opinion that there is no force in any of these contentions. Sec. 20(1) lays down that every officer or employee of the "existing air companies" employed by them prior to the first day of July, 1952, and still in their employment immediately before the appointed day shall become as from the appointed day an officer or employee, as the case may be, of the Corporation in which the undertakings are vested. The object of this provision was to ensure continuity of service to the employees of the "existing air companies" which were being taken over by the Corporation and was thus for the benefit of the officers and employees concerned. It is further provided in s. 20(1) that the terms of service etc., would be the same until they are duly altered by the Corporation. One should have thought that the employees of the air

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companies would welcome this provision as it ensured them continuity of service on the same terms till they were duly altered. Further there was no compulsion on the employees or the officers of the "existing air companies" to serve the Corporation if they did not want to do so. The proviso laid down that any officer or other employee who did not want to go into the service of the Corporation could get out of service by notice in writing given to the Corporation before the date fixed, which was in this case July 10, 1953. Therefore, even if the argument of Mr. Chatterjee that the contract of service between the appellants and their employers had been transferred or assigned by this section and that this could not be done, be correct, it loses all its force, for the proviso made it clear that any one who did not want to join the Corporation, was free not to do so, after giving notice upto a certain date. Mr. Chatterjee in this connection relied on *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* (1), where it was observed at p. 1018—

"It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A and X would have to be terminated by notice or by mutual consent and a new contract of service entered into by agreement between A and Y." This observation itself shows that a contract of service may be transferred by a statutory provision; but in the present case, as we have already said, there was no compulsory transfer of the contract of service between the "existing air companies" and their officers and employees to the Corporation for each of them was given the option not to join the Corporation, if he gave notice to that effect. The provision of s. 20(1) read with the proviso is a perfectly reasonable provision and, as a matter of fact, in the interest of employees themselves. But, Mr. Chatterjee argues that s. 20(1) will only apply to those who were in the employ of the "existing air companies"; it would not

(1) [1940] A.C. 1014.

apply to those who might be working for the "existing air companies" on being loaned from some other company. In other words, the argument is that the appellants were in the employ not of the ASI but of the Scindias and therefore s. 20(1) would not apply to them and they would not become the employees of the Corporation by virtue of that provision when they failed to exercise the option given to them by the proviso. According to him, only those employees of the ASI who were directly recruited by it, would be covered by s. 20(1).

We are of opinion that this argument is fallacious. It is true that the appellants were not originally recruited by the ASI. They were recruited by the Scindias and were transferred on loan to the ASI on various dates from 1946 to 1951. But for the purposes of s. 20(1) we have to see two things: namely, (i) whether the officer or employee was employed by the existing air company on July 1, 1952, and (ii) whether he was still in its employment on the appointed day, (namely, August 1, 1953). Now it is not disputed that the appellants were working in fact for the ASI on July 1, 1952, and were also working for it on August 1, 1953. But it is contended that though they were working for the ASI they were still not in its employment in law and were in the employment of the Scindias because at one time they had been loaned by the Scindias to the ASI. Let us examine the exact position of the appellants in order to determine whether they were in the employ of the ASI or not. It is not disputed that they were working for the ASI and were being paid by it; their hours of work as well as control over their work was all by the ASI. From this it would naturally follow that they were the employees of the ASI, even though they might not have been directly recruited by it. It is true that there were certain special features of their employment with the ASI. These special features were that they were on the same terms and conditions of service as were enjoyed by the employees of the Scindias in the matter of remuneration, leave, bonus, etc. It may also be that they could not be dismissed by the ASI and the Scindias may have had to take action in case it was

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desired to dismiss them. Further it may be that they could be recalled by the Scindias and it may even be that they might have the option to go back to the Scindias. But these are only three special terms of their employment with the ASI. Subject to these special terms, they would for all purposes be the employees of the ASI and thus would in law be in the employment of the ASI both on July 1, 1952 and on August 1, 1953. The existence of these special terms in the case of these appellants would not in law make them any the less employees of the ASI, for whom they were working and who were paying them, who had power of control and direction over them; who would grant them leave, fix their hours of work and so on. There can in our opinion be no doubt that subject to these special terms the appellants were in the employ of the ASI in law. They would therefore be in the employ of the ASI prior to July 1, 1952 and would still be in its employ immediately before August 1, 1953. Consequently, they would clearly be governed by s. 20(1). As they did not exercise the option given to them by the proviso to s. 20(1), they became the employees of the Corporation from August 1, 1953, by the terms of the statute.

The last point that has been urged is that even if s. 20(1) applies, the Scindias are bound to take back the appellants. Suffice it to say that there is no force in this contention either. As soon as the appellants became by force of law the employees of the Corporation, as they did so become on August 1, 1953, in the circumstances of this case, they had no further right against the Scindias and could not claim to be taken back in their employment on the ground that they were still their employees, in spite of the operation of s. 20(1) of the Act. Nor could they claim any of the alternative benefits specified in the order of reference, as from August 1, 1953, they are by operation of law only the employees of the Corporation and can have no rights whatsoever against the Scindias. We are therefore of opinion that the tribunal's decision is correct. The appeal fails and is hereby dismissed. There will be no order as to costs.

Appeal dismissed.

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December 1.

THE COMMISSIONER OF INCOME-TAX, BOMBAY

v.

M/S. DWARKADAS KHETAN & CO.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax — Partnership firm including minor, if can be registered — Indian Income-tax Act, 1922 (11 of 1922), s. 26A — Indian Partnership Act, 1932 (IX of 1932), s. 30.

One of the persons who entered into a partnership was a minor and in the instrument of partnership he was described as a full partner with equal rights and obligations with the other adult partners. The deed of partnership which was signed by the minor was produced before the Registrar of Firms for registration and he granted a certificate showing the minor as a full partner and not as one entitled merely to the benefits of the partnership. The Income-tax Officer, however, refused to register the firm under s. 26A of the Indian Income-tax Act and his decision was upheld by the Income-tax Authorities and the Income-tax Appellate Tribunal. The High Court differed from the Tribunal and held that the firm should be registered. On appeal by the Commissioner of Income-tax,

Held, that the Rules framed under s. 26A quite clearly show that a minor who is admitted to the benefits of partnership need not sign the application for registration. The law requires all partners to sign the application, and if the definition were to be carried to the extreme, even a minor who is admitted to the benefits of partnership would be competent to sign such an application. The definition is designed to confer equal benefits upon the minor by treating him as a partner; but it does not render a minor a competent and full partner. For that purpose, the law of Partnership must be considered, apart from the definition in the Income-tax Act.

Section 30 of the Indian Partnership Act clearly lays down that a minor cannot become a partner, though with the consent of the adult partners, he may be admitted to the benefits of partnership. Any document which goes beyond this section cannot be regarded as valid for the purpose of registration. Registration can only be granted of a document between persons who are parties to it and on the covenants set out in it. If the Income-tax Authorities register the partnership as between the adults only contrary to the terms of the document, in substance a new contract is made out. It is not open to the Income-tax Authorities to register a document which is different from the one actually executed and asked to be registered.

Hoosen Kassam Dada v. *Commissioner of Income-tax, Bengal*, [1937] 5 I.T.R. 182, *Hardutt Ray Gajadhar Ram* v. *Commissioner of*

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Income-tax, [1950] 18 I.T.R. 106, *Banka Mal Lajja Ram and Co.* v. *Commissioner of Income-tax*, [1953] 24 I.T.R. 150, approved.

Jakka Devayya and Sons v. *Commissioner of Income-tax*, [1952] 22 I.T.R. 264, disapproved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 328 of 1959.

Appeal by special leave from the judgment and order dated 23rd February, 1956, of the Bombay High Court in Income-tax Reference No. 34 of 1955.

K. N. Rajagopala Ayyangar and *D. Gupta*, for the appellant.

Rameshwar Nath, *S. N. Andley*, *J. B. Dadachanji* and *P. L. Vohra*, for the respondent.

1960. December 1. The Judgment of the Court was delivered by

Hidayatullah J.

HIDAYATULLAH, J.—The Commissioner of Income-tax has filed this appeal, with special leave, against the judgment and order of the High Court of Bombay, by which the High Court answered two questions referred to it in favour of the respondents, Messrs. Dwarkadas Khetan & Co., Bombay. These questions were:

"(1) Whether the instrument of partnership dated 27-3-1946 created a deed of partnership?

(2) If the answer to question No. 1 is in the affirmative, whether the fact that on 1-1-1946 there was no firm in existence would be fatal to the application for registration of the firm under Section 26A of the Indian Income-tax Act or whether the firm could be registered with effect from 26-3-1946 if it is held that the firm was genuine?"

Prior to January 1, 1945, there was a firm called Dwarkadas Khetan & Co. On that date, the firm ceased to exist, because the other partners had previously withdrawn, and it came to be the sole proprietory concern of Dwarkadas Khetan. On February 12, 1946, Dwarkadas Khetan obtained the selling agency of Seksaria Cotton Mills, Ltd. On March 27, 1946, he entered into a partnership with three others

by an instrument of partnership executed that day. Those three others were Viswanath Purumul, Govindram Khetan and Kantilal Kasherdeo. Dwarkadas Khetan's share in the partnership was 7 annas in the rupee, while the remaining 9 annas' share was divided equally among the three others. Though Kantilal Kasherdeo was a minor, he was admitted as a full partner and not merely to the benefits of the partnership, as required by s. 30 of the Indian Partnership Act. To the instrument of partnership, Kantilal Kasherdeo was also a signatory, though immediately after his signature there was the signature of one Kasherdeo Rungta, the natural guardian of the minor. In the instrument, Kantilal Kasherdeo was described as a full partner entitled not only to a share in the profits but also liable to bear all the losses including loss of capital. It was also provided that all the four partners were to attend to the business, and if consent was needed, all the partners including the minor had to give their consent in writing. The minor was also entitled to manage the affairs of the firm, including inspection of the account books, and was given the right to vote, if a decision on votes had to be taken. In short, no distinction was made between the adult partners and the minor, and to all intents and purposes, the minor was a full partner, even though under the partnership law he could only be admitted to the benefits of the partnership and not as a partner.

The deed of partnership was produced before the Registrar of Firms showing the names of the four partners. The Registrar of Firms granted a registration certificate, and in the certificate, Kantilal Kasherdeo was shown as a full partner and not as one entitled merely to the benefits of the partnership. Banks were also informed about the four partners, and it does not appear that to them intimation was sent that one of the named partners was a minor. Though the partnership came into existence on March 27, 1946, the firm was stated to have started retrospectively from January 1, 1946. It may be pointed out that the firm has the calendar year as its account year, and the matter before us refers to the account year, 1946 corresponding to the assessment year, 1947-48.

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For purposes of that year, registration of the firm was sought under s. 26A of the Indian Income-tax Act. The Income-tax Officer refused to accord registration on the ground that a minor had been admitted as a partner contrary to law, and that the deed could not, therefore, be registered. The appeal to the Appellate Assistant Commissioner also failed, the Commissioner holding that registration could only be of a legal or valid document and not of a document which was invalid in law. An appeal was then taken to the Tribunal, and it was contended that the document must be construed as showing only that the minor was admitted not as a full partner but to the benefits of the partnership. The Accountant Member held that the order of the Appellate Assistant Commissioner was correct, giving two reasons. The first was that the construction sought to be placed upon the document was not open, and the second, that since retrospective operation was given to the firm even though no firm existed from January 1, 1946, registration could not be granted. The Judicial Member differed from the Accountant Member, holding, as was contended, that the document must be construed as showing merely that the minor had been admitted to the benefits of the partnership. The appeal was then placed before the President, who agreed with the conclusion of the Accountant Member, with the result that the refusal to register the firm under s. 26A by the authorities was upheld.

Two questions were then posed for the decision of the High Court. The High Court differed from the Tribunal, and answered both the questions in favour of the assessee. In so far as the second question is concerned, the matter is now settled by the decision of this Court in *R. C. Mitter & Sons* v. *Commissioner of Income-tax* (1). But, in our opinion, the decision of the High Court on the first question was not correct, and the correct answer does not leave the second question open at all.

There is a distinct cleavage of opinion among the High Courts on this point. The Bombay, Madras and

(1) [1959] 36 I.T.R. 194.

Patna High Courts have held that where a minor is admitted as a full partner by adult partners, the document can be registered after interpreting it to mean that the minor has been admitted to the benefits of partnership and not as a full partner. The Calcutta, Allahabad and Punjab High Courts have taken a contrary view. The Bombay case is the one which is under appeal, and the Patna High Court followed that decision and the two earlier decisions of the Madras High Court. The Madras High Court decisions are of the same Divisional Bench, and were pronounced on the same day. The leading case in support of the respondents is the Madras decision reported in *Jakka Devayya and Sons* v. *Commissioner of Income-tax* (1), and that case alone needs to be considered, because all the reasons on which the cases on this side have proceeded are given there. In that case, there were three partners, one of whom was a minor. They formed a Hindu undivided family; later, a deed of partnership was executed in which the minor was represented by his father-in-law. It was held that the fact that the minor was included as a partner did not make the partnership as between the two adult partners invalid, and that the minor must be deemed to have been admitted to the benefits of the partnership by the two adults. The learned Judges referred to the provision of s. 2 (6-B) of the Income-tax Act, where it is provided:

" "Partner" includes any person who being a minor has been admitted to the benefits of partnership;",

and observed that in view of this definition and the fact that a minor could be admitted to the benefits of partnership under s. 30, the document was not invalid, but must be read as giving to the minor the rights laid down by the Partnership Act. They also observed that too rigid a construction need not be put upon the deed, and referred to Lindley on Partnership, 11th Edn., p. 87 and *A. Khorasany* v. *C. Acha and Others* (2). The other cases which we need not examine are *Vincent and Others* v. *Commissioner of*

(1) [1952] 22 I.T.R. 264. (2) (1928) I.L.R. 6 Ran. 198.

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Income-tax (1) and *Sahai Brothers* v. *Commissioner of Income-tax* (2).

On the other hand, there is a decision of the Calcutta High Court reported in *Hoosen Kassam Dada* v. *Commissioner of Income-tax, Bengal* (3), in which Costello and Panckridge, JJ. have held that under s. 26A of the Income-tax Act and the Rules, the Income-tax Officer is only empowered to register a partnership which is specified in the instrument of partnership and of which registration is asked for. The learned Judges, therefore, hold that it is not open to the Department to register a partnership different from that which is formed by the instrument. In *Hardutt Ray Gajadhar Ram* v. *Commissioner of Income-tax*(4) Malik, C. J. and Seth, J. hold that where a minor is admitted as a full partner with equal rights and obligations with adults, the deed is invalid. It is pointed out that the English law on the subject is different. In that case, however, there was one other ground for invalidating the deed, because the minor had been adopted into another family and his natural father who had signed as his guardian in the deed could not do so, as he had ceased to be the natural guardian. The decision, however, supports the case of the Commissioner.

In *Banka Mal Lajja Ram & Co.* v. *Commissioner of Income-tax* (5), it is held that a minor cannot be a partner, and that the partnership which admits a minor as full partner cannot be registered. It is true that in that case the High Court did not consider the question whether the partnership should have been taken to be a valid partnership consisting of the adult partners, because no such question was referred. The decision, however, is against a claim for registration of such a document.

In our opinion, the Calcutta view is preferable to the view taken by the Madras High Court. The error in the Madras view is in using the definition to show that a deed including a minor as a competent partner

(1) [1952] 22 I.T.R. 285.
(2) [1958] 33 I.T.R. 40.
(3) [1937] 5 I.T.R. 182.
(4) [1950] 18 I.T.R. 106.
(5) [1953] 24 I.T.R. 150.

is valid. What the definition does is to apply to a minor admitted to the benefits of partnership all the provisions of the Income-tax Act applicable to partners. The definition cannot be read to mean that in every case where a minor has, contrary to law, been admitted as a full partner, the deed is to be regarded as valid, because, under the law, a minor can be admitted to the benefits of partnership. The Rules which have been framed under s. 26A quite clearly show that a minor who is admitted to the benefits of partnership need not sign the application for registration. The law requires all partners to sign the application, and if the definition were to be carried to the extreme, even a minor who is admitted to the benefits of partnership would be competent to sign such an application. The definition is designed to confer equal benefits upon the minor by treating him as a partner; but it does not render a minor a competent and full partner. For that purpose, the law of Partnership must be considered, apart from the definition in the Income-tax Act.

Section 30 of the Indian Partnership Act clearly lays down that a minor cannot become a partner, though with the consent of the adult partners, he may be admitted to the benefits of partnership. Any document which goes beyond this section cannot be regarded as valid for the purpose of registration. Registration can only be granted of a document between persons who are parties to it and on the covenants set out in it. If the Income-tax Authorities register the partnership as between the adults only contrary to the terms of the document, in substance a new contract is made out. It is not open to the Income-tax authorities to register a document which is different from the one actually executed and asked to be registered. In our opinion, the Madras view cannot be accepted.

The judgment under appeal has followed the Madras view, and, in our opinion, it falls into the same error in which the Madras High Court had fallen earlier. The answer to the first question should, therefore, have been in favour of the Department. The answer given by the High Court is vacated, and

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the question will now be answered in the negative. As already stated, there is no need to answer the second question, which does not arise.

The appeal is allowed with costs here and in the High Court.

Appeal allowed.

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December 1.

LT. COL. KHAJOOR SINGH

v.

THE UNION OF INDIA & ANOTHER.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Fundamental Right, Enforcement of—Power of High Court to issue writs against the Government of India—Constitution of India, Arts. 32(2A), 226.

The High Court of Jammu and Kashmir, relying on the decisions of this Court in *Election Commission, India* v. *Saka Venkata Subba Rao,* [1953] S.C.R. 1144 and *K. S. Rashid and Son* v. *The Income Tax Investigation Commission etc.,* [1954] S.C.R. 738, dismissed an application for a writ made by the appellant against the Union of India and Anr. under Art. 32(2A), the relevant provisions of which are in the matter of enforcement of fundamental rights the same as in Art. 226 of the Constitution, on the preliminary objection that the said application was not maintainable against the Union of India as it was outside the territorial jurisdiction of that Court. The appellant's case was that he was holding the substantive rank of Lieut. Col. in Jammu and Kashmir and had the right to continue in service until he attained the age of 53 on November 20, 1961, but was prematurely retired by a letter issued by the Government of India on July 31, 1954, without any allegation or charge and in contravention of Art. 16(1) of the Constitution.

Held, that there can be no doubt as to the correctness of the decisions relied on by the High Court and the appeal must fail.

The jurisdiction of the High Court under Art. 226 of the Constitution, properly construed, depends not on the residence or location of the person affected by the order but of the person or authority passing the order and the place where the order has effect cannot enter into the determination of such jurisdiction. Since functioning of a Government really means giving effect to its order, such functioning cannot determine the meaning of the words "any person or authority within these territories" occurring in the article. A natural person, therefore, is within those territories if he resides there permanently or temporarily, an authority other than the Government is within those territories if its office is located there and a Government if its seat from which, in fact, it functions is there.

It is not correct to say that the word "authority" in Art. 226 cannot include a Government. That word has to be read along with the clause "including in appropriate cases any Government" immediately following it, which, properly construed, means, that the word may include any Government in an appropriate case. That clause is not connected with the issuance of a writ or order and is not intended to confer discretion on the High Courts in the matter of issuing a writ or direction on any Government, and only means in such cases where the authority against whom the High Court has jurisdiction to issue the writ, happens to be a Government or its subordinates, the High Court may issue a writ against the Government.

Election Commission, India v. *Saka Venkata Subba Rao*, [1953] S.C.R. 1144 and *K. S. Rashid and Son* v. *The Income-tax Investigation Commission etc.*, [1954] S.C.R. 738, approved.

Maqbulunnissa v. *Union of India*, I.L.R. (1953) 2 All. 289, overruled.

The Lloyds Bank Limited v. *The Lloyds Bank Indian Staff Association (Calcutta Branches)*, I.L.R. [1954] 2 Cal. 1, referred to.

Proceedings under Art. 226 are not suits covered by Art. 300 of the Constitution. Such proceedings provide for extraordinary remedies by a special procedure and there is no scope for introducing the concept of cause of action in it in the face of the express limitation imposed by it, that the person or authority concerned must be within the territories over which the High Court exercises jurisdiction.

Ryots of Garabandho v. *Zamindar of Parlakimedi*, (1943) L.R. 70 I.A. 129, held inapplicable.

The resulting inconvenience of such an interpretation of Art. 226 to persons residing far away from New Delhi, where the Government of India is in fact located, and aggrieved by some order passed by it, may be a reason for suitably amending the Article but cannot affect its plain language.

This Court should not, except when it is demonstrated beyond all reasonable doubt that the previous ruling, given after

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due deliberation and full hearing, was erroneous, go back upon it, particularly on a constitutional issue.

Per Subba Rao, J.—The object that the framers of our Constitution had before them in declaring the fundamental rights in Part III of the Constitution and empowering the High Courts by Art. 226 of the Constitution to enforce them would be largely defeated if a person in a remote part of the country had to come to New Delhi to seek the protection of the Punjab High Court whenever the Union Government infringed his fundamental right.

The power of the High Courts under Art. 226 of the Constitution is of the widest amplitude and it can issue not merely writs but also directions and orders.

The words "any Government" in the Article includes the Union Government which has no constitutional *situs* in a particular place and exercises its powers throughout India and must, therefore, be deemed in law to have functional existence throughout India and thus within the territories of every State. Consequently, when the Union Government infringes the legal right and interest of a person residing within the territorial jurisdiction of a High Court, the High Court has the power under the Article to issue a writ to that Government. If its orders are disobeyed by that Government or any of its officers, even though physically outside its territories, it can proceed in contempt against them under the Contempt of Courts Act, 1952.

Election Commission, India v. *Saka Venkata Subba Rao*, [1953] S.C.R. 1144, held inapplicable.

K. S. Rashid and Son v. *Income Tax Investigation Commission*, [1954] S.C.R. 738 and *Ryots of Garabandho* v. *Zamindar of Parlakimedi*, L.R. 70 I.A. 129, considered.

Maqbul-Un-Nissa v. *Union of India*, I.L.R. (1953) 2 All. 289, approved.

Surajmal v. *State of M.P.*, A.I.R. 1958 M.P. 103 and *Radheshyam Makhanlal* v. *Union of India*, A.I.R. 1960 Bom. 353, held inapplicable.

In the instant case, therefore, the High Court had the power to issue the writ to the Union Government under Art. 32(2A) of the Constitution.

Per Das Gupta, J.—It is neither correct nor appropriate to speak of location of any Government and there is no satisfactory test for ascertaining the location of the Government of India. Since the Government functions throughout the territory of India, the conclusion must be that it is within the territories under the jurisdiction of every High Court. The words "any Government" in Art. 226 clearly indicate that the High Court was intended to give relief against that Government as well.

Even though the Government of India is within the territories of every High Court, it will not have to face applications

for relief against the same order in all the High Courts in India. The words "in appropriate cases" in that Article, properly construed, indicate that there can be only one High Court thereunder that can exercise jurisdiction under the Article for every act or omission in respect of which relief is claimed. It is possible in every case to ascertain the place where the act or omission took place and that High Court alone, which exercises jurisdiction over that place, can have jurisdiction to grant relief under the Article.

It is not correct to say that under Art. 226 the cause of action determines the jurisdiction. Neither that Article nor Art. 32(2A) of the Constitution is based on that principle.

Election Commission, India v. *Saka Venkata Subba Rao*, [1953] S.C.R. 1144, approved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 37 of 1955.

Appeal from the judgment and order dated December 7, 1954, of the Jammu and Kashmir High Court in Criminal Misc. No. 76 of 2011.

Vir Sen Sawhney, for the appellant.

C. K. Daphtary, Solicitor-General of India, B. R. L. Iyengar, R. H. Dhebar and *T. M. Sen*, for the respondents.

Sardar Bahadur, for the intervener.

1960. December 5. The Judgment of Sinha, C. J., Kapur, Gajendragadkar, Wanchoo and Shah, JJ., was delivered by Sinha, C. J. Subba Rao, J. and Das Gupta, J. delivered separate judgments.

Sinha C. J.

SINHA, C. J.—This appeal on a certificate of fitness granted by the High Court of Judicature, Jammu and Kashmir, is directed against the judgment and order dated December 7, 1954, in an application under Art. 32(2A) of the Constitution for issue of a writ, directions or order against the Union of India, through the Secretary, Ministry of Defence, New Delhi, as the first respondent and the State of Jammu and Kashmir through the Chief Secretary, Jammu and Kashmir State, as the second respondent.

The petition is based on the following allegations. The petitioner will be referred to as the appellant in the course of this judgment. He was aged 45 years

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262 days on August 12, 1954. He was holding a regular commission in the Jammu and Kashmir State Forces, which were amalgamated with the Defence Forces of the Union with effect from September 1, 1949. The appellant holding the substantive rank of Lieut. Col. in the amalgamated forces had the right to continue in service until he attained the age of 53 years, which event will happen on November 20, 1961. The Government of India issued a letter dated July 31, 1954, retiring the appellant from the service with effect from August 12, 1954. This decision of the Government of India is not based on any allegations or charge of inefficiency, indiscipline or any other irregularity on the part of the appellant. The aforesaid decision of the Government of India prematurely retiring the appellant is impugned as illegal, unwarranted and discriminatory and as having been made in contravention of Art. 16(1) of the Constitution.

The petition was opposed on behalf of the respondents aforesaid on a number of preliminary grounds of which it is only necessary to mention the first, namely, that the authority against whom the writ is sought, that is to say, respondent No. 1, being outside the territorial limits of the jurisdiction of the Jammu and Kashmir High Court, the same was not maintainable. This preliminary objection was heard by a Division Bench, (Janki Nath Wazir, C. J. and M. A. Shahmiri, J.) Jammu and Kashmir High Court. By its judgment dated December 7, 1954, the High Court upheld the preliminary objection. The High Court, relying upon the decisions of this Court in *Election Commission, India* v. *Saka Venkata Subba Rao* (1) and *K. S. Rashid and Son* v. *The Income-tax Investigation Commission etc.* (2), held that it had no jurisdiction to issue a writ against the first respondent and, therefore, dismissed the petition, but the High Court granted the necessary certificate under Art. 132 of the Constitution; hence this appeal.

The matter was first heard by a Bench of five judges. In the course of hearing it became clear to us that the appellant not only sought to distinguish

(1) [1953] S.C.R. 1144. (2) [1954] S.C.R. 738.

the two decisions aforesaid of this Court, but questioned the correctness of those decisions. Hence this larger Bench was constituted in order to examine the correctness of the decisions aforesaid of this Court on the strength of which the High Court had refused to entertain the appellant's petition, on merits.

It has been argued on behalf of the appellant, in the first instance, that the previous decisions of this Court were distinguishable on the ground that they did not, in terms, consider the question whether the Government of India was amenable to the jurisdiction of the High Court under Art. 226 or of the Jammu and Kashmir High Court under Art. 32(2A) of the Constitution; that those provisions, on a true construction, would not stand in the way of the appellant, inasmuch as the Government of India has no location and its authority is present throughout the Union territory; that the correct test is whether or not the cause of action arose within the territorial limits of the High Court's jurisdiction; that the High Court was in error in holding that the term "authority" included a Government.

In answer to these contentions on behalf of the appellant, the learned Solicitor-General contended that, on a proper construction of the relevant provisions of the Constitution, it is clear that Sastri C. J.'s observations relating to "authority" in the case of *Election Commission, India* v. *Saka Venkata Subba Rao* [1] applied with equal force to Government, including the Union Government. The Government of India functions through its officers and, therefore, the location contemplated means the place at which the orders impugned are ordinarily passed. The considerations in a suit with reference to the cause of action for the suit do not stand on the same footing in a writ matter, because the writ has to reach the particular officers of the Government concerned. The expression "in appropriate cases" means that there may be cases where though the Union Government as such is not located within the territorial limits of a High Court yet a writ may be issued against it by the High

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Courts because an officer of the Union Government is functioning within such limits and it is his order which is the subject matter of the controversy. Therefore, it is not in every case that a High Court can issue a writ against the Union. A writ of *mandamus*, for example, is directed against a pariticular named person or authority. Similarly, a writ of *certiorari* is directed against a particular record. Therefore, the writ must issue to someone within the territorial limits of the High Court's jurisdiction.

The question that we have to determine in this case is of far-reaching importance and is not a matter of first impression. The question was first raised in this Court in 1952 and was determined by a Constitution Bench in the case of *Election Commission, India* v. *Saka Venkata Subba Rao* (1). In that case a writ was applied for in the Madras High Court for restraining the Election Commission from enquiring into the alleged disqualification of the respondent. A single Judge of the High Court of Judicature of Madras issued a writ of prohibition restraining the Election Commission, a statutory authority constituted by the President of India, with its office permanently located at New Delhi, when the matter was heard by the learned single Judge of the High Court. In the High Court the Election Commission demurred to the jurisdiction of the Court to issue any writ against it on the ground that the Commission was not within the territory in relation to which the High Court exercised jurisdiction, apart from other objections. The learned Judge of the High Court overruled the preliminary objection and decided the case on merits, and issued a writ prohibiting the Commission from proceeding with the enquiry. The learned Judge granted the certificate under Art. 132 that the case involved a substantial question of law as to the interpretation of the Constitution. The Election Commission accordingly came up in appeal to this Court and challenged the jurisdiction of the Madras High Court to issue the writ it had purported to do. This Court overruled the contention on behalf of the respondent which was

(1) [1953] S.C.R. 1144.

based on the decision of the Privy Council in the *Parlakimedi case* (1) that the jurisdiction of the High Court to issue a writ is analogous to the jurisdiction of a court to grant a decree or order against persons outside the limits of its local jurisdiction, provided that the cause of action arose within those limits. This Court overruled that contention in these words:—

"The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Art. 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction".

The Constitution Bench in that case considered that the language of Art. 226 of the Constitution was "reasonably plain" and that the exercise of the power conferred by that Article was subject to a two-fold limitation, namely, (1) that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction" and (2) that the person or authority to whom the High Court is empowered to issue the writs must be "within those territories". In other words, the writ of the Court could not run beyond the territories subject to its jurisdiction and that the person or authority affected by the writ must be amenable to the Court's jurisdiction, either by residence or location within those territories.

The second case of this Court, which dealt with this question is *K. S. Rashid and Son* v. *The Income-Tax Investigation Commission* (2). That was a case on appeal from the judgment and order dated August 10, 1950, of the High Court of Judicature, Punjab, at Simla, in a number of miscellaneous matters, in which the High Court had been moved under Arts. 226 and 227 of the Constitution praying for quashing proceedings started against the appellants under the Taxation on Income (Investigation Commission) Act (XXX of 1947). It was prayed in the High Court that a writ of prohibition might issue against the Income-Tax

(1) (1943) L.R. 70 I.A. 129. (2) [1954] S.C.R. 738.

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Investigation Commission directing it not to proceed with the investigation of cases referred to it under the provisions of the Act. The writ petitions in the High Court were opposed on behalf of the Commission on a number of grounds, one of them being that the Punjab High Court had no jurisdiction to issue the writs prayed for under Art. 226 of the Constitution, simply because the Commission was located in Delhi. Reliance was placed on behalf of the Commission on the decision of the Privy Council in the *Parlakimedi case* (1) that the substance of the matter was that the assessees against whom the investigation had been started belonged to U. P. and all the assessment proceedings, including reference to the High Court, would lie in Uttar Pradesh. The High Court gave effect to this contention and dismissed the application primarily on the ground that the High Court had no jurisdiction to issue the writ to the Commission. The assessees came up in appeal to this Court, and this Court substantially adopted the reasons given by it in its previous judgment in the case of *Election Commission, India* v. *Saka Venkata Subba Rao* (2). It is to be noted that when the High Court of Punjab decided the case, the decision of this Court referred to above had not been given. Relying upon its previous decision, this Court held that the Punjab High Court was in error in holding that it had no jurisdiction to deal with the matter under Art. 226 of the Constitution. The appeal was dismissed by this Court on other grounds, not material to this case.

Learned counsel for the appellant has contended that the two decisions of this Court referred to above are distinguishable from the facts of the present case, inasmuch as in those cases the Election Commission and the Income-tax Investigation Commission were statutory bodies, which had their location in Delhi, and, therefore, this Court held that the Punjab High Court was the High Court within whose jurisdiction those bodies functioned and had their location and were, therefore, amenable to its jurisdiction. He further contended that the Union Government functioned throughout the territory of India and could

(1) (1943) L.R. 70 I.A. 129. (2) [1953] S.C.R. 1144.

not be said to be located only in Delhi simply because the capital for the time being was in Delhi. In this connection, strong reliance was placed on the decision of the Full Bench of the Allahabad High Court in *Maqbulunnissa* v. *Union of India* (1). That case does lend a great deal of support to this contention on behalf of the appellant. It was held by the High Court in that case that the words "any Government" in Art. 226(1) of the Constitution clearly indicated that the Allahabad High Court had jurisdiction to entertain the petition under Art. 226, not only against the State of Uttar Pradesh, but also against the Union Government for the issue of a writ in the nature of *mandamus*, directing the Government to forbear from giving effect to the order asking the petitioner to leave India. The ratio of the decision was that, even though the capital of the Government of India is in Delhi, its executive power extends throughout the territory of India and that the real test to determine the jurisdiction would be the residence of the petitioners and the effect of the impugned order upon them. After holding that the High Court had the jurisdiction to entertain the petition, the Court dismissed it on other grounds, not material to this case. The Allahabad High Court distinguished the decision of a Division Bench of the Calcutta High Court dated January 17, 1951, in the case of *The Lloyds Bank Limited* v. *The Lloyds Bank Indian Staff Association (Calcutta Branches)* (2) which was unreported till then. In that case, Harries, C. J., speaking for the Court, had held that though Art. 226 of the Constitution had gone beyond the English practice by providing that writs in the nature of prerogative writs could issue even against a Government, that Government must be located within the territorial limits of the Court which was moved to exercise its power under that Article. He further observed that the Government of India could not be said to be located in the State of West Bengal and, therefore, writs under Art. 226 could not issue against that Government by the High Court of Calcutta. That

(1) I.L.R. (1953) 2 All. 289. (2) I.L.R. [1954] 2 Cal. 1.

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decision of the Calcutta High Court was distinguished by the Allahabad High Court on the ground that "the effects of the orders of the Union Government were not operative within the jurisdiction of the Court". It may be added that that decision came up in appeal to this Court in Civil Appeal No. 42 of 1952 but the appeal was dismissed by this Court by its judgment dated April 20, 1952, on other grounds. It will be noticed that when the Allahabad decision, so strongly relied upon by the appellant, was given, the two decisions referred to above of this Court were not there. The Allahabad High Court may not have given that judgment if the two decisions of this Court had then been in existence.

The two main questions which arise, therefore, are: (i) whether the Government of India as such can be said to have a location in a particular place, viz., New Delhi, irrespective of the fact that its authority extends over all the States and its officers function throughout India, and (ii) whether there is any scope for introducing the concept of cause of action as the basis of exercise of jurisdiction under Art. 226. Before, however, we deal with these two main questions, we would like to clear the ground with respect to two subsidiary matters which have been urged on behalf of the appellant.

The first argument is that the word "authority" used in Art. 226 cannot and does not include Government. We are not impressed by this argument. In interpreting the word "authority" we must have regard to the clause immediately following it. Art. 226 provides for "the issue to any person or authority including in appropriate cases any Government" within those territories. It is clear that the clause "including in appropriate cases any Government" goes with the preceding word "authority", and on a plain and reasonable construction it means that the word "authority" in the context may include any Government in an appropriate case. The suggestion that the said clause is intended to confer discretion on the High Courts in the matter of issuing a writ or direction on any Government seems to us clearly unsustainable.

