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(REPORTS)

I] SUPREME COURT [1974

THE SUPREME COURT OF INDIA.

(Civil Appellate/Original Jurisdiction.)

PRESENT:—*S.M. Sikri, C.J., J.M Shelat, A.N. Ray, I.D. Dua and H.R. Khanna, JJ.*

Balmadies Plantations Ltd. and another .. *Petitioners**

v.

The State of Tamil Nadu .. *Respondent.*

and

Nilambur Kovilakam, etc. .. *Appellants**

v.

The State of Tamil Nadu .. *Respondent.*

Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act (XXIV of 1969)—Applicability—Constitutional validity—Validity of section 3 in so far as it relates to transfer of forests in Janmam estates.

The case of the petitioners that their lands in the Gudalur taluk which were previously janmam estates had subsequently become ryotwari estates, especially after the resettlement of 1926 and as such the provisions of the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, were not applicable to those lands is untenable. The effect of the resettlement of 1926 was to retain the janmam estates and not to abolish the same or to convert them into ryotwari estates. There was merely a change of nomenclature. Government janmam lands were called the new holdings, while private janmam lands were called the old holdings. But the right of the janmam was kept intact. [*para.* 11.]

The object and the general scheme of the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, is to abolish intermediaries between the State and the cultivator and to help the actual cultivator by giving him the status of direct relationship between himself and the State. The Act, as such, in its broad outlines should be held to be a measure of agrarian reform and would consequently be protected by Article 31-A of the Constitution. Hence it is immune from attack on the ground of being violative of Article 14, 19 or 31 of the Constitution of India. This fact would not, however, stand in the way of the Court examining the constitutional validity of any particular provision of the Act. [*Para.* 17.]

So far as forests in janmam estates are concerned, the acquisition of those forests is not in furtherance of the objective of agrarian reform and as such is not protected by Article 31-A. In the absence of anything in the Act to show the purpose for which the forests are to be used by the Government, it cannot be said that the acquisition of the forests in janmam land would be for a purpose related to agrarian reform. The mere fact the the ownership of forests would stand transferred to the State would not show

* W. P. No. 373 of 1970 and C. A. Nos. 2211 and 2212 of 1970 and 85 to 91 of 1971.

19th April, 1972.

that the object of the transfer is to bring about agrarian reform. Hence the provisions of section 3 in so far as they relate to the transfer of forests in janmam estates to the Government, are not protected by Article 31-A of the Constitution and being violative of the Constitution has to be struck down. The vires of the rest of the Act must be upheld.

[*Para.* 18, 20.]

Cases referred to:—

Kottarathil Kochuni v. *The State of Madras*, (1960) 3 S.C.R. 887: (1961) 2 S.C.J. 443: A.I.R. 1960 S.C. 1080; *Karimbil Kunhikoman* v. *State of Kerala*, (1962) 1 S.C.R. (Supp.) 829: (1962) 1 S.C.J. 510: (1962) 1 An.W.R. (S.C.) 213: (1962) 1 M.L.J. (S.C.) 213: A.I.R. 1962 S.C. 723; *State* v. *Ashtamurthi*, (1890) I.L.R. 13 Mad. 89; *Trimbak Ranu* v. *Nana Bhavani*, (1875) 12 Bom. H.C.R. 144; *Secretary of State* v. *Vira Rayan*, (1886) I.L.R. 9 Mad. 175; *Sukapuram Sabhayogam* v. *State of Kerala*, A.I.R. 1963 Ker. 101; *P. Vajravelu Mudaliar* v. *Special Deputy Collector, Madras*, (1965) 1 S.C.R. 614 : (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (S.C.) 173 : (1964) 2 An.W.R. (S.C.) 173: A.I.R. 1965 S.C. 1017; *State of Uttar Pradesh* v. *Raja Anand Brahma Shah*, (1967) 1 S.C.R. 362: (1967) 2 S.C.J. 871: A.I.R. 1967 S.C. 661.

M.C. Chagla, Senior Advocate (*K. Jayaram*, Advocate, with him), for Petitioners (In W.P. No. 373 of 1970).

M. Natesan, Senior Advocate, (*Sardar Bahadur Saharya*, *K. Jayaram* and *Miss Yougindra Khushalani*, Advoates, with him), (In C.A. No. 2211 of 1970) and *M. C. Setalvad* (*K. Jayaram*, Advocate, with him), (In C.A.No. 2212 of 1970) and *K. Jayaram*, Advocate, (In C.As. Nos. 85 to 91 of 1971), for Appellants.

S. *Govind Swaminathan*, Advocate-General, for State of Tamil Nadu, (*S. Mohan*, *A.V. Rangam*, *Miss A. Subhashini* and *N.S. Sivan*, Advocates, with him), for Respondents (In all the matters).

The Judgment of the Court was delivered by

Khanna, J.—The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act (XXIV of 1969), hereinafter referred to as the Act, received the assent of the President on 6th December, 1969, after it had been enacted by the Legislature of the State of Tamil Nadu. It was thereafter published in the Gazette on 17th December, 1969. The Act extends to the Gudalur taluk of the Nilgiris district and applies to all janmam estates. It is to come into force on such date as the State Government may, by notification, appoint. This Court stayed the issue of the notification and, as such, no notification has so far been issued.

2. Nine petitions under Article 226 of the Constitution of India were filed in the Madras High Court challenging the vires of the Act on the ground that it was violative of Articles 14, 19 and 31 of the Constitution. The case of the petitioners was that their lands in the Gudalur taluk were previously janmam estates but subsequently became ryotwari estates, especially after the resettlement of 1926 and, as such, the provisions of the Act were not applicable to those lands. The Act, it was stated, did not get the protection of Article 31-A of the Constitution. One of the above petitions was filed by O'Valley Estate Ltd. This petitioner had taken on lease an estate comprising about, 2,000 acres of land in the 19th century from the Nilambur Kovilakam who was the proprietor of that land besides some other land. The Company (O'Valley Estate Ltd.) has a plantation on the estate and is engaged in cultivation and manufacturing of tea and other plantation products. The Nilambur Kovilakam was the petitioner in another petition.

3. The nine petitions were resisted by the State of Tamil Nadu on the ground that the lands in question were Janmam estates and had retained that character till the passing of the Act. The State of Tamil Nadu also invoked the protection of Article 31-A of the Constitution. The nine petitions were dismissed by the Madras High Court by a common judgment given in the petition filed by O'Valley Estate Ltd. It was held that the lands were janman estates and had not lost that character. The Act was held to be protected by Article 31-A of. of the Constitution. Civil Appeals Nos. 2211 and 2212 of 1970 and Nos 85 to 91 of 1971, have been filed against the above judgment of the High Court.

4. Writ Petition No. 373 of 1970, has been filed under Article 32 of the Constitution by Balmadies Plantations Ltd., and its shareholder Dayanand Bansilal Saxena, challenging the vires of the Act on the ground that it is violative of Articles 14, 19 and 31 of the Constitution and is not protected by Article 31-A. According to the petitioner, the jamam estates which are now intended to be abolished by the Act had been converted into ryotwari estates. The purpose of the Act, it is further stated, is not to bring about agrarian reform. The petitioner-company in this case had taken on lease 170.78 hectares from the Nilambur Kovilakam, the appellant in Civil Appeal No. 2211 of 1970, in the 19th century. Out of the above area, 143.22 hectares is under coffee plantation, while the rest of the land consists of forests and waste land.

5. The writ petition has been resisted by the State of Tamil Nadu and the affidavit of Shri A.S. Venkataraman, Additional Secretary, has been filed in opposition to the petition. The respondent has controverted the different grounds taken by the petitioner.

6. Gudalur taluk, it may be stated, compries 12 villages. The said taluk was originally part of Malabar district which now formes part of Kerala State. O'Valley village was transferred to the Nilgiris in 1873 and the other eleven villages were transferred in 1877. Originally the janmis in Malabar were absolute proprietors of the land and did not pay land revenue. After Malabar was annexed by the British in the beginning of the 19th century, the janmis conceded the liability to pay land revenue. According to the case set-up by the petitioner-appellants, there was a gradual erosion of the rights of janmis in the lands in question and the janmam estates became ryotwari estates after the resettlement of 1926. As such, the Act, it is submitted, does not apply to the lands in dispute. Before dealing with this aspect of the matter, it would be pertinent to refer to the different provisions of the Act. Section 2 of the Act contains the various definitions. Relevant clauses of that section read as under :

"*Section* 2.—In this Act, unless the context otherwise requires,—

(1) all expressions defined in the Malabar Tenancy Act, shall have the same respective meanings as in that Act with the modifications, if any, made by this Act;

(2) "appointed day" means the date appointed by the Government under sub-section (4) of section 1 ;

(4) "forest" includes waste or arrable land containing trees, shrubs or reeds.

Explanation.—A forest shall not cease to be such by reason only of the fact that, in a portion thereof, trees, shrubs or reeds are felled, or lands are cultivated, or rocks, roads, tanks, rivers or the like exist;

(6) "janmam estate" means any parcel or parcels of land included in the holding of janmi;

(7) "janmi" means a person entitled to the absolute proprietorship of land and includes a trustee in respect thereof;

(9) "plantation crop" means tea, coffee rubber, cinchona or cardamom;

(11) "tenant" means a verrumpattamdar as defined in sub-clause (*a*) of clause (29) of section 3 of the Malabar Tenancy Act."

Section 3 of the Act deals with the vesting of janmam estates in Government, and reads as under:

" *Vesting of janmam estates etc, in Government,—*

With effect on and from the appointed day and save as otherwise expressly provided in this Act—

(*a*) the Malabar Tenancy Act, the Malabar Land Registration Act, 1895 (Tamil Nadu Act III of 1896), the Gudalur Compensation for Tenants Improvements Act, 1931 (Tamil Nadu Act XII of 1931) and all other enactments applicable to janmam estates as such, shall be deemed to have been repealed in their application to janmam estates;

(*b*) every janmam estate including all communal lands and porambokes, waste lands, pasture lands, forests, mines and minerals quarries, rivers and streams, tanks and irrigation works, fisheries, and ferries situated within the boundaries thereof shall stand transferred to the Government and vest in them free of all encumbrances, and the Tamil Nadu Revenue Recovery Act, 1864 (Tamil Nadu Act II of 1864), the Tamil Nadu Irrigation Cess Act, 1865 (Tamil Nadu Act VII of 1865), the Tamil Nadu Cultivating Tenants Protection Act, 1955 (Tamil Nadu Act XXV of 1955), the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Tamil Nadu Act XXIV of 1956) and all other enactments applicable to ryotwari lands shall apply to the janmam estate;

(*c*) all rights and interests created by the janmi in or over his janmam estate before the appointed day shall as against the Government cease and determine;

(*d*) the Government may, after removing any obstruction that may be offered, forthwith take possession of the janmam estate and all accounts, registers, pattas, muchilikas, maps, plans and other documents relating to the janmam estate which the Government may require for the administration thereof:

Provided that the Government shall not dispossess any person of any land in the janmam estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta pending the decision of the appropriate authority under this Act as to whether such person is entitled to such patta;

(*e*) the janmi and any other person whose rights stand transferred under clause (*b*) or cease and determine under clause (*c*) shall be entitled only to such rights and privileges as are recognised or conferred on him by or under this Act;

(*f*) the relationship of janmi and tenant, shall as between them, be extinguished; and

(*g*) any rights and privileges which may have accrued in the janmam estate to any person before the appointed day against the janmi shall cease and determine and shall not be enforceable against the Government or against the janmi and every such person shall be entitled only to such rights and privi-

leges as are recognized or conferred on him by or under this Act".

According to section 8, the janmi shall with effect on and from the appointed day be entitled to a ryotwari patta in respect of all lands proved to have been cultivated by the janmi himself, or by the members of his tarwad, tavazhi, illom or family or by his own servants or by hired labour with his own or hired stock in the ordinary course of husbandry for a continuous period of three agricultural years immediately before the 1st day of June, 1969. *Explanation I* to that section defines the word " cultivate " to include the planting and rearing of topes, gardens, orchards and plantation crops. According to *Explanation II* where any land is cultivated with plantation crops, any land occupied by any building for the purpose of or ancillary to the cultivation of such crops or the preparation of the same for the market and any waste land lying interspersed among or contiguous to the planted area upto a maximum of twenty-five per centum of the planted area shall be construed to be land cultivated by the janmi. Section 9 deals with lands in respect of which a tenant is entitled to ryotwari patta. According to the section, every tenant shall, with effect on and from the appointed day, be entitled to a ryotwari patta in respect of the lands in his occupation. The right of the tenant to the ryotwari patta is subject to the conditions regarding cultivation mentioned in the provisos to the section. Section 10 provides that where no person is entitled to a ryotwari patta in respect of a land in a janmam estate under section 8 or section 9 and the land vests in the Government, a person who had been personally cultivating such land for a continuous period of three agricultural years immediately before the 1st day of June, 1969, shall be entitled to a ryotwari patta in respect of that land. This right too is subject to conditions mentioned in that section. According to section 11, no ryotwari patta shall be granted with respect to the following categories situated within the limits of a janmam estate :

(*a*) forests ;

(*b*) beds and bunds of tanks and of supply, drainage, surplus or irrigation channels;
(*c*) threshing floor, cattle stands, village sites, cart-tracks, roads, temple sites and such other lands situated in any janmam estate as are set apart for the common use of the villagers ;

(*d*) rivers, streams and other porambokes. Section 12 empowers the Settlement Officer to inquire into the claims of any person for a ryotwari patta under the Act in respect of any land in a janmam estate and decide in respect of which land the claim should be allowed. A right of appeal against the decision of the Settlement Officer to the Tribunal appointed under the Act is given by sub-section (3) of section 12. The Tribunal, according to section 7, shall consist of one person only who shall be a Judicial Officer not below the rank of Subordinate Judge. Section 13 fastens liability to pay land revenue to Government on the person who becomes entitled to a ryotwari patta under the Act. As regards a building, section 14 provides that with effect on and from the appointed day, the same shall vest in the person who owned it immediately before that day, subject to the conditions mentioned in that section. Section 15 deals with rights of persons admitted into possession of any land in a janmam estate by any janmi for a non-agricultural purpose, while section 16 makes provision for directions to be issued by the Government in respect of a person admitted by a janmi into possession of any land of the description specified in section 11. Section 17 relates to the rights of lessees of plantations and reads as under ;

"*Section 17—Rights of lessees of plantations.*—(1) (*a*) Where at any time before the appointed day the janmi has created by way of lease, rights in any lands for purposes of cultivation of plantation crops, the Government may, if in their opinion, it is in the public interest to do so, by notice given to the person concerned terminate the right with effect from such date as may be specified in the notice, not being earlier than three months from the date thereof.

(*b*) The person whose right has been so terminated shall be entitled to compensation from the Government which shall be determined by the Board of Revenue in such manner as may be prescribed, having regard to the value of the right and the period for which the right was created.

(*c*) Where any such right is not determined under this sub-section, the transaction whereby such right was created shall be deemed to be valid and all rights and obligations arising thereunder, on or after the appointed day, shall be enforceable by or against the Government :

Provided that the transaction was not void or illegal under any law in force at the time.

(2) The Government may, if in their opinion, it is in the public interest to do so, impose reasonable restrictions on the exercise of any right continued, under this section.

Explanation.—Any rights granted in perpetuity shall cease and determine and be dealt with under section (3) (*e*) and not under this section."

Section 18 deals with the rights of certain other lessees.

7. Chapter IV of the Act, which contains sections 19 and 20, deals with survey and settlement of janmam estates. Chapter V, which contains sections 21 to 30, makes provisions for determination and payment of compensation. As regards the Nilambur Kovilagam, one of the appellants before us, the *Explanation* to section 22 reads as under :

"*Explanation.*—For the purposes of this section, the janmam estate owned by the Nilambur Kovilagam which is partly divided and partly held in common by the several tavazhis shall be construed as a single janmam estate.' Amount of compensation is the subject of section 28, while section 29 relates to the determination of the basic annual sum and compensation. The subject dealt with by Chapter VI, containing sections 31 to 46, is 'Deposit and Apportionment of Compensation.' Sections 47 to 50 contained in Chapter VII make provision for recovery of contribution from pattadars. Chapter VIII contains the miscellaneous provisions. Section 58 makes final the orders passed by the various authorities under the Act, while section 60 confers powers on the Government to make rules for carrying out the purposes of the Act. The rules are required to be published in the gazette and to be placed on the table of both Houses of Legislature, so that the Houses may, if they so deem proper, make any modification in any such rule."

8. We may at this stage advert to janmam estate. According to Land Tenures in the Madras Presidency by S. Sundararaja Iyengar, Second Edition, (page 49), the exclusive right to, and hereditary possession of the soil in Malabar is denoted by the term jenmam which means birthright and the holder thereof is known as jenmi, jenmakaran or mutalalan. Until the conquest of Malabar by the Mahomedan princes of Mysore, the jenmis appear to have held their lands free from any liability to make any payment, either in money or in produce, to Government and therefore until that period

such an absolute property was vested in them as was not found in any other part of the Presidency. Sir Charles Turner, after noticing the various forms of transactions prevalent in Malabar stated that they pointed to an ownership of the soil as complete as was enjoyed by a freeholder in England. Subba Rao, J. (as he then was), speaking for the Court, in the case of *Kavalappara Kottarathil Kochuni* v. *The State of Madras*[1], observed :

> "A janmam right is the freehold interest in a property situated in Kerala. Moore in his 'Malabar Law and Custom' describes it as a hereditary proprietorship. A janmam interest may, therefore, be described as 'proprietary interest of a landlord in lands', and such a janmam right is described as 'estate' in the Constitution."

It was held that the proprietor called janmi could create many subordinate interests or tenures like lease or mortgage in a janmam estate. It is not, however necessary to dilate upon the matter as janmam estate has been defined in clause (6) of section 2 of the Act to mean any parcel or parcels of land included in the holding of a janmi. Janmi, according to clause (7) of the said section, means a person entitled to the absolute proprietorship of land and includes a trustee in respect thereof.

9. Ryotwari or kulwar system was first introduced into the British possessions by Col. Read in 1792. When the Baramahal and Salem were ceded to the British by Tippu, Lord Cornwallis specially deputed Col. Read for their settlement. The prevailing system of land revenue settlement at the time was the permanent settlement. Col. Read, however, deemed it prudent to enter into temporary settlements with the actual cultivators and this gave rise to a new system since designated ryotwari or kulwar system. The system introduced by Col. Read embraced the survey of every holding in the district and a field assessment based on the productive powers of the soil. The ryot was not regarded as the proprietor of the soil but only as a cultivating tenant from whom was to be exacted by government all that he could afford. Certain objectionable features of the ryotwari system were then noticed, and an effort was made to eliminate those objectionable features. The ryotwari system in force at present means the division of all arable land, whether cultivated or waste into blocks, the assessment of each block at a fixed rate for a term of years and the exaction of revenue from each occupant according to the area of land thus assessed. That area may remain either constant or may be varied from year to year at the occupant's pleasure by the relinquishment of old blocks or the occupation of new ones. The distinguishing features of this system is that the State is brought into direct contact with the occupant of land and collects its revenue through its own servants without the intervention of an intermediate agent such as the zamindar. All the income derived from extended cultivation goes to the State Ryotwari lands are known as taraf lands in the Tanjore District, and as ayan, sirkar, goru, or Government lands in the other parts of the Presidency (*see* pages 152 and 153 of the Land Tenure in the Madras Presidency, Second Editions by Sundararaja Iyengar).

10. According to Land Systems of British India by Baden-Powell, the holders of ryotwari pattas used to hold lands on lease from Government. The basic idea of ryotwari settlement is that every bit of land is assessed to a certain revenue and assigned a survey number for a period of years, which is usually thirty, and each occupant of such land holds it subject to his paying the land revenue fixed on that

1. (1960) 3 S.C.R. 887: (1961) 2 S.C.J. 443: A.I.R. 1960 S.C. 1080.

land. But it is open to the occupant to relinquish his land or to take new land which has been relinquished by some other occupant or become otherwise available on payment of assessment. The above observations were referred to by this Court in the case of *Karimbil Kunhikoman* v. *State of Kerala*[1], and it was said :

> "The ryot is generally called a tenant of Government but he is not a tenant from year to year and cannot be ousted as long as he pays the land-revenue assessed. He has also the right to sell or mortgage or gift the land or lease it and the transferee becomes liable in his place for the revenue. Further, the lessee of a ryotwari pattadar has no rights except those conferred under the lease and it generally a sub-tenant at-will liable to ejectment at the end of each year. In the Manual of Administration, as quoted by Baden-Powell, in Volume III of Land Systems of British India at page 129, the ryotwari tenure is summarised as that 'of a tenant of the State enjoying a tenant-right which can be inherited, sold, or burdened for debt in precisely the same manner as a proprietary right subject always to the payment of the revenue due to the State'. Though therefore the ryotwari pattadar is virtually like a proprietor and has many of the advantages of such a proprietor, he could still relinquish or abandon his land in favour of the Government. It is because of this position that the ryotwari pattadar was never considered a proprietor of the land under his patta, though he had many of the advantages of a proprietor."

This Court held in the above case that the land held by ryotwari pattadars in the area which came to the State of Kerala by virtue of the State Reorganization Act from the State of Madras were not 'estates' within the meaning of Article 31-A (2) of the Constitution. Subsequent to that decision, Clause (2) of Article 31-A was amended by the Constitution (Seventeenth Amendment) Act, 1964. As a result of that amendment, 'estate' would also include any land held under ryotwari settlement.

11. Let us now go into the question as to whether the janmam rights in the lands in question have been converted into ryotwari estate. We are concerned in the present case with the settlement of 1886 and resettlement of 1926. In connection with the settlement of 1886, G.O. No. 741, Revenue, dated 27th August, 1886. was issued and its main purpose was to settle the lands which had been escheated to the Government and to collect revenue for the State. An attempt was then made to have direct dealing with the cultivators without notice to the janmi. This act of the State was held to be against law by a Division Bench of the Madras High Court in the case of *Secretary of State* v. *Ashtamurthi*[1]. In that case the Collector of Malabar let defendant No. 2 into possession of certain waste land in in 1869 under a cowle, and in 1872 granted to him a patta for it. The cowledar then brought the land under cultivation but subsequently left it uncultivated and failed to pay the assessed revenue. The land was consequently attached in 1885 for arrears of revenue under the Revenue Recovery Act and sold to defendant No. 3. The plaintiff, who was the janmi of the land, had no notice of the grant of either the cowle or the patta. He asserted his right to janmabhogam in a petition presented to the Collector at the time of the sale, but the sale proceeded without reference to his

1. (1962) 1 S.C.R. (Supp.) 829, 847: (1962) 1 S.C.J. 510 : (1962) 1 An.W.R. (S.C.) 213 : (1962) 1 M.L.J. (S.C.) 213: A.I.R. 1962 S.C. 723.

1. (1890) I.L.R. 13 Mad. 89.

claim. Suit was thereafter brought by the plaintiff to set aside the sale. It was held that the interest of the janmi did not pass by the sale. Parker, J. in the above context observed :

"The evidence shows that the janmis or the proprietors of the soil in Malabar have long been in the habit of leasing out the greater portion of their estates to kanamdars who are thus in the immediate occupancy of the greater part of the soil. This was the State of things at the time of Hyder's conquest (exhibit XIV), and the British Government is stated to have continued the practice of the Mysore Government in settling the assessment with these kanamdars. At the annexation of Malabar in 1799 the Government disclaimed any desire to act as the proprietor of the soil, and directed that rent should be collected from the immediate cultivators, *Trimbak Ranu* v. *Nana Bhavani*[1] and *Secretary of State* v. *Vira Rayan*[2] thus limiting its claim to revenue. Further, in their despatch of 17th December, 1813 relating to the settlement of Malabar the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates. This may be regarded as an absolute disclaimer by the Government of the day of any proprietary right in the janmis' estate, and is hardly consistent with the right of letting in a tenant which is certainly an exercise of proprietary right."