To connect this clause with the issuance of a writ or order and to suggest that in dealing with cases against Government the High Court has to decide whether the case is appropriate for the issue of the order is plainly not justified by the rules of grammar. We have no hesitation in holding that the said clause goes with the word "authority" and that its effect is that the authority against whom jurisdiction is conferred on the High Court to issue a writ or appropriate order may in certain cases include a Government. Appropriate cases in the context means cases in which orders passed by a Government or their subordinates are challenged, and the clause therefore means that where such orders are challenged the High Court may issue a writ against the Government. The position, therefore, is that under Art. 226 power is conferred on the High Court to issue to any person or authority or in a given case to any Government, writs or orders there specified for enforcement of any of the rights conferred by Part III and for any other purpose. Having thus dealt with the two subsidiary points raised before us, we may now proceed to consider the two main contentions which arise for our decision in the present appeal.

This brings us to the first question, namely, whether the Government of India as such can be said to be located at one place, namely, New Delhi. The main argument in this connection is that the Government of India is all-pervasive and is functioning throughout the territory of India and therefore every High Court has power to issue a writ against it, as it must be presumed to be located within the territorial jurisdiction of all State High Courts. This argument in our opinion confuses the concept of location of a Government with the concept of its functioning. A Government may be functioning all over a State or all over India; but it certainly is not located all over the State or all over India. It is true that the Constitution has not provided that the seat of the Government of India will be at New Delhi. That, however, does not mean that the Government of India as such has no seat where it is located. It is common knowledge that the seat of the

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Government of India is in New Delhi and the Government as such is located in New Delhi. The absence of a provision in the Constitution can make no difference to this fact. What we have to see, therefore, is whether the words of Art. 226 mean that the person or authority to whom a writ is to be issued has to be resident in or located within the territories of the High Court issuing the writ? The relevant words of Art. 226 are these—

"Every High Court shall have power...to issue to any person or authority...within those territories...". So far as a natural person is concerned, there can be no doubt that he can be within those territories only if he resides therein either permanently or temporarily. So far as an authority is concerned, there can be no doubt that if its office is located therein it must be within the territory. But do these words mean with respect to an authority that even though its office is not located within those territories it will be within those territories because its order may affect persons living in those territories? Now it is clear that the jurisdiction conferred on the High Court by Art. 226 does not depend upon the residence or location of the person applying to it for relief; it depends only on the person or authority against whom a writ is sought being within those territories. It seems to us therefore that it is not permissible to read in Art. 226 the residence or location of the person affected by the order passed in order to determine the jurisdiction of the High Court. That jurisdiction depends on the person or authority passing the order being within those territories and the residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction. Thus if a person residing or located in Bombay, for example, is aggrieved by an order passed by an authority located, say, in Calcutta, the forum in which he has to seek relief is not the Bombay High Court though the order may affect him in Bombay but the Calcutta High Court where the authority passing the order is located. It would, therefore, in our opinion be wrong to introduce in Art. 226 the concept of the place where the order

passed has effect in order to determine the jurisdiction of the High Court which can give relief under Art. 226. The introduction of such a concept may give rise to confusion and conflict of jurisdictions. Take, for example, the case of an order passed by an authority in Calcutta, which affects six brothers living, say, in Bombay, Madras, Allahabad, Jabalpur, Jodhpur and Chandigarh. The order passed by the authority in Calcutta has thus affected persons in six States. Can it be said that Art. 226 contemplates that all the six High Courts have jurisdiction in the matter of giving relief under it? The answer must obviously be 'No', if one is to avoid confusion and conflict of jurisdiction. As we read the relevant words of Art. 226 (quoted above) there can be no doubt that the jurisdiction conferred by that Article on a High Court is with respect to the location or residence of the person or authority passing the order and there can be no question of introducing the concept of the place where the order is to have effect in order to determine which High Court can give relief under it. It is true that this Court will give such meaning to the words used in the Constitution as would help towards its working smoothly. If we were to introduce in Art. 226 the concept of the place where the order is to have effect we would not be advancing the purposes for which Art. 226 has been enacted. On the other hand, we would be producing conflict of jurisdiction between various High Courts as already shown by the illustration given above. Therefore, the effect of an order by whomsoever it is passed can have no relevance in determining the jurisdiction of the High Court which can take action under Art. 226. Now, functioning of a Government is really nothing other than giving effect to the orders passed by it. Therefore it would not be right to introduce in Art. 226 the concept of the functioning of Government when determining the meaning of the words "any person or authority within those territories". By introducting the concept of functioning in these words we shall be creating the same conflict which would arise if the concept of the place where the order is to have effect is introduced in

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Art. 226. There can, therefore, be no escape from the conclusion that these words in Art. 226 refer not to the place where the Government may be functioning but only to the place where the person or authority is either resident or is located. So far therefore as a natural person is concerned, he is within those territories if he resides there permanently or temporarily. So far as an authority (other than a Government) is concerned, it is within the territories if its office is located there. So far as a Government is concerned it is within the territories only if its seat is within those territories.

The seat of a Government is sometimes mentioned in the Constitutions of various countries but many a time the seat is not so mentioned. But whether the seat of a Government is mentioned in the Constitution or not, there is undoubtedly a seat from which the Government as such functions as a fact. What Art. 226 requires is residence or location as a fact and if therefore there is a seat from which the Government functions as a fact even though that seat is not mentioned in the Constitution the High Court within whose territories that seat is located will be the High Court having jurisdiction under Art. 226 so far as the orders of the Government as such are concerned. Therefore, the view taken in *Election Commission, India* v. *Saka Venkata Subba Rao* (1) and *K.S. Rashid and Son* v. *The Income-tax Investigation Commission* (2) that there is two-fold limitation on the power of the High Court to issue writs etc. under Art. 226, namely, (i) the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction, and (ii) the person or authority to whom the High Court is empowered to issue such writs must be "within those territories" which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories, is the correct one.

This brings us to the second point, namely, whether

(1) [1953] S.C.R. 1144. (2) [1954] S.C.R. 738.

it is possible to introduce the concept of cause of action in Art. 226 so that the High Court in whose jurisdiction the cause of action arose would be the proper one to pass an order thereunder. Reliance in this connection has been placed on the judgment of the Privy Council in *Ryots of Garabandho* v. *Zamindar of Parlakimedi* (1). In that case the Privy Council held that even though the impugned order was passed by the Board of Revenue which was located in Madras, the High Court would have no jurisdiction to issue a writ quashing that order, as it had no jurisdiction to issue a writ beyond the limits of the city of Madras except in certain cases, and that particular matter was not within the exceptions. This decision of the Privy Council does apparently introduce an element of the place where the cause of action arose in considering the jurisdiction of the High Court, to issue a writ. The basis of that decision, however, was the peculiar history of the issue of writs by the three Presidency High Courts as successors of the Supreme Courts, though on the literal construction of cl. 8 of the Charter of 1800 conferring jurisdiction on the Supreme Court of Madras, there could be little doubt that the Supreme Court would have the same jurisdiction as the Justices of the Court of King's Bench Division in England for the territories which then were or thereafter might be subject to or depend upon the Government of Madras. It will therefore not be correct to put too much stress on the decision in that case. The question whether the concept of cause of action could be introduced in Art. 226 was also considered in *Saka Venkata Subba Rao's case* (2) and was repelled in these words:—

"The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Art. 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction."

Article 226 as it stands does not refer anywhere to

(1) (1943) L.R. 70 I.A. 129. (2) [1953] S.C.R. 1144.

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the accrual of cause of action and to the jurisdiction of the High Court depending on the place where the cause of action accrues being within its territorial jurisdiction. Proceedings under Art. 226 are not suits; they provide for extraordinary remedies by a special procedure and give powers of correction to the High Court over persons and authorities and these special powers have to be exercised within the limits set for them. These two limitations have already been indicated by us above and one of them is that the person or authority concerned must be within the territories over which the High Court exercises jurisdiction. Is it possible then to overlook this constitutional limitation and say that the High Court can issue a writ against a person or authority even though it may not be within its territories simply because the cause of action has arisen within those territories? It seems to us that it would be going in the face of the express provision in Art. 226 and doing away with an express limitation contained therein if the concept of cause of action were to be introduced in it. Nor do we think that it is right to say that because Art. 300 specifically provides for suits by and against the Government of India, the proceedings under Art. 226 are also covered by Art. 300. It seems to us that Art. 300 which is on the same line as s. 176 of the Government of India Act, 1935, dealt with suits as such and proceedings analogous to or consequent upon suits and has no reference to the extraordinary remedies provided by Art. 226 of the Constitution. The concept of cause of action cannot in our opinion be introduced in Art. 226, for by doing so we shall be doing away with the express provision contained therein which requires that the person or authority to whom the writ is to be issued should be resident in or located within the territories over which the High Court has jurisdiction. It is true that this may result in some inconvenience to persons residing far away from New Delhi who are aggrieved by some order of the Government of India as such, and that may be a reason for making a suitable constitutional amendment in Art. 226. But the argument of inconvenience, in our opinion, cannot

affect the plain language of Art. 226, nor can the concept of the place of cause of action be introduced into it for that would do away with the two limitations on the powers of the High Court contained in it.

We have given our earnest consideration to the language of Art. 226 and the two decisions of this Court referred to above. We are of opinion that unless there are clear and compelling reasons, which cannot be denied, we should not depart from the interpretation given in these two cases and indeed from any interpretation given in an earlier judgment of this Court, unless there is a fair amount of unanimity that the earlier decisions are manifestly wrong. This Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue. In this case our reconsideration of the matter has confirmed the view that there is no place for the introduction of the concept of the place where the impugned order has effect or of the concept of functioning of a Government, apart from the location of its office concerned with the case, or even of the concept of the place where the cause of action arises in Art. 226 and that the language of that Article is plain enough to lead to the conclusion at which the two cases of this Court referred to above arrived. If any inconvenience is felt on account of this interpretation of Art. 226 the remedy seems to be a constitutional amendment. There is no scope for avoiding the inconvenience by an interpretation which we cannot reasonably, on the language of the Article, adopt and which the language of the Article does not bear.

In this view of the matter the appeal fails and is hereby dismissed with costs.

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SUBBA RAO, J.—I have had the advantage of perusing the judgment prepared by my Lord the Chief Justice. I regret my inability to agree. I would not have ventured to differ from his weighty opinion but for the fact that the acceptance of the contention of

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the respondents would practically deprive the majority of citizens of our country of the benefit of cheap, expeditious and effective remedy given to them under Art. 226 of the Constitution against illegal acts of the Union Government. If the relevant provisions are clear and unambiguous, the said contention must prevail however deleterious the effect may be to public interest. But if the words of the Article are capable of two or more interpretations, one that will carry out the intention of the Constituent Assembly and the other that would defeat it, the former interpretation must necessarily be accepted. We must also bear in mind that the provisions of the Constitution are not "mathematical formulae which have their essence in mere form". It being an organic statute, its provisions must be construed broadly and not in a pedantic way, but without doing violence to the language used.

The facts have been fully stated in the judgment of my Lord the Chief Justice and it would be redundant to restate them. It would be enough if I formulate the point of law raised and express my opinion thereon. The question is whether the appellant, who is a citizen of India and is residing in the State of Kashmir, can enforce his fundamental right under Art 32(2A) of the Constitution by filing an appropriate writ petition in the High Court of Jammu & Kashmir, if his right is infringed by an order of the Union Government. The Constitution of India has been made applicable to the State of Jammu & Kashmir by the Constitution (Application to Jammu & Kashmir) Order, 1954 (Order No. 48 dated May 14, 1954) with certain exceptions and modifications. By the said Order, cl. (3) of Art. 32 of the Constitution was deleted, and a new clause (2A) was inserted after cl. (2). The question falls to be decided on a true construction of the said cl. (2A) which reads:

"Without prejudice to the powers conferred by clauses (1) and (2), the High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within these territories, directions or orders or writs,

including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by this Part."

The operative part of this clause is in *pari materia* with Art. 226 of the Constitution with the difference that the words "for any other purpose" found in the latter Article are omitted in the former. Though the power of the High Court of Jammu & Kashmir is limited to that extent, in other respects it is as extensive as that of the other High Courts under Art. 226. The object of the amendment is self-evident; it was enacted to enable the said High Court to protect the fundamental rights of the citizens of India in that part of the country.

The learned Solicitor-General broadly contends that this Court has construed the analogous provisons of Art. 226 of the Constitution and held that the writs under that Article do not run beyond the territories in relation to which a High Court exercises jurisdiction and that a High Court cannot issue a writ thereunder unless the person or authority against whom the writ is sought is physically resident or located within the territorial jurisdiction of that High Court; and that, therefore, on the same parity of reasoning, the High Court of Jammu & Kashmir cannot issue a writ to run beyond the territories of that State against the Union Government functioning through its officers in New Delhi.

Learned counsel for the appellant contends, on the other hand, that neither Art. 32(2A) nor Art. 226 bears any such limited construction and that on a liberal and true construction of the said constitutional provisions it must be held that the High Court can issue a writ against any Government, including the Union Government, exercising the functions within the territories of a State, if it infringes the right of a person in that State.

Before I attempt to construe the provisions of cl. (2A) of Art. 32, I think it would be convenient to trace briefly the history of Art. 226, for it throws a flood of light on the legislative intention expressed in

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Art. 32(2A). In pre-independence India the High Courts, other than the High Courts in the presidency towns of Bombay, Calcutta and Madras, had no power to issue prerogative writs; even in the case of the said presidency High Courts the power to issue writs was very much circumscribed; their jurisdiction to issue the said writs was confined only to the limits of their original jurisdiction and the Governments were excluded from its scope. But the framers of our Constitution with the background of centuries of servility, with the awareness of the important role played by the High Court of England in protecting the rights of its citizens when they were infringed by executive action, with the knowledge of the effective and impartial part played by the High Courts in pre-independence India within the narrow limits of their jurisdiction to protect the rights of the citizens of our country, with a vision to prevent autocracy raising its ugly head in the future, declared the fundamental rights in Part III of the Constitution, conferred powers on the High Courts to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs for the enforcement of the fundamental rights or for any other purpose. In short, any person of India can approach an appropriate High Court to protect his rights against any person, authority or any Government if his fundamental right or any other right is infringed by the said person, authority or Government. If the contention of the respondents be accepted, whenever the Union Government infringes the right of a person in any remote part of the country, he must come all the way to New Delhi to enforce his right by filing a writ petition in the Circuit Bench of the Punjab High Court. If a common man residing in Kanyakumari, the southern-most part of India, is illegally detained in prison, or deprived of his property otherwise than by law, by an order of the Union Government, it would be a travesty of fundamental rights to expect him to come to New Delhi to seek the protection of the High Court of Punjab. This construction of the provisions of Art. 226 would attribute to the framers

of the Constitution an intention to confer the right on a person and to withhold from him for all practical purposes the remedy to enforce his right against the Union Government. Obviously it could not have been the intention of the Constituent Assembly to bring about such an anomalous result in respect of what they conceived to be a cherished right conferred upon the citizens of this country. In that event, the right conferred turns out to be an empty one and the object of the framers of the Constitution is literally defeated.

The scope of Art. 226 vis-a-vis the reach of the High Courts' power has been considered in two decisions of this Court, namely, *Election Commission, India* v. *Saka Venkata Rao* (1) and *K. S. Rashid and Son* v. *The Income-tax Investigation Commission* (2). As this Bench of seven Judges is constituted to enable this Court to approach the problem with a fresh mind unhampered by precedents, I propose to scrutinize the provisions of Art. 32(2A) free from the curbs imposed by the earlier decisions.

The core of the Article is discernible in the following clause and phrases: "throughout the territories in relation to which it exercises its jurisdiction", "any Government", "within those territories", "directions or orders or writs, including writs in the nature of *habeas corpus*, etc." The words "throughout the territories, etc." delimit the territorial jurisdiction of the High Courts in the matter of issuing directions or writs. A High Court exercises jurisdiction throughout the State in which it is located. Its writs run only throughout the State and not beyond its territorial limits. The main object of the power is to keep the authorities or tribunals within their bounds and to prevent them from infringing the fundamental or other rights of citizens. At the instance of an aggrieved person it can issue one or other of the writs or orders or directions against the offending authority in respect of an act done or omitted to be done by it. It is implicit in the limitation that the impugned act must affect a person or property amenable to its territorial jurisdiction.

(1) [1953] S.C.R. 1144. (2) [1954] S.C.R. 738.

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This question, in a different context, has been considered by the Judicial Committee of the Privy Council in *Ryots of Garabandho* v. *Zemindar of Parlakimedi* (1). There the Board of Revenue situated in the State of Madras under s. 172 of the Madras Estates Land Act, 1908, enhanced the rents payable by the ryots in three villages, including Parlakimedi village, in the district of Ganjam in the Northern Circars. The question was whether the Madras High Court had power to issue a writ to quash the order of the Board of Revenue, as the parties to that litigation were not subject to the original jurisdiction of the Madras High Court. The Judicial Committee held that the Madras High Court had no jurisdiction to issue a writ of *certiorari* to run beyond the territorial limits of that High Court. When it was contended that, as the Revenue Board was in Madras, the High Court had jurisdiction to quash its order, the Judicial Committee repelled that contention with the following remarks at p. 164:

"The Board of Revenue has always had its offices in the Presidency Town, and in the present case the Collective Board, which made the order complained of, issued this order in the town. On the other hand, the parties are not subject to the original jurisdiction of the High Court, and the estate of Parlakimedi lies in the north of the province..... Their Lordships think that the question of jurisdiction must be regarded as one of substance, and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing certiorari to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court, in the matter of settlement of rents for ryoti-holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance."

This decision in clear terms lays emphasis on the substance of the matter and holds that mere physical

(1) (1943) L.R. 70 I.A. 129.

presence of an authority within the jurisdiction of a High Court does not enable that Court to issue writs against the said authority in respect of an order made in a dispute between persons residing outside the territorial jurisdiction of the said High Court. Therefore, a High Court's jurisdiction to issue an appropriate writ depends on the co-existence of two conditions, namely, (i) the cause of action has accrued within the territories in relation to which it has jurisdiction, and (ii) the said authority is "within" the said territories. This interpretation may give rise to a criticism; it may be asked, which High Court could give the relief if the cause of action accrues within the territorial jurisdiction of one High Court and the authority concerned is located within that of another High Court? There may be statutory authorities with all-India jurisdiction, but for convenience located in a particular State. In exercise of the powers conferred under statutes, they may make orders affecting the rights of parties residing in different States. I am *prima facie* of the view that the said authorities, in so far as their orders operate in a particular territory, will be "within" those territories and the High Court, which exercises its jurisdiction throughout that territory, can issue a suitable writ against the said authorities. This interpretation avoids the anomaly of one High Court issuing a writ against an authority located "within" its territorial jurisdiction in respect of a cause of action accruing in another State or territory over which it has no jurisdiction. But this question does not arise in this case, for we are mainly concerned with the Union Government.

Article 226 of the Constitution is expressed in wide and most comprehensive terms. There is no difficulty about the words "person or authority", but the phrase "including any Government" gives rise to a conflict of opinion. If the framers of the Constitution intended to extend simply the power of the High Court to issue writs only against the Government of the State, they could have stated "or the Government of the State", instead they designedly used the words "any Government" which at first sight appear rather involved but on a deeper scrutiny reveal that the words

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"any Government" cannot mean only the Government of the State. The word "any" clearly presupposes the existence of more than one Government functioning in a State. Under the Constitution two Governments function in each State. Under Art. 1, India shall be a Union of States and the territory of India shall comprise, *inter alia*, the territories of the States. Part II provides for one class of citizens, that is, citizens of India. In whatever State a person with the requisite qualifications of a citizen may reside, he is a citizen of India and not of that particular State. All the three departments of the Union as well as the State function in the State; both Parliament and the Legislature of the State make laws which govern the State in respect of matters allotted to them respectively. Both the Union and the State executive powers extend to the State, and the former is exercised in regard to matters with respect to which Parliament has power to make laws and the latter in regard to matters with respect to which the Legislature of the State has power to make laws: see Arts. 73 and 162. The Judiciary consists of an hierarchy of courts and all the courts from the lowest to the Supreme Court exercise jurisdiction in respect of a cause of action arising in that State. The demarcation between the Union Government and the State Government is, therefore, not territorial but only subjectwise and both the Governments function within the State. With this background it is easy to perceive that "any Government" must include the Union Government, for two State Governments cannot administer the same State, though for convenience or as a temporary arrangement, the offices of one State may be located in another State. Then it is asked why the Article confers power to issue writs against any Government only in appropriate cases. There are two answers to this question. Till the Constitution was framed there was no power in a High Court to issue a writ even against the Provincial Government. The Constitution conferred for the first time a power on the High Court to issue a writ not only against the State Government but also the Union Government. As the

Union Government has sway over not only the State in question but beyond it, it became necessary to administer a caution that a writ can only be issued in appropriate cases. The High Court's jurisdiction is limited in the matter of issuing writs against the Union Government, for it cannot issue writs against it in respect of a cause of action beyond its territorial jurisdiction. There may also be a case where the secretariat of one of the State Governments is located in another State temporarily. In such a case also the High Court of the latter State cannot issue writs against that State Govcrnment as it is not appropriate to issue such writs, for the cause of action accrues within the former State.

I have, therefore, no doubt that the words "any Government" must necessarily take in the Union Government.

Much of the argument turns upon the words "within those territories". It is said that the Union Government is not within the territories of the State, for its headquarters are in Delhi. The Article does not use the word "headquarters", "resident" or "location". The dictionary meaning of the word "within" is "inside of, not out of or beyond". The connotation of the words takes colour from the context in which they are used. A person may be said to be within a territory if he resides therein. He may also be within a territory if he temporarily enters the said territory or is in the course of passing through the territory. Any authority may be in a territory if its office is located therein. It may also be said to be within a territory if it exercises its powers therein and if it can make orders to bind persons or properties therein. So too a Government may be within a State if it has a legal *situs* in that State. It may also be said to be within a State if it administers the State, though for convenience some of its executive authorities are residing outside the territory. We must give such meaning to these words as would help the working of the Constitution rather than retard it. To put it differently, can it be said that the Union Government

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is within a particular State? Union Government in the present context means the executive branch of the Government. Where is it located? To answer this question it is necessary to consider what is "Union Government". The Constitution in Part V under the heading "The Union" deals with separate subjects, namely, the executive, the Parliament and the Union judiciary. Under Art. 53, the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 74 provides for a council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. By Art. 77, all executive action of the Government of India shall be expressed to be taken in the name of the President; and cl. (3) thereof authorizes the President to make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. Article 73 says that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exerciseable by the Government of India by virtue of any treaty or agreement. The Constitution nowhere fixes the seat of the Union Government or even that of the President. Shortly stated, the Union Government is the President acting on the advise of the Ministers directly or through officers subordinate to him in accordance with the Constitution and the jurisdiction of the said Government extends, so far as is relevant to the present purpose, to matters in respect of which Parliament has power to make laws. The question that immediately arises is, what is the *situs* of such a Government? There is no statutory *situs*. For convenience of administration, the officers of such Government may stay at one place, or they may be distributed in different places; the President may reside in one place, the Prime Minister in another, the

Ministers in a third place and the officers through whom the President exercises his powers in a place different from the rest. What happens when the Secretariat remains in New Delhi and the President resides for some months in a year in, say, Hyderabad? Contrary-wise, what would be the position if the President stays in New Delhi and the entire or part of the Secretariat or some of the Ministers stay in Hyderabad? It is, therefore, not possible to apply the test of residence or location in the absence of any statutory *situs*. The Union Government has no fixed legal abode; it is present throughout the territories over which it exercises jurisdiction and in respect whereof it can make effective and binding orders in the field allotted to it by the Constitution. The constitutional *situs* of the Union Government is the entire territories of the Union and it is "within" the territories of India and, therefore, within the territories of every State.

Let us look at the problem from another standpoint. Under Art. 300 of the Constitution, the Government of India may sue or be sued by the name of the Union of India. The word "sued" is used in a general sense and cannot be narrowly construed in the Constitution as to comprehend only action by way of filing a suit in a civil court. According to Webster, it means to seek justice or right by legal process. Generally speaking, it includes any action taken in a court. The practice followed in the various High Courts and the Supreme Court is also consistent with the wide meaning attributed to it, for writs are filed against the Government of India only in the name of the Union of India. Union of India is a juristic person and it is impossible to predicate its residence in a particular place in the Union. Its presence synchronizes with the limits of the Union territories. That is the reason why that Order XXVII, rule 3, Code of Civil Procedure, says that in suits by or against the Government instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name as provided in s. 79. Section 79 of the

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Civil Procedure Code is in terms analogous to Art. 300 of the Constitution, and under that section,

"In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, the Union of India, and

(b) in the case of a suit by or against a State Government, the State."

As the Union of India has no statutory *situs*, Order XXVII, rule 3, Code of Civil Procedure, exempts its place of residence being given in the plaint or the written statement, as the case may be. The suit by or against the Union Government shall be filed in a court which has jurisdiction to entertain such a suit, having regard to the provisions of ss. 15 to 20 of the said Code. On the same analogy, it may be held that the Union of India has no legal *situs* in a particular place and a writ petition can be filed against it in a place within the jurisdiction of the High Court wherein the cause of action accrues.

It is said that the limits of the power to issue a writ are implicit in the nature of a particular writ. What is the nature of the principal writs, namely, *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari?* The writ of *habeas corpus* "is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody". The writ of *mandamus* "is, in form, a command directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty." An order of prohibition is an order directed to an inferior tribunal forbidding it to continue with the proceedings pending therein. An information in the nature of a *quo warranto* lies against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim. A *certiorari* is directed to an authority "requiring the record of the proceedings in some cause or matter to

be transmitted into the High Court to be dealt with there." (See Halsbury's Laws of England, Vol. II, 3rd edition).

It was asked how could the liberty of a subject be secured, the command be issued, the proceedings of an inquiry be prohibited, the credentials of a person to hold office be questioned, the records of a proceeding be directed to be transmitted to the High Court, if the authority concerned was located, or the person directed resided, outside the territorial jurisdiction of the High Court? It was also asked how, if the said authority, or person, disobeyed the order of the High Court, it could be enforced against the said authority or person. On the parity of the same reasoning the argument proceeded that, as the officers acting for the Government of India reside in Delhi, a writ which would become *brutum fulmen* could not be issued by the High Court.

The questions so posed are based on a misapprehension of the relevant provisions of the Constitution. They also mix up the nature of the writs with the procedure in dealing with the writs or enforcing the orders made therein. As I have already indicated, the Article confers a power on the High Court to issue writs against the Union Government. If the said Government is "within the State", is it an answer to it that an officer of the Government dealing with a particular paper or papers is residing outside the territorial jurisdiction of the High Court? If the Union Government is bound by the order of the High Court, the question of service of notice on a particular officer acting for the Government or to enforce an order against him is a matter pertaining to the realm of procedure and appropriate rules can be framed by the High Court or the requisite law made by the Parliament. If the Union Government disobeys the order it would certainly be liable for contempt of court under the Contempt of Courts Act, 1952. Even if the contemner happens to be an officer of the said Government residing outside the territorial limits of the High Court, the High Court has ample power to reach him under s. 5 of the said Act.

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The analogy drawn from English law is rather misleading. England is comparatively a small country and it has only one Government functioning throughout the State. The problem that has arisen now could not have arisen in England, for the jurisdiction of the Queen's Bench Division of the High Court extends throughout England. In England the manner of the exercise of the jurisdiction was also regulated by a procedure brimming with technicalities, but later on simplified by statute. The framers of our Constitution therefore designedly used the words "in the nature of" indicating that they were not incorporating in the Constitution the entire procedure followed in England, for the procedure will have to be evolved having regard to the federal structure of our Government. How can the procedural law of England in the matter of writs be bodily lifted and implanted in India? This Court shall have to put a reasonable construction on the words without being unduly weighed down by the historical background of these writs and construe the Article in such a way, if legally permissible, to carry out the intention of the Constitution-makers. That apart, Article 226 of the Constitution is not confined to the prerogative writs in vogue in England. The Article enables the appropriate High Court to issue also directions or orders, and there is no reason why the High Court could not, in an appropriate case, give a suitable direction to, or make a proper order on, the Union Government. Such directions or orders are certainly free from the procedural technicalities of the said writs.

I shall now notice briefly the decisions cited at the Bar. The first is the decision of this Court in *Election Commission, India* v. *Saka Venkata Rao*(1). There the Governor of Madras referred to the Election Commission, which had its offices permanently located in New Delhi, the question whether the respondent was disqualified and could be allowed to sit and vote in the Assembly. The respondent thereupon applied to the High Court of Madras under Art. 226 of the Constitution for a writ restraining the Election Commission

(1) [1953] S.C.R. 1144.

from enquiring into his alleged disqualification for membership of the Assembly. This Court held that the power of the High Court to issue writs under Art. 226 of the Constitution was subject to the two-fold limitation: (i) that such writs cannot run beyond the territories subject to its jurisdiction; and (ii) that the person or authority to whom the High Court is empowered to issue writs must be amenable to the jurisdiction of the High Court either by residence or location within the territories subject to its jurisdiction. On that basis the writ petition was dismissed. At the outset it may be noticed that there is one obvious difference between that case and the present one. In that case the respondent was not the Union of India but an authority which could have and had its location in a place outside the Madras State. The present case satisfies both the conditions: the writ does not run beyond the territorial jurisdiction of the High Court, as the Union Government must be deemed to be "within" the said territories; the second condition is also satisfied, as the Union Government, being within the State, is also amenable to its jurisdiction.

The next case relied upon by the learned Solicitor-General is a converse one. It is the decision of this Court in *K. S. Rashid & Son* v. *The Income-tax Investigation Commission* (1). In that case the Income-tax Investigation Commission located in Delhi was investigating the case of the petitioners under section 5 of the Taxation on Income (Investigation Commission) Act, 1947, although the petitioners were assessees belonging to Uttar Pradesh and their original assessments were made by the Income-tax authorities of that State. It was contended that the Punjab High Court had no jurisdiction to issue a writ under Art. 226 of the Constitution to the said Commission. This Court, after restating the two limitations on the power of the High Court to issue a writ, held that the Commission was amenable to the jurisdiction of the Punjab High Court and, therefore, the Punjab High Court had jurisdiction to issue the writ. This decision also

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deals with a case of statutory authority located in Delhi and it has no application to the case of the Union Government. The question whether the principles that apply to the Government of India would equally apply to statutory authorities situate in one State but exercising jurisdiction in another, does not arise for consideration in this case; though, as I have already expressed, I am *prima facie* of the view that there is no reason why they should not.

Now coming to the decision of the High Courts, there is a clear enunciation of the relevant principles in *Maqbul-Un-Nissa* v. *Union of India* (1). The Full Bench of the Allahabad High Court directly decided the point now raised before us. The importance of the decision lies in the fact that the learned Judges approached the problem without being oppressed by the decision of this Court in *Saka Venkata Rao's case* (2), which was decided only subsequent to that decision. After considering the relevant Articles of the Constitution, Sapru, J., speaking for the Full Bench, observed at pp. 293-294 thus:

"The analogy between a government and a corporation or a joint stock company which has its domicile in the place where its head office is situate is misleading. To hold that the jurisdiction of this Court does not extend to the Union Government as it has its capital at Delhi and must be deemed to have its domicile at Delhi would be to place the Union Government not only in respect of the rights conceded in Part III but for any other purpose also beyond the jurisdiction of all State High Courts except the Punjab High Court."

The learned Judge proceeded to state at p. 294—

"In our opinion, the jurisdiction of this Court to intervene under Article 226 depends not upon where the Headquarters or the Capital of the Government is situate but upon the fact of the effect of the act done by Government, whether Union or State being within the territorial limits of this Court."

Adverting to the words "any Government" in Art. 226, the learned Judge observed at p. 292 thus:

(1) I.L.R. [1953] 2 All. 289. (2) [1953] S.C.R. 1144.

"They indicate that the founding fathers knew that more than one government would function within the same territory."

I entirely agree with the observations of the learned Judge, for they not only correctly construe the provisions of Art. 226 but also give effect to the intention of the Constitution-makers.

After the decision of this Court in *Saka Venkata Rao's case* (1) the High Court of Madhya Pradesh considered the question in *Surajmal* v. *State of M. P.* (2). There, the Central Government rejected an application for a mining lease and the order rejecting the application was communicated to the applicant who was residing in the State of Madhya Pradesh. It was held by the High Court that the writ asked for could not be issued so as to bind the Central Government because, "(a) the Central Government could not be deemed to be permanently located or normally carrying on its business within the jurisdiction of the High Court; (b) the record of the case which the Central Government decided was not before the High Court and could not be made available from any legal custody within the State; (c) the order of the State Government must be deemed to have merged in that of the Central Government; (d) the order of the State Government could not be touched unless the order of the Central Government could be brought before the High Court and quashed." We are concerned here with the first and second grounds. The learned Chief Justice, who delivered the judgment on behalf of the Full Bench, applied the principle of the decision of this Court in *Saka Venkata Rao's case* (1) to the Union Government; and for the reasons already mentioned I am of opinion that the decision is not applicable to the case of the Union Government. The second reason in effect places the procedure on a higher pedestal than the substantive law. It is true that in a writ of *certiorari* the records would be called for; but, if once it is held that the Union Government is within the State within the meaning of Art. 226 of the Constitution, I do not think why the High Court in exercise

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of its constitutional power cannot direct the Union Government to bring the records wherever its officers might have kept them. This second ground is really corollary to the first, viz., that the Union Government is not within the territorial jurisdiction of the High Court concerned.

The Bombay High Court in *Radheshyam Makhanlal* v. *The Union of India* (1) also held that a writ cannot issue against the Union Government whose office is located outside the territorial jurisdiction of the High Court. Shah, J., applying the principle of the decision in *Saka Venkata Rao's case* (2) to the Union Government held that as the office of the Union Government was not located within the State of Bombay, the Bombay High Court could not issue a writ to the Union Government. But S. T. Desai, J., was not willing to go so far, and he based his conclusion on a narrower ground, namely, that even if the writ was issued it could not be enforced. I have already pointed out that both the grounds are not tenable. The Union Government is within the State of Bombay in so far as it exercises its powers in that State and the High Court has got a constitutional power to issue writs to the Union Government and, therefore, their enforceability does not depend upon its officers residing in a particular place.

The foregoing discussion may be summed up in the following propositions: (1) The power of the High Court under Art. 226 of the Constitution is of the widest amplitude and it is not confined only to issuing of writs in the nature of *habeas corpus*, etc., for it can also issue directions or orders against any person or authority, including in appropriate cases any Government. (2) The intention of the framers of the Constitution is clear, and they used in the Article words "any Government" which in their ordinary significance must include the Union Government. (3) The High Court can issue a writ to run throughout the territories in relation to which it exercises jurisdiction and to the person or authority or Government within the said territories. (4) The Union Government has

(1) A.I.R. 1960 Bom. 353. (2) [1953] S.C.R. 1141.

no constitutional *situs* in a particular place, but it exercises its executive powers in respect of matters to which Parliament has power to make laws and the power in this regard is exercisable throughout India; the Union Government must, therefore, be deemed in law to have functional existence throughout India. (5) When by exercise of its powers the Union Government makes an order infringing the legal right or interest of a person residing within the territories in relation to which a particular High Court exercises jurisdiction, that High Court can issue a writ to the Union Government, for in law it must be deemed to be "within" that State also. (6) The High Court by issuing a writ against the Union Government is not travelling beyond its territorial jurisdiction, as the order is issued against the said Government "within" the State. (7) The fact that for the sake of convenience a particular officer of the said Government issuing an order stays outside the territorial limits of the High Court is not of any relevance, for it is the Union Government that will have to produce the record or carry out the order, as the case may be. (8) The orders issued by the High Court can certainly be enforced against the Union Government, as it is amenable to its jurisdiction, and if they are disobeyed it will be liable to contempt. (9) Even if the Officers physically reside outside its territorial jurisdiction, the High Court can always reach them under the Contempt of Courts Act, if they choose to disobey the orders validly passed against the Union Government which cannot easily by visualized or ordinarily be expected. (10) The difficulties in communicating the orders pertain to the rules of procedure and adequate and appropriate rules can be made for communicating the same to the Central Government or its officers.