On account of the above decision the Madras Government reconsidered the matter and in 1896 the Malabar Land Registration Act (III of 1896) was enacted. The object of that Act would be clear from its preamble which reads :

"WHEREAS Regulation XXVI of 1802 provides that landed property paying revenue to Government shall be registered by the Collector ; and whereas such landed property in certain areas in the Nilgiri district has in many cases not been registered in the names of the proprietors thereof ; and whereas it is desirable for the security of the public revenue to provide summary means whereby the Collector may ascertain such proprietors : It is hereby enacted as follows."

According to section 13 of the above Act, every person registered as proprietor of an estate shall be deemed to be the landholder in respect of such estate within the meaning and for the purposes of the Madras Revenue Recovery Act II of 1864. The janmam rights in the lands in dispute thus remained intact. The stand taken on behalf of the petitioner-appellant, as mentioned earlier, is that the janmam rights in the lands in dispute were converted into ryotwari estate as a result of resettlement of 1926. Government order No. 1902 Revenue, dated 1st November, 1926 was issued in this connection. Para. 3 of that order deals with the janmam estates and reads as under :

"3. JANMABHOGAM :—Paragraph 11 of the Board's Proceedings—Lands have hitherto been described as—

(*a*) Government janmam *i.e.*, lands which are held directly from the Government and on which taram assessment and janmabhogam are paid to the Government, and

(*b*) private janmam, *i.e.*, lands which are held directly from the Government and on which taram assessment but not janmabhogam is paid to the Government.

These two classes of land will hereafter be referred to as 'New Holdings' and 'Old Holdings'.

The Special Settlement Officer proposed—

1. (1875) 2 Bom. H.C.R. 144.
2. (1886) I.L.R. 9 Mad. 175.

(1) to raise the existing rate of janmabhogam of 8 annas an acre on all so-called Government janmam land in estates to Re. 1 an acre for highly developed estate crops;

(2) to retain the existing rate on lands cultivated with non-estate crops; and

(3) to reduce it to 4 annas an acre on undeveloped lands.

The Board supported the proposals (1) and (3) but recommended an increase to Re. 1 in the case of proposal (2). The Government have decided to apply the 18 3/4 per cent. limit imposed in G.O. No. 924, Revenue, dated 18th June, 1924, to janmabhogam. After careful consideration the Government have decided to accept the Board's proposal to amalgamate the two items of land revenue, *i.e.*, taram assessment and so called 'janmabhogam' which are being collected on all so-called Government janmam lands *i.e.*, on new holdings, and in future to collect assessment on these lands at a consolidated rate based upon the total of the rates at which these two items of the land revenue are now being levied. In all the figures quoted in the Appendix to this order concerning these lands the revised rate given is this consolidated rate."

It would appear from the above that the effect of the resettlement of 1926 was to retain the janmam estates and not to abolish the same or to convert them into ryotwari estates. There was merely a change of nomenclature. Government janmam lands were called the new holdings, while private janmam lands were called the old holdings. In respect of janmabhogam (janmi's share) relating to Government janmam lands, the order further directed that the amount to be paid to the Government should include both the taram assessment and janmabhogam. It is difficult, in our opinion, to infer from the above that janmam rights in the lands in question were extinguished and converted into ryotwari estates. The use of the word 'Janmabhogam' on the contrary indicates that the rights of janmis were kept intact.

12. It has been argued on behalf of the petitioner-appellants that the grant of a right of relinquishment to janmis had the effect of obliterating the distinction between janmam estate and ryotwari estate. The janmam rights, according to the submission, were thus converted into ryotwari estate. In this connection we find that the Government order No. 1902 dated 1st November, 1926 shows that question was raised as to whether a janmi of private janmam land could claim exemption from assessment by leaving cultivable lands waste. The Board of Revenue recommended that exemption should not be granted unless the janmi pattadar relinquished his whole right, title and interest. The Government, however, considered that having regard to the practice of exempting unoccupied Janmam lands from assessment the janmi should not be required to pay assessment on lands the cultivation of which was to cease. In 1896 a system was introduced, according to which a janmi could give notice of relinquishment without giving up his janmam rights over the land and claim remission of assessment on the relinquished land if it was not taken up for cultivation in the following year. The Board of Revenue in proceedings dated 16th October, 1897 pointed out that this was in effect a reversion to the old system of charging all cultivation with all its attendant evils of corruption, loss of revenue and unnecessary labour in inspection. The matter was thereafter further considered and the Board in its proceedings dated 13th June, 1916 expressed the opinion that the existing rule relating to relinquishment of private lands was anomalous

and proposed that no relinquishment of such lands should be permitted unless the janmi surrendered also his janmam right and that until he relinquished such right, he should be responsible to the Government for the payment of the assessment due on such lands. This proposal was accepted by the Government in 1917 and reiterated in 1919. It would thus appear that the relinquishment permissible in the case of janmi was of a somewhat peculiar nature inasmuch as there could be no relinquishment of janmam lands unless the janmi surrendered also his janmam rights. The above right of relinquishment, in our opinion, did not have the effect of converting the janmam rights in the lands in dispute into ryotwari estate.

13. It is not disputed that apart from the lands in question, there are no other janmam estates in the State of Tamil Nadu (Madras). If the janmam estates in question had been converted into ryotwari estates as a result of the resettlement of 1926, there would have arisen no necessity to mention the janmam right in the State of Madras in Clause (2) (*a*) (i) of Article 31-A of the Constitution. The fact that in addition to the janmam right in the State of Kerala, the janmam right in the State of Madras was also mentioned in Clause (2) (*a*) (i) of Article 31-A as a result of amendment, shows that the janmam rights in the lands in question were assumed by the Legislature to be in existence. To hold that the janmam rights in the lands in question ceased to exist after the resettlement of 1926 would have the effect of rendering the words, wherein there is a reference to janmam rights in the State of Madras in clause (2) (*a*) (i) of Article 31-A, to be meaningless and without any purpose.

14. Reference has been made on behalf of the petitioner-appellants to the Full Bench case of *Sukapuram Sabhayogam* v. *State of Kerala*[1], wherein it was held that a person would cease to be proprietor of a soil if he gets a right or is under an obligation to relinquish or abandon the land. The above case related to the plains of Malabar, while we are concerned with the hilly tracts of Gudalur taluk. In the cited case pattas and Adangal registers were produced in the Court and the State accepted the authenticity of those documents. In the cases before us, no patta was produced by the petitioner-appellants either in the High Court or in this Court. In view of the above, we are of the opinion that the facts of the Full Bench case are distinguishable. In any case, we are unable to subscribe to the proposition that the right of relinquishment of janmam rights of a janmi would by itself convert janmam rights into ryotwari estate.

15. Argument has also been advanced on behalf of the petitioner-appellants that so far as the forest areas in the janmam lands in question are concerned, they do not constitute an estate unless they are held or let for purposes of agriculture or for purposes ancillary thereto, as contemplated by clause (2) (*a*) (iii) of Article 31-A of the Constitution. This contention, in our opinion, is devoid of force. Sub-clause (*a*) of clause (2) of Article 31-A reads as under :

> "(2) In this Article,—
>
> (*a*) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its equivalent has in the existing law relating to land tenures in force in that area and shall also include—
>
> (i) any jagir inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right;
>
> (ii) any land held under ryotwari settlement;
>
> (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest

1. A.I.R. 1963 Ker. 101.

land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans."

Janmam lands are covered by clause (2) (a) (i) of Article 31-A. Forest area, which is part of such janmam land would like the remaining janmam lands, constitute an estate, and it would not be necessary in such a case to show that the forest land is held or let for purposes of agriculture or for purposes ancillary thereto. All lands which are part of janmam estate of a janmi in the States of Madras and Kerala would constitute an estate as mentioned in clause (2) (a) (i) of Article 31-A of the Constitution. As janmam lands fall under clause (2) (a) (i), it is not essential to show that the requirements of clause (2) (a) (iii) too are satisfied for such lands and it would make no difference whether forests are a part of the janmam lands.

16. The next question which arises for consideration is whether the acquisition of the lands in question is for agrarian reform. It is well established that in order to invoke the protection of Article 31-A, it has to be shown that the acquisition of the estate was with a view to implement agrarian reform. The said article is confined only to agrarian reform and its provisions would apply only to a law made for the acquisition by the State of any rights therein or for extinguishment or modification of such rights if such acquisition, extinguishment or modification is connected with agrarian reform (see *P. Vajravelu Mudaliar* v. *Special Deputy Collector, Madras*[1]).

17. We have referred in the earlier part of this judgment to the various provisions of the Act, and it is manifest from their perusal that the object and general scheme of the Act is to abolish intermediaries between the State and the cultivator and to help the actual cultivator by giving him the status of direct relationship between himself and the State. The Act, as such, in its broad outlines should be held to be a measure of agrarian reform and would consequently be protected by Article 31-A of the Constitution. The said Article provides that notwithstanding anything contained in Article 13, no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such right shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31, provided that where such law is a law made by the Legislature of a State, the provisions of Article 31-A shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent. The impugned Act, as stated earlier, received the assent of the President on 6th December, 1969. As the Act is protected by Article 31-A of the Constitution, it is immune from attack on the ground of being violative of Article 14, Article 19 or Article 31. This fact would not, however, stand in the way of the Court examining the constitutional validity of any particular provision of the Act.

18. It has been submitted on behalf of the appellants that whatever might be the position in respect of other janmam lands, so far as forests in janmam estates are concerned, the acquisition of those forests is not in furtherance of the objective of agrarian reform, and as such, is not protected by Article 31-A. This submission in our opinion, is well founded. According to section 11 of the Act no ryotwari Patta would be issued in respect of forests in janmam estates after those estates stand transferred to the Government. There is

1. (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (S.C.) 173 : (1964) 2 An.W.R. (S.C.) 173 : (1965) 1 S.C.R. 614 at 622 : A.I.R. 1965 S.C. 1017.

nothing in the Act to indicate as to what would be the purpose for which the said forests would be used after the transfer of janmam land containing forests to the Government. All that section 16 states is that, except where the Government otherwise directs, no person admitted by a janmi into possession of any such forest shall be entitled to any rights in or remain in possession of such land. Sub-section (2) of that section specifies the directions which the Government may issue while allowing any person to remain in possession of any such land. In the absence of anything in the Act to show the purpose for which the forests are to be used by the Government, it cannot be said that the acquisition of the forests in janmam land would be for a purpose related to agrarian reform. The mere fact that the ownership of forests would stand transferred to the State would not show that the object of the transfer is to bring about agrarian reform. Augmenting the resources of the State by itself and in the absence of anything more regarding the purpose of utilisation of those resources, cannot be held to be a measure of agrarian reform. There is no material on the record to indicate, that the transfer of forests from the janmi to the Government is linked in any way with a scheme of agrarian reform or betterment of village economy.

19. Learned Advocate-General has referred to the case of *State of Uttar Pradesh* v. *Raja Anand Brahma Shah*[1]. In that case all the estates in a Pargana, including the forests, were acquired by the State of Uttar Pradesh under the U. P. Zamindari Abolition and Land Reforms Act. Objection was taken to the acquisition of forests on the ground that it was not for the purpose of agrarian reform. Repelling the objection, this Court observed :

> "Mr. A. K. Sen further urges that the acquisition of the estates was not for the purpose of agrarian reform because hundreds of square miles of forest are sought to be acquired. But as we have held that the area in dispute is a grant in the nature of Jagir or inam, its acquisition like the acquisition of all Jagirs, inams, or similar grants, was a necessary step in the implementation of the agrarian reforms and was clearly contemplated in Article 31-A."

It would appear from the above that the Court in that case was dealing with the acquisition of an estate which was in the nature of a Jagir, inam or similar grant, and it was found that the said acquisition was a necessary step in the implementation of agrarian reform. We are, in the cases before us, not concerned with Jagir, inam or other grant, and so far as the forests in question are concerned, it has already been observed that their acquisition is not in any way related to agrarian reform. As such, the respondent State, in our view, cannot get much assistance from the cited case.

20. We, therefore, hold that the acquisition of the forests on the janmam land is not protected by Article 31-A. It has not been shown to us that if the protection of Article 31-A is taken off, the acquisition of forests can otherwise be justified. We, therefore, are of the view that the provisions of section 3 of the Act in so far as they relate to the transfer of forests in the janmam estates in question are violative of the Constitution. As such, we strike down those provisions to that extent. Invalidity of the provisions relating to the transfer of forests would not, however, affect the validity of the other provisions of the Act as the two are distinct and severable.

21. The last submission which has been made on behalf of the petitioner-appellants relates to section 17 of the Act regarding

1. (1967) 2 S.C.J. 871 : (1967) 1 S.C.R. 362 : A.I.R. 1967 S.C. 661.

the rights of plantation lessees. It is stated that it would be open to the Government under the above position to terminate by notice the right of the lessees. Such a termination of the lessee rights under the above provision, according to the submission made on behalf of the petitioner-appellants would be violative of their rights under Articles 14, 19 and 31 of the Constitution. It is, in our opinion, not necessary to deal with this aspect of the matter. It is admitted that no notice about the termination of the lessee rights has been issued under section 17 of the Act to any of the petitioner-appellants. Indeed, the question of issuing such a notice can only arise after the Act comes into force. Even after the Act comes into force, the Government would have to apply its mind to the question as to whether in its opinion it is in public interest to terminate the rights of the plantation lessees. Till such time as such a notice is given, the matter is purely of an academic nature. In case the Government decides not to terminate the lease of the plantation lessees, any discussion in the matter would be an exercise in futility. If on the contrary, action is taken by the Government under section 17 in respect of any lease of land for purposes of the cultivation of plantation crop, the aggrieved party can approach the Court for appropriate relief.

22. As a result of the above, we uphold the vires of the Act, except in one respect. The provisions of section 3 in so far as they relate to the transfer of forests in janmam estates to the Government are not protected by Article 31-A and being violative of the Constitution are struck down. The appeals and writ petition are disposed of accordingly. The parties in the circumstances, are left to bear their own costs throughout.

V.K. —— *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*I. D. Dua, C. A. Vaidialingam and A. Alagiriswami, JJ.*

K. K. Chari .. *Appellant**

v.

R. M. Seshadri .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a)—*Order of eviction based on consent or compromise—Validity.*

Per *Vaidialingam, J.*—(on behalf of himself and *Dua, J.*).—An order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact *viz.* the existence of one or more of the conditions mentioned in section 10 of the Madras Buildings (Lease and Rent Control) Act were shown to have existed when the Court made the order. Satisfaction of the Court, which is no doubt a requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding. If at some stage the Court was called upon to apply its mind to the question and there was sufficient material before it, before the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the Court was satisfied about the grounds on which the order of eviction was based. The High Court has proceeded on the basis that even if there was material before the Court, when it passed the order of eviction by consent, from which it can be shown that the Court was satisfied about the requirement of the landlord being *bona fide*, nevertheless such an order will be a nullity unless the Rent Controller has given his decision in

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*C.A. No. 447 of 1971. *16th March*, 1973.

favour of the landlord. This view is erroneous. [*Paras.* 24, 26.]

It is no doubt true that before making an order for possession the Court is under a duty to satisfy itself as to the truth of the landlord's claim if there is a dispute between the landlord and tenant. But if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the Court to act on that admission and make an order for possession in favour of the landlord without further enquiry. It is no doubt true that each case will have to be decided on its own facts to find out whether there is any material to justify an inference that an admission express or implied, has been made by the tenant about the existence of one or other of the statutory grounds. [*Para.* 27.]

In the present case when the evidence of the landlord was before the Court, supported, as it was, by the innumerable exhibits filed by him, it can surely be stated that a stage had been reached when the Controller was called upon to apply his mind to the question whether the plea of the landlord that he required the premises for his own occupation was *bona fide.* There is the further circumstance that the tenant did not cross-examine the landlord. On the other hand, he entered into a compromise in and by which he withdrew his defence and submitted to a decree for eviction unconditionally. His withdrawal of the defence, after the plaintiff had given evidence and filed exhibits in support of his plea, clearly shows that he accepted as true the claim of the landlord that he requires the premises *bona fide* for his own occupation. He has accepted the position that the landlord has made out the statutory requirement, entitling him to ask for possession of the premises. It is this unconditional withdrawal of the defence regarding the statutory condition pleaded by the landlord and the compromise following it, that was accepted by the Court and a decree for eviction passed thereon. Under these circumstances, when the tenant has accepted the plea of the landlord, it is futile to hold that the Rent Controller must again embark upon an enquiry regarding the requirement of the landlord being *bona fide* and adjudicate upon the same. Hence it cannot be held, in the particular circumstances of this case, that the decree for eviction has been passed solely on the basis of the compromise entered into between the parties. On the other hand, it is clear that the Court was satisfied about the *bona fide* requirement of the landlord. Therefore the decree for eviction is neither void nor inexecutable. [*Paras.* 25, 28.]

Per *Alagiriswami, J.*—The words in section 10 of the Madras Buildings (Lease and Rent Control) Act, 'if the Controller is satisfied' do not have any special significance. An ordinary civil Court trying a suit either on a mortgage or on a promissory note has necessarily to be satisfied about the execution of the document, the passing of consideration etc. before it can pass a decree on the basis of either the mortgage or the promissory note. Therefore, the fact that under section 10 the Controller has to be satisfied that the grounds for eviction exist does not mean that his satisfaction cannot be based on the same considerations on the basis of which the civil Courts can be satisfied. Under Order 23, rule 3 of the Code of Civil Procedure, all matters to be decided in a suit can be settled by means of a compromise. The application of the Code of Civil Procedure, is not excluded in proceedings before the Rent Controller and in any case there is no reason why the principle underlying Order 23, rule 3 should not apply to those proceedings.

It is not clear why a tenant should be treated as a minor or as an imbecile. In the case of a minor, Order 32, rule 7 of the Civil Procedure Code, specifically lays down that the Court should be satisfied before it sanctions a compromise for it to be binding a minor. There is no such provision in the Rent Control Act. Therefore the time has come when a hard look must be taken on this point and it should be held that there is no objection to a compromise consenting to an order of eviction in rent control proceedings. [*Para.* 35.]

Of course, a compromise can be valid only if it is in accordance with the Act, *i.e.*, only if the landlord has asked for possession of the building on one of the grounds laid down in the Act. For instance, a landlord merely on the ground that he is the owner of the building cannot come to the Rent Controller and ask for possession of the property and the Rent Controller cannot pass a valid order merely because the tenant submits to an order of eviction. [*Para.* 36.]

Cases referred to:

Bahadur Singh v. *Muni Subrat Dass*, (1969) 2 S.C.W.R. 51 : (1969) 2 S.C.R. 432 ; *Kaushalya Devi* v. *K. L. Bansal*, (1969) 2 S.C.R. 1048 : (1969) 2 S.C.J. 145 : A.I.R. 1970 S.C. 838 ; *Perozi Lal Jain* v. *Man Mal*, (1970) Ren.C.R. 375 : A.I.R. 1970 S.C. 794 ; *Remon* v. *City of London Real Property Co., Ltd.*, (1921) 1 K.B. 49 ; *Thorne* v. *Smith*, (1947) 1 K.B. 307 ; *Middleton* v. *Baldock* (*T.W.*), (1950) 1 K.B. 657 ; *Jagan Nath* v. *Jatinder Nath*, A.I.R. 1961 Punj. 574 ; *Vas Dav* v. *Milkhi Ram*, A.I.R. 1960 Punj. 514 ; *Barton* v. *Fincham*, (1921) 2 K.B. 291 ; *Babu Ram Sharma* v. *Bal Singh*, (1959) 61 Punj. L.R. 33.

The Judgment of the Court was delivered by

Vaidialingam, J.—The short question that arises for consideration in this appeal, by Special Leave, is whether the order, dated 31st March, 1969, passed by the Court of Small Causes, Madras, in H.R.C. No. 983 of 1968. directing the eviction of the respondent-tenant is a nullity and as such not executable. The facts leading upto the passing of the order may be stated :

2. The appellant was occupying a premises in Madras as a tenant. His landlady filed an application H.R.C. No. 1924 of 1967, seeking eviction of the appellant on the ground that she *bona fide* required the premises for her own occupation. At that time the suit premises No. 64, Lloyds Road, Royapettah, Madras-14, was advertised for sale. The appellant for purposes of his occupation purchased the premises on 23rd October, 1967 as per registered document No. 1633 of 1967, in Sub-Registrar's Office, Mylapore. The respondent was then a tenant of the suit premises under the vendor. After the purchase, he attorned in favour of the appellant and has been paying rent. An eviction order was passed by consent against the appellant in H.R.C. No. 1924 of 1967, on 27th January, 1968. He was given time till 27th January, 1969, to vacate the premises, of which he was in occupation as a tenant, by virtue of the said decree. On the same day *i.e.*, 27th January, 1968 the appellant issued two notices to the respondent his tenant, in respect of the suit premises, terminating the tenancy of the Respondent under section 106 of the Transfer of Property Act, and calling upon him to quit and deliver vacant possession on 29th February, 1968. The two notices were given because of the fact that the first notice had asked for vacant possession on 28th February, 1968 and to avoid any objection regarding the first notice probably the second notice was also given asking for possession on 29th February, 1968. In both the notices, the appellant had referred to the purchase of the bungalow in question for his own occupa-

tion and also attributed knowledge of the said purpose to the tenant. There is a reference to the appellant being a tenant of premises No. 2, Lakshmipuram, 1st Street, Madras-14, and to his having no other house of his own in the city of Madras except the suit premises. It is further stated that in view of the fact that an eviction order against him has been passed on 27th January, 1968, in H.R.C. No. 1924 of 1967, the appellant requires his own bungalow, namely, the suit premises in the occupation of the respondent for his own *bona fide* use and occupation.

3. As the respondent did not surrender possession of the premises, the appellant filed H.R.C. No. 983 of 1968, in the Court of Small Causes, Madras under section 10 (3) (a) (*i*) of the Madras Buildings (Lease and Rent Control) Act, 1960, (hereinafter referred to as the Act). In this petition, after referring to the purpose of the suit premises, as well as the order of eviction passed against him in H.R.C. No. 1924 of 1967, the appellant has stated that he has no other house of his own anywhere in the city of Madras excepting the suit premises of which the respondent is the tenant. He has further averred that he has terminated the tenancy of the respondent by issuing notices on 27th January, 1968 and that the tenant has not vacated the premises though he has received the notice. There is also a reference to the fact that the respondent is not in essential service and that the suit premises is not exempt under section 30 of the Act. He has further stated that he requires the house for his *bona fide* use and occupation. Accordingly he prayed for eviction of the respondent and for possession being delivered to him.

4. The respondent filed two counter-affidavits, one on 19th July, 1968 and another on 14th January, 1969. In the former he has raised the contention that he is not a tenant of the suit premises, either under the appellant or under the previous owner of the premises. According to him, the tenant of the premises was and continues to be at the relevant time M/s. R. M. Seshadri, a partnership firm. He has further pleaded that as he was never a tenant, the claim made by the appellant of having terminated his tenancy is meaningless. Finally he has stated that the application is not maintainable against him and prayed for its being dismissed. In the additional counter-affidavit, the respondent pleaded that the appellant does not require the house for his occupation and that his claim is not *bona fide*. He has also controverted the claim of the appellant that an eviction order had been passed against him in H.R.C. No. 1924 of 1967. In any event, the order of eviction against the appellant is a collusive one and is only a device to evict the respondent. He further pleaded that the purchase by the appellant itself is not lawful. Finally he raised a contention that the tenant, M/s. R. M. Seshadri, has spent enormous amounts on the house acting on the assurance of its previous owner that the house would never be sold and the tenant of the premises would never be evicted. Finally there is a challenge also to the notices determining the tenancy not being in accordance with law.

5. The enquiry before the Court of Small Causes appears to have commenced on 16th January, 1969. The appellant was examined on that day as P.W. 1 and his evidence appears to have spread over till 20th February, 1969. In the course of his evidence, he has spoken to his being a tenant of a house of which one Seethalakshmi Ammal was the landlady and to her having filed an application for eviction against him, to his purchasing the present suit premises on 23rd October, 1967, for purposes of his own occupation, to the respondent having been a tenant against the original landlord at the time of purchase and later attorned to him,

to the payment of rent by the respondent subsequent to the purchase and to the notices issued to the respondent terminating his tenancy under section 106 of the Transfer of Property Act, and requiring him to deliver possession of the property for purposes of his occupation. He has also filed a large volume of exhibits in respect of the matters spoken to by him before the Court. He has particularly mentioned the fact that he purchased the said house for purposes of his occupation, as he was under orders of eviction in H.R.C. No. 1924 of 1967, and to his having no other house in the city of Madras. The last exhibit that was filed by him was Exhibit P-45, which was a certified copy of the order in H.R.C. No. 1924 of 1967, which showed that an order of eviction had been passed against the appellant on 27th January, 1968 and he was given time till 27th January, 1969 for vacating the premises. It was no doubt a consent order. But all the exhibits filed by him clearly go to establish that his evidence that he required the suit premises *bona fide* for his own occupation, was true. The respondent had not chosen to cross-examine the appellant. On 31st March, 1969 both parties entered into a compromise in the following terms :

" Memo of Compromise

(1) The Respondent hereby withdraws his defence in the aforesaid petition and submits to a decree for eviction unconditionally.

(2) The Respondent prays that time for vacating up to 5th June, 1969 might please be given and the petitioner agrees to the same.

(3) The Respondent agrees to vacate the petition premises and hand over possession of the entire petition premises to the petitioner on or before the said date *viz.*, 5th June, 1969 without fail under any circumstances and undertakes not to apply for extension of time.

(4) It is agreed by both the parties that this Memo. of Compromise is executable as a Decree of Court.

Dated at Madras this the 31st day of March, 1969."

The compromise petition was signed by both the appellant and the respondent as well as the advocates appearing for them. The Court, after referring to the petition of the landlord being under section 10 (3) (*a*) (i) of the Act on the ground of his own occupation, passed the following order :—

"Compromise memo. filed and recorded. By consent eviction is ordered granting time to vacate till 5th June, 1969. No cost."

The terms of the compromise, which have been already set out, were also incorporated in the order.

6. It will be noted that the respondent had raised substantially the following defence to the application filed by the appellant, namely :—

(1) he was not a tenant of the premises and that on the other hand, the tenant of the premises was M/s. R. M. Seshadri, a partnership firm ;

(2) the claim of the appellant that he requires the house for his occupation is not *bona fide* :

(3) the purchase of the premises by the appellant is not lawful ;

(4) the tenant, M/s. R. M. Seshadri, has spent enormous amounts by way of repairs and improvements ; and

(5) the notice determining the tenancy is not in accordance with law. It was to meet the above defence and also to establish his claim of requiring the premises *bona fide* for his own occupation, the landlord-appellant gave the evidence

and also produced about 45 exhibits. It is needless to state that the respondent, who is a retired I. C. S. Officer and an advocate, must have been fully aware of the averments made by the landlord, the pleas raised in defence as well as the nature of the evidence led by the landlord to meet his defence. The respondent, apart from not having cross-examined the landlord, when he gave evidence, has also by the compromise withdrawn all his defence to the application filed by the landlord and submitted to a decree for eviction unconditionally. It is with this background that one has to appreciate the nature of the decree passed by the Court on 31st March, 1969.

7. It is also seen from the records that the appellant paid a sum of Rs. 20,000 on 31st March, 1969 to the respondent towaıds the cost of repairs and improvements effectd by him during his occupation of the suit premises. On the same date, as the compromise *i.e.*, 31st March, 1969, the respondent passed a letter to the appellant. In this letter after referring to the compromise filed in the Court as well as the order passed thereon, he gave an undertaking to vacate the premises on or before 5th June, 1969. He also acknowledged the receipt of the sum of Rs. 20,000 from the landlord towards the cost of repairs and improvements. The respondent has also further agreed to refund the sum of Rs. 20,000 if he does not vacate the premises within time and he has also further agreed to pay an additional sum of Rs. 10,000 as damages. We are not concerned with this sum of Rs. 20,000 or the further agreement of the respondent to pay damages. The respondent has further stated in the said letter that in the event of his failure to vacate the premises within time, the landlord is at liberty to execute the necree of eviction without any further doicet to him.

8. The assurance and the undertaking given by the respondent to abide by the compromise decree and to vacate the premises without raising any objection have proved to be of no avail, as will be seen from th events that followed. When the time for delivery of property was drawing near, the respondent's son, one S. M. Sundaram, filed a suit in the City Civil Court, Madras, for a declaration that the purchase by the appellant of the suit property was void. The son also obtained an interim injunction against the appellant from executing the order of eviction passed in H. R. C. No. 983 of 1968, and disturbing his possession. The suit was tried on merits and was ultimately dismissed by the City Civil Court on 12th December, 1969 with costs of the appellant. According to the appellant, this suit was engineered by the respondent himself in order to put off his eviction from the suit property.

9. After the dismissal of the above suit, the appellant filed execution petition No. 953 of 1969, in the City Civil Court, Madras (which was the competent Court for purposes of execution) to execute the order of eviction against the respondent in H. R. C. No. 983 of 1968. The respondent filed E. A. No. 1314 of 1969, objecting to the execution of the decree on the ground that it was a nullity and inexecutable ; and as such he prayed for the warrant of possession issued in the Execution Petition to be recalled and to dismiss the Execution Petition itself. His main plea in this application was that the decree sought to be executed was one based on compromise or consent without the Rent Control Court having satisfied itself by an independent consideration regarding the *bona fide* requirement of the property by the landlord for his own occupation ; and as such the decree contravened section 10 of the Act. This application was opposed by the

appellant in a lengthy counter-affidavit. In this counter-affidavit, the landlord, after referring to the various items of evidence adduced before the Court, which have been referred to earlier, has stated that it was when the respondent found that the pleas raised by him could not be sustained and that the landlord's case was true that he unconditionally withdrew his defence and submitted to a decree. He has further pleaded that the decree sought to be executed does not suffer from any infirmity.

10. The learned City Civil Judge by his order dated 18th March, 1970 overruled the objections raised by the respondent and dismissed E. A. No. 1314 of 1969, and gave time to the respondent till 20th April, 1970 to vacate and deliver possession of the property.

11. The respondent carried the matter to the High Court in Civil Revision Petition No. 797 of 1970. The High Court by its judgment and order dated 15th September, 1970 has reversed the order of the City Civil Court and accepted the contentions of the respondent. The learned Judge has held that the decree for eviction dated 31st March, 1969 is solely passed on the basis of the compromise and the Rent Controller has not applied his mind to satisfy himself whether the *bona fide* requirement of the landlord has been established. It is the further view of the High Court that even if there was enough material before the Rent Control Court, when it passed the order of eviction by consent, the decree will, nevertheless, be void so long as the Rent Controller has not given his decision regarding the requirement of the landlord being *bona fide*. On this line of reasoning the learned Judge held that the eviction order is a nullity and is not executable.

12. Mr.M. C. Setalvad, learned Counsel for the appellant, has urged that the High Court has misunderstood and mis-interpreted the decisions of this Court bearing on the point. He pointed out that the appellant had specifically pleaded that he required the house *bona fide* for his own occupation, which is one of the circumstances under which a landlord can claim eviction of the tenant under the Act. The circumstances under which the house was required by him were also spoken to by the landlord when he gave evidence and he sought support by filing as many as forty-five exhibits before the Court. The respondent had denied the plea of the landlord in his counter-affidavit. Nevertheless, when the entire evidence was placed before the Court by the landlord, the tenant did not choose to cross-examine him, as he must have felt that the landlord's claim would be accepted by the Court and his defence rejected. It was under those circumstances that the respondent unconditionally withdrew his defence and submitted to a decree for eviction. That conduct of the respondent clearly establishes that he has accepted as true the claim of the landlord that he *bona fide* required the premises for his own use and occupation. The materials on record also show that the Court was satisfied about the *bona fide* requirement of the landlord and hence it accepted the compromise and made it a decree of Court. Under those circumstances, the Counsel contended that it cannot be said that the decree is one passed only on the basis of the compromise so as to make it void.

13. Mr. Tarkunde, learned Counsel for the respondent, urged that the decree for eviction has been passed exclusively on the basis of the compromise entered into by the parties. There is no indication that the Court at any stage applied its mind and satisfied itself regarding the premises being required by the land-

lord *bona fide* for his own occupation. The relevant provision of the Act, the counsel pointed out, is quite clear and it makes it mandatory that the Court must apply its mind and satisfy itself that the claim for eviction falls within one or other of the provisions which enables a landlord to get possession. He further pointed out that if the satisfaction of the Court is not expressed in the decree, the executing Court has no option but to hold that the same is void, as laid down by this Court, and it cannot go into the question whether from the materials on record the Rent Control Court was satisfied or not. Such an enquiry, it is pointed out, will be asking the executing Court also to go into the question whether the landlord has made out a case for eviction—a question which is within the exclusive jurisdiction of the Rent Control Court. Mr. Tarkunde, finally pointed out that the decision of the High Court holding that the decree in question is void is correct, as it is in accordance with the decisions of this Court.

14. It is now necessary to refer to the material provisions of the Act. Section 10 deals with eviction of tenants. The relevant part of section 10, necessary for our purpose, is as follows :

> " 10. *Eviction of tenants*—(1) A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16:
>
> *   *   *   *
>
> 3 (*a*) A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building—
>
> (i) in case it is a residential building if the landlord requires it for his own occupation or for the occupation of his son and if he or his son is not occupying a residential building of his own in the city, town or village concerned :
>
> *   *   *   *
>
> (*e*) The Controller shall, if he is satisfied that the claim of the landlord is *bona fide*, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and if the Controller is not so satisfied he shall make an order rejecting the application :
>
> *   *   *   *
>
> Provided further that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building and may extend such time so as not to exceed three months in the aggregate."

15. Section 10 (1) places an embargo on the right of a landlord to get a tenant evicted except in accordance with the provisions of that section or sections 14 to 16. We are not concerned with sections 14 to 16 in this case. Sub-section (2) enumerates certain circumstances under which a landlord can ask for eviction. We are not also concerned, with that provision. Sub-section (3) again enumerates certain other circumstances under which a landlord, subject to the provisions of clause (*d*), can ask for possession of the building from the tenant. It is accepted by both parties that clause (*d*), has no application. Sub-clause (*i*), which deals with residential building, enables a landlord to ask for possession of a building in the circumstances mentioned therein. Under sub-clause (*e*), if the Controller is satisfied that the claim of the landlord is *bona fide*, he may pass an order of eviction.

16. In this case, the landlord has asked for eviction on the ground that he requires the premises for his own occupation. The Controller can pass an order in his favour only if he is satisfied that his claim is *bona fide*. The statute says so and that has to be given full effect. The question is whether in the case before us, it can be stated that the Controller was so satisfied when he passed the order of eviction on 31st March, 1969.

17. Our attention has been drawn to certain English decisions rendered under the Rent Restrictions Act, wherein it has been held that though the Court has jurisdiction to order possession in favour of a landlord only on one or other of the specified statutory grounds, the Court may act on an admission made by a tenant in that behalf and pass an order of eviction without being obliged to hear a case out. It is not necessary for us to refer to those decisions as, in our opinion, the case on hand will have to be decided in accordance with the principles laid down by this Court.

18. There are three decisions of this Court which require to the considered. In *Bahadur Singh* v. *Muni Subrat Dass*[1], a decree for eviction passed on the basis of a compromise between the parties, was held, by this Court to be a nullity as contravening section 13 (1) of the Delhi and Ajmer Rent Control Act, 1952. The facts therein were as follows.

19. The tenant and the son of the landlord referred the disputes between them to arbitration. The landlord was not a party to this agreement. The arbitrators passed an award whereunder the tenant was to give vacant possession of the premises in favour of the landlord within a particular time. This award was made a decree of Court. The landlord, who was neither a party to the award nor to the proceedings which resulted in the award being made a decree of Court, applied for eviction of the tenant on the basis of the award. The tenant resisted execution by raising various objections under section 47 of the Code of Civil Procedure. One of the objections, was that the decree for eviction based upon the award was a nullity as being opposed to the Delhi and Ajmer Rent Control Act, 1952. This Court held that the decree directing the tenant to deliver possession of the premises to the landlord was a nullity, as it was passed in contravention of section 13 (1) of the relevant statute. After quoting the sub-section, this Court further held that the decree for eviction passed according to an award, in a proceeding to which the landlord was not a party, and without the Court satisfying itself that a statutory ground of eviction existed was a nullity and cannot be enforced in execution. It will be seen from this decision that the decree was held to be a nullity because the landlord was not a party thereto, and also because the Court had not satisfied itself that a ground for eviction, as required by the statute, existed. This decision is certainly an authority for the proposition that a Court ordering eviction has to satisfy itself that a statutory ground of eviction has been made out by a landlord. How exactly that satisfaction is to be expressed by the Court or gathered from the materials, has not been laid down in this decision, as this Court was not faced with such a problem.

20. In *Kaushalya Devi* v. *K. L. Bansal*,[1] the question again rose under the same Delhi statute regarding the validity of a decree passed for eviction on compromise. The plaintiff therein filed a suit for eviction of the tenant on two grounds :

(*a*) the premises were required for their own use ; and

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1. (1969) 2 S.C.W.R. 51 ; (1969) 2 S.C.R. 432.

1. (1969) 2 S.C.R. 1048 : (1969) 2 S.C.J. 145 : A.I.R. 1970 S.C. 838.

(*b*) the tenant had committed default ni payment of rent.

The tenant filed a written statement denying both these allegations. He disputed the claim of the landlord regarding his requiring the premises for his own use *bona fide* and also the fact of his being in arrears. When the pleadings of the landlord and the tenant were in this state, both parties filed a compromise memo. in and by which they agreed to the passing of a decree of eviction against the tenant. Representations to the same effect were also made by the Counsel for both parties. The Court passed the following order :

> " In view of the statement of the parties Counsel and the written compromise, a decree is passed in favour of the plaintiff against the defendant."

The tenant did not vacate the premises within the time mentioned as per the compromise memo. On the other hand, he filed an application under section 47, Civil Procedure Code, pleading that the decree is void as being in contravention of section 13 of the Delhi statute. The High Court held that the decree was a nullity, as the order was passed solely on the basis of the compromise without indicating that any of the statutory grounds mentioned in section 13 existed. Following the decision in *Bahadur's Singh case*[1], this Court upheld the order of the High Court. Here again, it will be seen that the manner in which the Court's satisfaction is to be expressed or gathered has not been dealt with.

21. A similar question came up again before this Court in *Ferozi Lal Jain* v. v. *Man Mal*[2]. The landlord filed an application for eviction of the tenant on the ground that he had sublet the premises without obtaining, his consent in writing. Subletting, without the consent of the landlord in writing, was one of the grounds under section 13 (1) of the Delhi statute entitling a landlord to ask for eviction. The tenant denied the allegation that he had sublet the premises. Both the landlord and the tenant entered into a compromise and the Court, after recording the same, passed the following order :

> " As per compromise, decree for ejectment and for Rs. 165 with proportionate costs is passed in favour of the plaintiff and against the defendant. The parties shall be bound by the terms of the compromise. The terms of the compromise be incorporated in the decree-sheet....."

As the tenant did not surrender possession of the properties within the time mentioned in the compromise memo., the landlord levied execution. It was resisted by the tenant on various grounds one of which was that the decree for eviction was a nullity, being in contravention of section 13 of the Delhi statute. This contention was accepted by the execution Court, as well as by the High Court. This Court, after a reference to the provisions of section 13, held that a decree for recovery of possession can be passed only if the Court concerned is satisfied that one or other of the grounds mentioned in the section is established. This Court, further observed :

> "From the facts mentioned earlier, it is seen that at no stage, the Court was called upon to apply its mind to the question whether the alleged subletting is true or not. Order made by it does not show that it was satisfied that the subletting complained of has taken place, nor is there any other material on record to show that it was

1. (1969) 2 S.C.W.R. 51 : (1969) 2 S.C.R. 432.
2. (1970) Ren.C.R. 375 : A.I.R. 1970 S.C. 794.

so satisfied. It is clear from the record that the Court had proceeded solely on the basis of the compromise arrived at between the parties. That being so there can be hardly any doubt that the Court was not competent to pass the impugned decree. Hence the decree under execution must be held to be a nullity."

22. Reference was also made to the two earlier decisions holding such decrees to be void. It is significant to note that this Court in the last mentioned decision referred to the facts leading upto the compromise decree, namely, the basis of the claim of the landlord, the denial by the tenant and both of them filing a memo. of compromise without any reference to the plea of subletting made by the landlord. In the said decision this Court has held that the compromise decree is void, as there could have been no satisfication of this Court regarding the statutory requirement in view of the following three circumstances :

(1) At no stage the Court was called upon to apply its mind to the question whether the plea of subletting is true or not.

(2) The order made by the Court does not show that it was satisfied that the subletting complained of has taken place.

(3) There was no other material on record to show that the Court was so satisfied.

The view of this Court further is that the decree for eviction has been passed solely on the basis of the compromise arrived at between the parties.

23. In the last decision, in our opinion, there is an indication as to how the satisfaction of a Court can be expressed or gathered in a particular case. If a stage had been reached in a particular proceeding for a Court to apply its mind regarding the existence of a statutory condition, it may be held that it was so satisfied about the plea of the landlord. Again from other material on record, it can be inferred that the Court was so satisfied.

24. We are not inclined to accept the contention of Mr. Tarkunde, that the decree for eviction in the case before us has been passed solely on the basis of the compromise arrived at between the parties. No doubt a reading of the order of the Court dated 31st March, 1969 isolated from all other circumstances may give the impression that the decree for eviction is passed because of the compromise between the parties. It is no doubt true that the order on the face of it does not show that the Court has expressed it satisfaction that the requirement of the landlord is *bona fide*. If the Court had expressed its satisfaction in the order itself, that will conclude the matter. That the Court was so satisfied can also be considered from the point of view whether a stage had been reached in the proceedings for the Court to apply its mind to the relevant question ? Other materials on record can also be taken into account to find out if the Court was so satisfied. The High Court has proceeded on the basis that even if there was material before the Court, when it passed the order of eviction by consent, from which it can be shown that the Court was satisfied about the requirement of the landlord being *bona fide*, nevertheless such an order will be a nullity unless the Rent Controller has given his decision in favour of the landlord. In our opinion, this view is erroneous.

25. We have very exhaustively referred to the plea of the landlord as well as the evidence let in by him regarding his requiring the building *bona fide* for his own occupation. There is no controversy that if such a plea is established,

an order of eviction of the tenant can be obtained by the landlord under section 10 of the Act. The respondent no doubt at the initial stage denied the claim of the landlord. The landlord gave evidence on various matters with particular reference to his requiring the house *bona fide* for his own occupation. He had also filed as referred by us earlier as many as 45 Exhibits, one of which was the order of eviction obtained against him, being Exhibit 45. The respondent did not cross-examine the appellant. When the evidence of the landlord was before the Court supported, as it was, by the innumerable exhibits filed by him, it can surely be stated that a stage had been reached when the Controller was called upon to apply his mind to the question whether the plea of the landlord that he required the premises for his own occupation was *bona fide*. There is the further circumstance that the tenant did not cross-examine the plaintiff. On the other hand, he entered into a compromise in and by which he withdrew his defence and submitted to a decree for eviction unconditionally. His withdrawal of the defence, after the plaintiff had given evidence and filed exhibits in support of his plea, clearly shows that he accepted as true the claim of the landlord that he requires the premises *bona fide* for his own occupation. He has accepted the position that the landlord has made out the statutory requirement, entitling him to ask for possession of the premises. It is this unconditional withdrawal of the defence regarding the statutory condition pleaded by the landlord, and the compromise following it that was accepted by the Court and a decree for eviction passed thereon. Under those circumstances, when the tenant has accepted the plea of the landlord, in our opinion, it is futile to hold that the Rent Controller must again embark upon an enquiry regarding the requirement of the landlord being *bona fide* and adjudicate upon the same. Of course, if there is a dispute between the landlord and the tenant, the Court must decide the matter and adjudicate upon the plea of the landlord.

26. The true position appears to be that an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact *viz.*, the existence of one or more of the conditions mentioned in section 10 were shown to have existed when the Court made the order. Satisfaction of the Court, which is no doubt a pre-requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding. If at some stage the Court was called upon to apply its mind to the question and there was sufficient material before it, before the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the Court was satisfied about the grounds on which the order of eviction was based.

27. It is no doubt true that before making an order for possession the Court is under a duty to satisfy itself as to the truth of the landlord's claim if there is a dispute between the landlord and tenant. But if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the Court to act on that admission and make an order for possession in favour of the landlord without further enquiry. It is no doubt true that each case will have to be decided on its own facts to find out whether there is any material to justify an inference that an admission, express or implied, has been made by the tenant about the existence of one or other of the statutory grounds. But in the case on hand, we have already referred to the specific claim of the landlord as well as to the fact of the tenant withdrawing his defence. According to us, such with-

drawal of the defence expressly amounts to the tenant admitting that the landlord has made out his case regarding his requiring the premises for his own occupation being *bona fide*. In the three decisions of this Court, to which we have already referred, the position was entirely different. In none of those cases was there any material to show that the tenant had expressly or impliedly accepted the plea of the landlord as true. Therefore those decisions do not assist the respondent-tenant.

28. For all the reasons mentioned above, it cannot be held, in the particular circumstances of this case, that the decree for eviction has been passed solely on the basis of the compromise entered into between the parties. On the other hand, it is clear from the various matters referred to, that the Court was satisfied about the *bona fide* requirement of the landlord. Therefore, the decree for eviction is neither void nor inexecutable.

29. Mr. Tarkunde, learned Counsel, contended that if the execution Court is to find out whether the Court, which passed the decree, was satisfied about the statutory requirement in a particular case, it will have to conduct a very elaborate enquiry. We are not impressed with this contention. Once it is accepted that the question about the decree, being void and as such not executable on any ground available in law can be raised before the executing Court, it is needless to state that the executing Court will have to adjudicate upon that plea and for that purpose the relevant materials have to be considered. If that is so, there is no insurmountable difficulty, as envisaged by Mr. Tarkunde, in an executing Court considering whether a particular decree for eviction is void as being contrary to the relevant sections of the statute governing the matter.

30. Mr. Tarkunde, learned Counsel, contended that the tenant had disputed the title of the landlord as well as the validity of the notice issued under section 106 of the Transfer of Property Act. As those matters have not been considered by the Courts below, as requested the proceedings may be remanded for this purpose. We are not inclined to accede to this request. The tenant raised these objections also in his original plea, but he has unconditionally withdrawn all his defence. That means those pleas also no longer survive for consideration.

31. In the result the appeal is allowed. The order and judgment dated 15th September 1970, of the High Court are set aside and the order dated 18th March, 1970 of the City Civil Court, Madras, will stand restored with costs throughout.

Alagiriswami, J.—I agree with the order proposed by my learned brother, Vaidialingam, J., but I think it is necessary to add a few words of my own. The law on this subject has got into a labyrinth and I think it is time we took a hard look at it and laid down the correct position.

33. The learned single Judge of the Madras High Court, who allowed the respondent's petition, was mainly influenced by the judgments of this Court in *Bahadur Singh* v. *Muni Subrat Dass*[1], *Ferozi Lal Jain* v. *Man Mal*[2], and *Kaushalya Devi* v. *K. L. Bansal*[3]. Before him the cases in *Remon* v. *City of London Real Property Co. Ltd.*[4]; and *Thorne* v. *Smith*[5] and *Middleton* v. *Baldock (T. W.)*[6], were cited in support of the contention taken on behalf of the landlord, as also decisions in *Jagan*

1. (1969) 2 S.C.W.R. 51: (1969) 2 S.C.R. 432
2. (1970) Ren.C.R. 375: A.I.R. 1970 S.C. 794.
3. (1969) 2 S.C.R. 1048: (1969) 2 S.C.J. 145: A.I.R. 1970 S.C. 838.
4. (1921) 1 K.B. 49.
5. (1947) 1 K.B. 307.
6. (1950) 1 K.B. 657.