For the aforesaid reasons, I hold that Art. 32(2A) of the Constitution enables the High Court of Jammu & Kashmir to issue the writ to the Union Government in respect of the act done by it infringing the fundamental rights of the parties in that State.

In the result, I allow the appeal, set aside the order of the High Court and direct it to dispose of the

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matter in accordance with law. The appellant will have his costs.

DAS GUPTA, J.—I have had the advantage of reading the judgments prepared by my Lord the Chief Justice and Mr. Justice Subba Rao. I agree with the conclusions reached by the Chief Justice that the appeal should be dismissed. As, however, I have reached that conclusion by a slightly different process of reasoning I propose to indicate those reasons briefly.

The facts have been fully stated in the judgment of My Lord the Chief Justice and it is not necessary to repeat them. It is sufficient to state that the appellant filed an application to the High Court of Jammu & Kashmir under Article 32(2A) of the Constitution for the issue of an appropriate writ, order or directions restraining the Union of India and the State of Jammu & Kashmir from enforcing an order conveyed in the Government of India's letter dated July 31, 1954, whereby the Government of India ordered the premature compulsory retirement of the appellant with effect from August 12, 1954. A preliminary objection was raised on behalf of the respondents that Government of India is not a Government within the territorial limits of the jurisdiction of the Jammu and Kashmir High Court and so the application was not maintainable. The High Court accepted this objection as valid and dismissed the application. The sole question in controversy in appeal is whether the High Court had jurisdiction, on the facts and circumstances of this case, to issue a writ to the Government of India under Art. 32(2A) of the Constitution.

Article 32(2A) of the Constitution under which the appellant asked the High Court for relief is in the following words:—

"Without prejudice to the powers conferred by clauses (1) and (2), the High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within those territories, directions or orders or writs,

including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by this Part."

Except for the fact that "the High Court" in this Article means only the High Court of the State of Jammu & Kashmir, while Art. 226 of the Constitution refers to all other High Courts and the further fact that power granted by this Article is for the enforcement only of the rights conferred by Part III of the Constitution while Art. 226 gives power to the High Courts in the Union for the enforcement not only of the rights conferred by Part III but for any other purpose, the provisions of the two articles are exactly the same. Power is given to the High Court to give relief in certain matters by issuing appropriate writs and orders to (1) any person; (2) any authority other than the Government and (3) any Government. The exercise of this power is subject to the existence of the condition precedent that the person or the Government or the authority other than the Government must be "within the territories in relation to which the High Court exercises jurisdiction". A special limitation in respect of the issue of writs or orders to a Government is introduced by the words "in appropriate cases" before the words "any Government". Leaving for later consideration the effect of the words "in appropriate cases" we have first to examine the question: when is a Government within the territories under the jurisdiction of a particular High Court? On behalf of the first respondent, the Union of India, it is urged that to be within the territories under the jurisdiction of a High Court the Government must be located within those territories. It is pointed out that "any person" to be within any specified territories has to be present within those territories; an authority other than Government has also, before it can be said to be within any particular territories, a physical existence within those territories by having its office therein. The same requirement of location within the particular territories, it is argued, should apply to the case of Governments. The

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argument is no doubt attractive and at first sight even plausible. On closer examination however it becomes evident that this argument oversimplifies the problem by slurring over the fallacious assumption that a Government has a location in the same way as any person or any authority other than Government. Has the Government any location in a similar sense—in the same way as a person has a location at any point of time by being present at a particular place or an authority other than the Government can be said to be located at the place where its office is situated? There is no doubt that when we think of a Government, whether of the States or of the Union we are thinking of the executive organ of the State. The executive power of the Union is under Art. 53 vested in the President and is to be exercised by him. The executive power of the States is vested in the Governors of the States and has to be exercised by them. Does it follow however that the Government of India is located at the place where the President resides and similarly the Government of each State is located at the place where the Governor resides? It has to be noticed that while the Constitution contains specific provisions in Art. 130 as to where the Supreme Court shall sit, no such provision is made as to where the President of India shall reside or exercise his executive power vested in him. Art. 231 of the Constitution speaks of a principal seat for the High Court of each State. We search in vain however for any mention of any principal seat "for the President of India or the Governors of the States". The fact that the President of India has a special place of residence, the Rashtrapati Bhawan in Delhi and the Governors of States have also special places of residence at some places in the State known as Raj Bhavan, is apt to make us forget that the Constitution does not provide for any place of residence for the President or Governors. There is nothing to prevent the President of India from having more than one permanent place of residence within the Union. If this happens and places of residence are provided for the President of India in, say, Bombay, Calcutta and

Madras in addition to the residence at Delhi, can it be said that the Government of India is located in Delhi when the President of India resides in Delhi, it goes to Calcutta when he resides in Calcutta, it goes to Bombay when the President resides in Bombay and to Madras when the President goes and resides in Madras? This may seem at first sight a fantastic illustration; but when we remember that in fact in the days of British rule, the Viceroy had a permanent place of residence at Simla for part of the year and another permanent place of residence at Calcutta for part of the year before 1911 and after 1911 one permanent place of residence in Delhi and another in Simla, it is easy to see that what has been said above by way of illustration is by no means improbable. If therefore a Government is to be held to be located at the place where the head of the State—the President of India in the case of the Government of India and the Governor in the case of each State—resides, it may well become impossible to speak of any particular place as the place where the Government is located throughout the year. This may not affect the question of any State Government being within the territories of the High Court of the State. For whatever place the Governor may have for his residence is bound to be within the territories of the State. The position will however become wholly uncertain and difficult as regards the Government of India being within the territorial jurisdiction of any particular High Court. For part of the year it may be, if the residence of the President be the criterion for ascertaining the location of the Government, that the Government of India will be within the territories of one High Court and for other parts of the year in another High Court. It will be wholly unreasonable therefore to accept the test of residence of the President of India for deciding where the Government of India is located.

Finding the test of the President's residence illusory, one may try to say that the Government of India or of a State is situated at the place where the offices of the Ministry are situated. Under Art. 77 the President allocates the business of the Government of India

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among the Ministers while under Art. 166 the Governor of a State allocates the business of the Government of a State—except business with respect to which the Governor is required to act in his discretion—among the Ministers of the State. If therefore it was correct to say that all the Ministers of the Government of India had to perform their functions in respect of the business allocated to them at one particular place, it might be reasonable to say that the Government of India is located at that place. Similarly if all the Ministers of a State had to perform their functions in respect of the business allocated to them at one particular place the Government of the State might well be said to be located at that place. The Constitution however contains no provision that all the Ministers of a State shall perform their functions at one particular place in the State nor that the Ministers of the Union will perform their functions at one particular place in the State. Situations may arise not only in an emergency, but even in normal times, when some Ministers of the Government may find it necessary and desirable to dispose of the business allocated to them at places different from where the rest of the Ministers are doing so. The rehabilitation of refugees from Pakistan is part of the business of the Government of India and for the proper performance of this business there is a Ministry of Rehabilitation for Refugees. It is well-known that the Minister in this Ministry has to perform a great portion of his business at Calcutta in West Bengal and stays there for a considerable part of the year. Many of the offices of this Ministry are situated in Calcutta. What is true of this Ministry, may happen as regards other Ministries also. Special circumstances may require that some portion of the business of the Ministry of Commerce be performed at places like Bombay, Calcutta or Madras in preference to Delhi, and if this happens the Minister to whom the business of Government of India in respect of commerce has been allocated will be transacting his business at these places instead of at Delhi. If public interest requires that the greater portion of the business of the Ministry of

Defence should for reasons of security or other reasons be carried on at some place away from Delhi the Defence Minister will have to transact its business at that place. It is clear therefore that while at any particular point of time it may be possible to speak of any Ministry of the Government of India being located at a particular place, the Government of India as a whole may not necessarily be located at that place. In my opinion, it is therefore neither correct nor appropriate to speak of location of any Government. Nor is it possible to find any other satisfactory test for ascertaining the location of the Government of India.

In *Election Commission* v. *Saka Venkata Subba Rao* (1) this Court held that before a writ under Art. 226 could issue to an authority, the authority must be located within the territories under the jurisdiction of the High Court. There however the Court was not concerned with the case of any Government, and had no occasion to consider whether a Government could be said to have a location. The decision in that case and in the later case of *K. S. Rashid and Son* v. *The Income-tax Investigation Commission, etc.*, (2) does not therefore bind us to hold that a Government has a location in the same way as an authority like an Election Commission or an Income-tax Investigation Commission. It appears reasonable therefore to hold that all that is required to satisfy the condition of a Government being within the territories under the jurisdiction of a High Court is that the Government must be functioning within those territories. The Government of India functions throughout the territory of India. The conclusion cannot therefore be resisted that the Government of India is within the territories under the jurisdiction of every High Court including the High Court of Jammu and Kashmir.

The use of the words "any Government" appears to me to be an additional reason for thinking that the Government of India is within the territories under the jurisdiction of the Jammu & Kashmir High Court. "Any Government" in the context cannot but mean

(1) [1953] S.C.R. 1144. (2) [1954] S.C.R. 738.

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every Government. If the location test were to be applied the only Government within the territories of the State of Jammu and Kashmir would be the Government of Jammu and Kashmir. It would be meaningless then to give the High Court the power to give relief against "any Government" within its territories. These words "any Government" were used because the Constitution-makers intended that the High Court shall have power to give relief against the Government of India also.

But, contends the respondent, that will produce an intolerable position which the Constitution-makers could not have contemplated. The result of the Government of India being within the territories of every High Court in India will, it is said, be that the Government of India would be subjected to writs and orders of every High Court in India. A person seeking relief against the Government of India will naturally choose the High Court which is most convenient to him and so the Government of India may have to face applications for relief as against the same order affecting a number of persons in all the different High Courts in India. If a position of such inconvenience to the Government of India, though of great convenience to the persons seeking relief, did in fact result from the words used by the Constitution-makers, I for one, would refuse to shrink from the proper interpretation of the words merely to help the Government. I do not however think that that result follows. For, on a proper reading of the words "in appropriate cases", it seems to me that there will be, for every act or omission in respect of which relief can be claimed, only one High Court that can exercise jurisdiction.

It has first to be noticed that the limitation introduced by the use of these words "in appropriate cases" has not been placed in respect of issue of writs to persons and to authorities other than government. It has been suggested that the effect of these words is that in issuing writs against any Government the High Court has not got the same freedom as it has when issuing writs against any person or authority other than

Government and that when relief is asked against a Government the High Court has to take special care to see that writs are not issued indiscriminately but only in proper cases. I have no hesitation in rejecting this suggestion. It cannot be seriously contemplated for a moment that the Constitution-makers intended to lay down different standards for the courts when the relief is asked for against the Government from when the relief is asked for against other authorities. In every case where relief under Art. 226 is sought the High Court has the duty to exercise its discretion whether relief should be given or not. It is equally clear that in exercising such discretion the High Court will give relief only in proper cases and not in cases where the relief should not be granted.

Why then were these words "in appropriate cases" used at all? It seems to me that the Constitution-makers being conscious of the difficulties that would arise if all the High Courts in the country were given jurisdiction to issue writs against the Central Government on the ground that the Central Government was functioning within its territories wanted to give such jurisdiction only to that High Court where the act or omission in respect of which relief was sought had taken place. In every case where relief is sought under Art. 226 it would be possible to ascertain the place where the act complained of was performed or when the relief is sought against an omission, the place where the act ought to have been performed. Once this place is ascertained the High Court which exercises jurisdiction over that place is the only High Court which has jurisdiction to give relief under Art. 226. That, in my view, is the necessary result of the words "in appropriate cases".

On behalf of the appellant it was contended on the authority of the decision of the Privy Council in *Ryots of Garabandho* v. *Zemindar of Parlakimedi* (1) that all that is necessary to give jurisdiction to a High Court to act under Art. 226 is that a part of the cause of action has arisen within the territories in relation to which it exercises jurisdiction. The question whether the cause of action attracts jurisdiction for relief

(1) (1943) L.R. 70 I.A. 129.

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under Art. 226 of the Constitution as in the case of suits was considered by this Court in *Saka Venkata Subba Rao's Case* (1) and the answer given was in the negative. Referring to the decision of the Privy Council in *Parlakimedi's Case* (2) this Court pointed out that the decision did not turn on the construction of a statutory provision similar in scope, purpose or wording to Art. 226 of the Constitution, and is not of much assistance in the construction of that article. Delivering the judgment of the Court Patanjali Sastri C. J. also observed:—

"The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Art. 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction."

This decision is binding on us, and I may respectfully add that I find no reason to doubt its correctness.

It is true that in that case the Court had to consider the question of jurisdiction in respect of an authority other than Government. It is difficult to see however why if cause of action could not attract jurisdiction against persons and authorities other than Government it would attract jurisdiction as against a Government. It seems to me clear that the principle of basing jurisdiction on cause of action has not been introduced in the Constitution under Art. 226 or Art. 32(2A) of the Constitution.

It may seem at first sight that to hold that the High Court within whose jurisdiction the action or omission, complained of took place will have jurisdiction, is in effect to accept the accrual of cause of action as the basis of jurisdiction. This however is not correct. The High Court within the jurisdiction of which the act or omission takes place, has jurisdiction, not because a part of the cause of action arose there, but in consequence of the use of the words "in appropriate cases".

(1) [1953] S.C.R. 1144. (1) (1943) L.R. 70 I.A. 129.

The several cases in the High Court in which the question now before us has been considered have been referred to in the majority judgment and also in the judgment of Mr. Justice Subba Rao and no useful purpose would be served in discussing them over again.

For the reasons discussed above I have reached the conclusion that while the Government of India is within the territories of every High Court in India the only High Court which has jurisdiction to issue a writ or order or directions under Art. 226 or Art. 32 (2A) against it is the one within the territories under which the act or omission against which relief was sought took place.

In the present case the act against which the relief has been sought was clearly performed at Delhi which is within the territories under the jurisdiction of the Punjab High Court and the Jammu and Kashmir High Court cannot therefore exercise its jurisdiction under Art. 226.

In the result, I agree with my Lord the Chief Justice that the appeal should be dismissed with costs.

BY COURT. In accordance with the opinion of the majority of the Court, this appeal is dismissed with costs.

Appeal dismissed.

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(B. P. SINHA, C. J., S. K. DAS, K. C. DAS GUPTA, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

District Judges—Eligibility for appointment—Appointment under the Constitution—Qualifications—Period of practice as Advocate, if includes period of practice in Lahore High Court—High Courts (Punjab) Order, 1947, cl. 6—Bar Councils Act, 1926 (38 of 1926), s. 8—Constitution of India, Art. 233(2).

The validity of the appointment of respondents 2 to 6 as District Judges was challenged in a petition filed by the appellant under Art. 226 of the Constitution of India before the High Court of Punjab, on the ground, inter alia, that the appointment was made in contravention of Art. 233(2) of the Constitution of India which lays down that "a person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader..." The respondents had been enrolled as advocates of the Lahore High Court on various dates between 1933 and 1940, and while respondents 2, 4 and 5 had their names on the roll of advocates of the Punjab High Court and were practising as advocates at the time they were appointed as District Judges in 1950 and 1952, respondents 3 and 6 did not have their names factually on the roll when they were appointed as District Judges in 1957 and 1958. Respondent 6 had his name so enrolled after his appointment.

Under a notification dated September 28, 1948, ss. 3 to 16 of the Bar Councils Act, 1926, came into force in respect of the East Punjab High Court, by virtue of which a Bar Council was constituted and a roll of advocates had to be prepared and maintained by the High Court in accordance with s. 8 of the Act. The proviso to sub-s. (2) of s. 8 of the Act required them to deposit a fee of Rs. 10 payable to the Bar Council. The appellant's contention was that after the partition of the country, which led to the establishment of a separate High Court for the province of East Punjab the Punjab High Court was established only on August 15, 1947, under the High Courts (Punjab) Order, 1947, and as the respondents did not have seven years' standing as advocates with reference to their right of practice in a court in India after that date, they did not fulfil the requirements of Art. 233(2) when they were appointed as District Judges and, therefore, their appointments were constitutionally invalid. The question was whether the period of seven years referred to in Art. 233(2) must be counted as the

standing of the advocate or pleader with reference to his right of practice in a court in the territory of India as defined in Art. 1 of the Constitution, or whether any right of practice in a court which was in India before the partition of the country in 1947 but which was not in India since partition, could also be taken into consideration for the purpose of counting the period of seven years.

Held, that under cl. (6) of the High Courts (Punjab) Order, 1947, read with s. 8(3) of the Bar Councils Act, 1926, an advocate of the Punjab High Court was entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar. Accordingly as respondents 2, 4 and 5 continued to be advocates of the Punjab High Court when they were appointed as District Judges and had a standing of more than seven years when so appointed, they fulfilled the requirements of Art. 233(2) of the Constitution.

Held, further, that the effect of cl. (6) of the High Courts (Punjab) Order, 1947, and s. 8(2)(a) of the Bar Councils Act, 1926, was that from August 15, 1947, to September 28, 1948, advocates who had been enrolled as advocates of the Lahore High Court were recognised as advocates entitled to practice in the Punjab High Court, and after September 28, 1948, they automatically came on the roll of advocates of the Punjab High Court, but had to pay a fee of Rs. 10 to the Bar Council. Consequently, respondents 3 and 6 who did not cease to be advocates at any time or stage after August 15, 1947, continued to be advocates of the Punjab High Court till they were appointed as District Judges and had the necessary standing of seven years to be eligible under Art. 233(2) of the Constitution.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 438 of 1960.

Appeal by special leave from the judgment dated September 21, 1959, of the Punjab High Court, Chandigarh, in Civil Writ No. 1050 of 1959.

A. S. R. Chari, M. S. K. Sastri and *K. L. Mehta*, for the appellant.

S. M. Sikri, Advocate General for the Punjab, N. S. Bindra, K. L. Arora and *D. Gupta*, for the respondent No. 1.

Gurbachan Singh, Tirth Singh Munjral and *R. H. Dhebar*, for respondents Nos. 2, 3 and 5.

A. V. Viswanatha Sastri, R. Ganapathy Iyer and *D. Gupta*, for respondents Nos. 4 and 6.

H. N. Sanyal, Additional Solicitor-General of India, and *D. Gupta*, for the Intervener (Union of India).

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M. K. Nambiyar, M. S. K. Sastri and *K. L. Mehta*, for the Interveners (Om Dutt Sharma and B. D. Pathak).

1960. December 5. The Judgment of the Court was delivered by

S. K. DAS, J.—This is an appeal by special leave from an order of the High Court of Punjab dated September 21, 1959, by which it summarily dismissed a petition made by the present appellant under Art. 226 of the Constitution for certain reliefs in respect of five persons, two of whom are now working as Additional Judges of the Punjab High Court, the third as Officiating Judge of the same Court, the fourth as District and Sessions Judge, Delhi, and the fifth as Registrar, Punjab High Court, Chandigarh. Shorn of details which are not material, the case of the appellant was and is that the aforesaid five persons, now respondents 2 to 6 before us, were not qualified to be appointed as District Judges under Art. 233 of the Constitution at the time when they were so appointed by the State Government, now respondent 1 before us, and, therefore, their appointment as such was constitutionally invalid; and the appellant claimed by way of his main relief that a writ in the nature of a writ of *quo warranto* should issue "ousting them from their office and restraining them from exercising the powers, duties and functions of the posts they are holding and from claiming any rights, privileges or emoluments attached to their office." Certain other subsidiary or ancillary reliefs were also claimed details whereof need not now be stated. We have stated that the petition was summarily dismissed by the High Court. An application for a certificate of fitness having failed in the High Court, the appellant asked for and obtained special leave from this Court on August 19, 1960.

The appeal has been contested by the State of Punjab, respondent 1, and the other respondents of whom Shamsher Bahadur, Harbans Singh and Gurdev Singh are Justices of the Punjab High Court, Hans Raj Khanna is District and Sessions Judge, Delhi,

and P. R. Sawhney is Registrar of the High Court. These respondents have filed separate affidavits in reply, and some of them have been separately represented and heard. The Advocate-General of Punjab has appeared and contested the appeal on behalf of respondent 1. The Union of India was originally a party-respondent to the petition inasmuch as the appellant had initially impugned the appointment of two of the respondents as High Court Judges; this relief was, however, given up during the pendency of the special leave petition and on an application made by the appellant, the name of the Union of India was struck off by an order dated March 18, 1960, leaving the matter in dispute limited to the question of the validity of the initial appointment of respondents 2 to 6 as District Judges only. Later, the Union of India made an application to intervene in the appeal and in view of the circumstance that a question of the interpretation of Art. 233 of Constitution arises in the appeal, we have allowed the application and heard the learned Additional Solicitor-General, even though the Union of India did not appear at an earlier stage to contest the application which the appellant had made, to expunge it from the category of respondents.

The other persons B. D. Pathak and Om Dutt Sharma had also filed a writ petition in the Punjab High Court challenging the legality of the appointment of P. R. Sawhney who, it appears, had acquitted certain persons in three criminal appeals decided by him on January 22, 1959, as Additional District and Sessions Judge, Delhi, from the decision of a magistrate of Delhi in a case in which B. D. Pathak and Om Dutt Sharma said that they had been assaulted by the persons accused in the case. They filed three revision petitions in respect of the orders passed, which are pending in the High Court. In view of these circumstances they have also been allowed to intervene in the present appeal in so far as it relates to the appointment of P. R. Sawhney, and we have heard learned Counsel on their behalf.

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On behalf of the respondents who are no longer working as District Judges a preliminary objection has been taken to the maintainability of the appeal. It has been contended that the appeal is now limited to the question of their appointment as District Judges and as they are no longer holding the office of District Judge, the prayer for the issue of a writ of *quo warranto* in respect of that office is no longer maintainable. On behalf of the appellant it has been submitted in reply that respondents 2 to 4 are not permanent Judges of the High Court so that if and when they revert, they must go back to their substantive posts of District Judges; therefore, the question whether they were validly appointed to their substantive posts is a live issue and the appellant is entitled to ask this Court to pronounce on that issue. The learned Advocate-General has submitted that the State is anxious to have the decision of this Court on the legality of the appointments made in order to avoid future trouble and the State does not wish to raise any preliminary objection to the determination of the question in issue. On a careful consideration of the matter, we have come to the conclusion that the preliminary objection must be overruled and in the circumstances of this case, this Court must decide on the legality of the impugned appointments.

It would facilitate appreciation of the points in controversy if we state first, in broad outline, the circumstances in which respondents 2 to 6 were appointed as District Judges.

(1) Respondent 2 (Shamshere Bahadur, J.) was called to the Bar in England on January 26, 1933, by the Middle Temple. He was enrolled as an Advocate of the Lahore High Court on May 15, 1933, and practised as such in that Court. On February 9, 1949, he was enrolled as an Advocate of the Federal Court of India. On and after August 15, 1947, he practised as an Advocate of the East Punjab High Court till he was appointed as District and Sessions Judge on March 20, 1950. Then he functioned as Legal Remembrancer of the State Government from December 1953 to May 1959, when he was appointed as an Additional Judge of the Punjab High Court.

(2) Respondent 3 (Harbans Singh, J.) was also called to the Bar and then enrolled as an Advocate of the Lahore High Court on March 5, 1937. He worked as an Additional District and Sessions Judge, Ferozepore, from July 2, 1947, to February 22, 1948. He then returned to practice at Simla for a short while. On March 15, 1948, he worked as Deputy Custodian, Evacuee Property, till April 17, 1950. On April 18, 1950, he was appointed as District and Sessions Judge and on August 11, 1958, he was appointed as an Additional Judge of the Punjab High Court.

(3) Respondent 4 (Gurdev Singh, J.) was enrolled as a Pleader of the Lahore High Court on October 25, 1934, and then as an Advocate of the said Court on December 20, 1938. He was enrolled as an Advocate of the Federal Court of India on May 29, 1948, and was continuously in practice till he was appointed as District and Sessions Judge on February 2, 1952. On July 11, 1960, he was appointed to officiate as a Judge of the Punjab High Court.

(4) Respondent 5 (Hans Raj Khanna) was enrolled as a Pleader of the Lahore High Court on July 17, 1934, and then enrolled as an Advocate of the said Court on December 20, 1940. He started his practice as a lawyer at Amritsar and he continued his practice there till his appointment as District and Sessions Judge. His name was borne on the Roll of Advocates prepared by the East Punjab High Court when he was appointed as District and Sessions Judge on February 1, 1952.

(5) Respondent 6 (P. R. Sawhney) was called to the Bar on November 17, 1930, and was enrolled as an Advocate of the Lahore High Court on March 10, 1931. After partition he shifted to Delhi and worked for sometime as Legal Adviser to the Custodian, Evacuee Property, Delhi. Then he practised for sometime at Delhi; he then accepted service under the Ministry of Rehabilitation as an Officer on Special Duty and Administrator, Rajpura Township. On March 30, 1949, he became the Chairman, Jullundur Improvement Trust. On May 6, 1949, he got his licence to practise as an Advocate suspended. On

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April 6, 1957, he was appointed as District and Sessions Judge.

It would thus appear that of the five respondents mentioned above, three, namely, Shamshere Bahadur, Gurudev Singh and Hans Raj Khanna had their names on the Roll of Advocates of the Punjab High Court before they were appointed as District Judges. In other words, they were practising as Advocates at the time they were so appointed. Two of them, Harbans Singh and P. R. Sawhney, did not have their names factually on the Roll when they were appointed as District Judges. P. R. Sawhney, it appears, had his name so enrolled on October 20, 1959, that is, after his appointment as District Judge. We are inviting attention to this distinction amongst the respondents at this stage, because as will appear later this distinction has some bearing on one of the arguments made before us on behalf of the appellant.

We proceed now to a consideration of the main contention urged on behalf of the appellant, namely, that the appointment of respondents 2 to 6 as District Judges was made in contravention of the provisions of Art. 233 of the Constitution. It is convenient to read here Art. 233 of the Constitution:

"Art. 233(1). Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Now, the argument of learned Counsel for the appellant has ranged over a wide field; but the point for decision is a narrow one and depends on whether respondents 2 to 6 fulfilled the requirements of cl. (2) of Art. 233 of the Constitution when they were appointed as District Judges by respondent 1. That clause lays down that a person not already in the service of the Union or of the State shall only be eligible to be

appointed a district judge if (1) he has been for not less than seven years an advocate or a pleader and (2) is recommended by the High Court for appointment. As to the second requirement no question arises here, because admittedly respondents 2 to 6 were recommended by the High Court before their appointment. The dispute is with regard to the first requirement. Learned Counsel for the appellant has contended that respondents 2 to 6 did not fulfil the requirement of having been "seven years an advocate or pleader" and has put his argument in support of his contention in the following way. Firstly, he has submitted that the expression "advocate or pleader" is an expression of legal import and must be given its generally accepted meaning at the time the Constitution was adopted; and that expression according to learned Counsel means an advocate or pleader entitled to appear and plead for another in a Court in India, but does not include an advocate or pleader of a foreign Court; for this submission he has relied on the definition of the expression "legal practitioners" in the Legal Practitioners Act, 1879 (XVIII of 1879); of "pleader" in the Civil Procedure Code, 1908 (Act V of 1908); and of "advocate" in the Bar Councils Act, 1926 (XXXVIII of 1926). Secondly, he has submitted that by reason of the use of the present perfect tense "has been" in cl. (2) of Art. 233, the rules of grammar require that the person eligible for appointment must not only have been an advocate or pleader before but must be an advocate or pleader at the time he is appointed to the office of District Judge. Thirdly, he has submitted that the period of seven years referred to in the clause must be counted as the standing of the advocate or pleader with reference to his right of practice in a Court in the territory of India as defined in Art. 1 of the Constitution; in other words, any right of practice in a Court which was in India before the partition of the country in 1947 but which is not in India since partition, cannot be taken into consideration for the purpose of counting the period of seven years.

We shall presently consider these submissions in so

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far as they bear on the problem before us. But before we do so, it is necessary to explain the changes which took place after the partition of the country and led to the establishment of a High Court of Judicature for the province of East Punjab (now called the Punjab High Court for the State of Punjab) and how those changes affected the position of advocates or pleaders who had the right to practice in the Lahore High Court of undivided Punjab. The Independence Act, 1947, brought into existence two independent Dominions—India and Pakistan—and s. 9 thereof gave the Governor-General power to make orders *inter alia* for bringing the provisions of the Act into effective operation. In exercise of that power the Governor-General made the High Courts (Punjab) Order, 1947, which established as from the appointed day (August 15, 1947) a High Court of Judicature for the then Province of East Punjab. Clause 6 of the Order is important and must be quoted in full:

"6(1) The High Court of East Punjab shall have the like powers to approve, admit, enrol, remove and suspend advocates, vakils and attorneys, and to make rules with respect to advocates, vakils and attorneys as are, under the law in force immediately before the appointed day, exercisable by the High Court at Lahore.

(2) The right of audience in the High Court of East Punjab shall be regulated in accordance with the like principles as, immediately before the appointed day, are in force with respect to the right of audience in the High Court at Lahore:

Provided that, subject to any rule made or direction given by the High Court of East Punjab in the exercise of the powers conferred by this Article, any person who, immediately before the appointed day, is an advocate, vakil or attorney entitled to practise in the High Court at Lahore shall be recognised as an advocate, vakil or attorney entitled to practise in the High Court of East Punjab."

It is also necessary to notice cl. 14 of the Order which states *inter alia* that "the provisions of this Order shall have effect subject to any provision made on or

after the appointed day with respect to.....the High Court of East Punjab by any legislature or other authority having power to make such provision." The points which we must emphasise here are (1) that under cl. 6(2) the seniority of advocates in the new High Court as to their right of audience was to be regulated by the principle in force in the former High Court and (2) that under the proviso to cl. 6 any person who before August 15, 1947, was an advocate entitled to practise in the Lahore High Court was recognised as an advocate entitled to practise in the High Court of East Punjab, subject to any rule made or direction given by the High Court or any provision made by the legislature or other authority having power to make such provision. The Bar Councils Act, 1926, except for ss. 1, 2, 17, 18 and 19 did not then apply to the High Court of East Punjab. By a notification dated September 28, 1948, the Governor of East Punjab directed that the provisions of ss. 3 to 16 of the said Act shall come into force in respect of the East Punjab High Court with effect from that date. Section 3 of the Act says that for every High Court a Bar Council shall be constituted in the manner provided by the provisions of the Act. Section 8 of the Act says (We are reading such portion only as is relevant for our purpose):—

"S. 8(1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act:

Provided that nothing in this sub-section shall apply to any attorney of the High Court.

(2) The High Court shall prepare and maintain a roll of advocates of the High Court in which shall be entered the names of—

(a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section comes into force in respect thereof; and

(b) all other persons who have been admitted to be advocates of the High Court under this Act:

Provided that such persons shall have paid in

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respect of enrolment the stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a), and in other cases such amount as may be prescribed.

(3) Entries in the roll shall be made in the order of seniority and such seniority shall be determined as follows, namely:—

(a) all such persons as are referred to in clause (a) of sub-section (2) shall be entered first in the order in which they were respectively entitled to seniority *inter se* immediately before the date on which this section comes into force in respect of the High Court; and

(b) the seniority of any other person admitted to be an advocate of the High Court under this Act after that date shall be determined by the date of his admission or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier:

Provided that, for the purposes of clause (b), the seniority of a person who before his admission to be an advocate was entitled as of right to practise in another High Court shall be determined by the date on which he became so entitled.

(4) The respective rights of pre-audience of advocates of the High Court shall be determined by seniority."

It is not very clear from the record before us when the Bar Council was actually constituted for the Punjab High Court, but it was stated at the Bar that the first election took place in 1950. But on January 13, 1949, the High Court made certain rules under ss. 6 and 12 of the Act. Rule 2(1) of the said rules was in these terms:

"Rule 2(1). The Registrar shall classify the advocates entered in the roll prepared under section 8, sub-section (2), of the Indian Bar Councils Act as follows:—

(a) those who have or who on or before the date of election of the members of the Bar Council of the High Court will have, for not less than 10 years, been entitled as of right to practise in the High Court;

(b) those who other than those mentioned in clause (a) are or who on or before the date of the election of members of the Bar Council of the High Court may become entitled to practise in the High Court."

We have, therefore, two distinct periods to keep in mind. The first period is between August 15, 1947, to September 27, 1948, when the main provisions of the Bar Councils Act, 1926, were not in force for the Punjab High Court and the right of advocates was regulated by the High Courts (Punjab) Order, 1947. The second period was from September 28, 1948, when the main provisions of the Bar Councils Act were brought into force, rules were made thereunder, a Bar Council was constituted and a roll of Advocates was prepared and maintained in accordance with s. 8 of the said Act. It was in this second period that the Constitution of India came into force on January 26, 1950.

This is the background against which we have to consider the argument of learned Counsel for the appellant. Even if we assume without finally pronouncing on their correctness that learned Counsel is right in his first two submissions, viz., that the word "advocate" in cl. (2) of Art. 233 means an advocate of a Court in India and the appointee must be such an advocate at the time of his appointment, no objection on those grounds can be raised to the appointment of three of the respondents who were factually on the roll of Advocates of the Punjab High Court at the time of their appointment; because admittedly they were advocates in a Court in India and continued as such advocates till the dates of their appointment. The only question with regard to them is whether they can count in the period of seven years their period of practice in or under the Lahore High Court. The answer to this question is clearly furnished by cl. 6(2) of the High Courts (Punjab) Order, 1947, read with s. 8(3) of the Bar Councils Act, 1926. That clause lays down that the right of audience in the High Court of East Punjab shall be regulated in

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accordance with the principle in force in the Lahore High Court immediately before the appointed day. The relevant rule in the Lahore High Court Rules laid down that Advocates who are Barristers shall take precedence inter se according to the date of call to the Bar; Advocates who are not Barristers, according to the dates when they became entitled to practice in a High Court. The same principle applied to the East Punjab High Court, and an advocate of the Lahore High Court who was recognised as an advocate entitled to practise in the new High Court counted his seniority on the strength of his standing in the Lahore High Court. He did not lose that seniority, which was preserved by the Bar Councils Act, 1926, and we see no reasons why for the purpose of cl. (2) of Art. 233 such an advocate should not have the same standing as he has in the High Court where he is practising.

Learned Counsel for the appellant has also drawn our attention to Explanation I to cl. (3) of Art. 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the Explanation to cl. (2) of Art. 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution-makers thought it necessary they specifically provided for counting the period in a High Court which was formerly in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a requirement of Art. 233, and we do not think that cl. (2) of Art. 233 can be interpreted in the light of Explanations added to Arts. 124 and 217. Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under cl. (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in cl. (2) and all that is required is that he should be an advocate or pleader of seven years' standing. The

clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Art. 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge.

What will be the result if the interpretation canvassed for on behalf of the appellant is accepted? Then, for seven years beginning from August 15, 1947, no member of the Bar of the Punjab High Court would be eligible for appointment as district judge—a result which has only to be stated to demonstrate the weakness of the argument. We have proceeded so far on the first two submissions of learned Counsel for the appellant, and on that basis dealt with his third submission. It is perhaps necessary to add that we must not be understood to have decided that the expression 'has been' must always mean what learned Counsel for the appellant says it means according to the strict rules of grammar. It may be seriously questioned if an organic Constitution must be so narrowly interpreted, and the learned Additional Solicitor-General has drawn our attention to other Articles of the Constitution like Art. 5(c) where in the context the expression has a different meaning. Our attention has also been drawn to the decision of the Allahabad High Court in *Mubarak Mazdoor* v. *K. K. Banerji* (1) where a different meaning was given to a similar expression occurring in the proviso to sub-s. (3) of s. 86 of the Representation of the People Act, 1951. We consider it unnecessary to pursue this matter further because the respondents we are now considering continued to be advocates of the Punjab High Court when they were appointed as district judges and they had a standing of more than seven years when so appointed. They were clearly eligible for appointment under cl. 2 of Art. 233 of the Constitution.

We now turn to the other two respondents (Harbans Singh and P. R. Sawhney) whose names were not

(1) A.I.R. 1958 All. 323.

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factually on the roll of Advocates at the time they were appointed as district judges. What is their position? We consider that they also fulfilled the requirements of Art. 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr. Viswanatha Sastri appearing for him has submitted that cl. (2) of Art. 233 did not apply. We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of cl. (2), we must hold that they fulfilled those requirements. They were Advocates enrolled in the Lahore High Court; this is not disputed. Under cl. 6 of the High Courts (Punjab) Order, 1947, they were recognised as Advocates entitled to practise in the Punjab High Court till the Bar Councils Act, 1926, came into force. Under s. 8 (2)(a) of that Act it was the duty of the High Court to prepare and maintain a roll of advocates in which their names should have been entered on the day on which s. 8 came into force, that is, on September 28, 1948. The proviso to sub-s. (2) of s. 8 required them to deposit a fee of Rs. 10 payable to the Bar Council. Obviously such payment could hardly be made before the Bar Council was constituted. We do not agree with learned Counsel for the appellant and the interveners (B. D. Pathak and Om Dutt Sharma) that the proviso had the effect of taking away the right which these respondents had to come automatically on the roll of advocates under s. 8(2)(a) of the Act. We consider that the combined effect of cl. 6 of the High Courts (Punjab) Order, 1947, and s. 8(2)(a) of the Bar Councils Act, 1926, was this: from August 15, 1947, to September 28, 1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 1948, they automatically came on the roll of advocates of the Punjab High Court but had to pay a fee of Rs. 10 to the Bar Council. They did not cease to be advocates at any time or stage after August 15, 1947, and they continued to be advocates of the Punjab High Court till they were appointed as District Judges. They also had the

necessary standing of seven years to be eligible under cl. (2) of Art. 233 of the Constitution.

These conclusions really dispose of the appeal. We may state, however, that an alternative argument based on s. 4.of the Legal Practitioners Act, 1879, was also presented before us on behalf of these respondents. The argument was that the respondents having been enrolled as advocates in the Lahore High Court were entitled to practise in any subordinate Court in India, and that right was not taken away even after the Lahore High Court ceased to be a High Court in the territory of India under the Constitution. As we are resting our decision on conclusions drawn from the High Courts (Punjab) Order, 1947, and s. 8 of the Bar Councils Act, 1926, we consider it unnecessary to examine the alternative argument based on s. 4 of the Legal Practitioners Act, 1879.

The appellant had devoted a large part of his writ petition to support a contention that the appointment of the respondent was bad, because it contravened certain statutory service Rules. It was stated by the appellant that in the Punjab the judicial branch of superior appointments consisted of 27 posts inclusive of eight listed posts; two out of these eight listed posts were reserved for the members of the Bar and six for members of the subordinate judicial service. On the partition of the Province, it was stated, eleven superior judicial posts were allotted to East Punjab, and the number was later increased to twelve. Out of these twelve posts, the appellant contended, one-third was reserved for the members of the Bar, one-third for what was called the Provincial Civil Service (Judicial Branch) and the rest for recruitment from either of the aforesaid two sources on merit. The grievance of the appellant is that too many persons have been recruited from the Bar to the detriment of the members of the service to which the appellant belongs.

We asked learned Counsel for the appellant to point out to us any particular statutory rule which has been contravened by respondent 1 in making the appointments. Learned Counsel was unable to point

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out any such statutory rule and except making a general grievance that too many persons have been recruited from the Bar, he was unable even to substantiate that the one-third reservation made in favour of the service members has been violated. In any case, unless there is clear proof of a breach of a statutory rule in making any of the appointments under consideration here, the point does not merit any discussion. Such proof is singularly lacking in this case.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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(JAFER IMAM, K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

Criminal Trial—Commitment—If can be made without recording any evidence—Duty of Committing Court—Code of Criminal Procedure, 1898 (V of 1898), s. 207-A.

On the date fixed for the inquiry the prosecution intimated to the Magistrate that it did not intend to examine any witness in the Magistrate's Court. The Magistrate adjourned the inquiry to consider whether it was necessary to record any evidence before commitment. On the adjourned date he expressed his opinion that no witnesses need be examined, framed charges against the appellants and committed them to the Sessions Court. The appellants contended that the Magistrate had no jurisdiction to commit them to Sessions without examining witnesses under sub-s. (4) of s. 207-A of the Code of Criminal Procedure.

Held, that the order of commitment was valid and the Magistrate had jurisdiction to make it without recording any evidence. The position under s. 207-A of the Code is that:—

(i) the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution before the Committing Court;

(ii) the Magistrate, if he is of opinion that it is in the interests of justice to take evidence, whether of eye-witnesses or of others, he has a duty to do so;

(iii) the Magistrate, if he is not of that opinion and if the prosecution has not examined any eye-witnesses, he has jurisdiction to discharge or commit the accused on the basis of the documents referred to in s. 173 of the Code;

(iv) the discretion of the Magistrate is a judicial discretion which is liable to be corrected by a superior Court.

Macherla Hanumantha Rao v. *The State of Andhra Pradesh*, [1958] S.C R. 396, relied on.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 57 and 58 of 1960.

Appeals by special leave from the judgment and order dated November 5/6, 1958, of the Bombay High Court at Nagpur in Criminal Appeal No. 94 of 1958.

Jai Gopal Sethi and *G. C. Mathur*, for the appellant (in Cr. A. No. 57 of 1960).

G. C. Mathur, for the appellant (in Cr. A. No. 58 of 1960).

Gopal Singh and *D. Gupta*, for the respondent.

1960. December 5. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO, J.—These two appeals raise rather an important question on the interpretation of the provisions of s. 207A of the Criminal Procedure Code (hereinafter referred to as the Code).

The facts that have given rise to these appeals may be briefly stated. The appeals arise out of an incident that took place on November 29, 1957, when one Sadashiv was murdered in the courtyard of his house in village Nimgaon. The case of the prosecution was that the four appellants, armed with sticks, went to the house of the deceased, dragged him out of the house and beat him with sticks in the courtyard; and that as a result of the beating he died on the next day at about 5 p.m. at Bhandara Hospital. After investigation, the police submitted their report to the Magistrate under s. 173 of the Code along with the relevant documents. After forwarding the report, the officer in charge of the police station furnished

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the appellants with a copy of the report forwarded under sub-s. (1) of s. 173, the First Information Report recorded under s. 154 and all other documents or relevant extracts thereof on which the prosecution proposed to rely, including the statements recorded under sub-s. (3) of s. 161 and also intimated them of the persons the prosecution proposed to examine as its witnesses. The Magistrate posted the case for inquiry on February 10, 1958 and on that date the prosecution intimated that it did not intend to examine any witnesses in the Magistrate's Court. On behalf of the appellants no objection was raised to that course. But the Magistrate adjourned the inquiry to February 12, 1958, as he wanted to consider whether any evidence was necessary to be recorded before commitment. On February 12, 1958, he expressed his opinion that no witness need be examined at that stage; thereafter, he framed charges against accused-appellants under s. 302, read with s. 34, of the Indian Penal Code, and also under s. 448 thereof and committed the appellants to the Sessions Court.

Before the learned Sessions Judge the prosecution led four types of evidence, i.e., (1) eye-witnesses, namely, P.Ws. 6, 11, 20 and 25; (2) dying declaration, Ex. P-15, supported by P. Ws. 18, 22 and 19; (3) the identification of the appellants in jail by P.Ws. 20 and 25; and (4) recovery of various articles at the instance of the accused-appellants. The defence examined four witnesses. On a consideration of the entire evidence, the learned Sessions Judge held that the prosecution case had been amply borne out and that the four appellants entered into the house of the deceased and beat him in the manner described by the prosecution witnesses. As no less than 12 contused wounds were inflicted on the deceased, which resulted in the fracture of his ribs and injury to the lung, and as the doctor opined that the death was due to shock and haemorrhage resulting from the said fracture, the learned Sessions Judge held that the accused-appellants were guilty of murder and convicted them under s. 302, read with s. 34, Indian Penal Code, and he further convicted them under s. 448 of the Indian

Penal Code for trespassing into the house of the deceased. On these findings the learned Sessions Judge sentenced the appellants to undergo imprisonment for life on the first count and for 3 months rigorous imprisonment on the second count. The appellants preferred an appeal against their convictions and sentences to the High Court of Bombay at Nagpur. The learned Judges of the High Court, on a resurvey of the entire evidence, agreeing with the learned Sessions Judge, accepted the prosecution case, but they held that the appellants were guilty only under s. 304, Part I, read with s. 34, Indian Penal Code, and in the result they reduced the sentence from life imprisonment to 10 years' rigorous imprisonment in regard to appellant 1 and to 7 years' rigorous imprisonment in regard to appellants 2 to 4. Against the said convictions and sentences, the appellants have preferred, by special leave, appeals to this Court. Criminal Appeal No. 57 of 1960 has been preferred by the first appellant and Criminal Appeal No. 58 of 1960 by appellants 2 to 4.

Learned counsel for the appellants raised before us the following two points: (1) The Sessions Court and, on appeal, the High Court have not properly appreciated the evidence and the circumstances of the case in holding that the appellants had committed the offences. (2) The trial and conviction of the appellants by the Sessions Court were null and void, as the Magistrate had no jurisdiction to commit the appellants to Sessions without examining witnesses under sub-s. (4) of s. 207A of the Code and that, as the order of committal was without jurisdiction, the defect was not cured either under s. 532 or s. 537 of the Code.

The first question does not merit any consideration. Both the courts below have carefully considered the evidence adduced by the prosecution as well as the accused-appellants and have accepted the prosecution case. It is a well established practice of this Court not to interfere on questions of fact, particularly when they are concurrent findings, except under exceptional circumstances. We find no such exceptional

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circumstances in this case. We, therefore, reject the first contention.

The second contention turns upon the interpretation of the relevant provisions of s. 207A of the Code. Before attempting to construe the relevant provisions of the section it would be helpful to notice briefly the history of the said section. Under the Criminal Procedure Code, as it originally stood, in the matter of committal proceedings there was no distinction between the proceeding instituted on a police report and that instituted otherwise than on police report. The main object of the committal proceedings was to hold an inquiry to ascertain and record the case which was to be tried before the Court of Sessions. It was primarily to give an opportunity to an accused to know in advance the particulars of evidence that would be adduced against him in the Court of Sessions so that he could be in a position to prepare his defence. Another object, which was no less important, was to enable the Magistrate to discharge an accused if there was no *prima facie* case against him. This procedure prevented unnecessary harassment to such accused and at the same time saved the valuable time of the Sessions Court. In practice the committal proceeding, whether intended by the Legislature or not, served another purpose, namely, it gave an opportunity to the accused to test the credibility of witnesses by bringing out the discrepancies between their evidence in the committing court, the statements made by them to the police under s. 161 of the Code and the evidence given by them in the Court of Sessions. Though very often accused persons took full advantage of this additional opportunity to test the veracity of the witnesses, as often as not, it had turned out to be duplication of trials with the resultant long delays in the disposal of criminal cases. The advantage of committal proceeding was not solely for the accused, for the prosecution by examining the witnesses before the committing Magistrate secured their testimony in the sense that though it was tampered subsequenty—it is unfortunately a frequent phenomenon in criminal cases—it could use the said evidence as substantive

one under s. 288 of the Code. The Legislature, in its wisdom, presumably thought that undue delay in the disposal of sessions cases was due to the elaborate and prolonged committal proceedings and stepped in to amend the Code in that respect. The whole of s. 207A has been inserted by Act XXVI of 1955. While the section simplified the procedure in regard to commitment proceedings instituted on a police report, it confined the existing procedure to proceedings initiated otherwise than on a police report. This distinction between the two classes of cases had a reasonable factual basis. In the case of a police report, a thorough inquiry would have been made and the investigating officer would have sent a report to the Magistrate under s. 173 of the Code. The amended s. 173 of the Code also enjoins on the officer in charge of the police station a duty to furnish before trial, free of cost, to the accused copies of the report forwarded under that section to the Magistrate, the First Information Report recorded under s. 154 and all other documents or relevant extracts thereof on which the prosecution proposes to rely, including the statements, if any, recorded under s. 164 of the Code and those recorded under sub-s. (3) of s. 161 and a list of witnesses whom the prosecution proposes to examine as its witnesses. The Magistrate in a proceeding instituted on police report would ordinarily be in a position, on the said material, to understand the case of the prosecution and know the nature of the evidence that would be adduced on the basis of which the accused is sought to be proceeded against. The accused also would have an opportunity to know beforehand the case he would have to meet and the evidence that would be adduced against him. But in a proceeding instituted otherwise than on a police report, no such material would be available and therefore the old procedure continued to apply to such a case. With this background let us look at the provisions of s. 207A of the Code. The relevant provisions of s. 207A of the Code may now be read:

Section 207A: (1) When, in any proceeding instituted on a police report, the Magistrate receives the

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report forwarded under section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date not later than fourteen days from the date of the receipt of the report, unless the Magistrate, for reasons to be recorded, fixes any later date.

(2) If, at any time before such date, the officer conducting the prosecution applies to the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished.

(4) The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the Magistrate has considered all the documents referred to in section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate

that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

On the interpretation of sub-s. (4), which is the main sub-section under scrutiny in the present case, the High Courts in India have expressed conflicting views. It would not be necessary to consider the said decisions in detail, but it would be enough if we state the conflicting views, which are as follow: (1) Under sub-s. (4) the prosecution is bound to examine all the eye-witnesses indicated in the police report, and the discretion of the Magistrate to examine witnesses under the second part of the said sub-section is only in respect of witnesses other than the eye-witnesses: vide *M. Pavalappa* v. *State of Mysore* (1), *State* v. *Anadi Betankar* (2), *Ghisa* v. *State* (3) and *Chandu Satyanarayana* v. *The State* (4). (2) The Magistrate's power to examine eye-witnesses under the first part of sub-s. (4) is confined only to such witnesses as are produced in court by the officer conducting the prosecution and if he has not produced any such witnesses, the Magistrate cannot examine any eye-witnesses under the second part of the said sub-section, for, according to this view, the second part deals with only witnesses other than eye-witnesses. (3) If the prosecution has not produced any eye-witnesses the court may not in its discretion examine any witness under the second part, but can, if satisfied, discharge or commit the accused to sessions on the basis of the documents referred to in s. 173 of the Code: vide *State* v. *Lakshmi Narain* (5), *State of U. P.* v. *Satyavir* (6). (4) The first part confers a power on a Magistrate only to examine the eye-witnesses produced, but

(1) A.I.R. 1957 Mysore 61.
(2) A.I.R. 1958 Orissa 241.
(3) A.I.R. 1959 Raj. 294.
(4) A I.R. 1959 A.P. 651.
(5) A.I.R. 1960 All. 237.
(6) A.I.R. 1959 All. 408.

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the second part empowers him to examine any witness other than those produced, whether eye-witnesses or not, and in a case where the prosecution failed to discharge its duty to produce any witnesses or any important eye-witnesses, the court would not be exercising its judicial discretion if it commits the accused to sessions on the basis of documents referred to under s. 173 of the Code without examining at least the important witnesses: vide *State* v. *Yasin* (1), *In re Pedda Amma Muttigadu* (2), *A. Ishaque* v. *The State* (3) and *Manik Chand* v. *The State* (4). We have gone through the judgments of the High Courts cited at the Bar and derived considerable assistance from them for deciding the question raised. But as the question is to be primarily decided on the interpretation of the relevant provisions, we think, without any disrespect to the learned Judges, that it is not necessary to consider the said decisions in detail.

Now let us look at the relevant provisions of s. 207A of the Code to ascertain its intendment. Sub-s. (4) is the most important section vis-a-vis the taking of evidence. It is in two parts, the first part provides for the examination of witnesses produced by the prosecution and the second part for the examination of other witnesses. One of the fundamental rules of interpretation is that if the words of a statute are in themselves precise and unambiguous "no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature". The first part of the sub-section reads: "The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged." The word "shall" imposes a peremptory duty on the Magistrate to take the evidence; but the nature of the said evidence is clearly defined thereafter. The clause "as may be produced by the prosecution as witnesses to the actual commission of the offence alleged" governs the words "such persons";

(1) A.I.R. 1958 All. 861.
(2) A.I.R. 1959 A.P. 469.
(3) A.I.R. 1958 Cal. 341.
(4) A.I.R. 1958 Cal. 324.

with the result that the duty of the Magistrate to take evidence is only confined to the witnesses produced by the prosecution. Learned counsel for the appellants contends that it could not have been the intention of the Legislature to permit the prosecution to keep back the eye-witnesses in the committal court and therefore the word "produced" should be read as "cited". To accept this interpretation is to substitute the word "cited" in place of the word "produced": such a construction is not permissible, especially, when the plain meaning of the word used by the Legislature is clear and unambiguous, and the acceptance of that meaning does not make the section otiose. The phrase "if any" between the words "such persons" and the aforesaid clause emphasizes that the prosecution may not produce any such persons, in which case the obligation to examine such witnesses cannot arise. The wording of the second part of the sub-section is also without any ambiguity and it reads: "and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also." No doubt the word "may" in the clause "he may take evidence" imposes a duty upon the Magistrate to take other evidence; but that duty can arise only if he is of opinion that it is necessary in the interests of justice to take the evidence. The fulfilment of the condition that gives rise to the duty is left to the discretion of the Magistrate. The duty to take evidence arises only if he is of the requisite opinion. Doubtless the discretion being a judicial one, it should be exercised reasonably by the Magistrate. If he exercises it perversely, it may be liable to be set aside by a superior court. If so, what do the words "other witnesses" mean? Do they mean witnesses other than eye-witnesses or witnesses, eye-witnesses or not, other than those produced before the Magistrate by the prosecution? The witnesses who will depose to the prosecution case may be of different categories, namely, (i) witnesses who are eye-witnesses to the actual commission of the offence alleged; (ii) witnesses who speak to the facts

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which afford a motive for the commission of the offence; (iii) witnesses who speak to the investigation and to the facts unfurled by the investigation; and (iv) witnesses who speak to the circumstances and facts probablizing the commission of the offence, which is technically described as substantive evidence. Sub-section (4) enjoins on the Magistrate a duty to examine the first category of witnesses produced by the prosecution. The word "actual" qualifying the word "commission" emphasizes the fact that the said witnesses should be those who have seen the commission of the offence. We have held in interpreting the first part that the Magistrate should examine only such witnesses who are produced before him by the prosecution; but there may not be eye-witnesses in a case, or, if there are, the prosecution may not have produced all of them before the Magistrate. The second part of the sub-section therefore confers a discretionary power on the Magistrate to examine any one or more of witnesses of all categories, including the eye-witnesses who have not been produced by the prosecution within the meaning of the first part of the said sub-section. But it is said that sub-ss. (6) and (7) indicate that taking of evidence by the Magistrate is a condition precedent for making an order of discharge or of committal and, therefore, the provisions of sub-s. (4) must be so construed as to impose a duty on the Magistrate to examine some witnesses. Firstly, we cannot hold that the sub-sections impose any such condition. The argument is that the clause in sub-s. (6), namely, "When the evidence referred to in sub-section (4) has been taken" is a condition precedent for making an order of discharge. The adverb "when" in the clause in the context denotes a point of time and not a condition precedent. The clause means nothing more than that an order of discharge can be made under sub-s. (6) after the events mentioned therein have taken place. Secondly, the two clauses necessarily refer to the corresponding or appropriate situations under the earlier sub-sections. The first clause will not come into play if the Magistrate has not taken any evidence. So too, in sub-s. (7) also the

adverb "when" denotes the time when the Magistrate can make the order of committal. If evidence has not been taken, that sub-section is not applicable and the Magistrate proceeds to make an order of committal on other material referred to in the sub-section. On the other hand, if the said two sub-sections are construed as imposing a condition precedent for making an order of discharge or commitment, as the case may be, the said two sub-sections will directly come into conflict with the provisions of sub-s. (4). When one sub-section clearly confers a discretion on the Magistrate to take or not to take evidence, the other sub-sections take it away. It is not permissible to create conflict by construction, when by an alternative construction all the three sub-sections can be harmonized and reconciled. If the construction suggested by learned counsel for the appellants be adopted, it would also lead to an anomaly in that the Magistrate, though the documents referred to in s. 173 clearly pronounce the innocence of the accused, has to go through the pretence of examining one or more witnesses to satisfy the provisions of the sub-section.

Reliance is placed upon s. 251A of the Code relating to warrant cases whereunder the Magistrate is authorized, upon consideration of all the documents referred to in s. 173 and upon making such examination of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, to discharge the accused, if he considers the charge against the accused to be groundless; but if he is of opinion that there is ground that the accused has committed an offence alleged against him, he shall frame in writing a charge against the accused. By contrasting this provision with s. 207A, it is contended that if the construction put forward by learned counsel is not accepted, the obvious difference between the two procedures indicated by the Legislature would be obliterated. We cannot agree with this contention. The difference between the two procedures is that, in a case covered by s. 207A, evidence will have to be taken under certain

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contingencies, whereas under s. 251A no evidence need be taken at all. That distinguishes the different procedures under the two sections and it is not the province of the court to add any further conditions or limitations to those provided by the Legislature.

We are fortified in our view by a decision of this Court in *Macherla Hanumantha Rao* v. *The State of Andhra Pradesh* (1). There the point in controversy was whether ss. 207 and 207A, inserted in the Code by the Amending Act XXVI of 1955, violated the provisions of Art. 14 of the Constitution. In support of the contention that they violated Art. 14 of the Constitution, it was sought to be made out that the provisions of s. 207A of the Code, in comparison and contrast with other provisions of Ch. XVIII of the Code, prescribed a less advantageous position for the accused persons in a proceeding started under a police report than the procedure prescribed in other cases in the succeeding provisions of that chapter. This Court held that there was a reasonable classification to support the difference in the procedures. Sinha J., as he then was, who spoke for the Court, in order to meet the argument based on discrimination, considered the scope of the new section. In doing so, the learned Judge observed thus at p. 403:

"The magistrate then has to record the evidence of such witnesses as figure as eye-witnesses to the occurrence, and are produced before him. He has also the power, in the interest of justice, to record such other evidence of the prosecution as he may think necessary, but he is not obliged to record any evidence. Without recording any evidence but after considering all the documents referred to in s. 173 and after examining the accused person and after hearing the parties, it is open to the magistrate to discharge the accused person after recording his reasons that no ground for committing the accused for trial has been made out, unless he decides to try the accused himself or to send him for trial by another magistrate. If, on the other hand, he finds that the accused should be committed for trial, he is required to frame a charge

(1) [1958] S.C.R. 396.

disclosing the offence with which the accused is charged."

Then the learned Judge proceeded to consider the scope of s. 208 of the Code. After having found that there was obvious difference in the procedure, the learned Judge came to the conclusion that "the Legislature has provided for a clear classification between the two kinds of proceedings at the commitment stage based upon a very relevant consideration, namely, whether or not there has been a previous inquiry by a responsible public servant whose duty it is to discover crime and to bring criminals to speedy justice". It will thus be seen that the observations of the learned Judge at p. 403 cannot be said to be *obiter*, as learned counsel asks us to hold, for the construction of the provisions of s. 207A was necessary to ascertain whether there was reasonable classification or not. Assuming that the said observations are *obiter*, even then, they record the considered opinion of five learned Judges of this Court. The view we have expressed also is consistent with the said observations.

Our view could now be expressed in the following propositions: (1) In a proceeding instituted on a police report, the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in court. (2) The Magistrate, if he is of opinion that it is in the interest of justice to take evidence, whether of eye-witnesses or others, he has a duty to do so. (3) If the Magistrate is not of that opinion and if the prosecution has not examined any eye-witnesses, he has jurisdiction to discharge or commit the accused to sessions on the basis of the documents referred to in s. 173 of the Code. (4) The discretion of the Magistrate under sub-s. (4) is a judicial discretion and, therefore, in appropriate cases the order of discharge or committal, as the case may be, is liable to be set aside by a superior court.

Before closing we would like to make some observations. Rarely we come across cases where the prosecution does not examine important eye-witnesses, for such a procedure would entail the danger of the said witnesses being tampered with by the accused, with

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the result that there will not be any evidence taken by the committing Magistrate which could be used as substantive evidence under s. 288 of the Code. Even if the prosecution takes that risk, the Magistrate shall exercise a sound judicial discretion under the second part of sub-s. (4) of s. 207A in forming the opinion whether witnesses should be examined or not, and any perverse exercise of that discretion can always be rectified by a superior court. But there may be a case where the Magistrate can make up his mind definitely on the documents referred to in s. 173 without the aid of any oral evidence and in that event he would be within his rights to discharge or commit the accused, as the case may be. In this view, it is not necessary to express our opinion whether even if the Magistrate acted illegally in committing an accused without taking any evidence, the said illegality is cured either by s. 537 of the Code or any other section thereof.

In the result, the appeals fail and are dismissed.

Appeals dismissed.

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December 5.

M/s. RAMNARAIN SONS (Pr.) LTD.

v.

COMMISSIONER OF INCOME TAX, BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Assessment—Purchase of shares for acquiring managing agency rights—Loss incurred in sale of such shares—If of a capital nature.

The appellants, a private limited company, carrying on business as brokers, managing agents and dealers in shares and securities and having as one of their objects the acquisition of managing agencies, purchased shares of the Dawn Mills at a rate much higher than the market rate for obtaining the controlling voting right and thereby acquired the managing agency of the Mills. Later on, they sold some of those shares and suffered a loss of Rs. 1,78,438. The Income-tax Officer in assessing the taxable income disallowed the loss and the Appellate

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Assistant Commissioner on appeal confirmed that order. The Income-tax Appellate Tribunal held that the shares did not become stock-in-trade of the appellants, but since the loss incurred was incidental to their business of acquiring managing agency, it was allowable as a revenue loss. On reference, the High Court held that the shares acquired by the appellants were a capital asset and the loss suffered by the sale was of a capital nature.

Held, that the High Court had taken the correct view of the matter and the appeal must fail.

The question whether a transaction is or is not an adventure of the nature of trade has to be decided in the light of the intention of the assessee judged by the legal requirements associated with the concept of trade or business.

Since the shares in question were purchased by the appellants with the intention of acquiring the managing agency and not in the course of their business as dealers in shares with the intention of trading in those shares and what was acquired by such purchase was a capital asset in the shape of a managing agency, it could not be said merely because the managing agency could be utilised for earning profits, that those shares were stock-in-trade of their share business.

G. Venkataswami Naidu and Co. v. *The Commissioner of Income-tax*, [1959] Supp. 1 S.C.R. 464 and *The Oriental Investment Co., Ltd.* v. *The Commissioner of Income-tax, Bombay*, [1958] S.C.R. 49, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 698 of 1957.

Appeal by special leave from the judgment and order dated August 2, 1956, of the Bombay High Court in Income-tax Reference No. 1 of 1956.

A. V. Viswanatha Sastri, B. A. Palkhiwala and *G. Gopalakrishnan*, for the appellant.

Hardyal Hardy and *D. Gupta*, for the respondent.

1960. December 5. The Judgment of the Court was delivered by

Shah J.

SHAH, J.—The High Court of Judicature at Bombay answered the following two questions referred by the Income Tax Appellate Tribunal, Bench "B", Bombay, under s. 66(1) of the Indian Income Tax Act, 1922:

(1) Whether the acquisition of the managing agency

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of the Dawn Mills Co., Ltd., was in the nature of a "business" carried on by the assessee company?

(2) If the answer to the first question is in the affirmative, whether the loss suffered by the assessee company of Rs. 1,78,438 on purchase and sale of 400 shares of the Dawn Mills Co., Ltd., being incidental to its business of acquiring the managing agency, was a loss of a revenue nature?,

as follows:

(1) Acquisition of the managing agency was an acquisition of a capital asset;

(2) The loss in respect of the 400 shares was of a capital nature.

Against the order of the High Court, this appeal is preferred with special leave.

The appellants are a private limited company registered under the Indian Companies Act, 1913, and carry on business as brokers, managing agents and dealers in shares and securities. One of the objects for which the appellants were incorporated was to acquire managing agencies. The appellants also carried on business in shares of different companies, and were assessed to income-tax as dealers in shares and securities.

M/s. Sassoon J. David & Co., Ltd. were the managing agents of the Dawn Mills Ltd.—a public limited company—and they held 2,507 out of a total issue of 3,200 shares. On September 28, 1946, the appellants purchased from M/s. Sassoon J. David & Co., Ltd. 1,507 shares of the Dawn Mills at the rate of Rs. 2,321-8-0 per share and having obtained a controlling voting right, acquired the managing agency rights of the Mills. The remaining one thousand shares were acquired from M/s. Sassoon J. David & Co., Ltd. by the Directors of the appellants at the rate of Rs. 1,500. At the material time, the ruling market price of the shares of the Dawn Mills was Rs. 1,610. In December, 1946, the appellants sold 400 out of the shares purchased by them, and thereby suffered a loss of Rs. 1,78,438. The loss suffered by the appellants in the year of account January 1, 1946, to December 31, 1946, by sale of shares including 400 shares of the

Dawn Mills was Rs. 1,92,834. Crediting Rs. 1,05,907 earned as profit in certain other share transactions, the net loss suffered in the share transactions in the year of account amounted to Rs. 86,927. The appellants valued their shares at the end of the year of account at cost or market price whichever was lower. By this method of valuation, the books of account of the appellants showed a loss of Rs. 7,97,792 which included a loss of Rs. 7,04,000 on the valuation of the Dawn Mills shares held by the appellants at the end of the year of account.

In the income-tax assessment for the year 1947-48, the appellants claimed Rs. 86,927 as loss on sales in trade in shares and Rs. 7,97,792 as loss on valuation of stock-in-trade. The Income Tax Officer, Companies' Circle III(1), Bombay, disallowed the loss suffered by the appellants in the sale of the Dawn Mills shares, because in his view those shares were purchased by way of capital investment and the loss suffered by sale thereof could not be allowed as a trading loss. He also held that the appellants were not entitled to depart from the method adopted in earlier years and to value the closing stock of shares in the year of account at cost or market price whichever was lower and to claim the difference between the opening and closing valuation as a trading loss. The Appellate Assistant Commissioner confirmed that order. In appeal, the Income Tax Appellate Tribunal held that the managing agency of the Dawn Mills was acquired by the appellants as a part of their business activity and the shares of the Mills having been purchased in the regular course incidental to their business of acquiring the managing agency, the loss on the sale of those shares was allowable as a revenue loss; but the shares of the Dawn Mills were not the stock-in-trade of the appellants' business and they were not entitled to treat the difference between the purchase price and the value at close of the year of those shares, as a trading loss. Accordingly, the Tribunal allowed Rs. 1,78,438 as loss on sale of 400 shares of the Dawn Mills, but did not allow Rs. 7,04,000 as loss arising out of the valuation of the Dawn Mills shares at the

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end of the year of account. On the application of the Commissioner of Income Tax, the Tribunal referred to the High Court the questions set out hereinbefore. In the High Court, the appellants took out a notice of motion for directing the Tribunal to refer certain questions which the appellants claimed arose out of the order of the Tribunal and which the Tribunal did not refer.

The High Court agreed with the opinion of the Tribunal that the shares of the Dawn Mills were not the stock-in-trade of the appellants and that those shares were purchased by the appellants with the object of acquiring the managing agency. The High Court, however, held that the shares acquired by the appellants formed a capital asset and the loss suffered by sale of 400 out of those shares in the year of account being a capital loss, was not in the computation of income a permissible deduction. The High Court dismissed the notice of motion taken out by the appellants.

In considering whether a transaction is or is not an adventure in the nature of trade, the problem must be approached in the light of the intention of the assessee having regard to the "legal requirements which are associated with the concept of trade or business". The inference on this question raised by the Tribunal on the facts found is of mixed law and fact and is open to challenge before the High Court on a reference under s. 66 of the Income Tax Act—*G. Venkataswami Naidu & Co.* v. *The Commissioner of Income Tax* (1). It was held in *The Oriental Investment Co., Ltd.* v. *The Commissioner of Income Tax, Bombay* (2), that the question whether the appellants' transactions amounted to dealing in shares and properties or to investment, is a mixed question of law and fact, and that the legal effect of the facts found by the Tribunal on which the assessee could be treated as a dealer or an investor, is a question of law. The Tribunal held that the shares of the Dawn Mills purchased by the appellants did not become their stock-in-trade. But they held that the transaction

(1) [1959] Supp. 1 S.C.R. 646. (2) [1958] S.C.R. 49.

having been effected in the regular course of the business of the appellants, viz., the acquisition of managing agencies, the loss resulting from the sale of shares was incidental to that business and was a revenue loss. It is not easy to appreciate the process by which this conclusion was reached. The shares were purchased for the purpose of acquiring the managing agency of the Dawn Mills; they were not purchased in the course of the appellants' business as dealers in shares. By purchasing the shares which facilitated acquisition of the managing agency, a capital asset was acquired and merely because the managing agency could be utilised for earning profit, the acquisition of the shares which led to the acquisition of the managing agency could not, in the absence of an intention to trade in those shares, be regarded as acquisition of stock-in-trade of the share business. The appellants had undoubtedly purchased the shares of the Dawn Mills with money borrowed at interest, but that circumstance by itself does not evidence an intention to trade in the shares. Nor is the fact that the appellants are dealers in shares and their Memorandum of Association authorises them to carry on business in shares of any importance in the circumstances of this case. The appellants by entering the shares of the Dawn Mills in their statement of shares in which trading transactions were carried on could not alter the real character of the acquisition. The appellants were undoubtedly dealers in shares; but the transaction in the Dawn Mills shares was *ex facie* not a business transaction. The current market rate at the date of purchase was Rs. 1,610 per share whereas the appellants acquired the shares at the rate of Rs. 2,321-8-0 per share. Even assuming that the appellants acquired the entire block of 2,507 shares from M/s. Sassoon J. David & Co., Ltd.—the shares transferred to the names of the Directors being held by them merely as nominees of the appellants—the price per share was considerably in excess of the prevailing market rate. The olny reason for entering into the transaction which could not otherwise be regarded as a prudent business transaction, was the

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acquisition of the managing agency. If the purpose of the acquisition of a large block of shares at a price which exceeded the current market price by a million rupees was the acquisition of the managing agency, the inference is inevitable that intention in purchasing shares was not to acquire them as part of the trade of the appellants in shares. The Tribunal found that the Dawn Mills' shares were acquired by the appellants for obtaining the managing agency of the Mills. The agency was acquired by virtue of the voting power which the appellants obtained having purchased a very large block of shares, and for acquiring the managing agency, the appellants did not pay any distinct consideration. The managing agency is manifestly the source of profit of the appellants; but the shares purchased and the managing agency acquired were both assets of a capital nature and did not constitute stock-in-trade of a trading venture. If the shares were acquired for obtaining control over the managing agency of the Dawn Mills, the fact that the acquisition of the shares was integrated with the acquisition of the managing agency did not affect the character of the acquisition of the shares. Subsequent disposal of some out of the shares by the appellants could also not convert what was a capital acquisition into an acquisition in the nature of trade.