Nath v. *Jatinder Nath*[1], and *Vas Dav* v. *Milkhi Ram*[2]. In spite of this he felt bound by the decisions of this Court and on the ground that as the order of the Rent Controller on the face of it does not show that he had applied his mind and was satisfied that there was a *bona fide* requirement of the premises by the landlord for his personal occupation it was a nullity. He thought that even if there was enough material before the Court when it passed the order of eviction by consent so long as the Rent Controller had not applied his mind and given his decision in the matter as to whether the respondent was *bona fide* in requiring the premises for his own occupation, the eviction order cannot be held to be an order passed on merits under section 10 (3) of the Act. He further thought that having due regard to the decisions of this Court it was not possible for him to accept the contention of the learned Counsel for the appellant that a finding on merits in his favour had to be implied from the order of the Rent Controller in view of the existence of adequate material before him to support an implied finding. He also thought that even in a case where the tenant *bona fide* admits that the ground of eviction existed the Rent Controller must apply his mind and hold, basing himself on such admission by the tenant, that the ground for eviction put forward by the landlord existed and that he is entitled, to an eviction order, without solely relying on the compromise.

34. I am of opinion that in this approach the learned Judge relied more on the form than the substance of the matter. The true approach has been pointed out by our learned brother, Vaidialingam, J. He has pointed out that while the decision in *Bahadur Singh's case*[3], was an

1. A.I.R. 1961 Punj. 574.
2. A.I.R. 1960 Punj. 514.
3. (1969) 2 S.C.W.R. 432: (1969) 2 S.C.R. 51.

authority for the proposition that a Court ordering eviction has to satisfy itself that a statutory ground of eviction has been made out by a landlord; how exactly that satisfaction was to be expressed by the Court or gathered from the materials, has not been laid down in that decision that in *Kaushalya Devi's case*[1], also the manner in which the Court's satisfaction was to be expressed or gathered has not been dealt with; nor has the decision in *Ferozi Lal's case*[2], given an indication as to how the satisfaction of a Court could be expressed or gathered in a particular case. He has pointed out that "if a stage had been reached in a particular proceeding for a Court to apply its mind regarding the existence of a statutory condition, it may be held that it was so satisfied about the plea of the landlord. Again, from other material on record it can be inferred that the Court was so satisfied." He has also pointed out how in the particular circumstances of the present case as the tenant had withdrawn his defence and submitted to a decree for eviction unconditionally, he had accepted the claim of the landlord that he required the premises *bona fide* for his own occupation; that he has accepted the position that the landlord has made out the statutory requirement entitling him to ask for possession of the premises; that by this unconditional withdrawal of the defence regarding the statutory condition pleaded by the landlord, and the compromise following it that was accepted by the Court, the tenant had accepted the plea of the landlord, and it is futile to hold that the Rent Controller must again embark upon an enquiry regarding the requirement of the landlord being *bona fide* and adjudicate upon the same. He has also pointed

1. (1969) 2 S.C.R. 1048: (1969) 2 S.C.J. 145: A.I.R. 1970 S.C. 838.
2. (1970) Ren.C.R. 375: A.I.R. 1970 S.C. 794.

out that the true position appears to be that an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact, *viz.*, the existence of one or more of the conditions mentioned in section 10 were shown to have existed when the Court made the order ; that the satisfaction of the Court, which is no doubt a pre-requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding ; and that if at some stage the Court was called upon to apply its mind to the question and there was sufficient material before it before the parties invited it to pass an order in terms of their agreement it is possible to postulate that the Court was satisfied about the grounds on which the order of eviction was based. He has further pointed out that if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the Court to act on that admission and make an order for possession in favour of the landlord without further enquiry. It is on these grounds that he has come to the conclusion that the facts in this case satisfied these tests and, therefore, the order of the Madras High Court should be set aside. In so for as it is necessary for the purpose of this case this is a satisfactory conclusion.

35. Let us, however, consider this question based on principles. The Rent Controller is a quasi-judicial Tribunal created for the purpose of discharging certain functions under the Act. Not being an ordinary civil Court to which the provisions of section 9 of the Code of Civil Procedure, apply the Rent Controller gets jurisdiction to order eviction of a tenant only in case one or other of the various circumstances laid down in the Act like the *bona fide* requirement of the landlord of the building for his own occupation, wilful default in the payment of rent by the tenant etc., are satisfied. But once these grounds are alleged and found to be established no further question of its jurisdiction arises. A quasi-judicial Tribunal acting within jurisdiction may decide rightly or may decide wrongly. If it decides wrongly there are provisions in the Act itself for appeal, revision and ultimately even revision by the High Court under the provisions of section 115 of the Civil Procedure Code, or even under Article 227 of the Constitution. Of course, by a wrong decision on a jurisdictional fact a quasi-judicial Tribunal with a limited jurisdiction cannot confer jurisdiction on itself. But in the case of a compromise such a question does not arise. Whereas in this case the landlord has asked for possession of the building on the ground that he wants it for his own personal occupation which is one of grounds for eviction under the Act, the Rent Controller has, of course, to be satisfied that this requirement is real and *bona fide*. In regard to his decision on this point, as already pointed out there are provisions for appeal, revision etc. The words in section 10 "if the Controller is satisfied" do not have any special significance. An ordinary civil Court trying a suit either on a mortgage or on a promissory note has necessarily to be satisfied about the execution of the document, the passing of consideration etc., before it can pass a decree on the basis of either the mortgage or the promissory note. Therefore, the fact that under section 10 the Controller has to be satisfied that the ground for eviction exists does not mean that his satisfaction cannot be based on the same considerations on the basis of which the civil Courts can be satisfied. Let us take a suit on a promissory note. The defendant can appear before the Court and admit the plaintiff's claim. The suit can be decreed on that basis. The defendant may be absent and the case may be set *ex parte*. In such a case the plaintiff

lets in the evidence and on the basis of that evidence the suit may be decreed. Or the defendant might appear and file a written statement denying the execution of the promissory note or denying the receipt of consideration or even putting forward a plea of discharge. Now in these circumstances the Court will not pass a decree unless it is satisfied that the promissory note was executed, that consideration passed and that it had not been discharged. This does not prevent the defendant at any stage of the suit either submitting to a decree or entering into a compromise consenting to a decree. The fact that the consent to a decree takes the form of a compromise cannot make the consent any the less a consent. Under Order 23, rule 3 of the Code of Civil Procedure, all matters to be decided in a suit can be settled by menas of a compromise. The application of the Code of Civil Procedure, is not excluded in proceedings before the Rent Controller and in any case there is no reason why the principle underlying Order 23, rule 3, should not apply to those proceedings. It is not clear why a tenant should be treated as a minor or as an imbecile. In the case of a minor Order 32, rule 7 of the Code of Civil Procedure, specifically lays down that the Court should be satisfied before it sanctions a compromise binding the minor. There is no such provision in the Rent Control Act. I think, therefore, the time has come when a hard look must be taken on this point and it should be held that there is no objection to a compromise consenting to an order of eviction in Rent Control Proceedings.

36. Of course, a compromise can be valid only if it is in accordance with the Act, *i.e.*, only if the landlord has asked for possession of the building on one of the grounds laid down in the Act. For instance, a landlord merely on the ground that he is the owner of the building cannot come to the Rent Controller and ask for possession of the property and the Rent Controller cannot pass a valid order merely because the tenant submits to an order of eviction. *Bahadur Singh's case*[1], is an instance in point. In that case the landlord did not even apply for eviction. But where the landlord specifically asks for possession on any one of the grounds on the basis of which he is entitled to ask for possession under the provisions of the Act there will be no objection to the tenant either submitting to an order of eviction or entering into a compromise submitting to an order of eviction There is no magic in the words "if the Controller is satisfied" in section 10 (3)(*e*). The section would have been as effective even if those words were not there and the section had read as follows :

> "If the claim of the landlord is *bona fide* the Controller shall make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller; otherwise he shall make an order rejecting the application."

37. It is not necessary to refer to the three decisions of this Court which have been sufficiently discussed by our learned brother, Vaidialingam, J.

38. I may now refer to certain English decisions. In *Barton* v. *Fincham*[2], Scrutton, L.J., observed:

> "If the tenant is willing to go out, I do not see why any order is wanted; let him go ; but as at present advised I do not see any reason why the judge on being satisfied that a tenant is then ready to go out (not that he was once willing but has changed his mind) should not make an order for possession."

Lord Atkin, L. J., observed :

1. (1969) 2 S.C.R. 432: (1969) 2 S.C.W.R. 51.
2. (1921) 2 K.B. at 291 298.

"If the parties before the Court admit that one of the events has happened which give the Court jurisdiction, and there is no reason to doubt the *bona fides* of the admission, the Court is under no obligation to make further enquiry as to the question of fact."

In *Thorne* v. *Smith*[1], after referring to the observations of Atkin, L. J. and Scrutton, L. J., (*supra*), Bucknill, L. J. pointed out :

"But in the present case it is, I think reasonably clear that the tenant, in effect, agreed to the order because at the time when the landlord asked the Court to make the order the landlord by his own statements had satisfied the tenant that he intended to occupy the house himself and he, the tenant, could not hope successfully to resist the claim. If the tenant had stated this expressly in the Court the judge would surely have had jurisdiction to make the order on that ground. I think in the events which happened here, the tenant being legally represented, the judge was entitled to proceed on the view that this was the true position. Before making an order for possession the judge is under a duty to satisfy himself as to the truth if there be a dispute between landlord and tenant, but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Acts, without further inquiry."

Lord Justice Somervell referred to rule 18 of the Rules made under the Act of 1920, there under consideration, to the following effect :

"Where proceedings are taken in the county Court for the recovery of rent of any premises to which the Act applies or of interest on a mortgage to which the Act applies or for the recovery of possession of any premises to which the Act applies, or for the ejectment of a tenant from any such premises, *the Court shall, before making an order for the recovery of such rent or interest, or for the recovery of possession or ejectment, satisfy itself* that such order may properly be made, regard being had to the provisions of the Act."

and observed :

"Nothing in the decision that we are giving in any way, as it seems to me, diminishes the scope of that rule. We are deciding that on what happened in this case, the tenant being, as he was, legally represented, the county Court Judge was rightly 'satisfied.' that the order could properly be made. The other point arises from the use of the word 'consent' as applied to the order made herein. The expression 'a consent order' may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word 'consent' which may have a wider meaning and cover cases where the 'consent' was the result of an arrangement which could not properly be made the basis of an order."

These observations very clearly show that the fact that the Court had to satisfy itself did not prevent a consent order. It also shows clearly that a compromise or arrangement as long as it is not inconsistent with the provisions of the Act would not be objectionable. In *Middleton* v. *Baldock* (*T.W.*)[1], it was held :

1. (1947) 1 K.B. 307.

1. (1950) 1 K.B. 657.

"that a landlord seeking to recover possession against a tenant protected by the Rent Restriction Acts must establish the right to possession on one of the grounds stated in the Acts, unless after possession had been claimed on such a ground, the tenant admitted facts to support it, in which event the Court need not itself investigate the matters of fact "admitted."

39. In its decision in *Babu Ram Sharma* v. *Bal Singh*[1], the Division Bench of the Punjab High Court of which our learned brother Dua, J., was a member, had this to say on the point at issue :

"According to this section the landlord is entitled to seek eviction of his tenant on certain grounds and the Rent Controller, after giving notice to the tenant, is empowered to give his own finding and then to pass the necessary order. In the present case the ground on which the landlord had sought eviction was non-payment of rent. Such a ground is within the express language of section 13 of the aforesaid Act. It was, therefore, open to the Rent Controller to determine whether or not the allegation of the landlord that the tenant had not paid the rent was correct. It appears that the tenant admitted that he had not paid the rent as alleged by the landlord. In this view of things, I do not understand how it was necessary for the Controller to hold any further enquiry.

After fully considering the matter I am definitely of the opinion that if the compromise decree is based on the grounds on which the landlord could claim a decree for eviction under section 13 of the East Punjab Urban Rent Restriction Act, then it is within the jurisdiction and competence of the Rent Controller to pass such a decree with a default clause ; it is similarly competent for the civil Court to execute such a decree when default has occurred. The proviso to sub-section (2) of section 13 of the Act is not attracted in such circumstances as no question of extending time granted to the tenant for putting the landlord in possession arises. In the result my answer to the two questions referred would be in the affirmative."

In *Vas Dav* v. *Milkhi Ram*[1], Justice Grover of the Punjab High Court (as he then was) after referring to the three English cases, already referred to above, observed :

"From the above discussion of the English cases, the principle which has also been accepted by the Bench of this Court is quite clear that if the tenant admits after a suit for ejectment has been filed that the landlord is entitled to possession on one of the statutory grounds the Court can make an appropriate order or if the landlord has made some representation within the terms of the statute to the tenant and which is one of the ingredients of a ground on which possession can be ordered and the tenant accepts that representation and submits to an order, then also the Court will be fully justified in making a valid order of eviction. Each case, therefore will have to be decided on its own facts and it will have to be seen whether there is any material to justify an inference that an admission, be it express or implied, has been made by the tenant on the existence of one of the statutory grounds.

* * * * *

There is a good deal of force in the submissions of the learned Counsel for the landlord that enough material and evidence had come on the record to

1. (1959) 61 Punj. L.R. 33.

1. A.I.R. 1960 Punj. 514.

satisfy the Court as well as the tenant that the grounds on which ejectment had been sought would be ultimately established and when the tenant entered into the compromise, it was implicit in the aforesaid circumstances that he was admitting the correctness of the grounds which had been taken for his ejectment. I am, therefore, of the opinion that the tests which have been laid down by the authorities have been fully satisfied and it cannot be said that the decree which was passed on the basis of compromise was a nullity or could not be executed."

That is exactly the position here.

40. All these decisions amply support the proposition that I have put forward that an eviction order based on a compromise where the landlord has asked for possession on any one of the grounds on the basis of which he could ask for possession would be valid. This would, however, have to be considered when a proper occasion arises. The present appeal is allowed.

V.K. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—*H. R. Khanna and G. K. Mitter, JJ.*

Thulia Kali .. *Appellant**

v.

The State of Tamil Nadu.. *Respondent.*

(A) *Constitution of India* (1950), *Article* 136 —*Appeal under, in a criminal case—Reappraisal of evidence by Supreme Court—Practice.*

The Supreme Court does not normally reappraise evidence in an appeal under Article 136 of the Constitution, but that fact would not prevent interference with an order of conviction if on consideration of the vital prosecution evidence in the case, the Court finds it to be afflicted with *ex facie* infirmity.

In the instant case there are certain broad features of the prosecution story which create considerable doubt regarding the veracity of the prosecution evidence and it would not be safe to maintain the conviction on the basis of that evidence.

[*Para.* 10.]

(B) *Criminal Procedure Code* (*V of* 1898), *section* 154—*First information report—Evidentiary value—Delay in lodging the report —Effect.*

First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. [*Para.* 12.]

Appeal by Special Leave from the judgment and Order dated the 24th November, 1970 of the Madras High Court in Criminal Appeal No. 761 of 1970 and Referred Trial No. 50 of 1970.

S. Lakshminarasu, Advocate, *amicus curiae*, for Appellant.

A. V. Rangam, for Respondent.

The Judgment of the Court was delivered by

Khanna, J.—Thulia Kali (26) was convicted by Sessions Judge, Salem under

* Crl.A. No. 165 of 1971. *25th February,* 1972.

section 302, Indian Penal Code for causing the death of Madhandi Pidariammal (40) and under section 379, Indian Penal Code, for committing theft of the ornaments of Madhandi deceased. The accused was sentenced to death on the former count. No separate sentence was awarded for the offence under section 379, Indian Penal Code. The High Court of Madras affirmed the conviction and sentence of the accused. The accused has now come up in appeal to this Court by Special Leave.

2. The prosecution case was that Madhandi deceased purchased land measuring 1 acre 62 cents from Thooliya Thiruman (P. W. 5), elder brother of the accused for rupees one thousand. The land of the accused adjoined the land sold to Madhandi deceased. The accused wanted Madhandi deceased to sell that land to him but the deceased declined to do so. Madhandi constructed a fence around the land purchased by her, as a result of which the passage to the land of the accused was obstructed. About a week before the present occurrence, the accused removed some jackfruits from the land purchased by the deceased. Complaint about that was made by the deceased to the Panchayatdars. The Panchyatdars considered the matter, but the accused, declined to abide by the decision of the Panchayatdars.

3. On 12th March, 1970 at about 12 noon, it is stated, Madhandi deceased left her house situated in village Sakkarapatti along with her daughter-in-law Kopia Chinthamani (P.W. 2) aged 10, for Valaparathi at a distance of about two miles from the village, for grazing cattle. Shortly thereafter, Valanjiaraju (P. W. 1) step-son of Madhandi deceased, also went to Valaparathi and started cutting plants at a distance of about 250 feet from the place where the deceased was grazing the cattle. At about 2 P. M. the accused came to the place where Madhandi deceased was present and asked her whether she would give him the right of passage or not. The deceased replied in the negative. The accused then took out the knife, Exhibit 1, and gave a number of knife blows to the deceased in spite of her entreaties to the accused not to stab her and that she would give him what he wanted. Kopia P. W 2, raised alarm and ran from the place of occurrence. She met Valanjiaraju P. W 1, and told him that the accused was giving knife blows to Madhandi. Accompanied by Kopia, Valanjiaraju then went towards the accused but he threatened them with the knife. Valanjiaraju and Kopia thereupon went to the village and informed the husband of the deceased as well as a number of other villagers including Aneeba (P. W. 3) and Selvaraj (P. W. 4). Valanjiaraju and a large number of other villagers then went to the place of occurrence and found the dead body of Madhandi deceased lying there with injuries on her throat, face and other parts of the body. Both her ears were found to have been chopped off. Her jewels had been removed.

4. According further to the prosecution, Valanjiaraju went to the house of village munsiff Muthuswami (P. W. 8) to inform him about the occurrence. Muthuswami, however, was away from the house to another village in connection with some collection work. Muthuswami returned at about 10.30 P.M. and was told by Valanjiaraju about the occurrence. Muthuswami did not record the statement of Valanjiaraju at that time and told him that he would not go to the spot where the dead body was lying on that night as wild animals would be roaming there and that he would go there on the following morning. Muthuswami went to the spot where the dead body of the deceased was lying at about 8.30 A. M. on the following day, that is, 13th March, 1970 and had a look at the dead body of deceased. Statement P-1 of Valanjiaraju was recorded by Muthuswami at 9 A. M. at the spot. The statement was then sent by Muthuswami to police station Valavanthi at a distance of about two miles from the place of occurrence. Formal first information report P-15 on the basis of statement P-1 was prepared at the police station at 11-45 A. M.

5. Head Constable Rajamanickam, after recording the first information report, went to the place of occurrence and reached there at 2.30 P. M. Inspector Rajagopal (P. W. 13), on hearing about the occurrence at the bus stand, also went to the place of occurrence. Inquest report relating to the dead body of the de-

ceased was then prepared. Dr. Sajid Pasha (P. W. 7) was thereafter sent for from Sendamangalam. Dr. Pasha arrived at the place of occurrence at 12.30 P. M. on 14th March, 1970 and performed post-mortem examination on the dead body of Madhandi deceased.

6. Inspector Rajagopal arrested the accused, according to the prosecution, at 5. A. M. on 15th March, 1970, in a reserve forest about one mile from Seppangulam. The accused then stated that he had kept ornaments and knife in the house of Chakravarthi (P. W. 9) and would get the same recovered. The Inspector then went with the accused to the house of Chakravarthi P. W. 9 and from there recovered knife, Exhibit 1 and ornaments Exhibits 2 to 8. The said ornaments. belonged to Madhandi deceased. The knife was taken into possession and put into a sealed parcel. The clothes which the accused was wearing also got removed and put into a sealed parcel. The parcels were sent to the Chemical Examiner, whose report showed that neither the knife nor the clothes of the accused were stained with blood.

7. At the trial the plea of the accused was denial simpliciter. According to the accused, the villagers came to know on the evening of 12th March, 1970, that the deceased had been murdered. The accused along with the villagers went to the spot where the dead body of the deceased was lying and stayed with them there during the night. On the following day, the accused was suspected by the villagers. They gave him beating and tied him to a tree. Later on that day, that is, 13th March, 1970, the accused was taken to the police station and kept there for two days. The accused denied having committed the murder of the deceased or having got recovered the ornaments and the knife. No evidence was produced in defence.

8. The learned Sessions Judge in convicting the accused relied upon the evidence of Kopia (P. W. 2), who had given eye witness account of the occurrence, as well as the statement of Valanjiaraju (P.W. 1), who had been threatened by the accused with knife near the place of occurrence. Reliance was also placed upon the recovery of knife and ornaments in pursuance of the statement of the accused. The High Court agreed with the Sessions Judge and affirmed the conviction of the accused.

9. There can be no doubt that Madhandi deceased was the victim of a brutal attack. Dr. Sajid Pasha, who performed post-mortem examination on the dead body of Madhandi, found as many as 29 injuries on the body. Out of them, 24 were incised wounds and five were multiple abrasions. There were a number of incised wounds on the face, neck, chest and abdomen. The pinnas of the right and left ears had been completely severed. Injuries were also found in the eyes and laryngeal region. Death was the result of different injuries, some of which were individually sufficient to cause death. The case of the prosecution was that it was the accused-appellant who had caused the injuries to Madhandi deceased. The accused has, however, denied this allegation and has claimed that he has been falsely involved in this case on suspicion.

10. The trial Court and the High Court have based the conviction of the accused-appellant, as stated earlier, primarily upon the testimony of Kopia (P. W. 2) and Valanjiaraju (P. W. 1). This Court does not normally reappraise evidence in an appeal under Article 136 of the Constitution, but that fact would not prevent interference with an order of conviction, if on consideration of the vital prosecution evidence in the case, this Court finds it to be afflicted with *ex facie* infirmity. There are in the present case certain broad features of the prosecution story which create considerable doubt regarding the veracity of the aforesaid evidence and, in our opinion, it would not be safe to maintain the conviction on the basis of that evidence. According to Kopia (P. W. 2), the accused stabbed the deceased at about 2 P. M. Kopia raised alarm and immediately informed Valanjiaraju, who was cutting plants at a distance of about 250 feet from the place of occurrence. Valanjiaraju and Kopia then came towards the place where the accused had assaulted the deceased, but the accused threatened them with knife. Valanjiaraju and Kopia thereupon went to the village *abadi* and informed the other villagers. Valanjiaraju accompanied by other villagers then went

to the place of occurrence and found the dead body of Madhandi lying there with a number of injuries.

11. According to document P. 1 Valanjiaraju made statement about the occurrence to village munsif Muthuswami (P. W. 8) at about 9 A. M. on 13th March, 1970. Formal first information report on the basis of the above statement was prepared at the police station at 11-45 A. M. The delay in lodging the report, according to the prosecution, was due to the fact that Muthuswami P. W. 8 was away to another village in connection with some collection work and he returned to his house at 10-30 P. M. Muthuswami told Valanjiaraju when the latter met him at night that he would record the statement only after having a look at the dead body on the following morning.

12. It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami P.W. 8 was not found at his house till 10-30 P. M. on 12th March, 1970, by Valanjiaraju, it is not clear as to why no report was lodged by Valanjiaraju at the police station. It is, in our opinion, most difficult to believe that even though the accused had been seen at 2 P. M. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came to know of the death of Madhandi deceased on the evening of 12th March, 1970. They did not then know about the actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaniety, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia, daughter-in-law of Madhandi deceased, according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, step-son of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it.

13. As regards the alleged recovery of knife and ornaments at the instance of the accused, we find that the evidence consists of statements of Inspector Rajagopal (P. W. 13), Kali Gounder (P.W. 6) and Chakravarthi (P. W. 9). According to Chakravarthi (P. W. 9), the accused handed over the ornaments in question to the witness when the accused came to the house of the witness on the evening of 12th March, 1970 and passed the night

at the house. The witness also found knife in the bed of the accused after he had left on the following day. According, however, to Kali Gounder (P. W. 6), the accused, on interrogation by the Inspector of Police, stated that he had entrusted ornaments to Thangam, wife of Chakravarthi (P. W. 9). Apart from the discrepancy on the point as to who was the person with whom the accused had kept the ornaments, we find that Thangam, with whom the accused, according to Kali Gounder P.W. 6 had kept the ornaments, has not been examined as a witness. In view of the above statement of Kali Gounder, it was, in our opinion, essential for the prosecution to examine Thangam as a witness and its failure to do so would make the Court draw an inference against the prosecution.