The High Court was therefore right in holding that the acquisition of the managing agency was an acquisition of a capital asset and the loss incurred by sale of the 400 shares was of a capital nature. The High Court was also right in dismissing the notice of motion for an order directing the Tribunal to refer the questions suggested by the appellants. If the acquisition of the shares was not acquisition of a stock-in-trade, but of a capital asset, the appellants, by valuing the shares at cost or market price whichever was lower, could not bring the difference between the purchase price and the valuation made by them into their trading account.

The appeal therefore fails and is dismissed with costs.

ESTHURI ASWATHIAH

v.

THE INCOME-TAX OFFICER, MYSORE STATE

1960

December 5.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Reassessment—Notice issued by Income-tax Officer—if without jurisdiction—Indian Income-tax Act, 1922 (11 of 1922), ss. 34(1)(a), 23(1), 22(3)—Finance Act, 1950 (XXV of 1950), s. 13(1)—Part B States (Taxation Concessions) Order, 1950, cl. 5(1).

The appellants, a Hindu undivided family, carrying on business in the former State of Mysore, were assessed under the Mysore Income-tax Act for the year of assessment 1949-50 corresponding to the year of account July 1, 1948, to June 30, 1949. The Indian Income-tax Act came into force in that area in April 1, 1950, and on December 26, 1950, notice under s. 22(2) of that Act was served upon the appellants to submit their return for the assessment year 1950-51. On September 8, 1952, the appellants submitted their return stating that they had no assessable income for that year. The Income Tax Officer passed on that return an order, "no proceeding", and closed the assessment. When the appellants submitted their return for the next assessment year, their books of account disclosed an opening cash credit balance of Rs. 1,87,000 and odd on July 1, 1949. They failed to produce the books of account of the previous years, and the Income-tax Officer held that Rs. 1,37,000 out of the said opening balance represented income from an undisclosed source. The appellants submitted a fresh return for the assessment year 1950-51 purporting to do so under s. 22(3) of the Indian Income-tax Act. Pursuant to the direction of the Appellate Assistant Commissioner, the Income Tax Officer on October 15, 1957, served on the appellants a notice under s. 34 of the Act and thereupon the appellants moved the High Court under Art. 226 for an order quashing the said notice and the proceeding as without jurisdiction. The High Court dismissed the petition.

Held, that it was not correct to say that the issue of the notice for reassessment was without jurisdiction as the assessment was yet pending.

Under s. 23(1) of the Indian Income-tax Act, it is open to the Income-tax Officer, if he is satisfied as to correctness of the return filed by the assessee, to assess the income and determine the sum payable on the basis of the return without requiring the assessee either to be present or to produce evidence. The order 'no proceeding' recorded on the return must, therefore, mean that the Income Tax Officer had accepted the previous return and assessed the income as nil.

A revised return under s. 22(3) filed by the assessee may be

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entertained only before the order of assessment and not thereafter. Lodging of such a return after the assessment is no bar to reassessment under s. 34(1) of the Act.

It could not be said, having regard to the provisions of s. 13(1) of the Finance Act (XXV of 1950) and cl. 5(1) of Part B States (Taxation Concessions) Order 1950, issued by the Central Government under s. 60A of the Indian Income-tax Act, that for the assessment year 1950-51 the appellants were assessable under the Mysore Income-tax Act and not under the Indian Income-tax Act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 200 of 1960.

Appeal from the Judgment and Order dated the 19th March, 1959, of the Mysore High Court, Bangalore, in Writ Petition No. 263 of 1957.

K. Srinivasan and *R. Gopalakrishnan*, for the appellant.

A. N. Kirpal and *D. Gupta*, for the respondent.

1960. December 5. The Judgment of the Court was delivered by

Shah J.

SHAH, J.—This appeal with certificate of fitness granted by the High Court of Judicature of Mysore is from an order rejecting the petition of the appellant for a writ to quash a notice of reassessment under s. 34 of the Indian Income Tax Act.

The appellants are a Hindu Undivided Family carrying on business in groundnuts and other commodities at Goribidnur, Kolar District, in the territory which formed part of the former State of Mysore. The Mysore Income Tax Act was repealed and the Indian Income Tax Act was brought into force in the Part-B State of Mysore as from April 1, 1950. The appellants had adopted as their year of account July 1 to June 30 of the succeeding year and they were assessed under the Mysore Income Tax Act on that footing for the year of assessment 1949-50 corresponding to the year of account July 1, 1948, to June 30, 1949. After the Indian Income Tax Act was applied to the State of Mysore on December 26, 1950, notice under s. 22(2) of the Indian Income Tax Act was served upon the appellants requiring them to submit their

return of income for the assessment year 1950-51. On September 8, 1952, the appellants submitted their return stating that for the year ending June 30, 1949, corresponding to the assessment year 1949-50, they were assessed under the Mysore Income Tax Act, that their income for the year ending June 30, 1950, was assessable under the Indian Income Tax Act in the assessment year 1951-52 and that they had no assessable income for the assessment year 1950-51. The Income Tax Officer passed on that return an order "no proceeding" and closed the assessment. For the assessment year 1951-52, the appellants submitted their return of income. In the books of account produced by the appellants an opening cash credit balance of Rs. 1,87,000 odd on July 1, 1949, was disclosed. The Income Tax Officer called upon the appellants to produce their books of account of previous years, but the books were not produced on the plea that the same were lost. In assessing the income of the appellants for the year of account 1949-50, the Income Tax Officer held that Rs. 1,37,000 out of the opening balance in the books of account dated July 1, 1949, represented income from an undisclosed source. In appeal, the Appellate Assistant Commissioner observed that the appellants not having exercised their option under s. 2(ii) of the Indian Income Tax Act, and, in the absence "of any system of accounting adopted" by them, the only course open to the Income Tax Officer was to take the financial year ending March 31, 1950, as the previous year for the income from an undisclosed source, and directed the Income Tax Officer to consider this credit in the assessment for the year 1950-51 after giving opportunity to the appellants to explain the nature and source thereof. Before the appeal was disposed of by the Appellate Assistant Commissioner, the appellants had submitted a fresh return for the assessment year 1950-51 purporting to do so under s. 22(3) of the Indian Income Tax Act. Pursuant to the direction of the Appellate Assistant Commissioner, the Income Tax Officer issued a notice of reassessment under s. 34 of the Income Tax Act and served it on October 15, 1957,

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calling upon the appellants to submit a fresh return. The appellants thereupon submitted a petition under Art. 226 of the Constitution to the High Court of Mysore praying for an order declaring that the notice under s. 34 was without jurisdiction and for quashing the notice and proceeding consequent thereon. This petition was dismissed by the High Court, but the High Court, on the application of the appellants, certified that the appeal was a fit one for appeal to this court.

Section 34(1) of the Indian Income Tax Act at the relevant time in so far as it is material provided :

"(1) If—

(a) the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under s. 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year,

he may in cases falling under cl. (a) at any time within eight years and in cases falling cl. (b) within four years of the end of that year, serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of s. 22 and may proceed to assess or reassess such income, profits or gains; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

In the course of the assessment proceedings for 1951-52, the appellants produced their books of account containing an entry dated July 1, 1949, showing an opening cash balance of Rs. 1,87,000 odd which was not satisfactorily explained. Though called upon, they did not produce their books of account for the earlier year. The appellants had failed to disclose in their return for the assessment year 1950-51 any

income. In the circumstances, the Income Tax Officer had reason to believe that by reason of failure on the part of the appellants to disclose fully and truly all material facts necessary for assessment for that year, income chargeable to tax had escaped assessment. The Income Tax Officer had therefore jurisdiction to issue the notice for reassessment.

The submission that the previous return submitted on September 8, 1952, "had not been disposed of" and until the assessment pursuant to that return was made, no notice under s. 34(1) for reassessment could be issued, has in our judgment no substance. The Income Tax Officer had disposed of the assessment proceeding accepting the submission made by the appellants that they had no income for the assessment year 1950-51. Under s. 23(1) of the Indian Income Tax Act, it is open to the Income Tax Officer, if he is satisfied that the return made by an assessee under s. 22 is correct, to assess the income and to determine the sum payable by the assessee on the basis of the return without requiring the presence of the assessee or production by him of any evidence. The appellants had in their return dated September 8, 1952, submitted that they had no assessable income for the year in question and on this return, the Income Tax Officer had passed the order "no proceeding". Such an order in the circumstances of the case meant that the Income Tax Officer accepted the return and assessed the income as "nil". If thereafter, the Income Tax Officer had reason to believe that the appellants had failed to disclose fully and truly all material facts necessary for assessment for that year, it was open to him to issue a notice for reassessment.

Under s. 22, sub-s. (3), an assessee may submit a revised return if after he has furnished the return under sub-s. (2) he discovers any omission o statement therein. But such a revised return c be filed "at any time before the assessment is and not thereafter. The return dated Febr 1957, was submitted after the assessment wa pursuant to the earlier return and it coulc entertained. Nor could the lodging of such a

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debar the Income Tax Officer from commencing a proceeding for reassessment of the appellant under s. 34(1) of the Indian Income Tax Act.

There is also no substance in the contention that for the assessment year 1950-51 the assessee could be assessed under the Mysore Income Tax Act and not under the Indian Income Tax Act. By the Finance Act XXV of 1950 s. 13, cl. (1), it was provided in so far as it is material that:

"If immediately before the 1st day of April, 1950, there is in force in any Part-B State.....any law relating to income-tax or super-tax or tax on profits of business, that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income Tax Act, 1922 (XI of 1922), for the year ending on the 31st day of March, 1951, or for any subsequent year."

By virtue of s. 13(1), the Mysore Income Tax Act ceased to be in operation as from April 1, 1950, except for the purposes of levy, assessment and collection of income-tax and super tax in respect of any period which was not included in the previous year for the purposes of assessment under the Indian Income Tax Act for the assessment year 1950-51. The appellants had been assessed for the period July 1, 1948, to June 30, 1949, under the Mysore Income Tax Act. It is manifest that for any account year which was the previous year in relation to the assessment year 1950-51, the appellants were liable to be assessed under the Indian Income Tax Act and not under the repealed Act. The year of account July 1, 1949, to June 30, 1950, was not a period prior to such previous year and therefore liability to pay tax in respect of that period could be assessed not under the Mysore Income Tax Act, but under the Indian Income Tax Act. It was urged that this interpretation of s. 13 may, when the account year of an assessee does not coincide with the financial year lead to double taxation of the income for the account year ending between April 1, 1949,

and March 31, 1950. But in order to avoid the contingency envisaged by the appellants, the Central Government has, in exercise of its power under s. 60A of the Indian Income Tax Act, issued the Part-B States (Taxation Concessions) Order, 1950, which by cl. 5(1) provides amongst other things, that the income, profits and gains of any previous year ending after the 31st day of March, 1949, which is a previous year for the State assessment year 1949-50 shall be assessed under the Act (Indian Income Tax Act, 1922) for the year ending on the 31st March, 1951, if and only if such income, profits and gains have not, before the appointed day, been assessed under the State law. If, in respect of the previous year for the purposes of the assessment year ending 31st March, 1951, the appellants had been assessed by any State Government under a law relating to income-tax in force in the State, the Indian Income Tax authorities would be incompetent to assess income for that year; but in default of such assessment income of the appellants for that year was assessable under the Indian Income Tax Act.

The notice under s. 34 was also not issued after the expiry of the period prescribed in that behalf. The notice was issued by the Income Tax Officer because he had reason to believe that by reason of failure on the part of the appellants to disclose fully and truly all material facts necessary for the assessment for the the year 1950-51, income had escaped assessment. Such a notice fell manifestly within s. 34(1)(a) and could be issued within eight years from the end of the year of assessment. The impugned notice under s. 34 for reassessment of the income of the appellants for the year 1950-51 was, in our judgment, properly issued and the High Court was right in dismissing the petition for a writ to quash the notice.

The appeal fails and is dismissed with costs.

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December 5.

JAGAT DHISH BHARGAVA

v.

JAWAHAR LAL BHARGAVA & OTHERS

(P. B. GAJENDRAGADKAR, K. N. WANCHOO and K. C. DAS GUPTA, JJ.)

Appeal—Decree not prepared—Appeal filed without copy of decree—Competency of—Subsequently decree prepared and copy filed —Limitation—Code of Civil Procedure, 1908 (V of 1908) O. 41, r. 1 —Indian Limitation Act, 1908 (IX of 1908) s. 12(2).

The respondents filed a suit for specific performance against the appellant which was dismissed on March 12, 1954. On March 24 the respondents made an application for a certified copy of the judgment and decree. The decree was not drawn up and the respondents were supplied a certified copy of the judgment and the memo of costs. The respondents filed an appeal before the High Court without the certified copy of the decree and only with the certified copy of the judgment and the memo of costs. The appeal was admitted under O. 41, r. 11 Code of Civil Procedure on August 30, 1954. On December 23, 1958, the appellant served a notice on the respondents that he would raise a preliminary objection at the hearing that the appeal was incompetent as a certified copy of the decree was not filed as required by O. 41, r. 1. On December 24, 1958, the respondents moved the trial Court for drawing up of the decree, but since the record was in the High Court this could not be done. At the hearing of the appeal, the appellant raised the preliminary objection, but the High Court passed an order on December 15, 1959, allowing the respondents one month's time for getting a decree drawn up and obtaining a copy and directed the record to be sent to the trial Court. Against this order the appellant preferred an appeal to the Supreme Court contending that the High Court was bound to dismiss the appeal as it was manifestly incompetent under O. 41, r. 1. Subsequently, on December 23, 1959, the respondents obtained a certified copy of the decree and filed it before the High Court the same day. The appellant contended that the appeal was to be deemed to be filed on this date and was time barred.

Held, that in the circumstances of this case the order passed by the High Court was right. There was no doubt that O. 41, r. 1 was mandatory and in the absence of the decree the filing of the appeal was incomplete, defective and incompetent. The office of the trial Court was negligent in not drawing up a decree and the office of the High Court was also not as careful as it should have been in examining the appeal and these have contributed substantially to the unfortunate position. In such a case, the respondents deserved to be protected. Besides the

question had become academic and technical in view of subsequent events. The certified copy of the decree was filed on December 23, 1959, and even if the appeal was considered to have been filed on that date, it was within time. Under s. 12(2) of the Limitation Act the respondents could treat the time taken in the drawing up of the decree after the application for a certified copy thereof had been made as part of the time taken in obtaining the certified copy of the decree.

Tarabati Koer v. *Lala Jagdeo Narain*, (1911) 15 C.W.N. 787, *Bani Madhub Mitter* v. *Matungini Desai*, (1886) I.L.R. 13 Cal. 104 (F.B.), *Gabriel Christian* v. *Chandra Mohan Missir*, (1936), I.L.R. 15 Pat. 284(F.B.), *Jayashankar Mulshankar Mehta* v. *Mayabhai Lalbhai Shah*, (1951) 54 B.L.R. 11 (F.B.), *Gokul Prasad* v. *Kunwar Bahadur*, (1935) I.L.R. 10 Luck. 250 and *Umda* v. *Rupchand*, (1926) 98 I.C. 1057 (F.B.), referred to.

Rodger v. *Comptoir d'Escompte de Paris*, (1871) L.R. 3 P.C. 465, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 222 of 1960.

Appeal from the judgment and order dated December 15, 1959, of the Punjab High Court (Circuit Bench), Delhi, in R. F. Appeal No. 77-D of 1954.

G. S. Pathak and *B. C. Misra*, for the appellant.

Mukat Behari Lal Bhargava and *J. P. Goyal*, for respondents Nos. 1 to 7.

1960. December 5. The Judgment of the Court was delivered by

GAJENDRAGADKAR, J.—The short question of law which arises for decision in the present appeal by special leave is whether the appeal preferred against the appellant and respondents 8 and 9 in the High Court of Punjab by respondents 2 to 7 was competent in law or not. This question arises under somewhat unusual circumstances. It appears that an agreement of sale of one third of the one-fourth share in the property covered by the document was entered into between Gokal Dhish Bhargava and the appellant Jagat Dhish Bhargava. Gokal Dhish Bhargava sued the appellant and pro forma respondents 8 and 9 for specific performance of the said agreement of sale in the Court of the Senior Civil Judge, New Delhi (Civil Suit No. 684/128 of 1949/50). This suit was dismissed on

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March 12, 1954. Pending decision in the trial court Gokal Dhish Bhargava died and his son Jawahar Lal Bhargava, respondent 1 and Chunni Lal Bhargava were brought on the record as legal representatives. After the suit was dismissed and before the appeal in question was preferred in the High Court Chunni Lal Bhargava died; thereupon respondents 2 to 7, as his legal representatives, joined respondent 1 in preferring an appeal against the said decree in the High Court of Punjab. The memo of appeal along with the judgment dismissing the suit and the taxed bill of costs endorsed on the back of the last page of the judgment was filed in the High Court on July 29, 1954. It is the competence of this appeal that was questioned before the High Court and is in dispute before us in the present appeal.

The record shows that on March 24, 1954, an application was made by respondents 2 to 7 (who will be called the respondents hereafter) for a certified copy of the judgment and decree passed in the said suit for specific performance. A certified copy of the judgment and the bill of costs was supplied to them but the decree had not been drawn up and no copy of the decree was therefore supplied to them. In the result the appeal was filed without the certified copy of the decree and only with the certified copy of the judgment and the bill of costs. On August 2, 1954, the Assistant Registrar of the High Court returned the memo of appeal filed by the respondents to their counsel and pointed out to him that since no copy of the decree had been filed the presentation of the appeal was defective and the defect needed to be rectified. Thereafter, on August 16, 1954, the respondents' counsel re-filed the appeal with an endorsement that a memo of costs alone had been prepared by the trial court and no decree had been drawn up, and so the appeal should be held to be properly filed. Apparently this explanation was treated as satisfactory by the office of the High Court and the appeal was registered as No. 77-D of 1954.

In due course the appeal was placed for preliminary hearing under O. 41, r. 11 of the Code of Civil

Procedure before Dulat, J. who admitted it on August 30, 1954. Notice of the appeal was accordingly served on the appellant and the pro forma respondents. Ultimately when the appeal became ready for hearing it was put up on the Board of the Circuit Bench of the High Court to be heard on December 26, 1958. Meanwhile on December 23, 1958, the appellant served a notice on the respondents' counsel intimating to him that he proposed to raise a preliminary objection against the competence of the appeal on the ground that the decree under appeal had not been filed as required under O. 41, r. 1 along with the memo of appeal and the certified copy of the judgment. Next day, that is to say on December 24, 1958, the respondents moved the trial Court for drawing up of the decree, but since the record had in the meantime been sent by the trial Court to the High Court no decree could be drawn up by the trial Court, and so the motion became infructuous. The appeal, however, did not reach hearing on December 26, 1958. On December 29, 1958, the respondents moved the Court that the appeal should be declared to be maintainable as the memo of costs which alone had been prepared by the trial Court read along with the concluding paragraph of the judgment may be held to satisfy the requirements of the decree; in the alternative they prayed that the record of the suit in the trial Court should be sent for to enable them to get a decree prepared with a view to file the same in the High Court along with their appeal. Bishan Narain, J., before whom this application was taken out for orders, directed that it may be heard by the Bench which would hear the appeal.

Eventually the appeal came on for hearing before Falshaw and Chopra, JJ. on December 8, 1959. At the said hearing the appellant raised a preliminary objection that the appeal was not competent having regard to the mandatory provisions of O. 41, r. 1, and urged that the appeal should be dismissed as incompetent. This preliminary objection was, however, not upheld by the High Court, and it was held that "the proper course to follow was to allow the respondents a

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month's time for the purpose of getting a decree drawn up in the proper form by the lower Court and obtaining a copy thereof". Accordingly the record which had in the meanwhile been received by the High Court after the appeal was admitted under O. 41, r. 11 was ordered to be sent back to the lower Court without delay. It is against this order which was passed by the High Court on December 15, 1959, that the present appeal by special leave has been filed. On behalf of the appellant Mr. Pathak contends that the appeal filed before the High Court was plainly and manifestly incompetent, and so the High Court was in error in not dismissing it on that ground.

The position of law under O. 41, r. 1 is absolutely clear. Under the said rule every appeal has to be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in that behalf, and has to be accompanied by a copy of the decree appealed from, and of the judgment on which it is founded. Rule 1 empowers the appellate Court to dispense with the filing of the judgment but there is no jurisdiction in the appellate Court to dispense with the filing of the decree. Where the decree consists of different distinct and severable directions enforceable against the same or several defendants the Court may permit the filing of such portions of the decree as are the subject matter of the appeal but that is a problem with which we are not concerned in the present case. In law the appeal is not so much against the judgment as against the decree; that is why Article 156 of the Limitation Act prescribes a period of 90 days for such appeals and provides that the period commences to run from the date of the decree under appeal. Therefore there is no doubt that the requirements that the decree should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

That, however, cannot finally dispose of the point raised by the appellant before us. In the present case the respondents had applied for a certified copy of

the judgment as well as the decree in the trial Court on March 24, 1954, and they were not given a copy of the decree for the simple reason that no decree was drawn up; what they were given was a copy of the judgment and taxed bill of costs endorsed on the back of the last page of the judgment. These documents they filed along with their memo of appeal; but that would not affect the mandatory requirement of O. 41, r. 1. In considering the effect of this defect in the presentation of the appeal we must bear in mind the rules of procedure in regard to the drawing up of the decree. The position in that behalf is absolutely clear. Section 33 of the Code of Civil Procedure requires that the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow. Order 20, r. 3 provides, inter alia, that the judgment shall be dated and signed by the judge in the open Court at the time of pronouncing it, and under r. 4, sub-r. (2) a judgment has to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 6 of the same Order prescribes the contents of the decree. It provides that the decree shall agree with the judgment and shall contain the particulars therein specified. Under r. 7 it is provided that the decree shall bear the date, the day on which the judgment was pronounced, and it directs that when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree. It is, therefore, clear that the drawing up of the decree in the present case was the function and the duty of the office, and it was obligatory on the judge to examine the decree when drawn up, and if satisfied that it has been properly drawn up to sign it. Except in places where the dual system prevails the litigant or his lawyer does not play any material or important part in the drawing up of the decree. In fact the process of drawing up of the decree is beyond the litigant's control. Therefore, there is no doubt whatever that in failing to draw up a decree in the present suit the office of the trial Court was negligent in the discharge of its duties, and

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the said negligence was not even noticed by the learned trial judge himself.

Unfortunately, when the appeal was presented in the High Court, even the office of the High Court was not as careful in examining the appeal as it should have been, and as we have already indicated the appeal passed through the stage of admission under O. 41, r. 11 without the defect in the appeal being brought to the notice of the learned judge who admitted it. Thus it is quite clear on the record that the respondents had applied for a certified copy of the judgment and the decree, and when they were given only a certified copy of the judgment and the bill of costs they filed the same along with the memo of appeal in the bona fide belief that the said documents would meet the requirements of O. 41, r. 1. It is true that before the appeal came on for actual hearing before the High Court the appellant gave notice to the respondents about his intention to raise a preliminary objection that the appeal had not been properly filed; but, as we have already pointed out, the attempt made by the respondents to move the trial Court to draw up the decree proved infructuous and ultimately the High Court thought that in fairness to the respondents they ought to be allowed time to obtain the certified copy of the decree and file it before it; and so the High Court passed the order under appeal. The appellant contends that this order is manifestly erroneous in law; according to him the only order which could and should have been passed was to dismiss the appeal as incompetent under O. 41, r.1.

The problem thus posed by the appellant for our decision has now become academic because subsequent to the decision of the High Court under appeal the respondents have in fact obtained a certified copy of the decree on December 23, 1959, and have filed it in the High Court on the same day. This fact immediately raises the question as to whether the appeal which has admittedly been completely and properly filed on December 23, 1959, was in time or not. If it appears that on the date when the decree was thus filed the

presentation of the appeal was in time then the objection raised by the appellant against the propriety or the correctness of the High Court's order under appeal would be purely technical and academic.

The answer to the question as to whether the presentation of the appeal on December 23, 1959, is in time or not would depend upon the construction of s. 12, sub-s. (2) of the Limitation Act. We have already noticed that the period prescribed for filing the present appeal is 90 days from the date of the decree. Section 12, sub-s. (2) provides, inter alia, that in computing the period of limitation "the time requisite for obtaining a copy of the decree shall be excluded". What then is the time which can be legitimately deemed to have been taken for obtaining the copy of the decree in the present case? Where a decree is not drawn up immediately or soon after a judgment is pronounced, two types of cases may arise. A litigant feeling aggrieved by the decision may apply for the certified copy of the judgment and decree before the decree is drawn up, or he may apply for the said decree after it is drawn up. In the former case, where the litigant has done all that he could and has made a proper application for obtaining the necessary copies, the time requisite for obtaining the copies must necessarily include not only the time taken for the actual supply of the certified copy of the decree but also for the drawing up of the decree itself. In other words, the time taken by the office or the Court in drawing up a decree after a litigant has applied for its certified copy on judgment being pronounced, would be treated as a part of the time taken for obtaining the certified copy of the said decree. Mr. Pathak has fairly conceded that on this point there is a consensus of judicial opinion, and in view of the formidable and imposing array of authorities against him he did not raise any contention about the validity of the view take in all those cases. (Vide: *Tarabati Koer* v. *Lala Jagdeo Narain* (1); *Bani Madhub Mitter* v. *Mathungini Dassi & Ors. (Full Bench)* (2); *Gabriel Christian* v.

(1) (1911) 15 C.W.N. 787. (2) (1886) I.L.R. 13 Cal. 104.

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Chandra Mohan Missir (*Full Bench*) (1); *Jayashankar Mulshankar Mehta* v. *Mayabhai Lalbhai Shah* (*Full Bench*) (2); *Gokul Prasad* v. *Kunwar Bahadur & Ors.*(3); and *Umda* v. *Rupchand & Ors.* (*Nagpur Full Bench*) (4)).

There is, however, a sharp difference of opinion in regard to cases where an application for a certified copy of the decree is made after the said decree is drawn up. In dealing with such cases Courts have differed as to what would be the period requisite for obtaining the certified copy of the decree. The Bombay, Calcutta and Patna High Courts, appear to have held that the period taken in drawing up of the decree would be part of the requisite period, while other High Courts have taken a contrary view. It is significant that though the High Courts have thus differed on this point, in every case an attempt is judicially made to do justice between the parties. With that aspect of the problem, however, we are not concerned in the present appeal.

The position, therefore, is that when the certified copy of the decree was filed by the respondents in the High Court on December 23, 1959, the whole of the period between the date of the application for the certified copy and the date when the decree was actually signed would have to be excluded under s. 12, sub-s. (2). Inevitably the presentation of the appeal on December 23, 1959 would be in time. It is true that more than five years have thus elapsed after the pronouncement of the judgment but for this long delay and lapse of time the respondents are not much to blame. The failure of the trial Court to draw up the decree as well as the failure of the relevant department in the High Court to examine the defect in the presentation of the appeal at the initial stage have contributed substantially to the present unfortunate position. In such a case there can be no doubt that the litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties. As observed by Cairnes, L. C. in *Rodger* v. *Comptoir*

(1) (1936) I.L.R. 15 Pat. 284.
(2) (1951) 54 B.L.R. 11.
(3) (1935) I.L.R. 10 Lucknow 250.
(4) (1926) 98 I.C. 1057.

d'Escompte de Paris (1) as early as 1871 "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors"; that is why we think that in view of the subsequent event which has happened in this case, namely, the filing of the certified copy of the decree in the High Court, the question raised by the appellant has become technical and academic.

Faced with this position Mr. Pathak attempted to argue that the application made by the respondents on March 24, 1954, was not really an application for a certified copy of the decree; he contended that it was an application for the certified copy of the judgment and the bill of costs. This argument is wholly untenable. The words used in the application clearly show that it was an application for a certified copy of the judgment as well as the decretal order, and as subsequent events have shown, a certified copy of the decree was ultimately supplied to the respondents in pursuance of this application.

Then it was argued that the respondents should have moved the trial Court for the drawing up of a decree as soon as they found that no decree had been drawn up. It may be assumed that the respondents might have adopted this course; but where the dual system does not exist it would be idle to contend that it is a part of the duty of a litigant to remind the Court or its office about its obligation to draw up a decree after the judgment is pronounced in any suit. It may be that decrees when drawn up are shown to the lawyers of the parties; but essentially drawing up of the decree is the function of the Court and its office, and it would be unreasonable to penalise a party for the default of the office by suggesting that it was necessary that the party should have moved the Court for the drawing up of the decree. Therefore, we are not satisfied that the appellant is justified in attributing to the respondents any default for which the penalty of dismissing their appeal can be legitimately imposed on them. The result is that the appeal preferred by the respondents on December 23,

(1) (1871) L R 3 P.C. 465, 475.

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1959, is proper and in time and it can now be dealt with in accordance with law. It is true that in the circumstances over which the respondents had no control the appeal in question has already been admitted under O. 41, r. 11, and as a result of the decision under appeal it may not have to go through that process again. Dulat, J. who heard the appeal for admission was satisfied that it deserved to be admitted and we do not think it necessary to require that the present appeal should go through the formality of the procedure prescribed by O. 41, r. 11 once again. This position is no doubt unusual, but in the circumstances of the case it is impossible to say that the order passed by the High Court is not fair and just.

Let us then consider the technical point raised by the appellant challenging the validity or the propriety of the order under appeal. The argument is that O. 41, r. 1 is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment the appeal must be dismissed as being incompetent, the relevant provisions of O. 41 with regard to the filing of the decree being of a mandatory character. It would be difficult to accede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation

with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits. It is obvious that the complications in the present case have arisen as a result of two factors; the failure of the trial Court to draw up the decree as required by the Code, and the failure of the office in the High Court to notice the defect and to take appropriate action at the initial stage before the appeal was placed for admission under O. 41, r. 11. It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O. 41, r. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects. Therefore, in our opinion, the appellant is not justified in challenging the propriety or the validity of the order passed by the High Court because in the circumstances to which we have already adverted the said order is obviously fair and just. The High Court realised that it would be very unfair to penalise the party for the mistake committed by the trial Court and its own office, and so it has given time to the respondents to

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apply for a certified copy of the decree and then proceed with the appeal.

In this connection our attention has been drawn to the fact that in the Punjab High Court two conflicting and inconsistent views appear to have been taken in its reported decisions. Dealing with appeals filed without a certified copy of the decree some decisions have dismissed the appeals as defective, and have given effect to the mandatory words in O. 41, r. 1, without presumably examining the question as to whether the failure of the trial Court to draw up the decree would have any bearing or relevance on the point or not. (Vide: *Gela Ram* v. *Ganga Ram* (1); *Municipal Committee, Chiniot* v. *Bashi Ram* (2); *Mubarak Ali Shah* v. *Secretary of State* (3); *Nur Din* v. *Secretary of State* (4) *Hakam Beg* v. *Rahim Shah* (5); *Fazal Karim* v. *Des Raj* (6); and *Banwari Lal Varma* v. *Amrit Sagar Gupta* (7)). On the other hand it has in some cases been held that it would be fair and just that the hearing of the appeal should be adjourned to enable the appellant to obtain a certified copy of the decree and produce it before the appellate Court (Vide: *Manoharlal* v. *Nanak Chand* (8); *Mt. Jeewani* v. *Mt. Misri* (9); and, *Sher Muhammad* v. *Muhammad Khan* (10)). It would obviously have been better if this conflict of judicial opinion in the reported decisions of the High Court had been resolved by a Full Bench of the said High Court but that does not appear to have been done so far. However, as we have indicated, the question about the competence of the appeal has to be judged in each case on its own facts and appropriate orders must be passed at the initial stage soon after the appeal is presented in the appellate Court. If any disputed question of limitation arises it may have to go before the Court for judicial decision.

In the result the order passed by the High Court is right. Having regard to the fact that the decree

(1) A.I.R. (1920) 1 Lah. 223
(2) A.I.R (1922) Lah. 170.
(3) A.I R. (1925) Lah. 438.
(4) A I.R. (1927) Lah. 49.
(5) A I.R. (1927) Lah. 912.
(6) 35 Punj L.R. 471.
(7) A.I.R. (1949) East Punj. 400.
(8) A.I.R. (1919) Lah. 53.
(9) A I.R. (1919) Lah. 125.
(10) A.I.R. (1924) Lah. 352.

under appeal has already been filed by the respondents before the High Court on December 23, 1959, the High Court should now proceed to hear the appeal on the merits and deal with it in accordance with law. In the circumstances of this case we make no order as to costs.

Appeal dismissed.

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December 6.

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Village Offices—Village Munsif—Enactment providing for selection of post according to heredity—Constitutionality—Madras Hereditary Village-Offices Act, 1895 (3 of 1895), s. 6(1)—Constitution of India, Art. 16(1)(2).

Village P in the State of Andhra Pradesh was originally comprised of a village of the same name and a fairly large hamlet called PP, but in view of the difficulties in the two being treated as one unit for purposes of village administration the Board of Revenue sanctioned the bifurcation of P into two villages, P and PP. On the division of the village all the hereditary village offices of the original village ceased to exist under s. 6(1) of the Madras Hereditary Village-Offices Act, 1895, and new offices were created for the two villages. The section provided, inter alia, that "in choosing persons to fill such new offices the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished." Though applications for the post of Village Munsif of PP had been invited by the Revenue authorities and the petitioner among others had made the application, respondent 4 who was the son of the Village Munsif of the old village, P, was selected on the ground that in view of s. 6(1) of the Act, as the last holder of the office was appointed to the new village, P, after bifurcation, respondent 4 as the son of the last holder and nearest heir had a preferential claim for the post of Village Munsif for PP. The petitioner challenged the validity of the order of the Revenue authorities on the grounds (1) that the office of Village Munsif was an office under the State, and that the order in favour of

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respondent 4 which expressly stated that they proceeded on the basis of the hereditary principle laid down in s. 6(1) of the Act, discriminated against him as a citizen on the ground of descent only and violated the guarantee of equal opportunity enshrined in Art. 16 of the Constitution of India, and (2) that s. 6(1) of the Act, to the extent that it permitted such discrimination was void under Art. 13(1) of the Constitution. The plea of the respondents was (1) that the expression "office under the State" in Art. 16 had no reference to an office like that of the Village Munsif which in its origin was a customary village office later recognised and regulated by law, and (2) that Art. 16 did not apply to a hereditary office because a person entitled to it under the Act had a pre-existing right to the office and its emoluments which could be enforced by a suit.

Held: (1) that a village office like that of the Village Munsif was an office under the State within the meaning of Art. 16 of the Constitution of India;

M. Ramappa v. *Sangappa and others*, [1959] S. C. R. 1167, referred to.

(2) that a person entitled to an office under s. 6(1) of the Madras Hereditary Village-Offices Act, 1895, did not have any pre-existing right to property in the shape of emoluments of the office, independent or irrespective of the office, and consequently to such an office Art. 16 applied; and,

(3) that s. 6(1) of the Act embodied a principle of discrimination on the ground of descent only and was in contravention of Art. 16(2) of the Constitution.