14. It is also not clear as to why the accused should leave knife Exhibit 1 in his bed in the house of Chakravarthi (P. W. 9) when he had ample opportunity to throw away the knife in some lonely place before arriving at the house of Chakravarthi. The knife in question was found by the Chemical Examiner to be not stained with blood and according to the prosecution case, the accused had washed it before leaving it in the bed in the house of Chakravarthi. If the accused realised the importance of doing away with the blood stains on the knife, it does not seem likely that he would bring that knife to the house of Chakravarthi and leave it in his bed.

15. Looking to all the circumstances, we are of the view that it is not possible to sustain the conviction of the accused on the evidence adduced. We accordingly accept the appeal, set aside the conviction of the accused-appellant and acquit him.

V.K. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—*K. S. Hegde, P. Jaganmohan Reddy and H. R. Khanna, JJ.*

Controller of Estate Duty, Madras .. *Appellant**

v.

C. R. Ramachandra Gounder .. *Respondent.*

Estate Duty Act (XXXIV of 1953), section 10—Property deemed to pass on death—Deceased letting out his house property to firm in which he was partner—Gift of house property to his sons—Firm continuing to be in occupation as tenant of sons—Deceased continuing to be partner until dissolution of firm—Whether house property includible in estate of deceased—Deceased requesting firm to transfer amounts from his account to credit of his sons in firm's books—Amounts not withdrawn by sons and interest paid to them—Gifted amounts whether includible in estate of deceased.

The deceased was a partner in a firm. He owned a house property which the firm was occupying as tenant-at-will. In August, 1953, he executed a deed of settlement under which he transferred the property leased out to the firm to his two sons absolutely and irrevocably. After this transfer, the firm continued to be in occupation of the premises paying rent thereof at Rs. 300 per mensem to the two donees by crediting each of their accounts in the account books of the firm in equal shares. The deceased continued to be a partner of the firm even after the transfer till 13th April, 1957, when the firm was dissolved. He had also an account with the firm and on 30th March, 1953, he requested the firm by a letter to transfer from his account five

* C. A. Ref. No. 1391 of 1970.
27th February, 1973.

sums of Rs. 20,000 each with effect from 1st April, 1953, to the credit of his five sons in the firm's books. He also wrote to the five sons informing them of the transfer. Though the sons did not withdraw any amount from their accounts in the firm, the amounts continued to be invested in the firm for which interest at 7½ per cent. per annum was paid to them. On the death of the deceased on 5th May, 1957, the Assistant Controller of Estate Duty included in the estate of the deceased the property leased out to the firm on the ground that the possession and enjoyment of the subject-matter of the gift had not been assumed by the donees nor had they retained possession thereof to the entire exclusion of the donor, inasmuch as the partnership in which the donor was a partner with other parties, continued to be in possession and enjoyment of the gifted property as tenants-at-will of the donees. With respect to the gift of rupees one lakh to the five sons of the deceased, the Assistant Controller held that the donees had not been in possession and enjoyment of the subject-matter of the gift to the entire exclusion of the donor within the meaning of section 10 of the Estate Duty Act. He therefore, included this sum of rupees one lakh in the principal value of the estate of the deceased. The accountable persons appealed to the Appellate Controller who confirmed the said inclusion. The Tribunal, on a further appeal, held that the firm of which the deceased was a partner, occupied the property but that such interest was not as owner of the property, and therefore, the gift had been made without the donor retaining any interest; as such, it could not be included in the estate of the deceased under section 10 of the Estate Duty Act. It further held that the sum of rupees one lakh gifted to the sons was given by the sons to the firm which had benefit of the money and that the father could not be said to have enjoyed the benefit of the money as partner of the firm. In this view, the Tribunal excluded the sum of rupees one lakh from the estate of the deceased. The High Court agreed with these findings. On appeal to the Supreme Court,

Held: that neither the property gifted to the donees nor the amount of rupees one lakh gifted to the five sons, could be included in the estate of the deceased. [*Para.* 12.]

The crux of section 10 lies in two parts: (1) the donees must *bona fide* have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor, immediately upon the gift; and (2) the donees must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Both these conditions are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty under section 10 of the Act. The second part of the section has two limbs: the deceased must be entirely excluded (*i*) from the property, and (*ii*) from any benefit by contract or otherwise. The words "by contract or otherwise" in the second limb of the section will not control the words "to the entire exclusion of the donor" in the first limb. The first limb may be infringed if the donor occupies or enjoys the property or its income, even though he has no right to do so which he could legally enforce against the donee. In other words, in order to attract the section, it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable in law or in equity. In the context of the section, the word "otherwise" should be construed *ejusdem generis* and it must be interpreted to mean some kind of legal obligation or some

transaction enforceable at law or in equity, which, though not in the form of a contract, may confer a benefit on the donor.

[*Paras.* 6 *and* 7.]

Held on facts: the first two conditions are satisfied because there is an unequivocal transfer of the property and also of the money, in the one case by a settlement deed, and in the other by crediting the amount of Rs. 20,000 in each of the son's account with the firm which thenceforward became liable to the sons for the payment of the said amount and the interest at 7½ per cent. per annum thereon. In these circumstances, the Revenue has failed to establish that the donees had not retained possession and enjoyment of the property or the amount and that the deceased was not entirely excluded from the possession and enjoyment thereof. The last limb of the condition relating to any benefit to the donor by contract or otherwise is inapplicable in this case. The donor on the date when he gifted the property to his sons which was leased out to the firm, had two rights, namely, of ownership in the property and the right to terminate the tenancy and obtain the possession thereof. There is no dispute that the ownership has been transferred subject to the tenancy-at-will granted to the firm, to the donor's two sons because the firm from thenceforward had attorned to the donees as their tenant by crediting the rent of Rs. 300 to the respective accounts in equal moiety. The donor could, therefore, only transfer possession of the property which the nature of that property was capable of, which in this case was subject to the tenancy.

The possession which the donor can give is the legal possession which the circumstances and the nature of the property would admit. This he has given. The benefit the donor had as a member of the partnership was not a benefit referable in any way to the gift but is unconnected therewith. [*Para.* 8.]

Cases referred to:—

George Da Costa v. *Controller of Estate Duty*, (1967) 63 I.T.R. 497 : (1967) 1 S.C.R. 1004 (S.C.) : (1967) 1 I.T.J. 217 : (1967) 1 S.C.J. 493 : 12 L.R. 671 : A.I.R. 1967 S.C. 849 ; *Munro* v. *Commissioner of Stamp Duties*, (1934) A.C. 61 : 2 E.D.C. 462 (P.C.) ; *Clifford John Chick* v. *Commissioner of Stamp Duties*, (1958) A.C. 435 : (1959) 37 I.T.R. (E.D.) 89 : 3 E.D.C. 915 (P.C.); *Commissioner of Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.* (1943) A.C. 425 : 2 E.D.C. 788 (P.C.) ; *Controller of Estate Duty* v. *Aswathanarayana Setty*, (1969) 72 I.T.R. 29 (Mys.).

Appeal by certificate from the judgment and order dated 25th November, 1968, of the Madras High Court in Tax Case No. 103 of 1965.

B. B. Ahuja, R. N. Sachthey and *S. P. Nayar*, Advocates, for Appellant.

T. A. Ramachandran, Advocate, for Respondent.

The Judgment of the Court was delivered by

Jaganmohan Reddy, J.—This appeal is by certificate against the judgment of the Tamil Nadu High Court, which has answered the following two questions referred to it, in favour of the assessee and against the Revenue:

> "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the house property in Avanashi Road, Coimbatore, is not liable to estate duty as property deemed to pass on the death of the deceased under section 10 of the Estate Duty Act, 1953 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the sum of rupees one lakh gifted by the deceased to his sons in 1953, is not liable to estate duty as property deemed to pass on the death of the deceased under section 10 of the Estate Duty Act, 1953 ?"

2. These questions arose on the facts set out in the statement of the case which are: one Ramaiah Gounder was a partner in the firm called N. Desai Gounder & Co., Coimbatore. He owned property which the firm was occupying as tenant-at-will. In August, 1953, he executed a deed of settlement under which he transferred the property leased out to the firm to his two sons, Lingiah and Krishnan, absolutely and irrevocably. After this transfer, the firm continued to be in occupation of the premises paying rent thereof at Rs. 300 per mensem to the two donees by crediting each of their accounts in the account books of the firm in equal shares. It may be mentioned that Ramaiah, the father, continued to be a partner of the firm even after the transfer till 13th April, 1957, when the firm was dissolved. He had also an account with the firm Desai Gounder & Co., and on 30th March, 1953 he requested the firm by a letter to transfer from his account five sums of Rs. 20,000 each with effect from 1st April, 1953, to the credit of his five sons in the firm's books. He also wrote to the five sons informing them of the transfer. Though the sons did not withdraw any amount from their accounts in the firm, the amounts continued to be invested in the firm for which interest at 7½ per cent. per annum was paid to them.

3. On the death of Ramaiah Gounder on 5th May, 1957, the Assistant Controller of Estate Duty, included in the estate of the deceased the property leased out to the firm which was transferred to his two sons. According to him, possession and enjoyment of the subject-matter of the gift had not been assumed by the donees nor had they retained possession thereof to the entire exclusion of the donor, inasmuch as the partnership in which the donor was a partner with other parties, continued to be in possession and enjoyment of the gifted property as tenants-at-will of the donees. With respect to the gift of rupees one lakh to the five sons of the deceased, the Assistant Controller held that the donees had not been in possession and enjoyment of the subject-matter of the gift to the entire exclusion of the donor within the meaning of section 10 of the Estate Duty Act. He, therefore, included this sum of rupees one lakh in the principal value of the estate of the deceased.

4. The accountable persons appealed to the Appellate Controller who confirmed the said inclusion. The Tribunal on a further appeal, however, disagreed with the findings of the Assistant Controller and the Appellate Controller. It held that the firm, of which the deceased was a partner, occupied the property but that such interest was not as owner of the property, and therefore, the gift had been made without the donor retaining any interest; as such, it could not be included in the estate of the deceased under section 10 of the Estate Duty Act. It further held that the sum of rupees one lakh gifted to the sons was given by the sons to the firm which had benefit of the money and that the father could not be said to have enjoyed the benefit of the money as partner of the firm. In this view, the Tribunal excluded the sum of rupees one lakh from the estate of the deceased. The High Court agreed with these findings.

5. It is contended before us by the learned Advocate for the Revenue that both the

Tribunal and the High Court were in error in holding that the property as well as the sum of rupees one lakh were enjoyed by the donees to the exclusion of the donor or that the deceased did not derive benefit therefrom within the meaning of section 10 of the Estate Duty Act, because, firstly, the donor was a partner in the firm which had occupied the property as tenants-at-will even after the gift, and, secondly, the amount of rupees one lakh, though entered in each of the accounts of the donor's five sons in the books of the firms, was not utilised or enjoyed by them in any manner. Section 10 of the Estate Duty Act, as in force on the date of the death of the deceased, was as follows:

> "10. Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that *bona fide* possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:
>
> Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death....."

6. The crux of the above section as pointed out by this Court in *George Da Costa* v. *Controller of Estate Duty*[1], lies in two parts: (1) the donees must *bona fide* have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor, immediately upon the gift; and (2) the donees must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Both these conditions are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty under section 10 of the Act. The second part of the section has two limbs: the deceased must be entirely excluded (*i*) from the property, and (*ii*) from any benefit by contract or otherwise. The words "by contract or otherwise" in the second limb of the section will not control the words "to the entire exclusion of the donor" in the first limb. The first limb may be infringed if the donor occupies or enjoys the property or its income, even though he has no right to do so which he could legally enforce against the donee. In other words, in order to attract the section, it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable in law or in equity.

7. In the context of the section, the word "otherwise" should be construed *ejusdem generis* and it must be interpreted to mean some kind of legal obligation or some transaction enforceable at law or in equity, which though not in the form of a contract, may confer a benefit on the donor.

8. There is no doubt, on the facts of this case, the first two conditions are satisfied because there is an unequivocal transfer of the property and also of the money, in the one case by a settlement deed, and in the other by crediting the amount of Rs. 20,000 in each of the sons' account with the firm which thenceforward became liable to the sons for the payment of the said amount and the interest at 7½ per cent. per annum thereon. In these circumstances, the Revenue has failed to establish that the donees had not retained possession and enjoyment of

1. (1967) 63 I.T.R. 497: (1967) 1 S.C.R. 1004: (S.C.) (1967) 1 I.T.J. 217: (1967) 1 S.C.J. 493: 12 L.R. 671: A.I.R. 1967 S.C. 849.

the property or the amount and that the deceased was not entirely excluded from the possession and enjoyment thereof. The last limb of the condition relating to any benefit to the donor by contract or otherwise is inapplicable in this case. The donor on the date when he gifted the property to his sons which was leased out to the firm, had two rights, namely, of ownership in the property and the right to terminate the tenancy and obtain the possession thereof. There is no dispute that the ownership has been transferred subject to the tenancy at will granted to the firm, to the donor's two sons because the firm from thenceforward had attorned to the donees as their tenant by crediting the rent of Rs. 300 to the respective accounts in equal moiety. The donor could, therefore, only transfer possession of the property which the nature of that property was capable of, which in this case is subject to the tenancy. He could do nothing else to transfer the possession in any other manner unless he was required to effectuate the gift for the purpose of section 10 of the Act by getting the firm to vacate the premises and handing over possession of the same to the donees leaving the donees thereafter to lease it out to the firm. Even then the objection of the learned Advocate that since the donor was a partner in the firm which had taken the property on lease, he derived benefit therefrom and was, therefore, not entirely excluded from the possession and enjoyment thereof, will nevertheless remain unsatisfied. To get over such an objection, the donees will have to lease out the property after getting possession from the firm to some other person totally unconnected with the donor. Such an unreasonable requirement the law does not postulate. The possession which the donor can give is the legal possession which the circumstances and the nature of the property would admit. This he has given. The benefit the donor had as a member of the partnership was not a benefit referable in any way to the gift but is unconnected therewith.

9. The Privy Council in *Munro* v. *Commissioner of Stamp Duties*[1], was dealing with a case of a similar nature. The donor in that case by six registered transfers in the form prescribed, transferred by way of gift all his right, title and interest in portions of his land to each of his four sons and to trustees for each of his two daughters and their children. The four sons and the two daughters were, prior to this transfer, on a verbal agreement with the donor, treated as partners of the business carried on by him as grazier of the land owned by him. The evidence showed that the transfers were taken subject to the partnership agreement and on the undertsanding that any partner could withdraw and work his land separately. On an analogous provision of the law, the Privy Council thought it unnecessary to determine the precise nature of the right of the partnership at the time of the transfers because it was either a tenancy during the term of the partnership or a licence coupled with an interest. Lord Tomlin, giving his opinion, observed at page 67, that "the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not in their Lordships' opinion a benefit referable in any way to the gift." This decision was referred to and distinguished in *Clifford John Chick* v. *Commissioner of Stamp Duties*[2], though it was considered to have no application to the case at point, Viscount Simonds observed at page 97:

> "It must often be a matter of fine distinction what is the subject-matter of a gift. If, as in *Munro's case*[1], the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given."

1. 1943 A.C. 61 : 2 E.D.C. 462 (P.C.).
2. 1958 A.C. 435 : (1959) 37 I.T.R. (E.D.) 89 : 3 E.D.C. 915 (P.C.).

10. In *Commissioner of Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.*[1], the Privy Council further elaborated the concept of the nature of possession required to be given to the donee as not to attract the analogous provisions of the Commonwealth Act. Lord Russell of Killowen observed at page 440:

"The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty....because the son was (through the medium of the trustees) immediately put in such *bona fide* beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted. Did he assume it, and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: namely,

(1) the settlor had no enjoyment and possession such as is contemplated by the section; and (2) such possession and enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants, was had by him solely on behalf of the donee. In his capacity as donor he was entirely excluded from possession and enjoyment of what he had given to his son. Did the donee retain possession and enjoyment to the entire exclusion of any benefit to settlor of whatsoever kind or in any way whatsoever? Clearly yes."

11. The views expressed by the Privy Council are in complete accord with our views already expressed. This was also the view held in *Controller of Estate Duty* v. *Aswathanarayana Setty*[2], where a Bench of the Mysore High Court considered both the case of *Clifford John Chick*[3], and of *Munro*[1], above referred to. In that case, on 30th June, 1954, the deceased transferred to his two sons Rs. 57,594 being half of the share standing to his credit as on that date in the books of a firm in which he was a partner and from 1st July, 1954, the sons were also taken as partners in the firm. On the death of the deceased on 16th November, 1957 the Assistant Controller held that the amount transferred to the sons must be deemed to pass as per the provisions of section 10 of the Estate Duty Act, which decision was confirmed by the Appellate Controller. The Tribunal, however, held that the sum which subsequently was rectified to be Rs. 73,695 was not so includible. One of us (Hegde, J., as he then was), speaking for the Bench, observed at page 32:

"On the facts of the case, it cannot be said that, after the gifts, the donees did not retain the property gifted to the entire exclusion of the donor or that the donor had any benefit either by contract or otherwise in the property gifted. That in order that the property could deem to pass and estate duty could be leviable in such cases, the benefit of the donor must be a benefit referable to the gift and not a benefit referable to his own property. The view, that if it is once found that the deceased had some benefit in the property, that in itself was sufficient to bring the case within the ambit of section 10 irrespective of the question whether that benefit was referable or not referable to the gift, in our opinion, is erroneous."

12. In our view, neither the property gifted to the donees, nor the amount of rupees one lakh gifted to the five sons, could be included in the estate of the deceased. The appeal is accordingly dismissed with costs.

T.K.K. ——— *Appeal dismissed.*

1. 1943 A.C. 425 : 2 E.D.C. 788 (P.C.).
2. (1969) 72 I.T.R. 29 (Mys.).
3. (1958) A.C. 435 : (1959) 37 I.T.R. (E.D.) 89 : 3 E.D.C. 915 (P.C.).

1. (1934) A.C. 61 : 2 E.D.C. 462 (P.C.).

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*S. M. Sikri, C. J., A.N. Ray, D. G. Palekar, M. H. Beg and S. N. Dwivedi, JJ.*

The Secretary, Government of Madras, Home Department and another .. *Appellants**

v.

Zenith Lamp & Electrical Ltd. .. *Respondent.*

Deccan Engineering Co. and 9 others .. *Interveners*

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *Article* 1 *of Sch. I in its application to the High Court and rule* 1 *of the High Court-fees Rules,* 1956—*Constitutional validity*—"*Fees taken in Court*", *meaning of*—*Constitution of India* (1950), *Sch. VII, Entries* 77 *and* 96, *List I, Entry* 66, *List II and Entry* 47, *List III.*

It seems plain that "fees taken in Court" are not taxes, for if it were so, the word "taxes" would have been used or some other indication given. This conclusion is strengthened by two considerations. First, taxes that can be levied by the Union are mentioned in List I from Entry 82 ; in List II taxes that can be imposed start from Entry 45. Secondly, the very use of the words "not including fees taken in any Court" in Entry 96, List I and Entry 66, List II shows that they would otherwise have fallen within these Entries. It follows that "fees taken in Court" cannot be equated to "Taxes". If this is so, is there any essential difference between fees taken in Court and other fees? It is difficult to appreciate why the word "fees" bears a different meaning in Entries 77, List I and Entry 96, List I or Entry 3, List II and Entry 66, List II. But even if the meaning is the same, what is "fees" in a particular case depends on the subject-matter in relation to which fees are imposed. In this case fees must have relation to administration of civil justice. While levying fees the appropriate Legislature is competent to take into account all relevant factors, the value of the subject-matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of Courts and officers administering civil justice, the vexatious nature of a certain type of litigation and other relevant matters. It is free to levy a small fee in some cases, a large fee in others, subject, of course, to the provisions of Article 14. But one thing the Legislature is not competent to do, and that is to make litigants contribute to the increase of general public revenue. In other words, it cannot tax litigation, and make litigants pay, say, for road building or education or other beneficial schemes that a State may have. There must be a broad co-relationship with the fees collected and the cost of administration of civil justice. Whenever the State Legislature generally increases fees it must establish that it is necessary to increase Court-fees in order to meet the cost of administration of civil justice.

[*Paras.* 25 *to* 28 *and* 42.]

Cases referred to:—

Zenith Lamps and Electricals Ltd. v. *The Registrar, High Court, Madras*, I.L.R. (1968) 1 Mad. 247 ; *The Indian Mica and Micanite Industries Ltd.* v. *The State of Bihar and others*, A.I.R. 1971 S.C. 1182; *The Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 S.C.R. 1005 : 1954 S.C.J. 335 : (1954) 1 M.L.J. 596 : A.I.R. 1954 S.C. 282 ; *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Company and others*, (1950) A.C. 87 ; *Rachannasubrao* v. *Shiddappa Venkatarao*, (1918) I.L.R. 43 Bom. 507 ;

* C.A. No. 993 of 1967. 10*th November*, 1972.

Khacheru Singh v. *S. D. O., Khuria*, I.L.R. (1960) 1 All. 429; *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*, 1954 S.C.R. 1046 : 1954 S.C.J. 329: (1954) 1 M.L.J. 591: A.I.R. 1954 S.C. 400 : *The Central Provinces Syndicate (Pr.) Ltd.* v. *The Commissioner of Income-tax, Nagpur*, I.L.R. 1962 Bom. 208.

Appeal by certificate from the judgment and order dated 31st March, 1967 of the Madras High Court in Writ Petition No. 1743 of 1964.

S. Govind Swaminadhan, Advocate-General of Tamil Nadu (*S. Mohan, N.S. Sivan, K. Rajendra Ghoudhry* and *K. R. Choudhry*, Advocates, with him), for Appellant.

R. Thiagarajan, Advocate, for Respondent No. 1.

K. R. Choudhry, Advocate, for Respondent No. 2.

A. R. Somnatha Iyer, Senior Advocate (*S. Lakshiminarasu*, Advocate, with him), for Interveners Nos. 1—3.

V. M. Tarkunde, Senior Advocate (*B. D. Sharma*, Advocate, with him), for Intervener No. 4.

S. N. Choudhry, Advocate, for Intervener No. 5.

Syed Muhamud, Senior Advocate (*A. G. Pudissery*), Advocate, with him, for Intervener No. 6.

K. K. Sinha, S. K. Sinha and *B. P. Sinha*, Advocates, for Intervener No. 7.

V. S. Raman and *Vineet Kumar*, Advocates, for Intervener No. 8.

S. V. Gupte and *A.V. Diwan*, Senior Advocates (*P. C. Bhartari, J. B. Dadachanji, O. C. Mathur* and *Ravinder Narain*, Advocates, with them, for Intervener No. 9.

A. Subba Rao, Advocate, for Intervener No. 10.

The Judgment of the Court was delivered by

Sikri, C. J.—This appeal, by certificate granted by the High Court, is directed against the judgment dated 31st March, 1967 of the High Court of Madras in *Zenith Lamps and Electricals Ltd.* v. *The Registrar, High Court, Madras*[1], given in Writ Petition No. 1743 of 1964 (and Writ Petition No. 3891 of 1965). Messrs. Zenith Lamps and Electrical Limited, respondent before us and hereinafter referred to as the petitioner, intended to file a suit in the Madras High Court, on the original side, claiming a relief valued at Rs. 2,06,552, against the Revenue. The petitioner filed Writ Petition No. 1743 of 1964 on the question of Court-fee payable on the intended suit, praying that the High Court may be pleased to issue a writ of *mandamus* or other direction or order declaring rule 1 of the High Court-fees Rules, 1956, and the provisions of the Madras Court-fees and Suits Valuation Act (XIV of 1955) to be invalid and *ultra vires* in so far as they relate to the levy of fees on *ad valorem* scale. It was contended that rule 1 of the High Court-fees Rules, 1956, was void and *ultra vires* because the Madras Court-fees and Suits Valuation Act (XIV of 1955) which had been applied in these Rules was void and *ultra vires*. Various reasons were given in the petition for alleging that the impugned Rule was void. It was stated *inter alia* that there was no justification at all for the increase of Court-fees in 1955 and 1956 on the basis of civil litigants being made to pay fees covering the expenditure on civil litigation. It was alleged that "whenever an increase is contemplated, it is for the authority to justify by facts and figures such increase by showing that the actual expenditure at the time exceeds the fee income". The petitioner

1. I.L.R. (1968) 1 Mad. 247.

alleged that " judged by this test, the increases of 1955 were without any legal or actual justification". It was further alleged that the State was proceeding on the basis that the Court-fees had to compensate the Government both for the cost of civil as well criminal administration, which was unwarranted. In ground *D* it was alleged :

> " From the figures of 1963-64 available from the budget for 1964-65, it is seen that the fees levied exceeds the cost of administration of civil justice. The figures have further to be scrutinised and amended so that inadmissible items such as fees of Government's Law Officers are eliminated as it is not the duty of the litigant public generally to bear the expense of the State's Law Officers."