ORIGINAL JURISDICTION: Petition No. 133 of 1959.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri and *G. Gopalakrishnan*, for the petitioner.

D. Narasa Raju, Advocate-General of Andhra Pradesh, D. Venkatappayya Sastri and *T. M. Sen*, for respondents Nos. 1-3.

T. V. R. Tatachari, for respondent No. 4.

1960. December 6. The Judgment of the Court was delivered by

S. K. Das J.

S. K. DAS, J.—This is a writ petition under Art. 32 of the Constitution. Gazula Dasaratha Rama Rao is the petitioner. The respondents are (1) the State of Andhra Pradesh, (2) the Board of Revenue, Andhra Pradesh, (3) the Collector of Guntur in Andhra Pradesh and (4) Vishnu Molakala Chandramowleshwara

Rao. The petitioner prays that this Court must declare s. 6 of the Madras Hereditary Village-Offices Act, 1895 (Madras Act III of 1895), hereinafter called the Act, as void in so far as it infringes the fundamental right of the petitioner under Arts. 14 and 16 of the Constitution, and further asks for an appropriate writ or direction quashing certain orders passed by respondents 1 to 3 in favour of respondent No. 4 in the matter of the latter's appointment as Village Munsif of a newly constituted village called Peravalipalem. When this petition first came up for hearing we directed a notice to go to other States of the Union inasmuch as the question raised as to the constitutional validity of the law relating to a hereditary village office was of a general nature and might arise in relation to the existing laws in force in other States. Except the State of Andhra Pradesh which has entered appearance through its Advocate-General, none of the other States have entered appearance. The Advocate-General of Andhra Pradesh has appeared for respondents 1 to 3, and respondent 4 has been separately represented before us. These respondents have contested the application and have pleaded that s. 6 of the Act does not violate any fundamental right, nor are the impugned orders of respondents 1 to 3 invalid in law.

The short facts are these: Village Peravali in Tenali taluq of the district of Guntur in the State of Andhra Pradesh was originally comprised of a village of the same name and a fairly large hamlet called Peravalipalem. The two were divided by a big drainage channel. It is stated that for purposes of village administration the villagers felt some difficulties in the two being treated as one unit. So the villagers, particularly those of the hamlet, put in an application to the Revenue authorities for constituting the hamlet into a separate village. This application was recommended by the Tehsildar and was accepted by the Board of Revenue and the State Government. By an order dated August 25, 1956, Peravali village was bifurcated and two villages were constituted. The

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order was published in the District Gazette on October 15, 1956, and was in these terms:

"The Board sanctions the bifurcation of Peravali village of Tenali taluq, Guntur district, into two villages, viz., (1) Peravali and (2) Peravalipalem along the boundary line shown in the map submitted by the Collector of Guntur with his letter Re. A. 4. 28150/55 dated 30th June, 1956. These orders will come into effect from the date of publication in the District Gazette.

2. The Board sanctions the following establishments on the existing scale of pay for the two villages:

Peravali:—
1 Village Munsif.
1 Karnam.
1 Talayari.
3 Vettians.

Peravalipalem:—
1 Village Munsif.
1 Karnam.
1 Talayari.
1 Vettian."

It is convenient to read at this stage sub-s. (1) of s. 6 of the Act under which the bifurcation was made:

"S. 6(1). In any local area in which this Act is in force the Board of Revenue may, subject to rules made in this behalf under section 20, group or amalgamate any two or more villages or portions thereof so as to form a single new village or divide any village into two or more villages and, thereupon, all hereditary village offices (of the classes defined in section 3, clause (1), of this Act) in the villages or portions of villages or village grouped, amalgamated or divided as aforesaid, shall cease to exist and new offices, which shall also be hereditary shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished."

On the division of the village into two villages, all the hereditary village offices of the original village ceased to exist under the aforesaid sub-section, and new offices were created for the two villages. We are concerned in this case with the appointment to the office of Village Munsif in the newly constituted village of Peravalipalem. In accordance with the provisions of sub-s. (1) of s. 6 and certain Standing Orders of the Board of Revenue, the Revenue Divisional Officer, Tenali, invited applications for the post of Village Munsif of Peravalipalem. Eight applications were made including one by the petitioner and another by respondent 4. Respondent 4, be it noted, is a son of the Village Munsif of the old village Peravali. By an order dated October, 18, 1956, the Revenue Divisional Officer, appointed the petitioner as Village Munsif of Peravalipalem. From the order of the Revenue Divisional Officer, respondent 4 and some of the other unsuccessful applicants preferred appeals to respondent 3, the Collector of Guntur. By an order dated April 1, 1957, respondent 3 allowed the appeal of respondent 4 and appointed him as Village Munsif of Peravalipalem. In his order respondent 3 said: "Shri V. Chandramowleswara Rao is qualified for the post. He is the son of the present Village Munsif of Peravali and is, therefore, heir to that post.....S. 6(1) of the Hereditary Village Offices Act states that in choosing a person to fill a new office of this kind the Collector shall select the person whom he may consider best qualified from among the family of the last holder of the office which has been abolished. The Village Munsif's post of the undivided village of Peravali was abolished when the village was divided and the new post of Village Munsif of Peravalipalem has to be filled up from among the family of the previous Village Munsif. The same instructions are contained in Board's Standing Order 148(2)."

The petitioner then carried an appeal from the order of respondent 3 to the Board of Revenue. By an order dated April 24, 1958, the Board dismissed the appeal and stated:

"According to s. 6, in choosing the person to fill

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in a new office like this, the Collector shall select the person whom he considers best qualified from among the families of the last holders of the office, which have been abolished. Here the office of the Village Munsif was abolished and two new offices have been created. As the last holder of the office was appointed to the new village, Peravali, after bifurcation, the Collector has appointed the son of the last office holder as Village Munsif of Peravalipalem as he is the nearest heir. The appellant before the Board cannot claim any preference over the son of the last office holder. The Board, therefore, holds that the Collector's order is in accordance with the law on the subject. No interference, is, therefore, called for."

The petitioner then moved respondent 1, but without success. Thereafter, he filed the present writ petition.

The petitioner relies mainly on clauses (1) and (2) of Art. 16 of the Constitution. We may read those clauses here:

"Art. 16(1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State:

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

On behalf of the petitioner it has been contended that (1) the office of Village Munsif of Peravalipalem is an office under the State, and (2) respondents 1 to 3 in passing their orders in favour of respondent 4 expressly stated that they proceeded on the basis of the hereditary principle laid down in s. 6(1) of the Act and discriminated against him as a citizen on the ground of descent only. This discrimination, it is argued, violates the guarantee of equal opportunity enshrined in Art. 16, cls. (1) and (2); and s. 6(1) of the Act to the extent that it permits such discrimination is void under Art. 13(1) of the Constitution.

The first question before us is if the office of Village

Munsif under the Act is an office under the State within the meaning of cls. (1) and (2) of Art. 16 of the Constitution. For determining that question it is necessary to examine the scheme and various provisions of the Act. The long title shows that it was an Act made to repeal Madras Regulation VI of 1831 and for other purposes. The purposes mentioned in the preamble are—"to provide more precisely for the succession to certain hereditary village offices in the State; for the hearing and disposal of claims to such offices or the emoluments annexed thereto; for the appointment of persons to hold such offices and the control of the holders thereof; and for certain other purposes." Section 3 of the Act refers to classes of village offices to which the Act applies and Village Munsif is one of such offices. Under s. 4 "emoluments" of the office means and includes (i) lands; (ii) assignment of revenue payable in respect of lands; (iii) fees in money or agricultural produce; and (iv) money-salaries and all other kinds of remuneration granted or continued in respect of, or annexed to, any office by the State. Section 5 lays down that the emoluments of village offices, whether such offices be or be not hereditary, shall not be liable to be transferred or encumbered in any manner whatsoever and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof. Sub-s. (1) of s. 6 relates to the grouping or division of villages; this sub-section we have already read. Sub-s. (2) of s. 6 gives a right to the Board of Revenue, subject to the approval of Government, to reduce the number of village offices, and on such reduction the Collector is empowered to dispense with the services of the officers no longer required. Sub-s. (3) of s. 6 which was subsequently added in 1930 says that a minor shall not be ineligible for selection by reason of his minority only. Section 7 states the circumstances in which the Collector may, of his own motion or on complaint and after enquiry suspend, remove or dismiss, etc., some of the village officers mentioned in s. 3. A similar power of punishment is also given to the Tehsildar. Under these provisions the Collector may suspend, remove

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or dismiss the Village Munsif. Section 10 lays down certain rules which are to be observed in making appointments to some of the village offices and these rules lay down, among other things, the general qualifications requisite for appointment to the offices in question. For example, for the appointment to the office of Village Munsif no person is eligible unless he has attained the age of majority, is physically and mentally capable of discharging the duties of the office, has qualified according to the educational test prescribed for the office by the Board of Revenue, has not been convicted by a Criminal Court of any offence which, in the opinion of the Collector, disqualifies him for holding the office and has not been dismissed from any post under the Government on any ground which the Collector considers sufficient to disqualify him for holding the office. One of the qualifications prescribed by s. 10 as it originally stood required that the applicant must be of the male sex. This requirement was deleted by the Adaptation (Amendment) Order of 1950, presumably to bring the section into conformity with Arts. 15 and 16 of the Constitution which prohibit discrimination on the ground of sex. Sub-s. (2) of s. 10 says that the succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India. Sub-s. (3) of s. 10 says that where the next heir is not qualified, the Collector shall appoint the person next in order of succession, who is so qualified, and, in the absence of any such person in the line of succession, may appoint any person duly qualified. Sub-ss. (4), (5) and (6) of s. 10 deal with matters with which we are not directly concerned. Section 11 lays down the rules to be observed in making appointments to certain offices in proprietary estates and one of the rules is that succession shall devolve in accordance with the law or custom applicable to the office in question. Section 13 in effect says that any person may sue before the Collector for any of the village offices specified in s. 3 or for the recovery of the emoluments of any such office on the ground that he is entitled to hold such office and

enjoy such emoluments. There are some provisos to the section which lay down limitations on the right of suit. With those limitations we are not concerned in the present case. Section 14 lays down the period of limitation for bringing a suit. Sections 15, 16 and 17 relate to the transfer and trial of such suits and the decrees or orders to be passed therein. Section 20 empowers the Board of Revenue to make rules and s. 21 bars the jurisdiction of Civil Courts. Section 23 provides for appeals.

The above gives in brief the scheme and provisions of the Act. These provisions show, in our opinion, that the office of Village Munsif under the Act is an office under the State. The appointment is made by the Collector, the emoluments are granted or continued by the State, the Collector has disciplinary powers over the Village Munsif including the power to remove, suspend or dismiss him, the qualifications for appointment can be laid down by the Board of Revenue—all these show that the office is not a private office under a private employer but is an office under the State. The nature of the duties to be performed by the Village Munsif under different provisions of the law empowering him in that behalf also shows that he holds a public office. He not only aids in collecting the revenue but exercises power of a magistrate and of a Civil Judge in petty cases. He has also certain police duties as to repressing and informing about crime, etc.

The learned Advocate-General appearing for respondents 1 to 3 has contended that the expression "office under the State" in Art. 16 has no reference to an office like that of the Village Munsif, which in its origin was a customary village office later recognised and regulated by law. His contention is that the expression has reference to a post in a Civil Service and an ex-cadre post under a contract of service, as are referred to in Arts. 309 and 310 in Part XIV of the Constitution relating to the Services under the Union and the States. He has referred in support of his contention to Ilbert's Supplement to the Government of India Act, 1915, p. 261, where a similar

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provision with regard to the Indian Civil Service has been referred to as laying down that "no native of British India.....is by reason only of his religion, place of birth, descent, or colour, or any of them disabled from holding any place, office or employment under His Majesty in India" and has pointed out that the aforesaid provision reproduced s. 87 of the Act of 1833 and historically the office to which the provision related was an office or employment in a Service directly under the East India Company or the Crown. He also referred to s. 298 of the Government of India Act, 1935, which said *inter alia* that "no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India." The argument of the learned Advocate-General is that Art. 16 embodies the same principle as inspired the earlier provisions referred to above, and like the earlier provisions it should be confined to an office or post in an organised public Service or an ex-cadre post under a contract of service directly under the Union or the State. He has further suggested that the deletion of the requirement as to sex in s. 10 of the Act was by reason of Art. 15 and not Art. 16 of the Constitution. The argument is plausible, but on a careful consideration we are unable to accept it as correct. Even if we assume for the purpose of argument that Arts. 309 and 310 and other Articles in Chapter I, Part XIV, of the Constitution relate only to an organised public Service like the Indian Administrative Service, etc., and ex-cadre posts under a direct contract of service which have not yet been incorporated into a Service, we do not think that the scope and effect of cls. (1) and (2) of Art. 16 can be cut down by reference to the provisions in the Services Chapter of the Constitution.

Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds—religion, race, caste, sex, place

of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16, cl. (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State; and cl. (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. It would thus appear that Art. 14 guarantees the *general* right of equality; Arts. 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Art. 16, the latter being confined to matters relating to employment or appointment to any office under the State. It is also worthy of note that Art. 15 does not mention 'descent' as one of the prohibited grounds of discrimination, whereas Art. 16 does. We do not see any reason why the full ambit of the fundamental right guaranteed by Art. 16 in the matter of employment or appointment to any office under the State should be cut down by a reference to the provisions in Part XIV of the Constitution which relate to Services or to provisions in the earlier Constitution Acts relating to the same subject. These Service provisions do not enshrine any fundamental right of citizens; they relate to recruitment, conditions and tenure of service of persons, citizens or otherwise, appointed to a Civil Service or to posts in connection with the affairs of the Union or any State. The word 'State', be it noted, has a different connotation in Part III relating to Fundamental Rights: it includes the Government and Parliament of India, the Government and Legislature of each of the States and all local or other authorities within the territory of India, etc. Therefore, the scope and ambit of the Service provisions are to a large extent distinct and different from the scope and ambit of the fundamental right guaranteeing to all citizens an equality of opportunity in matters of public employment. The preamble to the Constitution states that one of its objects is to secure to all citizens equality of status and opportunity; Art. 16 gives equality of opportunity in matters

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of public employment. We think that it would be wrong in principle to cut down the amplitude of a fundamental right by reference to provisions which have an altogether different scope and purpose. Article 13 of the Constitution lays down inter alia that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with fundamental rights, shall to the extent of the inconsistency be void. In that Article 'law' includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right. Our attention has also been drawn to cl. (4) of Art. 16 which enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The argument is that this clause refers to appointments or posts and further talks of inadequate representation in the services, and the learned Advocate-General has sought to restrict the scope of cls. (1) and (2) of Art. 16 by reason of the provisions in cl. (4). We are not concerned in this case with the true scope and effect of cl. (4) and we express no opinion with regard to it. All that we say is that the expression 'office under the State' in cls. (1) and (2) of Art. 16 must be given its natural meaning.

We are unable, therefore, to accept the argument of the learned Advocate-General that the expression 'office under the State' in Art. 16 has a restricted connotation and does not include a village office like that of the Village Munsif. In *M. Ramappa* v. *Sangappa and Others* (1) the question arose whether certain village offices governed by the Mysore Villages Offices Act, 1908, were offices of profit under the Government of any State within the meaning of Art. 191 of the Constitution. This Court held that the offices were offices of profit under the Government and said:

"An office has to be held under someone for it is impossible to conceive of an office held under no one.

(1) [1959] S.C.R. 1167

The appointment being by the Government, the office to which it is made must be held under it, for there is no one else under whom it can be held. The learned Advocate said that the office was held under the village community. But such a thing is an impossibility for village communities have since a very long time, ceased to have any corporate existence."

Learned Counsel for respondent 4 has presented a somewhat different argument on this question. He has submitted that the office of Village Munsif is not merely an office simpliciter; but it is an office *cum* property. His argument is that Art. 16 does not apply to a hereditary village office because a person entitled to it under the Act has a pre-existing right to the office and its emoluments, which he can enforce by a suit. We now proceed to consider this argument.

Learned Counsel for respondent 4 has relied on the decision of this Court in *Angurbala Mullick* v. *Debabrata Mullick* (1) where it was held that in the conception of shebaiti under Hindu law, both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. He has argued that on the same analogy the office of a village Munsif must be held to be an office *cum* property. We do not think that the analogy holds. As this Court pointed out in *Kalipada Chakraborti and Another* v. *Palani Bala Devi and Others* (2) shebaitship is property of a peculiar and anomalous character and it is difficult to say that it comes under the category of immovable property as it is known to law. As to the office of a Village Munsif under the Act, the provisions of the Act itself and a long line of decisions make it quite clear that what go with the office are its emoluments, whether in the shape of land, assignment of revenue, agricultural produce, money, salary or any other kind of remuneration. These emoluments are granted or continued in respect of, or annexed to, the office by the State. This is made clear by s. 4 of the Act. Apart from the office there is no right to the emoluments. In other words, when a person is appoint-

(1) [1951] S.C.R. 1125. (2) [1953] S.C.R. 503.

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ed to be a "Village Munsif" it is an appointment to an office by the State to be remunerated either by the use of land or by money, salary, etc.; it is not the case of a grant of land burdened with service, a distinction which was explained by the Privy Council in *Lakhamgouda Basavprabhu Sardesai* v. *Baswantrao and Others* (1). In *Venkata* v. *Rama* (2) where the question for decision was the effect of the enfranchisement of lands forming the emoluments of the hereditary village office of Karnam, it was pointed out:

"Emoluments for the discharge of the duties of the office were provided either in the shape of land exempt from revenue or subject to a lighter assessment, or of fees in grain or cash, or of both land and fees.

.....

.....

When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once become entitled to the lands which constituted its emolument."

The same view was re-affirmed in *Musti Venkata Jagannada Sharma* v. *Musti Veerabhadrayya* (3) where the history of the office of Karnam was examined and it was observed that the "Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family." This latter decision was considered by a Full Bench of the Madras High Court in *Manubolu Ranga Reddi* v. *Maram Reddi Dasaradharami Reddi* (4)

(1) A.I.R. 1931 P.C. 157.
(2) I.L.R. 8 Mad. 249.
(3) A.I.R. 1922 P.C. 96.
(4) I.L.R. [1938] Mad. 249.

and it was pointed out that their Lordships of the Privy Council, though they indicated the nature of the right which the Karnam had, did not consider the question whether on the creation of an office under s. 6(1), the members of the family of the last holder of the abolished office had the right to compel the Collector to carry out the duty cast upon him by the section. It was held that s. 6(1) creates a right in the family which can be enforced by suit. Learned Counsel for respondent 4 has relied on this decision. It is worthy of note, however, that the decision was given on the footing that s. 6(1) was valid and mandatory in character. No question arose or could at that time arise of the contravention of a fundamental right guaranteed by the Constitution, by the hereditary principle embodied in s. 6(1) of the Act. The decision proceeded on the footing that the Act recognised a 'right vested in a family' to the office in question and contained provisions to enforce that right. It did not proceed upon the footing that the family had a right to the property in the shape of emoluments, independent or irrespective of the office. In other words, the decision cannot be relied upon in support of the contention that a hereditary village office is like a shebaiti, that is, office *cum* property. That was not the ratio of the decision. The ratio simply was this that the Act had recognised the right vested in a family to the office in question. That decision cannot assist respondent 4 in support of his contention that Art. 16, cls. (1) and (2), do not apply to the office, even though the office is an office under the State. In *Ramachandurani Purshotham* v. *Ramachandurani Venkatappa and Another* (1) the question was whether the office of Karnam was 'property' within the meaning of Art. 19(1)(f) of the Constitution. It was held that it was not property within the meaning of that Article. The same view was expressed in *Pasala Rama Rao* v. *Board of Revenue* (2) where it was observed that the right to succeed to a hereditary office was not property and the relation back of an adopted son's rights was only with regard to property.

(1) A.I.R. 1952 Mad. 150. (2) A.I.R. 1954 Mad. 483.

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S. K. Das J.

This view was not accepted in *Chandra Chowdary* v. *The Board of Revenue* [1] where it was observed that the fact that the adoption was posthumous did not make any difference and the adoption being to the last office holder, the adopted son must be deemed to have been in existence at the time of the death of the male holder and had the right to succeed to the office. It was further observed that the office of a Village Munsif was 'property' so as to attract the operation of the rule that the adoption related back to the date of the death of the last male holder. We are not concerned in this case with the doctrine of relation back in the matter of a posthumous adoption. The simple question before us is whether the office, though it is an office under the State, is of such a nature that cls. (1) and (2) of Art. 16 of the Constitution are not attracted to it. We are of the view that there is nothing in the nature of the office which takes it out of the ambit of cls. (1) and (2) of Art. 16 of the Constitution. An office has its emoluments, and it would be wrong to hold that though the office is an office under the State, it is not within the ambit of Art. 16 because at a time prior to the Constitution, the law recognised a custom by which there was a preferential right to the office in the members of a particular family. The real question is—is that custom which is recognised and regulated by the Act consistent with the fundamental right guaranteed by Art. 16? We do not agree with learned Counsel for respondent 4 that the family had any pre-existing right to property in the shape of the emoluments of the office, independent or irrespective of the office. If there was no such pre-existing right to property apart from the office, then the answer must clearly be that Art. 16 applies and s. 6(1) of the Act in so far as it makes a discrimination on the ground of descent only, is violative of the fundamental right of the petitioner.

There can be no doubt that s. 6(1) of the Act does embody a principle of discrimination on the ground of descent only. It says that in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from

(1) A.I.R. 1959 Andhra Pradesh 343.

among the families of the last holders of the offices which have been abolished. This, in our opinion, is discrimination on the ground of descent only and is in contravention of Art. 16(2) of the Constitution.

Learned Counsel for respondent 4 has also submitted that the petitioner cannot be permitted to assert the invalidity of s. 6(1) of the Act when he himself made an application for appointment as Village Munsif under the Act. He has drawn our attention to the decision in *Bapatla Venkata Subba Rao* v. *Sikharam Ramakrishna Rao*(1). That was a case where the appellant was appointed as a hereditary Karnam under the Act and but for the Act, he would not have had any claim to be appointed to the office of Karnam. It was held that he could not be permitted to contend for the first time in appeal that the very Act but for which he would not have had any right to the office, was unconstitutional. Apart from the question whether a fundamental right can be waived, a question which does not fall for consideration in this case, it is clear to us that the facts here are entirely different. The petitioner had the right to make an application for the new village office and he was accepted by the Revenue Divisional Officer. Respondents 1 to 3, however, passed orders adverse to him and in favour of respondent 4, acting on the principle of discrimination on the ground of descent only as embodied in s. 6(1) of the Act. It is, we think, open to the petitioner to say that s. 6(1) of the Act in so far as it violates his fundamental right guaranteed under Art. 16 of the Constitution is void and his application for appointment must, therefore, be decided on merits.

Finally, we must notice one other argument advanced by the learned Advocate-General on behalf of respondents 1 to 3. The argument is based on the distinction between Arts. 15 and 16. We have said earlier that Art. 15 is, in one respect, more general than Art. 16 because its operation is not restricted to public employment; it operates in the entire field of State discrimination. But in another sense, with

(1) A.I.R. 1958 Andhra Pradesh 322.

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regard to the grounds of discrimination, it is perhaps less wide than Art. 16, because it does not include 'descent' amongst the grounds of discrimination. The argument before us is that the provision impugned in this case must be tested in the light of Art. 15 and not Art. 16. It is submitted by the learned Advocate-General that the larger variety of grounds mentioned in Art. 16 should lead us to the conclusion that Art. 16 does not apply to offices where the law recognises a right based on descent. We consider that such an argument assumes as correct the very point which is disputed. If we assume that Art. 16 does not apply, then the question itself is decided. But why should we make that assumption? If the office in question is an office under the State, then Art. 16 in terms applies; therefore, the question is whether the office of Village Munsif is an office under the State. We have held that it is. It is perhaps necessary to point out here that cl. (5) of Art. 16 shows that the Article does not bear the restricted meaning which the learned Advocate-General has canvassed for; because an incumbent of an office in connexion with the affairs of any religious or denominational institution need not necessarily be a member of the Civil Service.

For the reasons given above, we allow the petition. The orders of respondents 1 to 3 in respect of the appointment to the post of Village Munsif of Peravalipalem in favour of respondent 4 are set aside and we direct that the application of the petitioner for the said office be now considered on merits by the Revenue authorities concerned on the footing that s. 6(1) of the Act in so far as it infringes the fundamental right of the citizens of India under Art. 16 of the Constitution is void. The petitioner will be entitled to his costs of the hearing in this Court.

Petition allowed.

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COMMISSIONER OF INCOME-TAX, BOMBAY

v.

M/S. ABDULLABHAI ABDULKADAR

1960

December 6.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Commission Agent's liability to pay for non-resident principal—Test of deductible business loss—Indian Income-tax Act, 1922 (11 of 1922), ss. 10(1), 10(2)(xi), 42(1), 43.

The respondent was a registered firm carrying on business as commission agents, and for the purpose of income-tax it was treated as the agent of a non-resident principal doing business outside India. Under s. 42(1) of the Indian Income-tax Act the respondent was deemed to be the assessee and had to pay Rs. 3,78,491 as income-tax on behalf of the non-resident principal. After allowing for the amounts lying with the respondent-firm the account of the non-resident principal showed a debit balance of Rs. 3,20,162. The respondent treated this amount as a bad debt and claimed it as a deductible loss. The Income-tax Officer and the Appellate Assistant Commissioner disallowed the respondent's claim but the Income Tax Appellate Tribunal held it to be an allowable deduction being a bad debt incurred as a result of the respondent's business activities with the non-resident principal. The High Court treating the amount as a deductible business loss incurred by the respondent affirmed the decision of the Income-tax Tribunal. On appeal by the Commissioner of Income-tax,

Held, that the respondent was not entitled to the reduction claimed by it. The liability to pay imposed upon it under s. 42(2) of the Income-tax Act did not arise directly from the carrying on of the business nor was it incidental to the business. The loss was not a commercial loss incurred in the respondent-firm's own business but it arose out of the business of another person and that was not a permissible deduction within s. 10(1) or s. 10(2)(xi) of the Act.

Gresham Life Assurance Society v. *Styles*, (1892) 3 T. C. 185 (H. L.), referred to.

Commissioner of Income-tax v. *Sir S. M. Chitnavis*, (1932) L. R. 59 I. A. 290, followed.

Badridas Daga v. *Commissioner of Income-tax*, [1959] S.C.R. 690 and *Curtis* v. *J. and G. Oldfield, Ltd.*, (1925) 9 T. C. 319, discussed.

Lord's Dairy Farm Ltd. v. *Commissioner of Income-tax, Bombay*, [1955] 27 I.T.R. 700, *Calcutta Co., Ltd.* v. *Commissioner of Income-tax*, [1959] 37 I.T.R. 1 and *C.I.R.* v. *Hagart and Burn Murdoch*, [1929] A.C. 386, not applicable.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 312 of 1959.

Appeal from the judgment and order dated August 23, 1956, of the Bombay High Court in Income-tax Reference No. 21 of 1956.

Hardyal Hardy and *D. Gupta*, for the appellant.

A. V. Viswanatha Sastri and *I. N. Shroff*, for the respondent.

1960. December 6. The Judgment of the Court was delivered by

Kapur J.

KAPUR, J.—This is an appeal by special leave brought by the Commissioner of Income-tax against the judgment and order of the High Court of Bombay answering the question in favour of the assessee. The question referred by the Tribunal was:

"Whether on the facts and in the circumstances of the case the amount of Rs. 3,20,162 is an allowable deduction under Section 10(2)(xi) or 10(2)(xv) of the Income-tax Act?"

which was amended by the High Court as follows:

"Whether on the facts and in the circumstances of the case the amount Rs. 3,20,162 is an allowable deduction"

and was answered in the affirmative and against the appellant.

The facts of the case shortly stated are these: The respondent is a registered firm carrying on business as commission agents. It was treated as the agent of a non-resident principal Haji Mohamed Syed Al Barbari of Port Sudan (hereinafter referred to as the 'non-resident principal'). It was carrying on the business of export of cloth and kariana (i.e., miscellaneous goods) to Aden, Saudi Arabia and Sudan. It used to supply goods from India to the non-resident principal, who on his part, was sending cotton to the respondent and other merchants for sale in India. For the years 1942-43, 1943-44, 1944-45 and 1945-46, the respondent firm was treated as the agent of the non-resident principal under s. 43 of the Income-tax Act

(which will hereinafter be termed 'the Act') for the purpose of income-tax and Excess Profits Tax. The respondent firm had to pay in all Rs. 3,78,491 under s. 42(1) of the Act and after allowing for the amounts which were in its hands the account of the principal non-resident showed a debit balance of Rs. 3,20,162. For the year of assessment, 1953-54, the respondent firm treated this amount as a bad debt and claimed it as a deductible loss to be set off against profits. The Income-tax Officer treating this claim as one under s. 10(2)(xv) of the Act, disallowed it. The Appellate Assistant Commissioner treated it as one under s. 10 (2)(xi) of the Act and he also disallowed it. On appeal to the Income-tax Appellate Tribunal it was held to be a bad debt and an allowable deduction as it was incurred as a result of the business activities which the respondent firm was carrying on with the non-resident principal. At the instance of the Commissioner of Income-tax, the case was stated to the High Court and the High Court modified the question and answered the same in the affirmative, i.e., against the appellant. The High Court held that as the law imposed an obligation upon the respondent firm to discharge the liability and it was incidental to the business of the respondent the amount was a deductible loss; and even if it was not a debt, then also the amount could be claimed by the assessee as a business or trading loss, because in arriving at the true profit of the respondent's business that loss had to be deducted. The High Court thus applied s. 10(1) of the Act to the amount claimed by the respondent.

The allowability of the amount in dispute depends upon the nature of the liability imposed upon the respondent firm. The contention of the respondent's counsel was that it was carrying on foreign trade and had dealings with a foreign merchant and in the course of the business there were imports and exports and therefore the inter-connection between the respondent firm and the non-resident principal was so intimate as to invite the application of s. 42(1), i.e., the establishment of agency as contemplated in that section. The liability to pay arises under s. 42(2) which provides :

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"Where a person not resident or not ordinarily resident in the taxable territories carries on business with a person resident in the taxable territories, and it appears to the Income-tax Officer that owing to the close connection between such persons the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income-tax in the name of the resident person who shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

Relying on this provision it was argued that the nature of the respondent's business was foreign trade which was inter-connected with the business of the non-resident principal. Its nature was such as to attract the imposition of liability on the respondent firm under s. 42(2) of the Act and therefore the loss so incurred must be taken to be incidental to and arising out of the business of the respondent.

"The thing to be taxed", said Lord Halsbury, L. C., "is the amount of profits and gains. The word 'profits' I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand": *Gresham Life Assurance Society* v. *Styles* (1). Hence even if a deduction is not specifically enumerated in sub-section (2) of s. 10 it would still be a debitable item to reflect the taxable profits. The Privy Council in *Commissioner of Income-tax* v. *Sir S. M. Chitnavis* (2) held that the Act nowhere authorises the deduction of bad debts of a business, such a deduction is necessarily allowable because what is chargeable to income-tax in respect of a business are the profits and gains of a year and in assessing the amount of profits and gains of that year account must necessarily be taken of all losses incurred, otherwise true profits and gains cannot be ascertained. In order

(1) (1892) 3 T.C. 185, 188 (H.L.).
(2) (1932) L.R. 59 I.A. 290, 296.

that a loss may be deductible it must be a loss in the business of the assessee and not payment relating to the business of somebody else which under the provisions of the Act is deemed to be and becomes the liability of the assessee. The loss becomes allowable if it "springs directly from and is incidental" to the business of the assessee. The decision therefore mainly depends upon whether the loss claimed is a business loss of that nature. In our opinion the amount which became payable by the respondent firm cannot be called its business loss. In order to be deductible the loss must be in the nature of a commercial loss and, as has been said above, must spring directly out of it and must really be incidental to the business itself. It is not sufficient that it falls on the trader in some other capacity or is merely connected with his business.

Counsel for the respondent relied upon a judgment of this Court in *Badridas Daga* v. *The Commissioner of Income-tax* (1). In that case an agent of the assessee engaged for the purpose of carrying on of the assessee's business had authority to operate a bank account. Acting under such authority the agent withdrew from the bank monies and put them to his personal use. The assessee was able to recover from the agent only a part of the amount misappropriated and the balance was written off as irrecoverable debt and it was held that it was not allowable under s. 10(2)(xi) or 10(2)(xv) of the Act but it was a loss deductible in computing the profits under s. 10(1) of the Act as a loss incidental to the carrying on of his business. Counsel relied on the following observation of Venkatarama Ayyar, J., at p. 695:

"The result is that when a claim is made for a deduction for which there is no specific provision in s. 10(2), whether it is admissible or not will depend on whether having regard to accepted commercial practice and trading principles it can be said to arise out of the carrying on of the business and to be incidental to it."

That passage has to be read in the circumstances of

(1) [1959] S.C.R. 690.

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that case where the employment of agents was incidental to the carrying on of the business and it was observed that it logically followed that the losses which were incidental to such employment were also incidental to the carrying on of the business. At page 696, it was observed:—

"At the same time it should be emphasised that the loss for which a deduction could be made under s. 10(1) must be one that springs directly from the carrying on of the business and is incidental to it and not any loss sustained by the assessee, even if it has some connection with his business."

Reference may also be made to an English decision in *Curtis* v. *J. & G. Oldfield Ltd.* (1). In that case the managing director of a company of wine and spirit merchants embezzled monies of the company and that was claimed as a loss as a bad debt and it was held that it was not a trading loss and was therefore not an admissible deduction. In that case the contention of the Crown was that the sum was not an ordinary trading debt and therefore could not be a bad debt and that the loss was not connected with and did not arise out of the trade. Rowlatt, J., said at p. 330:

"When the Rule speaks of a bad debt it means a debt which is a debt that would have come into the balance-sheet as a trading debt in the trade that is in question and that it is bad. It does not really mean any bad debt which, when it was a good debt, would not have come in to swell the profit."

In the present case the liability was imposed upon the respondent firm because it was treated as an agent within the meaning of s. 42(1) of the Act and the liability was imposed because of the deeming provision in sub-s. (2) of s. 42 of the Act. Can it be said, in the present case, that the liability imposed upon the respondent firm was a business debt arising out of the business of the respondent or to use the words of Venkatarama Ayyar, J., "springs directly from the carrying on of the business and is incidental to it or is a trading debt in the business of the respondent firm." As we have said above, that condition has not

(1) (1925) 9 T.C. 319.

been fulfilled and the loss which the respondent has incurred is not in its own business but the liability arose because of the business of another person and that is not a permissible deduction within s. 10(1) of the Act. It is not a loss which has to be deducted in respect of the business of the respondent from the profits and gains of the respondent's business.

Counsel for the respondent also relied on *Lord's Dairy Farm Ltd.* v. *Commissioner of Income-tax, Bombay* (1). That was a case of embezzlement by an employee and it was held that the loss directly arose from the necessity of employing cashiers and therefore the loss by embezzlement was a trading loss but in that very case it was held that before a claim could be made for deduction of a debt as bad debt it must be a debt in law. That case is not applicable to the facts of the present case and is of little assistance in the decision of the question before us. Counsel for the respondent next relied on *Calcutta Co., Ltd.* v. *The Commissioner of Income-tax* (2). It was held in that case that the expression "profits and gains" has to be understood in its commercial sense and that there could be no computation of profits and gains until the expenditure necessary for earning those profits and gains is deducted therefrom and that when there is no specific provision in s. 10(2) in regard to claim made, its allowability will depend on accepted commercial practice and trading principles and it will be allowed if it can be said to arise out of the carrying on of the business and is incidental to it. As a principle it is unexceptionable but it does not carry the matter any further.