2. In ground *E* it was alleged that it was *ultra vires* and inequitable to levy an *ad valorem* fee without limit from the petitioner in a single proceeding.

Various other reasons were given but it is not necessary to set them out.

3. The State filed an affidavit in reply maintaining that rule 1 of the High Court - fees Rules, 1956, and the Madras Court-fees and Suits Valuation Act, 1955 (Madras Act XIV of 1955) were legal and valid. It was stated that the rates of fees prescribed under the Court-fees Act of 1955 were not excessive and that the levy did not amount to a tax on litigants. The State gave figures to show that the expenditure on the administration of justice was higher during the year 1954-55 than the fees realised. The State rebutted the contention that the cost of criminal administraion and the fees paid to Government Law Officers should not be taken into account in justifying Court-fees.

4. This affidavit was filed on 6th March, 1965. It appears that a supplemental counter-affidavit on behalf of respondents 2 and 3 was filed on 11th October, 1966. In this affidavit various statements were given to show that the expenditure on the administration of justice was higher than the receipts.

5. The petitioner took objction to the filing of the supplemental counter-affidavit at that stage because it was filed after the arguments had started. It was contended that the figures given in the counter-affidavit would require drastic scrutiny. It was also alleged that various inadmissible items had been taken into account ; for example, the expenditure on law officers had been taken into consideration.

6. The High Court struck down the levy found in Article 1 of Schedule I of the Madras Court-fees and Suits Valuation Act, 1955, in its application to the High Court. As it was not contended before the High Court that the result of striking down Article 1 of schedule 1 in its application to the High Court would necessitate the declaration of the invalidity of the entire Court-fees Act, it refrained from examining the position.

7. The State having obtained certificate of fitness filed the appeal which is now before us. We may mention that the petitioner was not interested in pursuing the appeal and it prayed that if the appeal is decided against it no order may be made against it for costs in the circumstances of the case.

8. We issued notice to the Advocate General and a number of States have appeared before us.

9. The first question that arises out of the arguments addressed to us is : what is the nature of "fees taken in Court" in Entry 3, List II, Schedule VII of the Constitution ? Are they taxes or fees or are they *sui generis* ? Is it necessary that there should be correlationship

between "fees taken in Court" and the cost of administration of civil justice? Dr. Syed Mohammed, has on behalf of the State of Kerala urged that fees taken in Court are taxes simpliciter.

The Advocate-General of Madras had urged, that they are *sui generis*, and that they are more in the nature of taxes than in the nature of fees. Mr. Tarkunde has urged that it would be wrong to regard them as 'fees' of the same nature as fees in Entry 66, List II. The answer depends on the correct interpretation of various entries in the three Legislative Lists and several articles of the Constitution. In the background must be kept the history of fees taken in Courts in the past both in England and India.

10. Let us first look at the background. According to Holdsworth[1], the Judges, from the first, were paid salaries by the Crown which in the course of years were increased. "But from the earliest times, the salaries of the Judges had not formed their only source of income. Though they did not hold their offices as their freeholds, though they could be dismissed by the Crown, they nevertheless drew a considerable part of their income from fees". "When the income of the Judges from fees was taken away in 1826 their salaries were raised from £ 2,400 a year to £ 5,500.

11. As far as the officials of the Courts were concerned the "earliest information which we get about the officials of the Courts of common law shows that they were paid almost entirely by fees. In fact it would be true to say that the official staff of all the central Courts (except the Lord Chancellor and the Judges) was almost entirely self-supporting." "But probably the largest part of the remuneration of the official staff of the Courts came from fees in connection with the very numerous acts that must be done to set and keep in motion the complicated machinery of the Court, from the issue of the original writ to the execution of final judgment." (Holdsworth p. 256).

12. In the Dictionary of English Law by Earl Jowitt (Vol. 1, p. 791) it is stated:

> "Fees, perquisites allowed to officers in the administration of justice as a recompense for their labour and trouble, ascertained either by Acts of Parliament, by Rule or Order of Court, or by ancient usage; in modern times frequently committed for a salary *e.g.*, by the Justices Clerks Act, 1877."
>
> "Although, however, the officers of a Court may be paid by salary instead of the fees, the obligation of suitors to pay fees usually remains, these fees being paid into the fund out of which the salaries of the officers are defrayed. In the Supreme Court they are collected by means of stamps under the Judicature Act, 1875, section 26, and Order of 1884, and the Supreme Court-fees Order, 1930 (as amended.)
>
> "The mode of collecting fees in a public office is under the Public Office-fees Act, 1879 (repealing and replacing the Public Office-fees Act, 1866) by stamps or money, as the Treasury may direct."

13. At present "the Lord Chancellor has also power, with the consent of at least three judges of the Supreme Court and the concurrence of the Treasury, to fix fees to be taken in the High Court and the Court of Appeal or in any Court created by Commission. Under the powers referred to, the Rules of the Supreme Court, 1883 and the Supreme Court-fees Order, 1930 were made.[1]

1. History of English Law, W. S. Holdsworth, Seventh Edn. Vol. 1, pp. 252–254.

1. Vide Halsbury's Laws of England, Vol. 9, pp. 422–423.

14. The English history shows that a very close connection existed between fees and cost of administration of civil justice. In the beginning, they were directly appropriated by the Court officials. The existing law shows that fees are not taxes. It is not usual to delegate taxing powers to judges.

15. In India according to the Fifth Report on East India Affairs Vol. I (1812) chapter " The civil Courts of justice" "the chouthay or fourth part of the value of property recovered in a Court of judicature seems to be considered in most parts of the Indian Peninsula as the compensation or fee due to the ruling power for the administration of justice ". This was abolished on the accession of the British power to the Government of Bengal and in lieu of it, the introduction of a small percentage on the institution of a suit has been noticed.

16. The first legislative measure which has been brought to our notice is the Bengal Regulation XXXVIII of 1795. In the preamble, it is stated that the establishing of fees on the institution and trial of suits, and on petitions presented to the Courts was considered the best method of putting a stop to the abuse of bringing groundless and litigious suits. There are various sections of the Regulation which allow fees to be appropriated by the Judges.

In section 11 (4) it was laid down :

> " The Munsiffs are to appropriate the fees they may collect under this section, to their own use, as a compensation for their trouble and an indemnification for the expense which they may incur in the execution of the duties of their office."

17. Similarly under section 3 (6) the " Registrar " was entitled to appropriate the fees, collected under this section. Similarly sub-section (7) of section 3 enabled the Commissioners to appropriate the fees. But fees under section 4 to be paid on the trial of suits, tried in the first instance by the Judges of the Zillah and City Courts or by their Registrars were to be carried to the account of Government. Similarly various other fees were carried to the account of Government.

18. In the preamble to Bengal Regulation VI of 1797, the object is stated to be to discourage litigations, complaints and the filing of superfluous exhibits and the summoning of unnecessary witnesses on the trial of suits and also to provide for deficiency which would be occasioned in the public revenue by abolition of the police tax as well as to add eventually to public resources, without burdening individuals. The same object of discouraging litigation is stated in clause (1) of the Bombay Regulation VIII of 1802.

19. In the Statement of Objects and Reasons for the Court-fees Bill, 1869, it is stated that " the experience gained of their (stamp-fees) working during the two years in which they have been in force, seems to be conclusive as to "their repressive effect on the general litigation of the country". "It is, therefore, thought expedient to make a general reduction in the rates now chargeable on the institution of civil suits, and to revert to the principle of a maximum fee which obtained under the former law."

Later it is stated :

> " As some measure of compensation for the loss of revenue which is expected to result from the general reduction of fees, it is proposed to discontinue the refund of any portion of the amount levied on the first institution of suits, and also to raise the fees here-

to-fore chargeable on probates and letters of administration granted under the Indian Succession Act, and on certificates issued under Act XXVI of 1860, to the *ad valoram* rates leviable under the English law in like cases."

20. The Bill was designed to contain in one enactment the whole of the existing law relative to fees leviable in all Courts of Justice, whereas previously fees were leviable under various Acts.

21. This brief resume of the history shows that the Court-fees were levied sometimes with the object of restricting litigations ; sometimes with the object of increasing revenue. But there is no material to show that when the latter was the objective whether the cost of administration of civil justice was more than the fees levied and collected.

22. The constitutional question with which we are concerned could not arise before the enactment of the Government of India Act, 1935, because even if fees taken in Courts were taxes on litigation, there was no bar to the levy of taxes on litigation.

23. Various judges have spoken about the nature of Court-fees. In the judgment under appeal, in *Zenith Lamps and Electricals Ltd.* v. *The Registrar, High Court, Madras*[1] reference has been made to their observations but those judges were not faced with the constitutional problem with which we are concerned. Some described fees as one form of taxation, some regarded it as taxes for services rendered by the Court or work done by the Court or as price payable to Government for the trial of the suit.

24. This background does not supply a sure touchstone for the determination of the question posed in the beginning of the judgment, but it does show that fees taken in Court were not levied as taxes, the cost of administration was always one of the factors that was present. In its origin in England fees were meant for officers and judges. In India indeed section 3 of the Court-fees Act 1870, mentions "fees payable for the time being to the clerks and officers." Section 15 of the Indian High Courts Act, 1861, also spoke of " fees to be allowed to sheriffs,....and all clerks and, officers of Court." We will therefore have to interpret the relevant Entries and various Articles of the Constitution in order to ascertain the true nature of Court-fees. The relevant Entries of the Constitution are :

" *List I, Entry* 77 : Constitution, organisation, jurisdiction and power of the Supreme Court (including contempt of such Court), and the fees taken therein ; persons entitled to practise before the Supreme Court."

" *List I, Entry* 96 : Fees in respect of any matters in this List, but not including fees taken in any Court.

List II, Entry 3 : Administration of justice ; constitution and organisation of all Courts, except the Supreme Court and the High Court ; officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all Courts except the Supreme Court."

"*List II, Entry* 66 : Fees in respect of any of the matters in this List but not including fees taken in any Court."

" *List III, Entry* 13 : Civil procedure including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration."

" *List III, Entry* 47 : Fees in respect of any of the matters in this List,

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1. I.L.R. (1968) 1 Mad. 247, 311, 315.

but not including fees taken in any Court."

25. It will be noticed that the "fees taken therein *i.e.*, in Supreme Court", in List I, Entry 77 have been excluded from List I, Entry 96. Similarly the "fees taken in all Courts" included in List II, Entry 3 have been excluded from List II, Entry 66. In List III, Entry 47 "fees taken in any Court" have been excluded. What is the significance of this exclusion? Does the Constitution regard "fees taken in Court" as being different from "fees leviable under List I, Entry 96, List II, Entry 66 and in List III, Entry 47"?

26. It seems to us that the separate mention of "fees taken in Court" in the Entries referred to above has no other significance than that they logically come under Entries dealing with administration of justice and Courts. The draftsman has followed the scheme designed in the Court-fees Act, 1870 of dealing with fees taken in Court at one place. If it was the intention to distinguish them from fees in List II, Entry 66, surely some indication would have been given by the language employed. If these words had not been separately mentioned in List I, Entry 77 and List II, Entry 3, the Court-fees would still have been levied under List I, Entry 96 and List II, Entry 66.

27. It seems plain that " fees taken in Court" are not taxes, for if it were so, the word "taxes" would have been used or some other indication given. It seems to us that this conclusion is strengthened by two considerations. First, taxes that can be levied by the Union are mentioned in List I from Enty 82 ; in List II taxes that can be imposed start from Entry 45. Secondly, the very use of the words " not including fees taken in any Court " in Entry 96, List I, in Entry 66, List II shows that they would otherwise have fallen within these Entries. It follows that "fees taken in Court" cannot be equated to " Taxes ". If this is so, is their any essential difference between fees taken in Court and other fees ? We are unable to appreciate why the word "fees" bears a different meaning in Entries 77 List I and Entry 96, List I or Entry 3 List II and Entry 66, List II. All these relevant cases on the nature of fees were reviewed in *The Indian Mica and Micanite Industries Ltd.* v. *The State of Bihar and others*[1], by Hegde, J., and he observed :

> " From the above discussion, it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlationship with the services rendered by the Government. In other words, the levy must be proved to be a *quid pro quo* for the services rendered. But in these matters it will be impossible to have an exact correlationship. The correlalimship is one of a general character and not as of arithmetical exactitude."

28. But even if the meaning is the same what is "fees" in a particular case depends on the subject-matter in relation to which fees are imposed. In this case we are concerned with the administration of civil justice in a State. The fees must have relation to the administration of civil justice. While levying fees the appropriate Legislature is competent to take into account all relevant factors, the value of the subject-matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of Courts and officers administering civil justice, the vexatious nature of a certain type of litigation and other relevant matters. It is free to levy a small fee in some cases, a large fee in others, subject of course to the provisions of Article 14. But one thing the Legislature is not competent

1. A.I.R. 1971 S.C. 1182 at 1186.

to do, and that is to make litigants contribute to the increase of general public revenue. In other words, it cannot tax litigation, and make litigations pay, say for road-building or education or other beneficial schemes that a State may have. There must be a broad correlationship with the fees collected and the cost of administration of civil justice.

29. We may now dispose of other arguments addressed to us. We are not able to interpret the phrase fees taken in Court to mean that it described fees which were actually being taken before the Constitution came into force. If this was the meaning, no fees could be levied in the Supreme Court because the Supreme Court did not exist before the Constitution came into force and no fees were being taken therein. This would render part of the Entry of List I, nugatory.

30. It was urged that various Articles in the Constitution show that fees taken in Courts are taxes. For instance, by virtue of Article 266 all fees being revenues of the State will have to be credited to the Consolidated Fund. But this Court has held that the fact that one item of revenue is credited to the Consolidated Fund is not conclusive to show that the item is a tax. In *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1], it was held :

> "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.
>
> It is not possible to formulate a definition of fees that can apply to all cases as there are various kinds of fees. But a fee may generally be defined as 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 such expenses are arbitrarily assessed.
>
> The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden while a fee is a payment for special benefit or privilege."

31. Our attention was invited to Article 199 (2) which provides that a bill shall not be deemed to be a Money Bill by reason only that it provided for..... the demand or payment of fees for licences or fees for services rendered. It was suggested that as Court-fees were not for services rendered they would have to be levied by means of a Money Bill. It seems to us that this argument proceeds on an assumption that fees taken in Court are not for services rendered. Reference to Article 277 and Article 366 (28) does not throw any light on the problem before us.

32. In *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1], reference was made by Mukherjea, J., to Essays in Taxation by Seligman. We may here refer to some other passages which have reference to Court-fees.

> "The distinction between fees and taxes, although sometimes ascribed to Rau, is really much older. Adam Smith already speaks of certain expenses 'which are laid out for the benefit of the whole society'. 'It is reasonable', therefore, he adds, that they should be defrayed by the general contribution of the whole society, all the different members contributing as nearly as possible in proportion to

1. 1954 S.C.R. 1005 at 1006 : 1954 S.C.J. 335 : (1954) 1 M.L.J. 596 : A.I.R. 1954 S.C. 282.

1. 1954 S.C.R. 1005 at 1006 : 1954 S.C.J. 335 : (1954) 1 M.L.J. 596 : A.I.R. 1954 S.C. 282.

their respective abilities'. These, as he afterward explains, are taxes. On the other hand, he speaks of certain outlays, as for justice, 'for persons who give occasion to this expense,' and 'who are most immediately benefited by this expense'. The expenditure, therefore, he thinks 'may very properly be defrayed by the particular contributions of these persons'. that is, by fees of Court. And he extends this principle to tools of roads and various other expenses."

This point of view helps us out of difficulty as to the line of cleavage between fees and taxes. Thus, if a charge is made for the cost of judicial process, the payment is a fee, because. of the special benefit to the litigant If no charge is made, the cost of the process must be defrayed by general taxation ; and the litigant pays his share in general taxes. If the charge is so arranged as to bring in a considerable net revenue to the Government the payment by the litigant is a tax, not a general tax on all taxpayers, but a special tax on litigants, like the tax on law suits in some of our Southern Commonwealth. The character of fee disappears only secondarily because the principle of cost is deviated from, but primarily because the special benefit to the litigant is converted in the first case into a common benefit shared with the rest of the community, and in the second case into a special burden. The failure to grasp the basis of this distinction, which is equally true of other fees, has confused many writers."

33. A great deal of stress was laid by Mukherjea, J., at p. 1044 on the fact that the collections in that case went to the Consolidated Fund. He, however, said that that in itself might not be conclusive. But as Article 266 requires that all revenues received by the State have to go to the Consolidated Fund, not much stress can be laid on this point.

34. Reliance was placed on two cases decided by the Privy Council. In *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Company and others*[1], a case from Canada, question (7) was put thus :

> "Is the Esquimalt and Nanaimo Railway liable to tax (so called) for forest protection imposed by section 123 of the 'Forest Act' (later corrected to section 121) of the Forest Act.... in connection with its timber lands in the island railway belt acquired from Canada in 1887? In particular does the said tax (so called) derogate from the provisions of section 22 of the Act of 1883?"

The Privy Council observed :

> "The question is a short one. The exemption conferred by section 22 is given in the words 'the lands...... shall not be liable to taxation.' There is no context to give the word taxation any special meaning and the question comes to this : 'Is the impost charged by section 124 of the Forest Act 'taxation within the ordinary significance of that word'?".

35. After examining the provisions of Pt. XI of the Act, consisting of sections 95 to 127, which dealt with what is described as "Forest Protection" the Privy Council observed :

> "The levy has what are, undoubtedly, characteristics of taxation, in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown."

36. This case is distinguishable because the Privy Council did not have to deal with fees and taxes but interpreted the

1. (1950) A.C. 87, 120, 121.

word 'taxation' in section 22 of the Act to mean a compulsory levy by the State. Whether it was fees or taxes did not matter. The only question was whether it was a compulsory levy.

37. In *Rachannasubrao* v. *Shidappa Venkatrao*[1], before the Privy Council for the first time objection was raised that the suit out of which the appeal arose, was not triable by the First Class Subordinate Judge. It was argued that this was the result of provisions, contained in the Court-fees Act, 1870, and the Suits Valuation Act which, it was said imposed notional value on the property as distinct from its real value and that this notional value was less than Rs. 5,000.

It was in this context that the Privy Council observed :

> "Their Lordships are of opinion, that they would not be justified in assisting an objection of this type, but more than that hold that even the technicality on which the defendant relies cannot prevail.
>
> The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by section 12, which makes the decision of the First Court as to value final as between the parties and enables a Court of appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue.
>
> The defendant in this suit seeks to utilise the provisions of the Act, not to safeguard the interest of the State but to obstruct the plaintiff he does not contend that the Court wrongly decided to the detriment of the revenue, but that it dealt with the case without jurisdiction."

1. (1918) I.L.R. 43 Bom. 507.

38. We are unable to appreciate how this case assists the appellant. Fees and taxes are both revenue for the benefit of the State. At any rate the Privy Council was not concerned with the interpretation of legislative Entries, where a sharp distinction is drawn between fees and taxes.

39. Two High Courts have upheld the levy of increased Court-fees and the learned Advocate-General strongly relied on them. In *Khacheru Singh* v. *S. D. O. Khuria*[1], a petition under Article 226 was presented with a fee of Rs. 5 while by virtue of the Court-fees Uttar Pradesh (Amendment) Act, 1959, the fee leviable was Rs. 50. The latter fee was held to fall within Entry 3, List II. Mootham, C. J., held that because Court-fees were not appropriated for any specific purpose but formed part of the general revenue of the State these were neither tax nor fees as defined in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt*[2], and *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*[3], He observed :

> "It is not an exaction imposed without reference to any special benefit conferred on the prayers, for it is imposed only on those persons who wish to file documents, the filing of the document or the obtaining of the copy being of direct benefit to the person concerned. It would appear therefore not to be a tax as so defined."

40. He went on to observe, and here, with respect, he made a mistake : "Nor clearly is it a fee as so defined if only for the reason that the moneys realized

1. I.L.R. (1960) 1 All. 429.
2. 1954 S.C.R. 1005 : 1954 S.C.J. 335 : (1954) 1 M.L.J. 596 : A.I.R. 1954 S.C. 282.
3. (1954) S.C.R. 1046 : 1954 S.C.J. 329 : (1954) 1 M.L.J. 591 ; A.I.R. 1954 S.C. 400.

have not been set apart but have merged in the public revenue of the State ". Mukherjea, J., in *The Commissioner, Hindu Religious Endowents Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1] had said that this fact was not conclusive and in view of Article 266 of the Constitution, it could not be conclusive. Mootham, C. J., in *Khacheru Singh* v. *S. D. O., Khuria*[2], observed :

> " It clearly follows, I think from the fact that the fees or other money taken by the Supreme Court or a High Court are to be credited to the Consolidated Fund that such fees cannot be fees of the kind which the Supreme Court had under consideration ; for an essential characteristic of such a fee is that it shall be set apart and not merged in the general revenue of the State. It accordingly appears that there exists another class of imposition, also called a fee in the Constitution which differs from the type of fee which the Supreme Court had under consideration and that the definition of fee to be found in the three Supreme Court decisions of 1954 is not exhaustive ".

41. With respect, the fees taken in Courts and the fees mentioned in Entry 66, List I are of the same kind. They may differ from each oth r only because they relate to different subject-matters and the subject-matter may dictate what kind of fees can be levied conveniently, but the overall limitation is that fees cannot be levied for the increase of general revenue. For instance if a State were to double Court-fees with the object of providing money for road building or building schools, the enactment would be held to be void. Dayal, J., correctly observed in *Khacheru Singh* v. *S. D.O., Khuria*[2].

> " The expression ' the fees taken therein ' in item No. 77 of List I and ' fees taken in all Courts except the Supreme Court ' in item No. 3 of List II need not be interpreted to refer to such fees which must be credited to a separate fund and not to the general fund of India or the State. It follows therefore that the Constitution did not contemplate it to be an essential element of a fee that it be credited to a separate fund and not to the Consolidated Fund."

42. But the High Court in *Khacheru Singh* v. *S.D.O., Khuria*[1] did not meet the argument of the learned Counsel that "as the State Government was already making a very large profit out of Court-fees, the entire Amending Act of 1959 increasing those fees is *ultra vires* ". It seems to us that whenever the State Legislature generally increases fees it must establish that it is necessary to increase Court-fees in order to meet the cost of administration of civil justice. As soon as the broad correlationship between the cost of administration of civil justice and the levy of Court-fees ceases, the imposition becomes a tax and beyond the competence of the State Legislature.

43. The Bombay High Court in *The Central Provinces Syndicate (Private) Ltd.* v. *The Commissioner of Income-tax, Nagpur*[2] also fell into the same error. V. S. Desai, J., held that

> " one of the essential elements laid down by the Supreme Court as the requisite of a fee, namely, that it must be appropriated to a separate fund earmarked to meet the expenses of the services has never been true of the Court-fees at any time and is also not true of the Court-fees levied after the Constitution .... The learned Advocate-General, in our opinion, is right in saying that the levy of Court-fees for general revenues has been

1. 1954 S.C.R. 1005: 1954 S.C.J. 335.
2. I.L.R. (1960) 1 All. 429.