It was next contended that the matter falls within s. 10(2)(xi) of the Act, i.e., it is in respect of the business. This contention has even less substance than the claim of deduction under s. 10(1). Under cl. (xi) also a debt is only allowable when it is a debt and arises out of and as an incident to the trade. Except in money-lending trade debts can only be so described

(1) [1955] 27 I.T.R. 700. (2) [1959] 37 I.T.R. 1.

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if they are due from customers for goods supplied or loans to constituents or transactions of a similar kind. In every case the test is, was the debt due as an incident to the business; if it is not of that character it will be a capital loss. Thus a loan advanced by a firm of Solicitors to a company in the formation of which it acted as legal adviser is not deductible on its becoming irrecoverable because that is not a part of the profession of a Solicitor: *C. I. R.* v. *Hagart & Burn Murdoch* (1).

In our opinion the High Court was in error in answering the question in favour of the respondent. We therefore allow this appeal, set aside the judgment and order of the High Court and answer the question against the respondent. The appellant will have his costs in this Court and in the High Court.

Appeal allowed.

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December 6.

HOSHIARPUR ELECTRIC SUPPLY CO.

v.

COMMISSIONER OF INCOME TAX, SIMLA

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Assessee's receipts for installing new electricity installations—If "Profit" or capital—Indian Electricity Act, 1910 (9 of 1910), Schedule c. 6 (1)(b)—Indian Income-tax Act, 1922 (11 of 1922), s. 66(1).

The assessee, an electricity supply undertaking, received certain sum of money for new service connections granted to its customers. Part of this amount was spent for laying mains and service lines. The Income-tax Officer treated the entire amount as trading receipt. In appeal the Appellate Assistant Commissioner excluded the cost of laying service lines and the mains and treated the balance as taxable income. The Appellate Tribunal agreed with the Appellate Assistant Commissioner and held that the service connection receipts were trading receipts and the "profit element" therein was taxable income in the hands

(1) [1929] A.C. 386; (1929) 14 T.C. 433.

of the assessee. In a reference under s. 66(1) of the Income-tax Act, the High Court substantially agreed with the view of the Tribunal. On appeal by the assessee,

Held, that the High Court erred in holding that the excess of the receipts over the amount spent by the assessee for installation of service lines was a trading receipt. The receipts though related to the business of the assessee as distributors of electricity were not incidental to nor in the course of the carrying on of the assessee's business. They were receipts for bringing into existence capital of lasting value. The total receipts being capital receipts the balance remaining after a part thereof was expended for laying service lines and mains, could not be regarded as 'profit' in the nature of a trading receipt.

Commissioner of Income-tax v. *Poona Electric Supply Co. Ltd.*, [1946] 14 I.T.R. 622 and *Monghyr Electric Supply Co. Ltd.* v. *Commissioner of Income-tax, Bihar and Orissa*, [1954] 26 I.T.R. 15, discussed and applied.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 328 of 1960.

Appeal from the order dated March 4, 1958, of the Punjab High Court, Chandigarh, in Civil Reference No. 29 of 1952.

A. V. Viswanatha Sastri, R. Ganapathy Iyer and *G. Gopalakrishnan*, for the appellant.

Hardyal Hardy and *D. Gupta*, for the respondent.

1960. December 6. The Judgment of the Court was delivered by

SHAH, J.—The Income Tax Appellate Tribunal, Delhi Bench, stated under s. 66(1) of the Indian Income Tax Act the following question for decision of the High Court of Judicature at Chandigarh: *Shah J.*

"Whether the assessee's receipts from consumers for laying service lines, (that is, not distributing mains) were trading receipts and whether the profit element therein, viz., service connection receipts minus service connection cost was taxable income in the assessee's hands?"

The High Court answered the question as follows:

".....the company's receipts from the consumers for laying the service lines are trading receipts and

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the profit element therein being the difference between the service connection receipts and the service connection costs is taxable income in the hands of the company."

With certificate granted under s. 66A(2) of the Income Tax Act, this appeal is preferred by the Hoshiarpur Electric Supply Company — hereinafter referred to as the assessee.

The assessee is a licensee of an electricity undertaking. In the year of account, April 1, 1947—March 31, 1948, the assessee received Rs. 12,530 for new service connections granted to its customers. Out of this amount, Rs. 5,929 were spent for laying the service lines, and Rs. 1,338 were spent for laying certain mains. The Income Tax Officer treated the entire amount of Rs. 12,530 as trading receipt. In appeal to the Appellate Assistant Commissioner, the cost incurred for laying service lines and mains was excluded and the balance was treated as taxable income. In appeal, the Appellate Tribunal agreed with the Appellate Assistant Commissioner and held that the service connection receipts were trading receipts and that the "profit element" therein was taxable income in the hands of the assessee. In a reference under s. 66(1) of the Income Tax Act, the High Court substantially agreed with the view of the Tribunal.

The assessee has installed machinery for producing electrical energy and has also laid mains and distributing lines for supplying it to its customers. The assessee makes no charge to the consumers for laying service lines not exceeding 100 ft. in length from its distributing main to the point of connection on the consumer's property in accordance with cl. 6(1)(b) of the Schedule to the Indian Electricity Act, 1910. But where the length of a service line to be installed exceeds 100 ft., the cost is charged at certain rates by the assessee. The charge consists usually of cost of wiring copper as well as galvanised iron, service and other brackets, insulators, meter wiring, poles and appropriate labour and supervision charges. In the year of account, the assessee gave 229 new connections

and received Rs. 12,530 out of which Rs. 5,929 have been regarded as taxable income. In the forms of account prescribed under the Indian Electricity Rules framed under s. 37 read with s. 11 of the Indian Electricity Act, the assessee credited service connection receipts to the revenue account and debited the corresponding cost of laying service lines to the capital account. But the classification of the receipts in the form of accounts is not of any importance in considering whether the receipt is taxable as revenue.

The assessee contended that the service lines when installed became the property of the assessee, because they were in the nature of an extension of the assessee's distributing mains. On behalf of the Revenue, it was urged relying upon the judgment of the High Court that the service lines which are paid for by the consumers do not become the property of the assessee. We do not think that it is open to us in an appeal from an order under s. 66 of the Indian Income Tax Act to enter upon this question. The Tribunal did not record a finding on the question whether the assessee was the owner of the service lines. Undoubtedly, contributions were made by the consumers towards the cost of the service lines installed by the assessee which exceeded 100 ft. in length. Normally, a person who pays for installation of property may be presumed to be the owner thereof; but such a presumption cannot necessarily be made in respect of a service line, which so long as it is used for supplying electrical energy remains an integral part of the distributing mains of an electrical undertaking. The High Court was exercising advisory jurisdiction, and the question as to who was the owner of the service lines after they were installed could be adjudicated upon only by the Tribunal. It was for the Tribunal to record its conclusion on that question, but the Tribunal has recorded none. In our judgment, the High Court was in error in assuming to itself jurisdiction substantially appellate in character and in proceeding to decide the question as to ownership of the service lines which is a mixed question of law and fact, on which the Tribunal has given no finding.

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The assessee contended that the amount paid by the consumers for new connections is capital receipt and not liable to tax, because the amount is paid by the consumers towards expenditure to be incurred by the assessee in laying new service lines—an asset of a lasting character. This question falls to be determined in the light of the nature of the receipt irrespective of who remained owner of the materials of the service lines installed for granting electrical connections to new customers.

The assessee only spends a part of the amount received by it from the consumers. It is not clear from the statement of the case whether amongst the 229 new connections given, there were any which were of a length less than 100 ft. Payments received by the assessee must of course be for service lines installed of length more than 100 ft., but it is not clear on the record whether the expenditure of Rs. 5,929 incurred by the assessee is only in respect of service lines which exceeded 100 ft. in length or it is expenditure incurred in respect of all service lines. It is however not disputed that a part of the amount received from the consumers remains with the assessee after meeting the expenses incidental to the construction of the service lines. But an electric service line requires constant inspection and occasional repairs and replacement and expenses in this behalf have to be undertaken by the assessee. The amount contributed by the consumer for obtaining a new connection would of necessity cover all those services. The amount contributed by the consumer is in direct recoupment of the expenditure for bringing into existence an asset of a lasting character enabling the assessee to conduct its business of supplying electrical energy. By the installation of the service lines, a capital asset is brought into existence. The contribution made by the consumers is substantially as consideration for a joint adventure; the service line when installed becomes an appanage of the mains of the assessee, and by the provisions of the Electricity Act, the assessee is obliged to maintain it in proper repairs for ensuring efficient supply of energy. The assumption made by the

Department that the excess remaining in the hands of the assessee, after defraying the immediate cost of installation of a service line must be regarded as a trading profit of the company is not correct. The assessee is undoubtedly carrying on the business of distributing electrical energy to the consumers. Installation of service lines is not an isolated or casual act; it is an incident of the business of the assessee. But if the amount contributed by the consumers for installation of what is essentially reimbursement of capital expenditure, the excess remaining after expending the cost of installation out of the amount contributed is not converted into a trading receipt. This excess—which is called by the Tribunal "profit element"—was not received in the form of profit of the business; it was part of a capital receipt in the hands of the assessee, and it was not converted into a trading profit because the assessee was engaged in the business of distribution of electrical energy, with which the receipt was connected.

In *Commissioner of Income-tax* v. *Poona Electric Supply Co. Ltd.* (1), it was held by a Division Bench of the Bombay High Court that the amount received from the Government of Bombay by the Poona Electric Company in reimbursement of expenses incurred for constructing new supply lines for supplying energy to new areas not previously served, was a capital receipt and not a trade receipt. The question of the taxability of the "profit element" in the contribution received from the Government was not expressly determined; but the court in that case held that the entire amount received by the Poona Electric Company from the Government as contribution was a capital receipt.

In *Monghyr Electric Supply Co. Ltd.* v. *Commissioner of Income-tax, Bihar and Orissa* (2), it was held that the amount paid by consumers of electricity for meeting the cost of service connections was a capital receipt in the hands of the electricity undertaking and not revenue receipt and the difference between the amount received on account of service connection charges and

(1) [1946] 14 I.T.R. 622. (2) [1954] 26 I.T.R. 15.

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Shah J.

the amount immediately not expended was not taxable as revenue.

The receipts though related to the business of the assessee as distributors of electricity were not incidental to nor in the course of the carrying on of the assessee's business; they were receipts for bringing into existence capital of lasting value. Contributions were not made merely for services rendered and to be rendered, but for installation of capital equipment under an agreement for a joint venture. The total receipts being capital receipts, the fact that in the installation of capital, only a certain amount was immediately expended, the balance remaining in hand, could not be regarded as profit in the nature of a trading receipt. On that view of the case, in our judgment, the High Court was in error in holding that the excess of the receipts over the amount expended for installation of service lines by the assessee was a trading receipt.

The appeal is allowed and the question submitted to the High Court is answered in the negative. The assessee is entitled to its costs in this court as well as in the High Court.

Appeal allowed.

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December 7

SHRI MANNA LAL AND ANOTHER

v.

COLLECTOR OF JHALAWAR AND OTHERS

(B. P. SINHA, C. J., S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR and J. L. MUDHOLKAR, JJ.)

Public Demand—Loan due to Jhalawar State Bank—Assets transferred to United State of Rajasthan under covenant, later vested in State of Rajasthan—If recoverable as a public demand—Certificate—Requirements, if applicable to loans due to Government—Special facilities to Government as Banker, whether discriminatory—Constitution of India, Art. 14—Rajasthan Public Demands Recovery Act, 1952 (Raj. V of 1952), s. 4.

The Jhalawar State Bank was originally a Bank belonging to the ruling State of Jhalawar and its assets, including moneys

due to it, became vested in the United State of Rajasthan under the covenant executed by the Ruler of Jhalawar along with other Rulers by which the United State of Rajasthan was formed. On the promulgation of the Constitution of India, the United State of Rajasthan became the State of Rajasthan in the Indian Union and all its assets, including the Jhalawar State Bank and its dues, vested in the State of Rajasthan.

Moneys due from the appellants in respect of advances made to them by the Jhalawar State Bank at a time when it belonged to the ruling State of Jhalawar, could be recovered by the State of Rajasthan after the Bank had become vested in it, as a public demand under the Rajasthan Public Demands Recovery Act, 1952.

The form prescribed in the Rajasthan Public Demands Recovery Act, in which a certificate has to be drawn up and filed under s. 4 of the Act for commencing proceedings for recovery of public demands under the Act in so far as it required a statement as to the period for which a public demand is due, was not applicable to a public demand like a loan due to the Government in respect of which there is no question of any period for which it is due.

The Rajasthan Public Demands Recovery Act did not offend Art. 14 of the Constitution as giving special facility to the Government as a banker for the recovery of the bank's dues for, the Government can legitimately be put in a separate class for this purpose.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 88 of 1957.

Appeal from the judgment and order dated January 18, 1956, of the Rajasthan High Court (Jaipur Bench) in D.B.C. Writ Petition No. 262 of 1954.

S. K. Kapur and *Ganpat Rai*, for the appellants.

N. S. Bindra and *D. Gupta*, for the respondents.

1960. December 7. The Judgment of the Court was delivered by

Sarkar J.

SARKAR, J.—The appellants are traders of Jhalawar. Respondent No. 1, the Collector of Jhalawar, served on the appellants a notice under s. 6 of the Rajasthan Public Demands Recovery Act, 1952, hereafter called the Act, for the recovery from them as a public demand, of Rs. 2,24,607/6/6 said to be due on account of loans taken by them from the Jhalawar State Bank. The appellants filed a petition under s. 8 of the Act contending, among other things, that

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the amount sought to be recovered from them was not a public demand. Respondent No. 1 appears to have called upon the appellants to prove that it was not a public demand. The appellants without proceeding further before respondent No. 1, filed a petition in the High Court of Rajasthan for the issue of a writ quashing the proceedings under the Public Demands Recovery Act. The High Court dismissed the petition but granted a certificate that the case was fit for an appeal to this Court. Hence the present appeal.

The only question raised in this appeal is whether any loan due to the Jhalawar State Bank could be recovered as a public demand. A "public demand" within the meaning of the Act is "any money payable to the Government or to a department or an officer of Government under or in pursuance of a written instrument or agreement". The Government here means the Government of Rajasthan for the Act was passed in 1952 by the Rajasthan State Legislature. The question then is whether money due to the Jhalawar State Bank, is money payable to the Government of Rajasthan.

Now, the Jhalawar State Bank was started in 1932. At that time Jhalawar was a ruling State. Sometime in or about April, 1948, the State of Jhalawar, along with nine other ruling States of Rajputana, integrated and formed the United State of Rajasthan under a covenant executed by the Rulers of these States. One of the articles of this covenant provided, "All the assets and liabilities of the covenanting States shall be the assets and liabilities of the United State." Subsequently, on March 30, 1949, the States of Bikaner, Jaipur, Jaisalmer and Jodhpur joined the United State of Rajasthan. On the promulgation of the Constitution of India, the United State of Rajasthan became a Part B State in the Indian Union. The assets of the previous ruling State of Jhalawar, which had earlier vested in the United State of Rajasthan, thereupon passed to and devolved upon the State of Rajasthan in the Indian Union.

The proceedings under the Act against the appellants were started by the filing of a requisition with respondent No. 1 by respondents Nos. 2 and 3, being respectively the Treasury Officer, Jhalawar, and the Recovery Officer, Jhalawar State Bank, under s. 3 of the Act stating that the amount earlier mentioned was due from the appellants to the Government of Rajasthan in respect of the claims of the Jhalawar State Bank against them. This was done presumably shortly prior to June 16, 1953, on which date respondent No. 1 signed a certificate specifying the amount of the demand and certain other particulars and filed it in his own office under s. 4 of the Act. A notice of the signing and filing of the certificate was served upon the appellants under s. 6 of the Act. This notice and the subsequent proceedings have been referred to in the beginning of this judgment.

The claim thus is in respect of moneys due to the Jhalawar State Bank. If that Bank was not the property of the Jhalawar State, then its dues cannot of course be said to have merged in the present State of Rajasthan. The appellants first contended that the Jhalawar State Bank was not the property of the State of Jhalawar. The only material to which we have been referred by the appellants in support of this contention is certain rules framed by the Ruler of Jhalawar in respect of the Bank. It was pointed out that the rules showed that the Bank was like any other commercial enterprise. We are unable to agree that for this reason it could not be an institution belonging to the State. There was nothing to prevent the Jhalawar State carrying on a commercial undertaking. If it did so, the assets of that undertaking would be those of the State and, in the circumstances earlier mentioned, must now be held to be vested in the State of Rajasthan.

It was also said that the rules showed that the management of the Bank was in the hands of a board of which certain non-officials were members. It was contended that this showed that the Bank was not the property of the State. It is clear, however, from the

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rules that the Bank was not the property of the board. Again, the board was constituted from time to time by the Ruler and the majority of its members were officers of the State. This would show that the Ruler was in full control of the management of the Bank as a State undertaking. It is true that the rules indicate that the Bank might sue or be sued in respect of transactions made by or with it. That, however, would not indicate that the Bank had a separate identity. The rules in this connection only indicate in what name suits could be brought by or against the State's banking business. On the other hand, it is perfectly clear that the capital of the Bank was derived solely from the funds of the Jhalawar State. No part of it was contributed by anyone else. One of the objects of the Bank was to invest the surplus funds of the State. The entire transaction of the business of the Bank was in the ultimate control of the Ruler. The Jhalawar State guaranteed the financial liabilities of the Bank. The name "Jhalawar State Bank" also indicates that the institution belonged to the State of Jhalawar. About the time of the formation of the United State of Rajasthan in 1948, the Chief Executive Officer, Jhalawar, issued a public notification in which, after referring to the article in the Covenant which provided that the assets and liabilities of the covenanting States would be the assets and liabilities of the United State, he proceeded to state that by virtue of this article, on the formation of the new State, the responsibility and guarantee of the existing transactions with the different departments of Jhalawar State or the Jhalawar State Bank, would be of the newly formed United State of Rajasthan. This would show that the assets of the Jhalawar State Bank were being treated by all concerned as assets of the former Jhalawar State, which, upon the formation of the United State of Rajasthan, had vested in the latter State. Further, no one else has at any time made any claim to the assets of the Jhalawar State Bank. It is, therefore, clear beyond all doubt, that the Jhalawar State Bank was one of the assets of Jhalawar State and is now vested in the State of Rajasthan.

The second point argued for the appellants is that the dues of the Jhalawar State Bank have in any case been transferred by the Government of Rajasthan to the Bank of Rajasthan Ltd. under certain Notifications to which we shall presently refer. It is said that the Bank of Rajasthan Ltd. is, as its name shows, obviously a limited company having an independent existence and is not a department of the Government of Rajasthan State. It is also contended that this vesting took place before the proceedings under the Act had started. Therefore, it is said that at the commencement of those proceedings, the amount claimed from the appellants as due to the Jhalawar State Bank, was not a public demand within the meaning of the Act.

This contention which is based on the Notifications, earlier mentioned, does not seem to us to be well founded. We will assume for the present purpose that the Bank of Rajasthan Ltd. is not a department of the Government of Rajasthan State. The question is whether the effect of these Notifications, which were two in number, was to vest the dues of the Jhalawar State Bank in the Bank of Rajasthan Ltd. The first Notification is dated February 15, 1951. It stated that the Government of the State of Rajasthan had decided to transfer, among others, the Jhalawar State Bank, to the Bank of Rajasthan Ltd. It was contended that by this Notification the assets of the Jhalwar State Bank were transferred to the Bank of Rajasthan Ltd. We do not think that that was the effect of this Notification. It contained two very significant provisions which we set out below:

"All debtors of the State Banks irrespective of the class, category and nature of the debt are hereby informed that within one month from the date of publication of this notice they should clear accounts with the aforesaid State Banks which will continue to function only to clear the old accounts, and thereafter their accounts with the securities pledged will automatically be transferred to the Bank of Rajasthan Ltd., who will be authorised on behalf of the State, to effect necessary recoveries and settle accounts.

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The transfer of these debts to the Bank of Rajasthan Ltd. will not, on any account, take away the inherent right which the Rajasthan Govt. possess in these various transactions made on the guarantee of the respective convenanting States to make recoveries and settle accounts in accordance with the existing rules or laws that may hereafter be made to effect recovery of State dues or State debts."

It is clear from these provisions that the Bank of Rajasthan Ltd. was being authorised "on behalf of the State", that is, the Government of the State of Rajasthan, to recover the amounts due to the Jhalawar State Bank. The transfer of the latter Bank to the Bank of Rajasthan Ltd. was to be subject to this qualification that its dues would remain the dues of the Government of the State of Rajasthan and would only be recovered by the Bank of Rajasthan Ltd. as the agent of that Government. The last paragraph set out above emphasises this position. It preserves the right of the Government of the State of Rajasthan to recover the amounts due to the Jhalawar State Bank in accordance with any law that might be made after the date of the Notification. The position then is that under this Notification the debts due to the Jhalawar Bank were not transferred to the Bank of Rajasthan Ltd. and remained payable to the Government of Rajasthan. The other Notification is dated April 16, 1952, and it repeats that the banks mentioned in the earlier Notification, including the Jhalawar State Bank, "will be merged in the Bank of Rajasthan Limited". It is said that the effect of this Notification was in any event to cancel the earlier Notification, in so far as the latter preserved the power of the State to collect the debts of the Jhalawar State Bank. We are wholly unable to agree. This Notification only reiterates the intention of the Government of the State of Rajasthan to merge the banks named, in the Bank of Rajasthan Ltd. It says nothing specifically about the dues of these banks or as to their recoveries, with regard to which, therefore, the provisions of the previous Notification must have effect. Furthermore, there is nothing to show that the debts

due to the Jhalawar State Bank were by any document specifically transferred to or vested in the Bank of Rajasthan Ltd. and thereupon became its property. That being so, there is no basis for the contention that the debts due from the appellants are now due to the Bank of Rajasthan Ltd. in its own right. It would follow that such debts remained debts due to the Government of the State of Rajasthan.

The third point argued was that the moneys claimed from the appellants were not payable under a written instrument or agreement. This contention is wholly unfounded. It appears that the loans were granted by the Jhalawar State Bank to the appellants on their own applications. In each application the appellants stated that they wanted a loan from the Jhalawar State Bank and promised to repay it with interest at the rate mentioned in it. By these applications the appellants also proposed to hypothecate various properties belonging to them as security for the due repayment of the loans taken. They signed the applications and the receipts, which latter also bore the signatures of the officers of the Bank in token of the sanction of the loan. In our view, the money payable by the appellants was payable under these applications and receipts and was, therefore, payable under written instruments or agreements. A point was sought to be made that in each case there were two documents, namely, the application by the appellants and the receipt for the moneys advanced signed by them, whereas a public demand as defined in the Act, required one instrument. It is enough to say in regard to this contention that the Act does not say that the moneys shall be due under a single instrument. It is well-known that in a statute a singular includes the plural. In any case, the two documents constituted the written agreement between the parties and that is enough to satisfy the requirement of the Act, even if read in the way suggested by the appellants.

The fourth point advanced was that the certificate under the Act was defective and therefore the proceedings were a nullity. Section 4 of the Act requires that the certificate shall be in the prescribed form.

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One of the particulars to be stated in the form, requires that the period for which the demand was due should be specified. That period was not specified in the certificate in the present case. It seems to us however that this is no defect. In the case of loans due, there is no question of any period for which the demand is due. Obviously, the requirement as to the specification of the period was meant to apply where the demand consisted of a claim for revenue or rent or the like, which could be due for a period. It is clear to us that the requirement as to stating the period for which the demand is due, as appears from the prescribed form, does not arise in the case of a loan due to the Government which is a public demand within the Act and in such a case no question of stating the period arises. The certificate was not, therefore, defective.

The last point argued was that in so far as the Act enables moneys due to the Government in respect of its trading activities to be recovered by way of public demand, it offends Art. 14 of the Constitution. It is said that the Act makes a distinction between other bankers and the Government as a banker, in respect of the recovery of moneys due. It seems to us that the Government, even as a banker, can be legitimately put in a separate class. The dues of the Government of a State are the dues of the entire people of the State. This being the position, a law giving special facility for the recovery of such dues cannot, in any event, be said to offend Art. 14 of the Constitution.

We have now discussed all the points raised in this appeal and are unable, for the reasons earlier mentioned, to find merit in any of them. In the result we come to the conclusion that the amount claimed from the appellants was a public demand within the meaning of the Act and was legally recoverable by the impugned proceedings. This appeal therefore must be dismissed with costs and we order accordingly

Appeal dismissed.

SURAJPAL SINGH

v.

THE STATE OF UTTAR PRADESH

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December 7.

(B. P. SINHA, C. J., S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

Criminal Misconduct—Acquittal under one category of criminal misconduct charged—Conviction under another category not charged —Legality of—Presumption, whether creates an offence—Prevention of Corruption Act, 1947 (II of 1947), s. 5, sub-ss. (1), (2), (3).

The appellant was a Head Constable attached to a *malkhana* where articles seized in connection with excise offences were kept in deposit. The appellant was charged under s. 5(1)(c) read with s. 5(2), Prevention of Corruption Act, 1947, in that he had dishonestly or fraudulently misappropriated or otherwise converted to his use these articles; the charge further stated that a sum of Rs. 9,284-1-0 was recovered from him which was disproportionate to his known sources of income. He was acquitted of the charge under s. 5(1)(c) but was convicted under s. 5(2) on the ground that he had failed to account satisfactorily for the possession of Rs. 9,284-1-0 which was disproportionate to his known sources of income.

Held, that the conviction of the appellant under s. 5(2) of the Prevention of Corruption Act, 1947, was illegal. The only charge against the appellant was of criminal misconduct under s. 5(1)(c) of the Act for dishonestly or fraudulently misappropriating property entrusted to him and of this charge he could have been convicted by invoking the rule of presumption under s. 5(3). But since this was not done and he was acquitted of that charge, he could not be convicted of criminal misconduct referred to in cls. (a), (b) or (d) of s. 5(1) for which he had not been charged. The Courts below had proceeded wrongly on the footing as though sub-s. (2) or sub-s. (3) of s. 5 created an offence; the offence which was punishable under s. 5 (2) or which could be founded on the rule of presumption under s. 5(3) was the offence of criminal misconduct of one or more of the categories mentioned in cls. (a) to (d) of sub-s. (1) of s. 5.

C. S. D. Swamy v. *The State*, [1960] 1 S.C.R. 461, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 169 of 1959.

Appeal by special leave from the judgment and order dated March 27, 1958, of the Allahabad High Court in Criminal Appeal No. 785 of 1955.

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Nuruddin Ahmad and *Naunit Lal*, for the appellant.

G. C. Mathur and *C. P. Lal*, for the respondent.

1960. December 7. The Judgment of the Court was delivered by

S. K. DAS, J.—This is an appeal by special leave from the judgment and order of the High Court of Judicature at Allahabad dated March 27, 1958, whereby the said High Court maintained the conviction of the appellant under s. 5(2) of the Prevention of Corruption Act, 1947 (2 of 1947) but reduced the sentence of four years' rigorous imprisonment passed on the appellant by the Special Judge, Kanpur, to two years' rigorous imprisonment.

The short facts are these. The appellant Surajpal Singh was employed in the Police Department of the Uttar Pradesh Government. He started his service as a constable on a salary of Rs. 13 per month from August 1, 1930. In 1946 his pay was increased to Rs. 46 per month. He was appointed a Head constable on a salary of Rs. 50 per month in 1947. He officiated as a Sub-Inspector of Police sometime in 1948 and 1949 on a salary of Rs. 150 per month. On March 1, 1949, he was reverted to his post of Head constable. Between the dates February 27, 1951, and September 9, 1952, he was posted as a Head constable attached to the Sadar Malkhana, Kanpur. The charge against him was that in that capacity he dishonestly or fraudulently misappropriated or otherwise converted to his own use many articles, principally those seized in connection with excise offences kept in deposit in the said Malkhana. These articles included opium, bottles of liquor etc. The charge further stated that a sum of Rs. 9,284-1-0 was recovered on a search of his house on September 9 and 10, 1952 and this amount was disproportionate to the known sources of income of the appellant. There was an allegation by the prosecution that the acts of dishonest misappropriation etc. were committed by the appellant in conspiracy with two other persons called Bhagawat Singh and Gulab Singh. Therefore, the charges against the

appellant were (1) for the offence of conspiracy under s. 120B of the Indian Penal Code; (2) for the offence under s. 5(1)(c) of the Prevention of Corruption Act, 1947, for the acts of dishonest misappropriation or user, read with s. 5(2) of the said Act; and (3) for an offence under s. 465 of the Indian Penal Code in respect of a particular entry said to have been forged in the Register of Properties kept in the Sadar Malkhana.

The learned Special Judge who tried the appellant Bhagawat Singh and Gulab Singh recorded an order of acquittal in respect of the latter two persons. As to the appellant, he was also acquitted of all the charges except the charge under s. 5(2) of the Prevention of Corruption Act. On this charge the learned Special Judge recorded an order of conviction, but this was based on the sole ground that the appellant had failed to account satisfactorily for the possession of Rs. 9,284-1-0 which, according to the finding of the learned Special Judge, was disproportionate to the known sources of income of the appellant. It should be noted here that the learned Special Judge held the appellant not guilty of the various acts of dishonest misappropriation or user alleged against him in respect of the properties kept in the Sadar Malkhana.

In his appeal to the High Court the appellant urged various grounds, one of which was that he could not be convicted on the rule of presumption laid down in sub-s. (3) of s. 5 of the Prevention of Corruption Act, 1947, when on the only charge of criminal misconduct alleged under s. 5(1)(c) of the said Act he had been found not guilty. The High Court repelled this contention and upheld the conviction of the appellant but reduced the sentence.

The principal question before us is whether in the circumstances of this case, the conviction of the appellant on the charge under sub-s. (2) of s. 5 of the Prevention of Corruption Act, 1947, by invoking the rule of presumption as laid down in sub-s. (3) of that section, is correct.

It is convenient to read here s. 5 of the Prevention

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of Corruption Act, 1947, in so far as it is relevant for our purpose.

"S. 5(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriated or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) 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.

(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

(2A) .....

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any

other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

Now, learned Counsel for the appellant has put his argument on the principal question in the following way: he has submitted that he is not in a position in an appeal by special leave to go behind the finding of fact arrived at by the courts below. The appellant, it appears, gave some explanation with regard to the possession of Rs. 9,284-1-0. That explanation was not, however, accepted by the courts below. Learned Counsel has submitted that he does not wish to go behind that finding of fact. He has submitted, however, that the scheme of s. 5 of the Prevention of Corruption Act, 1947 is this: sub-s. (1) defines the offence of criminal misconduct in the discharge of his duties by a public servant; the offence can be one or more of four categories mentioned in cls. (a), (b), (c) and (d): sub-s. (2) is the penal section which states the punishment for the offence of criminal misconduct; and sub-s. (3) lays down a rule of presumption and states that no conviction for the offence shall be invalid by reason only that it is based solely on such presumption. Learned Counsel has pointed out, rightly in our opinion, that the charge against the appellant in the present case referred only to criminal misconduct in the discharge of his duty by a public servant of the nature mentioned in cl. (c) of sub-s. (1). In other words, the charge against the appellant was that he had dishonestly or fraudulently misappropriated or otherwise converted for his own use property entrusted to him etc. It was open to the learned Special Judge to have convicted the appellant of that offence by invoking the rule of presumption laid down in sub-s. (3). He did not, however, do so. On the

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contrary, he acquitted the appellant on that charge. Therefore, learned Counsel has submitted that by calling in aid the rule of presumption laid down in sub-s. (3), the appellant could not be found guilty of any other type of criminal misconduct referred to in cls. (a), (b) or (d) of sub-s. (1) in respect of which there was no charge against the appellant.

We consider that the above argument of learned Counsel for the appellant is correct and must be accepted. This Court pointed out in *C. S. D. Swamy* v. *The State* [1] that sub-s. (3) of s. 5 of the Prevention of Corruption Act, 1947 does not create a new offence but only lays down a rule of evidence which empowers the Court to presume the guilt of the accused in certain circumstances, contrary to the well known principle of Criminal law that the burden of proof is always on the prosecution and never shifts on to the accused person. In *Swamy's case* there were charges for the offence of criminal misconduct under two heads, cl. (a) and cl. (d). The trial court held the accused person in that case not guilty of the offence under cl. (a) but guilty of the offence under cl. (d) by invoking the rule of presumption laid down in sub-s. (3) of s. 5. The distinction between that case and the case under our consideration is this: in *Swamy's case* there were two charges either of which could be founded on the rule of presumption laid down in sub-s. (3); but in our case there is only one charge of criminal misconduct of which the appellant has been acquitted; therefore, there is no other charge which can be founded on the rule of presumption referred to in sub-s. (3). This is the difficulty with which the respondent is faced in the present case. It appears to us that the learned Special Judge and the High Court proceeded wrongly on the footing as though sub-s. (2) or sub-s. (3) of s. 5 of the Act creates an offence. The offence which is punished under sub-s. (2) or can be founded on the rule of presumption laid down in sub-s. (3) must be the offence of criminal misconduct of one or more of the categories mentioned in cls. (a) to (d) of sub-s. (1). In the case before us the only category which was alleged against the appellant was that of category (c),

(1) [1960] 1 S.C.R. 461.

namely, dishonest or fraudulent misappropriation etc. That charge having failed, there was no other charge which could be founded on the rule of presumption laid down in sub-s. (3).

Learned Counsel for the respondent State has contended before us that it was open to the appellate Court to affirm the conviction of the appellant under sub-s. (2) of s. 5 by holding him guilty of the offence of criminal misconduct of the category mentioned in cl. (a) or cl. (d) of sub-s. (1). We are unable to accept this contention as correct. The prosecution never alleged that the sum of Rs. 9,284-1-0 was the result of the appellant habitually accepting or obtaining illegal gratification etc. The prosecution case was that the sum of Rs. 9,284-1-0 was the result of the dishonest user of property which was entrusted with the appellant. It is not open to the appellate Court to affirm the conviction of the appellant on an entirely new case never suggested against the appellant at any earlier stage. It is unfortunate that in this case the courts below did not choose to rely on the rule of presumption laid down in sub-s. (3) with reference to the charge under cl. (c) of sub-s. (1) of s. 5. But that misfortune cannot now be repaired by evolving out of a vacuum as it were a new case against the appellant based on cl. (a) or cl. (d) of sub-s. (1) of s. 5 in support of which no facts were ever alleged or suggested.

For the reasons given above, we allow this appeal and set aside the conviction and sentence passed against the appellant.

Appeal allowed.

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December 7.

RAGHUVANSHI MILLS, LTD.

v.

COMMISSIONER OF INCOME-TAX, BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Majority shares of the assessee company held by Directors and their relations, if can be treated as held by the public —Test—Indian Income-tax Act, 1922 (11 of 1922), s. 23A, Third Proviso, Explanation (before amendment by the Finance Act, 1955).