1. I.L.R. (1960) 1 All. 429, 445.
2. I.L.R. (1962) Bom. 208.

authorised by the relevant Entries in the Legislature."

What impressed the High Court was that " there was however no monetary measure of the fees charged for the services rendered and the levy of the fees could also not be said to be in proportion to the services rendered."

44. We agree with the Madras High Court in the present case that the fees taken in Courts are not a category by themselves and must contain the essential elements of the fees as laid down by this Court. We also agree with the following observation in I.L.R. (1960) 1 Mad. 247 at 341-341 :

> "If the element of revenue for the general purposes of the State predominates, then the taxing element takes hold of the levy and it ceases to have any relation to the cost of administration of the laws to which it relates; it becomes a tax. Its validity has then to be determined with reference to its character as a tax and it has to be seen whether the Legislature has the power to impose the particular tax. When a levy is impugned as a colourable exercise of legislative power, the State being charged with raising a tax under the guise of levying a fee, Courts have to scrutinise the scheme of the levy carefully, and determine whether, in fact, there is correlation between the services and the levy, or whether the levy is excessive to such an extent as to be a pretence of a fee and not a fee in reality. If, in substance, the levy is not to raise revenues also for the general purposes of the State, the mere absence of uniformity or the fact that it has no direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service, or that some of the contributories do not obtain the same degree of service as others may, will not change the essential character of the levy."

45. The next question that arises is whether the impugned impositions are fees. The learned Advocate-General contended that the State of Madras does not make a profit out of the administration of civil justice. On the contrary it spends money on the administration of civil justice out of general revenues.

46. He relied on the supplemental counter-affidavit filed on 11th October, 1966. Objection was taken on behalf of the respondent in the connected civil appeals that this counter-affidavit should not be taken into consideration because it was filed in the course of arguments and they had no opportunity to meet the affidavit.

47. It seems to us that we cannot dispose of this appeal without giving opportunity to the respondents to file an affidavit or affidavits in reply to the supplemental counter-affidavit dated 11th October, 1966 because if we take the figures as given and explained by the Advocate-General we cannot say that the State is making a profit out of the administration of civil justice. Various items both on the receipts side and the expenditure side have to be carefully analysed to see what items or portion of items should be credited or debited to the administration of civil justice.

48. It is true, as held by the High Court, that it is for the State to establish that what has been levied is Court-fees properly so-called and if there is any enhancement the State must justify the enhancement.

49. We are accordingly constrained to allow the appeal and set aside the judgment passed by the High Court and remand the case to it. We direct that the High Court should give an opportunity

to the writ petitioners to file an affidavit or affidavits in reply to the affidavit dated 11th October, 1966. The High Court shall then decide whether the impugned fees are Court-fees or taxes on litigants or litigation. No Order as to costs.

V.M.K. —— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—*J. M. Shelat and H. R. Khanna, JJ.*

R. L. Kapur .. *Appellant.**

v.

The State of Tamil Nadu .. *Respondent.*

Constitution of India (1950), *Article* 215 *and Contempt of Courts Act (XXXII of* 1952), *sections* 3, 4 *and* 5—*Scope—Appellant found guilty of contempt of the High Court and sentenced to simple imprisonment and fine—Recovery of fine after a lapse of six years from the amount deposited during the proceedings for securing his presence—Section* 70, *Indian Penal Code, if any impediment.*

The appellant deposited a sum of Rs. 500 as security for his appearance in contempt of Court proceedings taken against him in the High Court. He was found guilty of contempt and sentenced to six months simple imprisonment and fine. He served out the sentence of imprisonment, but failed to pay the fine. Dismissing the application for refund of the deposit filed by the appellant, the High Court allowed the State's application for payment of the said sum towards satisfaction of the unpaid fine. The State's application was filed more than 6 years after the imposition of the fine. On the question whether the appellant is entitled to the refund of the said sum,

Held that : Article 215 of the Constitution declares that every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. This jurisdiction is a special one, not arising or derived from the Contempt of Courts Act, 1952, and therefore, not within the purview of either the Penal Code or the Code of Criminal Procedure. This is borne out from the provisions of the Contempt of Courts Act, 1952, themselves. The result is that section 70 of the Indian Penal Code is no impediment by way of limitation in the way of recovery of the fine. [*Para.* 5.]

Though the deposit was made for a particular purpose, that is, to secure the presence of the appellant at the time of the hearing of the said contempt proceedings, the High Court, as a Court of record, being clothed with a special jurisdiction, has also all incidental and necessary powers to effectuate that jurisdiction.

[*Para.* 6.]

Case referred to :

Sukhdev Singh Sodhi v. *The Chief Justice and Judges of the Pepsu High Court,* 1954 S.C.R. 454 : 1954 S.C.J. 67 : (1954) 1 M.L.J. 137 : A.I.R. 1954 S.C. 186.

Appeal by Special Leave from the Judgment and Order dated the 29th June, 1971 of the Madras High Court in Application Nos. 1171 and 1172 of 1971.

S. N. Prasad, Advocate, *amicus curiae*, for Appellant.

A. V. Rangam, for Respondent.

The Judgment of the Court was delivered by

Shelat, J.—This appeal, by Special Leave, is directed against the order of the High Court of Madras, directing a sum of Rs. 500, deposited in the High Court as security for the appellant's appearance before it in certain contempt of Court proceedings, to be adjusted

*Crl. Appeal No. 185 of 1971.
8th February, 1972.

against the fine imposed upon him in those proceedings. It appears that the contempt of Court proceedings, being No. 3 of 1962, were taken against the appellant in the High Court in respect of a letter written and addressed by the appellant to the then Chief Justice of the High Court and which contained certain remarks in regard to the dismissal of the appellant's revision application by a single Judge of the High Court . Thus, the contempt with which the plaintiff was charged in those proceedings was contempt of the High Court, and not the City Civil Court, Madras, in which the appellant had filed the suit from out of which the said revision application arose. In those proceedings, the High Court, by its judgment and order, dated 25th February, 1964, held that appellant guilty of contempt of Court and sentenced him to six months simple imprisonment and fine. The appellant served out the sentence of imprisonment, but failed to pay the fine.

2. It appears that the said amount of Rs. 500,deposited, as aforesaid in the said contempt proceedings, remained unattached till 1971. In 1971, two applications were filed in the High Court, one by the appellant for refund of the said amount and the other on behalf of the State for adjustment of the said amount towards the fine remaining unpaid. By an order, dated 29th June, 1971, the High Court dismissed the appellant's application for refund and allowed the State's application for payment of the said sum towards satisfaction of the said unpaid fine.

3. As against the said order, Counsel for the appellant relied on section 70 of the Penal Code and urged that six years having elapsed since the passing of the order imposing fine upon the appellant, the State's application was time barred and the High Court could not pass the impugned order, the effect of which was to collect the said fine from out of the said deposit. If section 70 were to apply to the said contempt of Court proceedings, there is no doubt that the State's application would be time-barred as that section in terms provides that such fine can be levied within six years after the passing of the order of conviction and sentence. But section 5 of the Penal Code provides, *inter alia*, that its provisions are not to affect the provisions of any special or local law. Under section 41 of the Penal Code, a special law is one applicable to a particular subject. Therefore, if the law as to contempt of Court, as administered by the High Court of Madras, a chartered High Court, were to be regarded as special law, section 70 of the Penal Code, obviously, cannot apply, and since such a special law does not prescribe any period of limitation for collecting and satisfying a fine imposed thereunder, no question of limitation would arise.

4. Counsel, however, relied on section 25 of the General Clauses Act, 1897 which provides that sections 63 to 70 of the Penal Code and the provisions of the Code of Criminal Procedure in relation to the issue and execution of warrants for the levy of fines shall apply to all fines imposed under " any Act, Regulation, rule or bye-law" unless such Act, Regulation, rule or bye-law contains an express provision to the contrary. The argument was that the order of sentence which imposed upon the appellant the fine was and must be regarded as an order passed under the Contempt of Courts Act, XXXII of 1952, and consequently, section 70 of the Penal Code was applicable.

5. The question is, does the power of the High Court of Madras to punish contempt of itself arise under the Contempt of Courts Act, 1952, so that under section 25 of the General Clauses Act, 1897 sections 63 to 70 of the Penal Code

and the relevant provisions of the Code of Criminal Procedure would apply ? The answer to such a question is furnished by Article 215 of the Constitution and the provisions of the Contempt of Courts Act, 1952 themselves. Article 215 declares that every High Court shall be a Court of record and shall have all powers of such as Court including the power to punish for contempt of itself. Whether Article 215 declares the power of the High Court already existing in it by reason of its being a Court of record, or whether the Article confers the power as inherent in a Court of record, the jurisdiction is a special one, not arising or derived from the Contempt of Courts Act, 1952, and therefore, not within the purview of either the Penal Code or the Code of Criminal Procedure. Such a position is also clear from the provisions of the Contempt of Courts Act, 1952. Section 3 of that Act provides that every High Court shall have and exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice in respect of contempt of Courts subordinate to it as it has and exercises in respect of contempts of itself. The only limitation to the power is, as provided by sub-section (2), that it shall not take cognizance of a contempt committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Penal Code. As explained in *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court*[1], section 3 of the Act is similar to section 2 of the 1926 Act, and " far from conferring a new jurisdiction assumes, as did the old Act, the existence of a right to punish for contempt in every High Court and further assumes the existence of a special practice and procedure, for it says that every High Court shall exercise the same jurisdiction, powers, and authority "in accordance with the same procedure and practice..." In any case, so far as contempt of the High Court itself is concerned, as distinguished from that of a Court subordinate to it, the Constitution vests these rights in every High Court, and so no Act of a Legislature can take away that jurisdiction and confer it afresh by virtue of its own authority. No doubt, section 5 of the Act states that a High Court shall have jurisdiction to inquire into and try a contempt of itself or of a Court subordinate to it whether the alleged contempt is committed within or outside the local limits of its jurisdiction and whether the contemnor is within or outside such limits. The effect of section 5 is only to widen the scope of the existing jurisdiction of a special kind and not conferring a new jurisdiction. It is true that under section 4 of the Act the maximum sentence and fine which can be imposed is respectively simple imprisonment for six months and a fine of Rs. 2,000, or both. But that again is a restriction on an existing jurisdiction and not conferment of a new jurisdiction. That being the position, section 25 in the General Clauses Act, 1897 cannot apply. The result is that section 70 of the Penal Code is no impediment by way of limitation in the way of the recovery of the fine.

6. It is true that the deposit was made for a particular purpose, that is, to secure the presence of the appellant at the time of the hearing of the said contempt proceedings. But the High Court, as a Court of record, being clothed with a special jurisdiction, has also all incidental and necessary powers to effectuate that jurisdiction. Consequently, it had the power to order satisfaction of the fine imposed by it from out of an available fund deposited by or on behalf of or for the benefit of the appellant.

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1. 1954 S.C.R. 454 at 463 : 1954 S.C.J. 67 : (1954) 1 M.L.J. 137 ; A.I.R. 1954 S.C. 186.

7. In our view, the contentions raised on behalf of the appellant cannot, for the reasons aforesaid, be sustained. The appeal fails and is dismissed. There will be no order as to costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*K. S. Hegde, P. Jaganmohan Reddy and D. G. Palekar, JJ.*

Chigurupati Venkata Subbayya and others .. *Appellants**

v.

Paladugu Anjayya and others .. *Respondents.*

(A) *Madras Estates Land Act (Madras Act I of 1908) as amended by Madras Act (VIII of 1934), sections 3 and 20-A—Scope—Communal lands, diversion of—Mere declaration that the land is no more required for purposes for which they were originally intended, if sufficient for purposes of the section.*

Before the Collector can order the diversion of the use of any communal land under section 20-A of the Estates Land Act he should first declare that the land or any portion of that land is no more required for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause 16 of section 3 and he should further make an order in writing directing that the same be used for any other specified communal purpose or if the same is not required for any communal purpose, that it be converted into ryotwari land or landholder's ryoti land. It is clear from sub-section (2) of section 20-A that, without a written order of the District Collector under clause (*b*) of sub-section (1), no land which was set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section 3 can be assigned or used for any other purpose. The order in question is an incomplete order. Apart from making a declaration that Survey Nos. 16 to 18 are no more required for the purpose for which they were originally intended, the Collector did not appear to have made any order under clause (*b*) of section 20-A. Hence despite the order of the Collector, Survey Nos. 16 to 18 continued to be communal lands. [*Para.* 11.]

(B) *Madras Estates Abolition and Conversion into Ryotwari Act (XXVI of 1948), section 3—Scope—Vesting of suit lands in the State, if has the effect of abrogating the rights of the community over them.*

It is true that in view of section 3 of the Estates Abolition Act the suit lands vested in the Government. That by itself did not mean that the rights of the community over it were taken away. What had been abrogated was the rights and interests created in or over the estate before the notified date by the principal or any other landholder. Hence those rights could not be said to have been abrogated by clause (*c*) of section 3 of the Madras Estates Abolition and Conversion into Ryotwari Act. [*Para.* 21.]

Case referred to :

Valathar Mooppannar v. *The Board of Revenue, Madras,* (1966) 1 M.L.J. 354.

Appeal by Special Leave from the Judgment and Decree, dated the 29th August, 1966 of the Andhra Pradesh High Court in Second Appeal No. 644 of 1962.

R. Vasudev Pillai and *P. Kesava Pillai,* for Appellants.

K. R. Chaudhuri and *K. Rajendra Chowdhary,* for Respondents Nos. 1 to 4.

The Judgment of the Court was delivered by

Hegde, J.—This is an appeal by Special Leave. Defendants 2 to 7 in the suit are the appellants in this appeal. The plaintiffs who are respondents 1 to 4 herein sued for a declaration that Survey Nos. 12 to 18 comprising an extent of

* C.A. No. 556 of 1967. *24th January,* 1972.

10 acres 54 cents in South Vallur village of Vijayawada Taluka are communal lands, the villagers therein having rights of irrigation and drainage. In that suit they challenged the assignment of the suit lands in favour of the 2nd defendant (1st appellant) by the Estate Manager by his order of 21st December, 1952. They also sought a permanent injunction restraining the defendants from interfering with the exercise of their rights in those lands. Further they prayed for a mandatory injunction against defendants 2 to 7 directing them to restore "Agakodu" at their own cost to its original condition. The plaintiffs brought the suit in a representative capacity after obtaining the permission of the Court.

2. The 2nd defendant resisted the suit on various grounds. He pleaded that he had been in possession of Survey Nos. 12 to 15 ever since 1946, after obtaining a grant from the Zamindar of the South Vallur under Patta Exhibit B-8 dated 15th January, 1946. According to him after the abolition of the Estates under the Estate Abolition Act, 1948 (in short the Estates Abolition Act), Survey Nos. 16 to 18 were held to be unnecessary for the original purpose by the Collector. Thereafter those Survey Nos. were granted to him by the Estates Manager under Exhibit B-16. He further pleaded that during the pendency of the suit, a Patta for the suit lands was granted to him under section 11 of the Estates Abolition Act by the Assistant Settlement Officer under Exhibit B-30 dated 10th December, 1955.

3. The trial Court dismissed the plaintiffs' suit upholding the contentions of the second defendant. It came to the conclusion that the plaintiffs had failed to establish the communal character of the lands pleaded by them and further even if those lands were communal lands at one time, they had ceased to be such in view of the various orders passed by the authorities.

4. The first appellate Court reversed the findings of the trial Court and decreed the plaintiffs' suit as prayed for. It came to the conclusion that the lands in question were communal lands and the villagers had rights of irrigation and drainage through those lands. It further came to the conclusion that the various orders referred to by the second defendant in his written statement were either invalid or ineffective. The High Court has affirmed the decision of the first appellate Court.

5. Mr. R. V. Pillai, the learned Counsel for the appellants formulated three contentions before us *viz.* (1) that the conclusion reached by the first appellate Court and affirmed by the High Court that the lands in question are communal lands has no basis in evidence ; (2) that the civil Court had no jurisdiction to entertain the suit ; and (3) in any event the communal rights in the suit lands were extinguished under section 3 of the Estates Abolition Act.

6. We shall now proceed to examine these contentions. But before doing so, it is necessary to point out that Mr. Pillai attempted to reopen questions of fact which appear to have been conceded before the High Court. We have not permitted him to do so. From the judgment of the High Court, it is clear that the arguments in that Court proceeded on the basis that the suit lands were once communal lands ; Survey Nos. 12 to 15 even now continue to be communal lands but Survey Nos. 16 to 18 ceased to be such because of the order passed by the Collector, Krishna on 29th October, 1946 under section 20-A (1) of the Madras Estates Land Act as well as that passed by the Estates Officer and Assistant Settlement Officer subsequently, to which we shall refer presently. In the

course of the judgment the learned Judge of the High Court observed :

> "It is not in dispute that the lands Survey Nos. 12 to 18 and measuring 10 acres and 54 cents, situate in South Vallur village in Vijayawada taluk are poramboke lands. That they were used for the purpose of irrigation and drainage is also not in dispute. It is common ground that under Exhibit A-1, the Collector, Krishna, passed an order under section 20 (1) (*a*) of the Madras Estates Lands Act as amended by Madras Act VIII of 1934 to the effect that lands, Survey Nos. 16, 17 and 18 were no longer required for the purpose for which they were originally intended. Under that order, the Collector asked the Zamindar to say whether he had got any reversionary rights in the lands. What happened subsequently is not clear from the record. It is however common ground that Survey Nos. 12 to 15 (both inclusive) continued to be communal lands and no order under section 20-A (2) was at any time passed by the Collector converting these communal lands into ryotwari lands or assigned them to anyone till the estate was abolished. It will thus be clear that there was merely a declaration that Survey Nos. 16, 17 and 18 were no longer required for the purpose for which they were originally intended. No further order converting those lands to ryotwari lands was passed and Survey Nos. 12 to 15 continued to be communal lands till the estate was abolished."

7. In view of the stand taken by the appellants before the High Court, it is not permissible for them to contend that Survey Nos. 12 to 18 were at no time communal lands nor is it open to them to contend that Survey Nos. 12 to 15 do not still continue to be communal lands. The controversy as regards the nature of the lands, therefore, must be confined to Survey Nos. 16, 17 and 18. In this view the first contention of Mr. Pillai fails so far as Survey Nos. 12 to 15 are concerned.

8. So far as Survey Nos. 16 to 18 are concerned, it was said that these lands had ceased to be communal lands as a result of the various orders passed by the authorities. Let us examine whether this contention is correct ? Before doing so it is necessary to refer to some of the provisions in the Estates Land Act as well as the Estates Abolition Act. No material was placed before the Court to show that the South Vallur Zamindari Estate included Survey Nos. 12 to 18. Section 3 of the Estates Land Act defines an 'Estate' as meaning.

> (*a*) "any permanently-settled estate or temporarily settled zamindari ;
>
> (*b*) any portion of such permanently settled estate or temporarily-settled zamindari which is separately registered in the office of the Collector ;
>
> (*c*) any unsettled palaiyam or jagir ;
>
> (*d*) any inam village of which the grant has been made, confirmed or recognized by the Government notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees.
>
> *Explantion* (1) Where a grant of an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that inam which have already been granted on service or other tenure or been reserved for communal purposes."

9. This definition does not help the appellants. The appellants have failed to establish that the Zamindar could

have conveyed any right in the suit lands to the appellants. In view of sections 20 and 20-A of the Estates Land Act, to which we shall refer a little later, no Zamindar appears to have had any right to deal with communal lands. Hence the alleged grant by the Zamindar, does not appear to confer on the first appellant any title.

10. This takes us to the question whether the order made by the Collector on 18th October, 1946 (Exhibit A-1) can be considered as having conferred any title on the Zamindar in respect of Survey Nos. 16, 17 and 18. That order reads :

" Re. A-3—13 M.P. 46 Exhibit A-1.

Proceedings of the Collector, Krishna at Chilakalapudi.

Sub : E.L. Act.—Bezwada Taluk, South Vallur, Survey Nos. 17, 18, 16 Enquiry under section 20-A. Order under section 20-A (1) (*a*) passed.

Read : This office D. Dis. 5876—45, dated 29th March, 1945 and R.D.O.'s Dis. 9609 of 1946, dated 18th October, 1946.

ORDER

Under section 20-A (1) (*a*) of the Madras E. L. Act as amended by Madras Act VIII of 1934 the lands mentioned in the schedule below are declared to be no longer required for the purpose for which they were originally intended.

SCHEDULE

Taluk.	*Village.*	*Survey No.*	*Extent.*	*Original Classification.*
Bezwada	South Vallur	16	0—85	Agakodu P.W.D.
		17	1—72	Drainage channel
		18	1—19	Poramboke

Sd./
29-10,—Collector.

(2) The Zamindar is requested to state whether he has any oral or documentary evidence to prove that the reversionary right in the lands vest in him and to adduce it if any, before the Collector within sixty days from the date of this order.

Sd./-
22-10-53.
Try. Deputy Collector,
Krishna."

11. For determining the effect of that order, it is necessary to refer to some of the provisions of the Estates Land Act. Section 3 (2) of that Act defines " Ryot " as meaning :

" a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it."

" Ryoti land " is defined in section 3 (16) which says :

" ' Ryoti land' means cultivable land in an estate other than private land but does not include—

(*a*) * * *

(*b*) thrashing-floor, cattle-stands, village sites, and other lands situated in any estate which are set apart for the common use of the villagers.

(*c*) * * *"

Section 20-A of the Estates Land Act says :

"(1) Subject to such rules as the State Government may prescribe in this behalf, the District Collector may on the application of the landholder, a ryot or any other person interested—

(*a*) declare that any land or any portion of any land which is set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause 16 of section 3 is no longer required for its original purpose; and

(*b*) by order in writing direct—

(i) that any such lands or portion in respect of which declaration is made be used for any other specified communal purpose; or

(ii) if such land or portion is not required for any communal purpose, that it be converted into ryotwari land or landholder's ryoti land according as the reversionary rights in such land vest under the terms, express or implied of the sanad, title-deed or other grant (in the Government) or in the landholder :

Provided that before making any such declaration and order, the District Collector shall have due regard to any other customary rights of the landholder or the ryots in the user of such land or portion and shall satisfy himself that the exercise of such rights would otherwise be provided for adequately if the declaration and order are put into effect :

Provided further that in the case of any land of the description referred to in sub-clause (*a*) of clause (16) of section 3 the reversionary rights in which vest in the landholder under the terms, express or implied, of the sanad, title-deed or other grant, any order under sub-clause (i) of clause (*b*) shall be made only with the consent of the landholder.

(2) Without the written order of the District Collector under clause (*b*) of sub-section (1), no land which is set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section 3 shall be assigned or used for any other purpose. Nothing contained in this sub-section shall affect or take away or be deemed to affect or take away the customary rights of the landholder or the ryots in the user of any such land."

Before the Collector can order the diversion of the use of any communal land, he should first declare that the land or any portion of that land is no more required for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section 3 and he should further make an order in writing directing that the same be used for any other specified communal purpose or if the same is not required for any communal purpose, that it be converted into ryotwari land or landholder's ryoti land. It is clear from sub-section (2) of section 20-A that without a written order of the District Collector under clause (*b*) of sub-section (1), no land which was set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section 3 can be assigned or used for any other purpose. The order of the Collector on which the first appellant has relied is an incomplete order. Apart from making a declaration that Survey Nos. 16 to 18 are no more required for purposes for which they were originally intended, the Collector did not appear to have made any order under clause (*b*) of section 20-A. Hence despite the order of the Collector, Survey

Nos. 16 to 18 continue to be communal lands.

12. Reliance was next placed by the appellants on the order of the Estates Manager, dated 21st December, 1952 (Exhibit B-2) for claiming title to the suit properties. In this order the Estates Manager proceeded on the basis that the Collector's order to which we have already made reference had already converted Survey Nos. 16 to 18 into ryotwari lands. This is an erroneous assumption. That assumption cannot confer any right on the 1st appellant. The Estates Manager is not shown to have had any power under any law to convert the communal lands into ryoti lands. Hence his order cannot be considered as having validly converted the suit lands into ryoti lands.