One Maganlal Parbhudas who was a Director of the assessee company held 6,344 shares out of a total of 10,000 shares of the company and he made a gift of 1000 shares to each of his five sons. During the accounting period the company had eight Directors including the said Maganlal Parbhudas and two of his sons and they held 4695 shares as between themselves. Out of the balance of the shares 4754 shares were held by the relatives of some of the Directors. Three sons of Maganlal Parbhudas were Directors of the Managing Company. The Income-tax Officer applied s. 23A of the Income-tax Act as it stood prior to its amendment by the Finance Act, 1955 to the company holding that this was not a company in which the public were substantially interested. The order of the Income Tax Officer was confirmed on appeal both by the Assistant Commissioner and the Tribunal. The High Court remitted the case to the Tribunal for a statement whether the Directors were exercising *de facto* control over any of the other shareholders. The Tribunal thereupon gave the finding that the Directors, particularly the three sons of Maganlal Parbhudas who formed the Directors of the Managing Company were under the *de facto* control of their father. The High Court agreed with the finding of the tribunal and held that on the facts and circumstances of the case the shares held by the three sons of Maganlal Parbhudas could not be considered to be shares held by the members of the public within the meaning of the Explanatiou to the third proviso to s. 23A of the Income Tax Act. On appeal by the assessee company,

Held, that in the Explanation the word "public" is used in contradistinction to one or more persons who act in unison and among whom the voting power constitutes a block. If such a block exists and possesses more than seventy five per cent of the voting power, then the company cannot be said to be one in which the public are substantially interested.

Sardar Baldev Singh v. *Commissioner of Income-tax, Delhi and Ajmer*, [1961] 1 S.C.R. 482, considered.

The test is first to find out whether there is an individual or a group which controls the voting power as a block. If there is such a block the shares held by it cannot be said to be held

"unconditionally" or "beneficially" by the public. Only those shares which are "unconditionally" and "beneficially" held by the public uncontrolled by the controlling group can be treated as shares held by the public under the Explanation. The group may be composed of Directors or their nominees or relations in different combinations, but none can be said to belong to that group, be he a Director or a relative unless he does not hold the shares unconditionally and beneficially for himself. It is only such a person who can fall properly outside the word "public".

The view that Directors merely by reason of their being Directors stand outside the "public" is erroneous.

Commissioner of Income-tax v. *H. Bjordal*, [1955] A. C. 309, followed.

Mere relationship is of no consequence unless it is proved that the voting power of one relative is controlled by another relative.

Tatem Steam Navigation Co. v. *Commissioner of Inland Revenue*, (1941) 24 T.C. 56, followed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 30 of 1957.

Appeal by special leave from the judgment and order dated September 1, 1955, of the Bombay High Court in Income-tax Reference No. 37 of 1952.

N. A. Palkhivala and *I. N. Shroff*, for the appellant.

K. N. Rajagopala Ayyangar and *D. Gupta*, for the respondent.

1960. December 7. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—The Raghuvanshi Mills Ltd., Bombay (a public limited Company), has filed this appeal by special leave against the judgment and orders of the High Court of Bombay dated March 10, 1953, and September 1, 1955. By the first order, the Bombay High Court directed the Income-tax Tribunal to submit a supplementary statement in the case in the light of its judgment, giving the parties liberty to lead further evidence, if any. By the second order, the High Court re-framed the question, and answered it against the assessee. *Hidayatullah J.*

The assessee Company's issued and subscribed capital was, at the material time, Rs. 10,00,000 divided into 10,000 shares of Rs. 100 each. Prior to

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November 14, 1941, one Maganlal Parbhudas, who was a Director of the Company, held 6,344 shares. On November 14, 1941, he made a gift of 1,000 shares to each of his five sons, Ravindra, Surendra, Bipinchandra, Hareshchandra and Krishnakumar. We are concerned with the account year of the Company, April 1, 1942, to March 31, 1943, the assessment year being 1943-44. In that year, the dividend which was declared at the Annual General Meeting held on December 17, 1943, was less than what was required under s. 23A of the Indian Income-tax Act. The question, therefore, arose whether the Company could be said to be one to which s. 23A(1) of the Act was applicable, regard being had to the third proviso and the Explanation under it.

During the accounting period, the Company had eight Directors, whose names along with the shares respectively held by them are given below:

	Shares
(1) Shri Maganlal Parbhudas	... 1,344
(2) ,, Ravindra Maganlal	... 1,168
(3) ,, Surendra Maganlal	... 1,100
(4) ,, Amritlal Chunilal (jointly with Babulal Chunilal)	... 833
(5) ,, Babulal Chunilal	... 100
(6) ,, Bhagwandas Harakchand	... 50
(7) ,, Haridas Purshottam	... 50
(8) ,, Sir Chunilal B. Mehta (jointly with Lady Tapibai Chunilal)	... 50
Total	... 4,695

Out of the balance of the shares, 4,754 shares were held by the relatives of some of the above-named Directors, as stated below:

	Shares
(1) Shrimati Kantabai Maganlal (wife of a Director)	... 771
(2) Shri Bipinchandra Maganlal	... 1,000
(3) Shri Hareshchandra Maganlal (son of a Director)	... 1,000
(4) Shri Krishnakumar Maganlal (do)	... 1,000

(5) Shrimati Dhanlaxmi Mohanlal		
(6) Srimati Prabhavati Nanalal Harilal (5 and 6 daughters of a Director)	...	50
(7) Shri Hirjibhai Purshottam and Haridas Purshottam (brothers of a Director)	...	25
(8) Shri Dhanjibhai Purshottam and Haridas Purshottam (brothers of a Director)	...	25
(9) Shri Chimanlal Vithaldas (cousin of a Director)	...	833
Total	...	4,754

The remaining 551 shares were held by the members of the public, who were not connected with the Directors of the Company in any way.

Before March, 1942, Messrs. Ravindra Maganlal and Bros. were the Managing Agents of the Company. Maganlal Parbhudas was the sole proprietor of that firm. On March 7, 1942, the Company appointed Ravindra Maganlal & Co. Ltd. as the Managing Agents for a period of 20 years. The Managing Company had a total issued and subscribed capital of Rs. 5,000 and the five sons of Maganlal Parbhudas who have been named before had subscribed that capital equally. During the account year, Maganlal Parbhudas and two of his sons, Ravindra Maganlal and Surendra Maganlal, were three of the Directors of the Company. Ravindra, Surendra and Bipinchandra were Directors of the Managing Company.

On these facts, the Income-tax Officer applied s. 23A (as it stood prior to its amendment by the Finance Act, 1955) to the Company, holding that this was not a Company in which the public were substantially interested. The order of the Income-tax Officer was confirmed on appeal, both by the Appellate Assistant Commissioner and the Tribunal. The Tribunal also refused to state a case under s. 66(1) of the Income-tax Act, but the High Court of Bombay acting under s. 66(2) called for a statement of the case on the question:

"Whether on the facts and circumstances of the

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case the provisions of s. 23A of the Indian Income-tax Act (XI of 1922) are applicable to the petitioners?" In stating the case, the Tribunal pointed out that probably the question ought to have been:

"Whether on the facts and circumstances of the case 1,000 shares each held by Bipinchandra, Haresh chandra and Krishnakumar in the capital of the assessee Company are held by members of the public within the meaning of the Explanation to the third proviso to s. 23A?"

The members of the Tribunal in deciding the appeal before them, gave slightly different reasons. According to the Accountant Member, the shares held by persons interested in the Managing Company were under the control of the Directors of the appellant Company, and those persons could not be considered to be members of the public. The Judicial Member held that the Directors were controlling the shareholders of the Company, that their relatives were mere nominees, whose voting power was controlled by the Directors, and that the public could not, therefore, be said to be substantially interested, as required by the Explanation to the third proviso to the section.

When the High Court heard the case, the learned Judges addressed themselves to the question, what was the proper meaning of the expression "held by the public" in the Explanation. They came to the conclusion that the object of the third proviso and the Explanation was that the voting power to be exercised by the public should be independent of the control of the Directors, and that the word "public" was used in contradistinction to the Directors. They apparently thought that a holding by a Director could not be described, in any event, as a holding by the public. The High Court came to the tentative opinion that both the tests stated by the Accountant Member and the Judicial Member were incorrect, and held that what the law required was *de facto* control, "a control which is, in fact, exercised," and that no finding appeared to have been given on that point by the Tribunal. The case was accordingly remitted to

the Tribunal for submission of a fresh statement of the case whether the Directors were exercising *de facto* control over any of the other shareholders, who belonged to the second category mentioned by us above. The Tribunal thereupon re-stated the case, and after examining further evidence, gave the finding that the Directors, particularly the three sons of Maganlal Parbhudas who formed the Directors of the Managing Company were under the *de facto* control of their father. At no stage in the case did the Tribunal alter the finding reached by the Department that the shares of the Company were not, in fact, freely transferable by the holders to members of the public.

The High Court then reheard the case, and came to the conclusion that there was evidence on which the Tribunal could hold that Maganlal Parbhudas exercised *de facto* control over his three sons. In view of this finding, the High Court held that the order made by the Tribunal was correct, and answered the question in the negative, re-framing it as follows:

"Whether on the facts and circumstances of the case the shares held by Bipinchandra, Harishchandra and Krishnakumar can be considered to be shares held by members of the public within the meaning of the explanation to the third proviso to Section 23A?" The High Court refused to grant a certificate; but the Company has obtained special leave from this Court, and has filed this appeal.

It is first contended that the test that the shares held by the Directors of a company are not shares in which the public are substantially interested is incorrect. According to learned counsel, all the authorities, the Tribunal and the High Court have proceeded on this wrong assumption, and have failed to apply the proper test laid down by the Explanation to the third proviso. It may be pointed out that there is no dispute that 551 shares, were, in fact, held by the public. The total shares of the Company being 10,000, the Company can only avoid the application of s. 23A, if the public hold shares carrying not less than 25 per cent. of the voting power, that is to say, 2,500 shares. The Directors between them hold 4,695 shares. These

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have been held by the High Court to be shares, which cannot be said to be beneficially held by the public. Even so, if the rest of the shares can be said to be held by the public, then the minimum 25 per cent. would still be reached. It was in this context that the shares of the sons of Maganlal, Bipinchandra, Harishchandra and Krishnakumar, were considered. If those shares can be said to fall outside the category of shares beneficially held by the public, then those shares along with the shares held by the Directors reduced the number of shares held by the remaining shareholders to less than 25 per cent. It was on this view that the case was remitted to the Tribunal by the High Court to obtain a further statement whether Maganlal Parbhudas was *de facto* controlling these three shareholders.

Two questions, therefore, arise in this appeal. The first is whether the shares held by the Directors must always be regarded as not held by the public. The second is what is the meaning of the provision:

"a company shall be deemed to be a company in which the public are substantially interested, if its shares carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by the public."

In this connection, we may point out that a ruling of the Privy Council appears to take a different view from that taken by the High Court, in regard to an Uganda Ordinance in *pari materia* with the proviso and the Explanation. We shall refer to that case as also to a case of the House of Lords, where also a different conclusion in law from that of the High Court has been reached.

Section 23A (as it stood prior to its amendment in 1955), omitting the portions not material, read as follows:

"23A. *Power to assess individual members of certain companies.*—Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that

previous year are laid before the company in general meeting are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income:

.....

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

Explanation.—For the purpose of this sub-section,—a company shall be deemed to be a company in which the public are substantially interested if shares of the company...carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by the public.....and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange or are in fact freely transferable by the holders to other members of the public."

It is clear from the third proviso that the sub-section

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does not apply to a company in which the public are substantially interested. The Explanation lays down, among the tests, the minimum interest which can be called 'substantial' by saying that shares of the company carrying not less than 25 per cent. of the voting power must be allotted unconditionally to, or acquired unconditionally by, the public and they must be beneficially held by the public. The essence of the Explanation lies not in the percentage which only shows the limit of the minimum holding by the public, but lies in the words "unconditionally" and "beneficially". These words underline the fact that no person who holds a share or shares not for his own benefit but for the benefit of another and who does not exercise freely his voting power, can be said to belong to that body, which is designated 'public'. The word 'public' is used in contradistinction to one or more persons who act in unison and among whom the voting power constitutes a block. If such a block exists and possesses more than seventy-five per cent. of the voting power, then the company cannot be said to be one in which the public are substantially interested. In *Sardar Baldev Singh* v. *The Commissioner of Income-tax, Delhi and Ajmer* (1), this Court took the following view :

"The section thus applies to a company in which at least 75 per cent. of the voting power lies in the hands of persons other than the public, which can only mean, a group of persons allied together in the same interest. The company would thus have to be one which is controlled by a group. The group can do what it likes with the affairs of the company, of course, within the bounds of the Companies Act. It lies solely in its hands to decide whether a dividend shall be declared or not."

Judged from the test we have indicated, it is clear that such a group may be formed by the Directors of a company acting in concert, or by some Directors acting in concert with others or even by some shareholder or shareholders, none of whom may be a Director. Such a group which may, for convenience, be

(1) [1961] 1 S.C.R. 482.

designated a block, must hold a controlling interest, and if the voting power of the block is 75 per cent. or more, then obviously it can do anything at a meeting, whether general or special.

When a company starts, the promoters may subscribe a portion of its capital and release the other unconditionally to the public. This is a case of unconditional allotment of shares to the public. The public may also unconditionally acquire a portion of the shares which were previously held by the group which promoted the company. If at the end of the previous year 25 per cent. or more of the voting power is so held by the public, the company can take the benefit of the third proviso. But if more than 75 per cent. of shares have again passed into the hands of a group which acts as a block, the third proviso ceases to apply.

In deciding if there is such a controlling interest, there is no formula applicable to all cases. Relationship and position as Director are not by themselves decisive. If relatives act, not freely, but with others, they cannot be said to belong to that body, which is described as 'public' in the Explanation. But it would be otherwise if they were free. Similarly, if Directors or some of them do not act as a body or in concert with others, the fact that they are Directors is of no significance. The case of *Tatem Steam Navigation Co., Ltd.* v. *Commissioners of Inland Revenue* (2) illustrates the first proposition. There, the assessing Commissioners had made directions under s. 21 of the Finance Act, 1922, against which the Company appealed on the ground that it was a Company in which the public were substantially interested, inasmuch as shares of the Company carrying not less than 25 per cent. of the voting power had been allotted unconditionally to or acquired unconditionally by, and were, at the end of the relevant periods, beneficially held by the public and the decision of the Special Commissioners that 16,000 shares given by Lord Glanely to his niece were not allotted to or acquired by the public and that the Company was, therefore, not

(1) (1941) 24 T.C. 57.

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a Company in which the public were "substantially interested" was erroneous. It was held by Lawrence, J., that merely because she was a niece of Lord Glanely did not make her cease to be a member of the public. The Court of Appeal agreed with Lawrence, J. No doubt, there were other provisions which laid down the kind of relationship which would lead to the inference that the holder was controlled by another, and a niece was not such a relative. The Act we are considering did not lay down the kind of relationship which would show such a control, and the same principle will apply. Mere relationship thus is not of consequence, unless control of the voting power held by such a relative, by another relative, is proved.

The other test adopted in the case by the Bombay High Court that Directors stand outside the 'public' is also not decisive. In *Commissioner of Income-tax* v. *H. Bjordal* (1), the Judicial Committee dealt with s. 21(1) of the Income Tax Ordinance No. 8 of 1940 (Uganda), as amended by s. 5 of the Income Tax (Amendment) Ordinance, 1943. That provision of law is completely in *pari materia* with s. 23A. Two brothers, H. Bjordal and S. Bjordal, held 73·96 and 25·09 per cent. of the voting power. Five others held ·04 per cent. of the voting power. The shares held by S. Bjordal were purchased for full value by him from his brother. There was no suggestion that he was a nominee of the respondent or that he was acting in concert with his brother. Both brothers were Directors of the Company. It was held by the Judicial Committee that shareholders in a company who are members of the 'public' do not cease to be so, because they become Directors. In the Uganda Ordinance also, like our Act, there was no guidance as to the meaning of the word 'public', as there was in the English statute considered in *Tatem's case* (2).

It is significant that in *Jubliee Mills Ltd.* v. *Commissioner of Income-tax* (3), Chagla, C. J., and S. T. Desai, J., speaking of the judgment under appeal and

(1) [1955] A.C. 309. (2) [1941] 24 T.C. 57.

(3) [1958] 34 I.T.R. 30, 41.

taking into consideration the Privy Council case, observed:

"It may be that our view is erroneous; and it may be—and very probably it is—that the view taken by the Privy Council is the right one."

In our judgment, the test is first to find out whether there is an individual or a group which controls the voting power as a block. If there be such a block, the shares held by it cannot be said to be "unconditionally" and "beneficially" held by members of the public. In the category of shares held by the public, only those shares can be counted which are unconditionally and beneficially held by the public, or, in other words, which are uncontrolled by the group, which controls the affairs. The group itself may be composed of Directors or their nominees or relations in different combinations, but none can be said to belong to that group, be he a director or a relative unless he does not hold the shares unconditionally and beneficially for himself. It is only such a person, who can fall properly outside the word 'public'.

Judged from this point of view, the judgment and orders of the High Court cannot be upheld. Directors cannot, by reason of being Directors, be said not to be members of the public. To that extent, the judgment is erroneous. There is a finding by the Tribunal in the supplementary statement of the case that the shares held by Bipinchandra, Harishchandra and Krishnakumar were under the control of their father, Maganlal Parbhudas. Their holding was 3,000 and with Maganlal's holding of 1,344 shares, makes up a total of 4,344 shares. Though the question as framed by the High Court appears to have been correctly answered in the negative, it does not dispose of the matter. The question to be determined still is whether more than 75 per cent. of the shares are not beneficially held by the public. We accordingly set aside the judgment and orders of the High Court, and direct the High Court to decide the question originally framed by it, viz.:

"Whether on the facts and circumstances of the

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case the provisions of s. 23A of the Indian Income-tax Act, XI of 1922, are applicable to the petitioners?" The High Court may call for a supplemental statement of the case from the Tribunal, if it finds it necessary.

The appeal is allowed. The respondents shall bear the costs of this appeal. The costs in the High Court shall abide the result.

Appeal allowed.

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December 7.

SHREE CHANGDEO SUGAR MILLS, LTD.

v.

THE COMMISSIONER OF INCOME TAX, BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH, and J. C. SHAH, JJ.)

Income-tax—Undistributed income—Company in which Public are substantially interested—Powers to assess Super Tax—Test—Part B States (Taxation Concession) Order, 1950, cl. 14—Indian Income-tax Act, 1922 (11 of 1922), s. 23A(1).

During the assessment year, the company had not distributed dividends to the extent of 60% of its profits and an order under s. 23A(1) of the Act was passed by the Income-tax Officer. The question referred by the Tribunal to the High Court was whether at the relevant time the assessee company could be deemed to be a company in which the public were substantially interested, i.e., held 25% of the voting power, was answered in the negative.

Held, that the test that no holding by the Directors of a company could be regarded as one in which the public were substantially interested was not the correct test to apply. The test as laid down in *Raghuvanshi Mills* v. *Commissioner of Income-tax*, [1961] 2 S.C.R. 978, would apply to this Case.

Held, further, that the paramount condition in applying the proviso and the explanation of s. 23A(1) was that the public should be beneficially interested in 25% of the voting power. The explanation to s. 23A required that shares held by the company should be considered as held by the public, only if s. 23A did not apply to it. The concession order in cl. 14 of the Part B States (Taxation Concession) Order, 1950, did not seek to negative that test, it only conferred a benefit on a company,

to which cl. 14 applied, and the company could avail that concession, and still might fall within s. 23A for other purposes.

The Raghuvanshi Mills Ltd. v. *Commissioner of Income-tax, Bombay*, [1961] 2 S.C.R. 978, applied.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 380 of 1957.

Appeal from the judgment and order dated March 8, 1956, of the Bombay High Court in Income-tax Reference No. 4 of 1956.

N. A. Palkhivala, S. N. Andley, Rameshwar Nath, J. B. Dadachanji and *P. L. Vohra*, for the appellant.

A. N. Kripal and *D. Gupta*, for the respondent.

1960. December 7. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—This appeal, on a certificate by the High Court, has been filed by Shree Changdeo Sugar Mills, Ltd., to which s. 23A of the Income-tax Act (prior to its amendment by the Finance Act, 1955) was applied in respect of the assessment year, 1948-49. The question which was referred to the High Court was whether at the relevant time the assessee Company could be deemed to be a Company, in which the public were substantially interested. This question was answered in the negative by the High Court.

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During the assessment year, the Company had not distributed dividends to the extent of 60 per cent. of its profits, and an order under s. 23A(1) of the Indian Income-tax Act was passed by the Income-tax Officer. The Company appealed to the Appellate Assistant Commissioner, who dismissed the appeal. It next appealed to the Tribunal, but was unsuccessful. The Tribunal, however, referred the above question which, as already stated, was answered in the negative by the High Court.

The issued, subscribed and paid-up capital of the assessee Company consisted of 60,000 shares, which were distributed as follows:

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(1)	11 Directors of the Company ...	41,500 shares.
(2)	The Managing Agency Firm ...	2,300 shares.
(3)	Mysore Merchants Ltd. ...	11,880 shares.
(4)	Others ...	4,320 shares.
		60,000 shares.

The question arose in determining whether the public were substantially interested in the Company, that is to say, held 25 per cent. of the voting power. The Bombay High Court in determining this point followed its decision in *Raghuvanshi Mills* v. *Commissioner of Income-tax* (1), and held that no holding by the Directors of a company could be regarded as one in which the public were substantially interested. We have heard Civil Appeal No. 30 of 1957 from the decision of the Bombay High Court in the *Raghuvanshi Mills case* (1), in which judgment has been pronounced today, and have held that that is not the correct test to apply. We have remanded the said appeal, after setting out the correct test to apply. What we have said there applies equally here.

There is yet another question, which arose in this appeal but not in the appeal of the Raghuvanshi Mills. As we have already stated, Mysore Merchants Ltd., held 11,880 shares of the assessee Company. If these shares could be said to be held by the public along with 4,320 shares, the public would be holding 25 per cent of the voting power, whether or not the Directors of the Company held the rest of the shares. It was, therefore, necessary for the High Court to consider whether the shares held by Mysore Merchants Ltd., could be said to be held by the public. The High Court held against the assessee Company that they could not be counted as part of the holding by the public, and, in our judgment, the High Court has reached the correct conclusion.

The matter has to be judged under the third proviso to s. 23A(1), which read as follows:

"Provided further that this sub-section shall not apply to any company in which the public are

(1) [1953] 24 I.T.R. 338.

substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

Explanation.—For the purpose of this sub-section, —a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply), and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public.".

In applying the proviso and the Explanation, we have to give effect to the words "not including a company to which the provisions of this sub-section apply", and have to determine whether Mysore Merchants Ltd., is a Company, to which the provisions of s. 23A can be said to be applicable. Learned counsel for the assessee Company contends that in deciding this, we have to be satisfied on three points, which he summarises as follows:

(a) The public should not be substantially interested in that Company;

(b) It must have assessable profits for the relevant assessment year; and

(c) It must not have distributed 60 per cent of its net assessable profits.

He contends that unless these three conditions are fulfilled, s. 23A will not apply to Mysore Merchants Ltd., and that the shares held by it will be deemed to be held by the public. He points out that Mysore Merchants Ltd., had no assessable income in the corresponding assessment year and had suffered a loss, that conditions (b) and (c) did not, therefore, apply, and

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that s. 23A is not applicable to that Company. In our opinion, the paramount condition is that even in that Company the public should be beneficially interested in 25 per cent. of the voting power, and it was admitted before us that it was not a public Company at all but a private Company, and that, therefore, the public were not interested in that Company. The shares held by Mysore Merchants Ltd., cannot at all be counted as a holding in which the public are beneficially interested, in view of the exclusion contained in the Explanation. This point will not, therefore, be open for the determination of the High Court, when the question is reconsidered by the High Court in the light of our observations in *The Raghuvanshi Mills Ltd.* v. *Commissioner of Income-tax, Bombay* (1), decided today.

Learned counsel for the assessee Company also contended that in view of cl. 14 of the Part B States (Taxation Concessions) Order, 1950, the provisions of s. 23A could not be applied to Mysore Merchants Ltd. That clause reads as follows:

"14. *Requiring distribution of dividends by private companies.*—

The provisions of section 23A of the Act shall not be applied in respect of the profits and gains of any previous year ending before the appointed day unless the State law contained a provision corresponding thereto."

This Concession would be open to Mysore Merchants Ltd., if it satisfied the terms of Cl. 14. That, however, cannot detract from the application of s. 23A to determine whether the shares held by it can be described as those in which the public are beneficially interested in another company. The Explanation requires that the shares held by a company should be considered as held by the public, only if s. 23A does not apply to it. The Concessions Order does not seek to negative this test; it only confers a benefit on a company, to which cl. 14 applies. Mysore Merchants Ltd., may be able to avail of that concession, and still fall within

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s. 23A for other purposes. This contention has no force.

The appeal is allowed, and the case is remitted to the High Court for deciding the question in the light of the observations in our decision in the *Raghuvanshi Mills case* (1). As the case is remanded, the costs of this appeal shall be paid by the respondent, but the costs in the High Court will abide the result.

Appeal allowed.

WORKMEN OF THE HERCULES INSURANCE CO., LTD.

v.

HERCULES INSURANCE CO., LTD., CALCUTTA

(P. B. GAJENDRAGADKAR, K. N. WANCHOO and K. C. DAS GUPTA, JJ.)

Industrial Dispute—Claim of bonus—General Insurance business—Validity of reference—Industrial Disputes Act, 1947 (14 of 1947), s. 10(1)—Insurance Act, 1938 (IV of 1938), s. 31A(1)(c), proviso (vii).

In view of the unqualified and absolute prohibition contained in s. 31A(1)(c) of the Insurance Act, 1938, against payment of bonus to the employees in general insurance business, the exception made by proviso (vii) to that section must be strictly confined to the limits prescribed by the said proviso.

The policy underlying the proviso clearly is to exclude the intervention of Industrial Tribunals and leave the question of payment of such bonus entirely to the discretion of the Central Government.

Consequently, where the workmen in general insurance business claimed bonus and the Central Government referred the dispute for adjudication to the Industrial Tribunal under s. 10(1) of the Industrial Disputes Act, 1947, and the Tribunal, on a preliminary objection under s. 31A(1)(c) of the Insurance Act, 1938, read with proviso (vii) thereof, held that the reference was invalid,

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Held, the decision of the Tribunal was correct and must be upheld.

The Central Bank of India v. *Their Workmen*, [1960] 1 S.C.R. 200, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 531 of 1959.

Appeal by special leave from the Award dated October 21, 1957 of the Central Government Industrial Tribunal, Dhanbad, in Reference No. 6 of 1957.

N. Dutta Mazumdar, G. N. Bhattacharjee and *B. P. Maheshwari*, for the appellants.

M. C. Setalvad, Attorney-General of India and *R. Gopalakrishnan*, for the respondent.

1960. December 7. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR, J.—The short question of law which falls to be decided in the present appeal is whether a dispute raised by the employees of a General Insurance Company against their employer for payment of bonus in any particular year can be referred for adjudication by an Industrial Tribunal under s. 10(1) of the Industrial Disputes Act, 1947 (XIV of 1947). This question arises in this way. The workmen of the Hercules Insurance Co. Ltd. are the appellants and the Insurance Company is the respondent before us. On April 11, 1957, the Central Government referred the appellants' claim for bonus for the years 1954 and 1955 for adjudication to the Industrial Tribunal, Dhanbad, constituted under s. 7A of the Industrial Disputes Act, and this reference has been made under s. 10(1)(d) of the Act. Before the Tribunal the respondent urged a preliminary objection against the validity of the reference itself. Its case was that the payment of bonus by an Insurance Company is conditioned entirely by the relevant provisions of the Insurance Act, 1938 (IV of 1938), and that the said provisions did not justify the reference of a dispute in that behalf for adjudication by any Industrial Tribunal. This preliminary objection was based on the provisions of s. 31A(1) and proviso (vii) of the

Insurance Act. It was also urged by the respondent that having regard to the limitations imposed on the General Insurance Companies by s. 40C of the Insurance Act the claim for bonus made by the appellants could not be sustained. The Tribunal has upheld the preliminary objection thus raised by the respondent and held that the reference is invalid. Incidentally it has also considered the plea raised under s. 40C and has observed that the said plea is also well founded. In the result the Tribunal refused to entertain the reference and dismissed it accordingly. It is against this order of the Tribunal that the appellants have come to this Court by special leave.

It is common ground that the respondent has paid the appellants bonus equivalent to two months' basic wages for each of the two years 1954 and 1955. The appellants claim two months' basic wages as additional bonus for each of the two years under reference. It is their case that if the trading profits made by the respondent are ascertained from the respondent's balance sheet and the Full Bench formula is applied, it would appear that the respondent has in its hands a substantial amount of available surplus from which the additional bonus claimed by them can be awarded. Since the reference has been rejected on the preliminary ground the Tribunal has naturally not considered this aspect of the problem.

The preliminary objection raised by the respondent is founded on the relevant provisions of s. 31A of the Insurance Act (hereafter called the Act) and so we must now turn to the said provisions. Section 31A(1)(c) of the Act provides, inter alia, that notwithstanding anything to the contrary contained in the Indian Companies Act, 1913, or in the articles of association of the insurer, if a company, or in any contract or agreement, no insurer shall after the expiry of one year from the commencement of the Insurance (Amendment) Act, 1950, be directed or managed by, or employ as manager or officer or in any capacity, any person whose remuneration or any part thereof takes the form of commission or bonus in respect of the

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general insurance business of the insurer. Thus looking s. at 31A(1)(c) by itself without the proviso the position is absolutely at clear. The respondent cannot be directed to employ the appellants in any capacity so as to include in their remuneration a liability to pay bonus in respect of the general insurance business of the respondent. Bonus under the Industrial Disputes Act is not a part of wages, but the right to claim bonus which has been universally recognised by industrial adjudication in cases of employment falling under the said Act has now attained the status of a legal right. Bonus can be claimed as a matter of right provided of course by the application of the Full Bench formula it is shown that for the relevant year the employer has sufficient available surplus in hand. Therefore a claim for bonus made by the appellants in the present proceedings is a claim in respect of the general insurance business of the respondent, and if allowed it would add to the remuneration payable to them. In other words, bonus claimed by the appellants, if awarded, would, for the purpose of s. 31A (1)(c), be a part of their remuneration, and that is precisely what is prohibited by the said provision.

There are, however, certain exceptions to this general prohibition, and it is to one of these exceptions that we must now turn. Proviso (vii) to s. 31A (1)(c) lays down that nothing in this sub-section shall be deemed to prohibit—

"the payment of bonus in any year on a uniform basis to all salaried employees or any class of them by way of additional remuneration, such bonus, in the case of any employee, not exceeding in amount the equivalent of his salary for a period which, in the opinion of the Central Government, is reasonable having regard to the circumstances of the case."

This provision which constitutes an exception to the rule prescribed by s. 31A(1)(c) allows the payment of bonus to the employees of Insurance Companies subject to the condition specified by it. Bonus intended to be paid to such employees must not exceed in amount the equivalent of their salary for a period which the Central Government regards as reasonable.

The result of this provision appears to be that the Central Government has to consider the circumstances of each insurer and then decide whether any bonus should be paid by the insurer to its employees. If the financial position of the insurer is sufficiently satisfactory, the Central Government may decide to allow the insurer to pay bonus to its employees, and in that context the Central Government would prescribe the maximum within which the payment should be made. In no case can payment exceed the maximum prescribed by the Central Government, and in all cases the matter has to be considered by the Central Government and no other authority. Having regard to the scheme of the Act which purports to supervise and regulate the working of Insurance Companies the legislature thought that the payment of bonus by the Insurance Companies to their employees should normally be prohibited and its payment should be permitted subject to the over-riding control of the Central Government to prescribe the maximum in that behalf. If the Central Government decides that no bonus should be paid, no bonus can be paid by the insurer. If the Central Government decides that bonus should be paid but not beyond specified limit the insurer cannot exceed that limit. That, in our opinion, is the effect of proviso (vii) to s. 31A(1).

It is, however, urged that proviso (vii) merely enables the Central Government to prescribe the maximum. It does not take away the Central Government's authority to refer an industrial dispute in respect of bonus for adjudication under s. 10 of the Industrial Disputes Act. In this connection it is urged by Mr. Mazumdar that in some cases the Central Government may take the view that the financial position of the insurer justified the payment of bonus, but the quantum may be better left to the Industrial Tribunal. In such a case the Central Government should have authority to make the reference. Similarly it is urged that the Central Government may decide that within the maximum prescribed by it, bonus should be paid by an insurer, but the insurer

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may not comply with the Central Government's decision and in that case the only way to make the Central Government's decision effective is to refer the matter to adjudication and enable the employees to obtain an award which can be executed. That is why the appellants contend that the enabling provision contained in proviso (vii) should not be construed to constitute a bar against the Central Government's power to act under s. 10(1) of the Industrial Disputes Act.

We are not impressed by this argument. In our opinion the policy of the relevant clause of the proviso is absolutely clear. Payment of bonus by insurers was intended by the legislature to be conditioned by the provisions contained in the said clause, and we feel no doubt or difficulty in reaching the conclusion that the intervention of the Industrial Tribunals was intended to be excluded and the matter was intended to be kept within the discretion of the Central Government so far as the payment of bonus by the insurers is concerned. Then, as to the argument that the Government directive issued under proviso (vii) may not be obeyed by any insurer, we do not think that such an event is likely to happen; but theoretically it is conceivable that an insurer may refuse to comply with the decision of the Government. In that case all we can say is that there is a lacuna left and the legislature may consider whether it is necessary to provide adequate remedy for making the Government decision binding and final. Having regard to the unqualified and absolute prohibition contained in s. 31A(1)(c) it seems to us difficult to hold that the payment of bonus to the employees of Insurance Companies is not absolutely conditioned by proviso (vii). In the absence of the said provision no bonus could have been claimed by Insurance employees, and so the effect of the said provision must be to limit the said right to the conditions prescribed by it. That is why we think that the Tribunal was right in coming to the conclusion that the reference made by the Central Government is invalid. The fact that the Central Government took the view that it could make such a reference

is hardly relevant in determining the scope and effect of the relevant provisions of the Act. This question must be considered on what we regard to be the fair construction of the relevant statutory provision, and as we have just indicated the construction of the relevant provision clearly supports the view taken by the Tribunal. Incidentally, it may be pointed out that in its award the Tribunal has referred to several other decisions of Industrial Tribunals which have taken the same view though there are one or two decisions which have upheld the validity of the reference without duly considering the effect of s. 31A(1).

In this connection we may refer to the decision of this court in *The Central Bank of India* v. *Their Workmen* (1), where a similar question has been considered. In that case the Court had to consider the effect of s. 10 of the Banking Companies Act, 1949, prior to its amendment in 1956. The said section, according to that decision, prohibited the grant of industrial bonus to bank employees inasmuch as such bonus is remuneration which takes the form of a share in the profits of a banking company. In dealing with the character of bonus in relation to remuneration specified by s. 10, S. K. Das, J., who spoke for the Court, observed that "bonus in the industrial sense as understood in our country does come out of the available surplus of profits, and when paid it fills the gap, wholly or in part, between the living wage and the actual wage. It is an addition to the wage in that sense, whether it be called contingent or supplementary. None the less, it is labour's share in the profits, and as it is a remuneration which takes the form of a share in profits, it comes within the mischief of s. 10 of the Banking Companies Act". Section 10 of the Banking Companies Act is comparable to s. 31A of the Insurance Act, and so this decision supports the view that we have taken about the effect of s. 31A(1)(c). We have already held that the payment of bonus would be an additional remuneration to the employees of Insurance Companies and it would be

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bonus in respect of the general insurance business of the insurer. In view of our conclusion that the Tribunal was right in upholding the preliminary objection, we do not propose to consider the other argument which had been urged by the respondent before the Tribunal under s. 40C of the Act, and which the Tribunal has incidentally considered and accepted.

The result is that the appeal fails and is dismissed. There will be no order as to costs.

Appeal dismissed.

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