13. Lastly appellants sought support from the order of the Assistant Settlement Officer made on 10th December, 1955 (Exhibit B-30). This order was made during the pendency of the suit and without notice to the plaintiffs-respondents. It is purported to have been made under section 11 (*a*) of the Estates Abolition Act. Under that order the Assistant Settlement Officer granted to the 1st appellant ryotwari patta in respect of Survey Nos. 16 to 18. Section 11 of the Estates Abolition Act, does not authorise the Assistant Settlement Officer to convert the communal land into a ryoti land. That section reads :

> "Every ryot in an estate shall, with effect on and from the notified date, be entitled to a ryotwari patta in respect of—
>
> (*a*) all ryoti lands which, immediately before the notified date, were properly included or ought to have been properly included in the holding and which are not either lanka lands or lands in respect of which a landholder or some other person is entitled to a ryotwari patta under any other provision of this Act ; and
>
> (*b*) all lanka lands in his occupation immediately before the notified date, such lands having been in his occupation or in that of his predecessors-in-title continuously from the 1st day of July, 1939 :
>
> Provided that no person who has been admitted into possession of any land by a landholder on or after the 1st day of July, 1945 shall, except where the Government after an examination of all the circumstances otherwise direct, be entitled to a ryotwari patta in respect of such land.
>
> *Explanation.*—No lease of any lanka land and no person to whom a right to collect the rent of any land has been leased before the notified date, including an ijaradar or a farmer of rent, shall be entitled to a ryotwari patta in respect of such land under this section."

14. The lands with which we are concerned are not lanka lands nor were they declared to be ryoti lands either under the Abolition Act or under the Estates Land Act. That being so, the Assistant Settlement Officer had no competence to grant ryotwari patta in respect of those lands—*see* the decision of the Madras High Court in *Valathar Mooppannar and others* v. *The Board of Revenue, Madras*[1]. That officer has purported to grant the patta in question even without notice to the interested parties and that during the pendency of the suit.

15. For the reasons mentioned above, we are unable to accept the contention of the appellants that Survey Nos. 16 to 18 have ceased to be communal lands or that the appellants had obtained any lawful title to them.

16. It was urged that the order of the Assistant Settlement Officer whether the

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1. (1966) 1 M.L.J. 354.

same was in accordance with law or not must be deemed to be final in view of section 56 of the Abolition Act. This contention is again untenable. Section 56 says :

> " (1) Where after an estate is notified, a dispute arises as to: (*a*) whether any rent due from a ryot for any fasli year is in arrear or (*b*) what amount of rent is in arrear or (*c*) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer.
>
> (2) Any person deeming, himself aggrieved by any decision of the Settlement Officer under sub-section (1) may, within two months from the date of the decision or such further time as the Tribunal may in its discretion allow, appeal to the Tribunal and its decision shall be final and not be liable to be questioned in any Court of law."

17. The decision of the Settlement Officer which is made final under this section must be a decision in respect of one of the matters referred to in sub-section (1) of section 56. The controversy with which we are concerned in this case *viz.* whether the suit lands continue to be communal lands does not fall within the scope of that section. Hence we are unable to accept the contention of the appellant that the order made by the Settlement Officer has become final or conclusive. It is a wholly invalid order. In this view, it is not necessary to consider whether an order made under section 11 without notice to the interested persons can be considered as a valid order.

18. The contention that the civil Courts have no jurisdiction to go into the controversies arising for decision in this case in view of section 189 (1) of the Estates Land Act is again without merit. That section provides :

> " A District Collector or Collector hearing suits or applications of the nature specified in Parts A and B of the Schedule and the Board of Revenue or the District Collector exercising appellate or revisional jurisdiction therefrom shall hear and determine such suits or applications or exercise such jurisdiction as Revenue Court.
>
> No civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made."

19. The jurisdiction of the civil Courts is taken away only in respect of suits or applications of the nature specified in parts (A) and (B) of the Schedule to the Act. No reliance was placed by the appellants on any of the matters mentioned in part (A) of the Schedule. Even as regards matters mentioned in part (B) reliance was only placed on item 5 of that Schedule. Part B refers to applications to be disposed of by a District Collector or Collector. Item 5 refers to a decision of the Collector under section 20-A (1). We have already come to the conclusion that the Collector had made no order under that section. Hence section 189 of the Estates Land Act is not attracted to the present case. This dispute with which we are concerned is a civil dispute. Therefore the Courts below had jurisdiction to decide the same under section 9 of the Civil Procedure Code.

20. The only other contention that remains to be considered is that the communal rights in the suit lands stood abolished under section 3 of the Estates Abolition Act. This contention does not appear to have been taken before the High Court. Therefore we see no justification to go into that contention. That apart, there appears to be no basis for that contention. Section 3 (*a*) of the Estates Abolition Act, repeals several Acts including the Madras Estates Land Act, 1908. In view of clause (*b*) of that section

all Estates including the communal lands, porambokes and other ryoti lands, waste lands, pasture lands, lanka lands, forests, mines and minerals, quarries, rivers and streams, tanks and irrigation works ; fisheries and ferries stood transferred to the Government and vested in them free from all encumbrances. It further provides that the Madras Revenue Recovery Act, 1864, the Madras Irrigation Cess Act, 1865 and all other enactments applicable to ryotwari areas shall apply to that estate. Clause 3 of that section prescribes that "all rights and interests created in or over the estate before the notified date by the principal or any other landholder shall as against the Government cease and determine."

21. It is true that the suit lands in view of section 3 of the Estates Abolition Act did vest in the Government. That by itself does not mean that the rights of the community over it were taken away. Our attention has not been invited to any provision of law under which the rights of the community over those lands can be said to have been taken away. What has been abrogated is the rights and interests created in or over the estate before the notified date by the principal or other landholder. The rights of the community over the suit lands were not created by the principal or any other landholder. Hence those rights cannot be said to have been abrogated by clause (*c*) of section 3 of the Estates Abolition Act.

22. In the result this appeal fails and the same is dismissed with costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*K. K. Mathew and M. H. Beg, JJ.*

M. L. Devender Singh and others .. *Appellants**

v.

Syed Khaja .. *Respondent.*

Specific Relief Act (I of 1877), sections 12 Explanation, 20 *and* 22—*Contract for sale of immovable property—Specific performance of —Contract providing for liquidated damages in case of breach—If operates as a bar to specific performance—Nature of discretion under section 22.*

A reference to section 22 of the Specific Relief Act (1877), would show that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds guided by judicial principles and capable of correction by a Court of Appeal. This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of section 20 of the Act so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted. [*Para.* 19.]

The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the sue of the words "unless and until the contrary is proved" in the *Explanation* to section 12 of the Act. The sufficiency or otherwise of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid

*C.A. No. 2517 of 1969. 3rd *August*, 1973.

in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But it is nothing more than a piece of evidence. It is not conclusive or decisive. [*Para.* 20.]

Similarly the contention, that once the presumption contained in the *Explanation* to section 12 of the Act is removed, the bar contained in section 21 against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption, the plaintiff may still be in a position to prove, by other evidence in the case that payment of money does not compensate him adequately.

[*Para.* 21.]

The discretion exercisable under section 23 (section 20 of the Act of 1963) is not to be exercised arbitrarily but on sound and reasonable grounds guided by judicial principles so that it is capable of correction by a Court of appeal. The trial Court's error in the exercise of discretion on an utterly untenable, fanciful and unsound ground can justifiably be corrected by the High Court. [*Para.* 25.]

The Judgment of the Court was delivered by

Beg, J.—This appeal has come before us on a Certificate of fitness granted by the High Court of Andhra Pradesh, under Articles 132 and 133 of the Constitution of India.

2. The plaintiff-respondent had sued the Defendant-Appellant Devender Singh (hereinafter referred to as the "first defendant") for specific performance of a contract to sell a house facing the Secunderabad Junction Railway Station in Hyderabad for a sum of Rs. 60,000 concluded on 9th October, 1962 at New Delhi where the first defendant resides. It appears that there was a previous agreement on 27th September, 1962 (hereinafter referred to as the "first agreement") between the plaintiff, who resides at Hyderabad, and the first defendant, through an agent, Laxmanaswamy, D.W. 2, with the help of Sambamurthy, D.W. 3, a nephew of Laxmanaswamy and an Income-tax practitioner residing at Secunderabad, for the sale of this very property for Rs. 55,000 the terms of which were embodied in a document Exhibit B-15. The first defendant denies the binding character of the first agreement of 27th September, 1962 under which a cheque for Rs. 10,000 was drawn up by the plaintiff in favour of the first defendant and handed over to his agent by the plaintiff. The exact reason for a cancellation of this cheque for Rupees 10,000 in favour of the 1st defendant is not clear but, according to Sambamurthy, D.W. 3, the reason was that, actually, Rs. 20,000 was being demanded on behalf of the first defendant as earnest money to which the plaintiff had consented so that a new cheque was for some unknown reason, to be issued and not another cheque for Rs. 10,000. The evidence of Sambamurthy also shows that the plaintiff had become aware of want of written authority on the part of either Laxmanaswamy or Sambamurthy to conclude the contract on behalf of the 1st defendant so that he must have felt uncertain about the effect of the first agreement. Evidently, attempts to show the plaintiff that his position was shaky under the first agreement and higglings were going on despite the agreement of 27th September, 1962. Evidence in the case and findings recorded thereon by the trial Court as well as the High Court

show that, although the first defendant, who was keen to dispose of his property at Secunderabad, may have had other offers, yet, upto 27th September, 1962, when the first agreement was concluded, he had no better offer than the plaintiff's. Evidence is conflicting on the question whether the first defendant had authorised Sambamurthy by telephone to conclude the contract on his behalf for the sale of property for Rs. 55,000, but this was unimportant in view of the subsequent agreement of 9th October, 1962. The plaintiff, who was evidently very anxious to obtain the property, had flown to Delhi with his lawyer and had managed, by offering Rs. 60,000 as the price of the property, out of which Rs. 20,000 was paid as earnest money (Rs. 10,000 in cash and Rs. 10,000 by a cheque dated 9th October 1962) and the balance at the time of the registration, to induce the first defendant himself to conclude and execute the fresh agreement of 9th October, 1962.

3. The deed of agreement of 9th October, 1962, Exhibit A-1 was not executed in a hurry by the first defendant. He had ample time to consider any other offers there might be till then for sale of his property and to take legal advice, if he had wanted to have it, before executing the deed of 9th October, 1962. The trial Court as well as the High Court had found that the first defendant was fully aware of all the facts and had entered into the agreement of 9th October, 1962, with open eyes because it was the most advantageous transaction open to the first defendant at that time and not as a result of any pressure or misrepresentation or fraud practised upon the first defendant, a middle aged, hard headed and astute businessman who deposed that he was a Director of Blackwood Hodge (Pvt.) Ltd., and was connected with a number of other business concerns. He had himself stated in his evidence in Court that he entered into the agreement of 9th October, 1962, because he considered that " a bird in hand was worth two in the bush " and had thus given out the real reason for the agreement of 9th October, 1962.

4. The first defendant had, however, ignoring the contract of 9th October, 1962, actually sold the property under a deed dated 19th October, 1962, Exhibit B-22 for a sum of Rs. 70,000 received from Gulam Hussain Jowkar (2nd defendant), Rajab (3rd defendant), Zafar Jowkar (4th defendant), Hussain Jowkar (5th defendant), Wali Hussain Nasab (6th defendant), all partners in the firm carrying on the business of running Alpha Hotel (7th defendant), situated in front of the Railway Station at Secunderabad. Apparently, the offer of Rs. 70,000 had come too late and proved too tempting for the first defendant to resist it.

5. The first defendant had, in answer to the suit of the plaintiff-respondent, pleaded that the contract of 9th October, 1962, was the result of misrepresentation and fraud. All he could urge in support of such a plea was that the first defendant had been so completely overawed by the plaintiff and his lawyer misrepresenting to him, that the first agreement was still binding and that the plaintiff could sue upon it, that he executed the agreement of 9th October, 1962. Both the trial Court and the High Court had found the plea of fraud and misrepresentation taken by the first defendant to be baseless. Nevertheless, the trial Court had relied upon the facts leading up to the agreement of 9th October, 1962 and the allegation that the first defendant was overawed as sufficient to justify the finding that the plaintiff had obtained an "unfair advantage" over the 1st defendant while concluding the agree-

ment of 9th October, 1962. Therefore, the trial Court thought that the plaintiff was not entitled to specific performance of the agreement of 9th October, 1962, but awarded a decree for the return of Rupees 20,000 to the plaintiff, which he had paid to the first defendant as earnest money, and for damages of Rs. 20,000 which had been stipulated for by way of liquidated damages or penalty in the agreement of 9th October, 1962, and for additional damages to the extent of Rs. 2,300. Interest at 6 per cent per annum and the costs of the suit were also awarded to the plaintiff by the trial Court.

6. The High Court had rightly found after a thorough re-examination of evidence in the case, that it was impossible to hold that the plaintiff had obtained any unfair advantage over the first defendant in concluding the agreement of 9th October, 1962. It found the stand of the 1st defendant to be disingenous and his plea as to why or how he found himself compelled to execute the agreement of 9th October, 1962, to be utterly incredible. The High Court had rightly held that the first defendant concluded the agreement of 9th October, 1962, because he obtained not only an enhancement of Rs. 5,000 in the sale consideration but Rs. 20,000 immediately as earnest money and a stipulation of a further sum of Rupees 20,000 as liquidated damages or as penalty in the event of the plaintiff resiling from the contract. Actually the first defendant-appellant was, owing to the fact that he could put forward want of the alleged agent's authority to sell, for whatever such an excuse may be worth, and the fact that he had still to execute a sale deed and give possession of the property, placed in a more favourable and advantageous bargaining position. And, bargaining had evidently not stopped despite the first agreement.

7. The only point which could be and which was seriously urged before us by Mr. Chagla, appearing for the defendants-appellants was that, the parties themselves having stipulated for Rs. 20,000 as liquidated damages in the event of a breach by the first defendant, the presumption contained in the *Explanation* to section 12 of the Specific Relief Act, 1877 (hereinafter called the old Act) was rebutted. Here, section 12 of the old Act may be reproduced *in toto* :

" 12. Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced :—

(*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust ;

(*b*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

(*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ; or

(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer movable property can be thus relieved."

8. The principles embodied in section 12 of the old Act have been incorporated in section 10 of the Specific Relief Act of 1963 (hereinafter referred to as " the Act of 1963") which runs as follows :

"10. Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

(*a*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ; or

(*b*) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.—Unless and until the contrary is proved, the Court shall presume—

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money ; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases :

(*a*) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market ;

(*b*) where the property is held by the defendant as the agent or trustee of the plaintiff."

The term of the contract of 9th October, 1962, which according to Mr. Chagla, attracts the explanation of section 12 of the old Act reads as follows :

"It is agreed that should I fail to comply with the terms of this agreement, I shall be liable not only for the refund of the advance of Rs. 20,000 (Rupees twenty thousand only) received by me but I shall also be liable to pay a similar amount of Rs. 20,000 (Rupees twenty thousand only) as damages to the said Syed Khaja."

9. There is no mention anywhere in the contract that a party to it will have the option to either fulfil the contract to buy or sell or to pay the liquidated damages or penalty of Rs. 20,000 stipulated for a breach, as an alternative to the performance of the contract to buy or to sell.

10. Section 21 of the old Act to which section 14 of the Act of 1963 corresponds, enacts, *inter alia*, that "a contract for the non-performance of which a compensation of money is adequate relief" cannot be specifically enforced. Hence, it is contended that, once the presumption contained in the Explanation to section 12 is rebutted, by proof that the parties themselves contemplated a certain amount as liquidated damages for a breach of contract, the bar under section 21 of the old Act must be given effect to because it must be deemed to be proved that the non-performance complained of can be adequately compensated by money.

11. The assumptions underlying the superficially attractive arguments on behalf of the Defendants-appellants are two : firstly, that the mere existence of a clause in a contract providing for liquidated damages or a penalty for a breach is sufficient to rebut the presumption raised by the explanation to section 12 ; and, secondly, that if the presumption is rebutted, the bar contained in section 21 of the old Act will *ipso facto* become operative. We now proceed to deal with each of the two assumptions mentioned above.

12. The answer to the first assumption is provided by section 20 of the old Act. It reads :

"20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in

case of its breach, and the party in default is willing to pay the same."

13. If the Legislative intent was that the mere proof that a sum is specified as liquidated damages or penalty for a breach should be enough to prove that a contract for the transfer of immovable property could be adequately compensated by the specified damages or penalty, section 20 of the old Act will certainly, become meaningless. It is true that section 20 of the old Act does not mention the case of an express contract giving an option to a promisor to either carry out the contract to convey, or in the alternative, to pay the sum specified, in which case the enforcement of the undertaking to make the payment would be an enforcement of the contract itself and no occasion for rebutting the presumption in the Explanation to section 21 would arise. In such cases the contract itself is specifically enforced when payment is directed in lieu of the conveyance to be made.

14. It may be mentioned here that the principles contained in section 20 of the old Act are re-enacted in section 23 of the Act of 1963 in language which makes it clear that a case where an option is given by a contract to a party either to pay or to carry out the other terms of the contract falls outside the purview, of section 20 of the old Act, but, mere specification of a sum of money to be paid for a breach in order to compel the performance of the contract to transfer property will not do. Section 23 of the Act of 1963 may be advantageously cited here. It runs as follows :

"23. (1) A contract, otherwise, proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the Court shall not also decree payment of the sum so named in the contract."

15. We think that section 23 of the Act of 1963 contains a comprehensive statement of the principles on which, even before the Act of 1963, the presence of a term in a contract specifying a sum of money to be paid for a breach of the contract has to be construed. Where payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property.

16. The position stated above is in conformity with the principles found stated in Sir Edward Fry's " Treatise on the Specific Performance of Contracts " (Sixth Edn. at p. 65). It was said there :

" The question always is : What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act ? Or, is it that one of the two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money ? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties ; if the latter, the contract is satisfied by the payment of a sum of money, and

there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes :

(i) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty is a bond.

(ii) Where the sum named is to be paid as liquidated damages on a breach of the contract.

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract."

17. Sir Edward Fry pointed out that the distinction between a strict penalty and liquidated damages for a breach of contract was important in common law where liquidated damages were considered sufficient compensation for breach of contract, but sums stipulated by way of penalty stood on a different footing. He then said :

"But as regards the equitable remedy the distinction is unimportant : for the fact that the sum named is the amount agreed to be paid as liquidated damages, is equally with a penalty strictly so called, ineffectual to prevent the Court from enforcing the contract *in specie.*"

18. The equitable principles which regulated the grant of specific performance by the separate Court of Equity which existed in England at one time have been given statutory form in India. It is, therefore, immaterial that the stipulated payment under the terms of the contract under consideration before us could be viewed as one for payment of liquidated damages. The question would still remain whether the Courts are relieved by the agreement between the parties of the duty to determine, on the facts of a particular case, whether damages, specified or left unspecified, would really afford adequate compensation to the party which wants a conveyance of immovable property as agreed upon.

19. A reference to section 22 of the old Act, (the corresponding provision is section 20 of the Act of 1963) would show that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds "guided by judicial principles and capable of correction by a Court of appeal." This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. We think that this is made perfectly clear by the provisions of section 20 of the old Act (corresponding to section 23 of the Act of 1963) so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted.

20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words " unless and until the contrary is proved ". The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.

21. The second assumption underlying the contentions on behalf of the Defendants-Appellants is that, once the presumption, contained in Explanation to section 12 of the old Act, is removed, the bar contained in section 21 of the old Act, against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption the plaintiff may still be in a position to prove, by other evidence in the case, that payment of money does not compensate him adequately.

22. In the instant case, both sides have led evidence. But, there is no evidence as to the extent of loss of prospective gains to the Plaintiff-Respondent, who carries on a bakery business, from the deprivation of a site so valuable as one in front of the Secunderabad Junction Railway Station. In fact, there is no standard for judging the loss from such a deprivation either to the Plaintiff-Respondent or to the partners of the Alpha Hotel who are the real contending parties. No attempt was even made to gauge the value of future prospects of such a site to businessmen in the position of Plaintiff-Respondent and those Defendants-Appellants who are partners of the Alpha Hotel. It is clear that the property has got no such value for the first Defendant, who is a businessman fully occupied with a number of businesses at Delhi where he had been residing for 19 years in 1963. It is evident that he could not conveniently look after the property situated in Secunderabad.

23. The Defendants-Appellants had miserably failed to prove their case. The attempt to prove either fraud or misrepresentation or "an unfair advantage" over the first Defendant, so as to bring his case within section 22 (1) of the old Act, was totally unsuccessful. The Courts commented adversely on incorrect assertions made by the first Defendant who could not show anything beyond the penalty or damages clause in the contract for sale dated 9th October, 1962. It is strange that the first Defendant, while willing to pay Rs. 20,000 as damages to the Plaintiff-Respondent will only get Rs. 10,000 more in price over Rs. 60,000 if his contract of sale to the partners of the Alpha Hotel were to stand. It is, therefore, clear that the first Defendant must have some ulterior motive in being prepared to suffer an ostensible loss of Rs. 10,000 even if his sale of 16th October, 1962 for Rs. 70,000 to the partners of the Alpha Hotel could be upheld. The Plaintiff himself had stated that financial considerations do not really determine his stand. We are unable to accept this profession of un-

concern for financial gain on the part of an astute businessman like the first Defendant. It is more likely that there is some undisclosed understanding between him and the partners of Alpha Hotel who are also co-appellants with him before us.

24. The result is that we think that the presumption contained in the Explanation to section 12 of the old Act was not rebutted here. In such cases equity helps honest Plaintiffs against Defendants who break solemnly given undertakings. The High Court had rightly decreed the suit for specific performance of the contract.

25. Lastly, it was urged before us that the High Court should not have lightly interfered with the exercise of its discretion by the trial Court to grant or not to grant specific performance on the facts and circumstances of this case. It is clear that the discretion as laid down in section 22 of the old Act (corresponding to section 20 of the Act of 1963), is not to be exercised arbitrarily but on sound and reasonable grounds " guided by judicial principles so that it is capable of correction by a Court of appeal". It appeared, quite rightly, to the High Court that the trial Court had gone completely astray in the exercise of its discretion on the footing that the Plaintiff-Respondent enjoyed an unfair advantage " over the first Defendant-Appellant, whereas, on the facts and circumstances of the case, it was the first Defendant who was placed in a position to exploit the need of the plaintiff and the plaintiff's allegedly insecure position under the first agreement. It is clear that the Plaintiff-Respondent had dealt very fairly and squarely with the first Defendant-Appellant. The trial Court's error in the exercise of its discretion on an utterly untenable, fanciful and unsound ground was rightly corrected by the High Court.

26. We, therefore, dismiss this appeal with costs.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*K. S. Hegde and A. N. Grover, JJ.*

State of Madras *Appellant**

v.

M/s. Lateef Hamid & Co. *Respondent.*

(A) *Constitution of India* (1950), *Article* 133—*Finding of fact by Sales Tax Tribunal—High Court declining to interfere—Supreme Court if can alter finding—Practice.*

The assessing officer as well as the Appellate Assistant Commissioner disallowed the two exemptions asked for by the assessee on the ground that there was interpolation in the relative documents covering the turnover. The Tribunal reversed that finding of those authorities and allowed the exemptions asked for. This finding of the Tribunal was essentially a finding of fact and hence the Supreme Court would not be justified in interfering with that finding and more so as the High Court had declined to interfere with that finding. [*Para.* 2.]

(B) *Madras General Sales Tax Act (I of* 1959), *sections* 31 *and* 61—*Madras General Sales Tax Act (IX of* 1939), *sections* 11 *and* 12 (1)—*Dealer in hides and skins—Assessment for the year* 1958-59 *made after the coming into force of* 1959 *Act—Appeal by assessee under section* 31 *of* 1959 *Act—Appellate authority while disposing of that appeal enhancing assessment—Validity of enhancement.*

Until 31st March, 1959, sales tax was being levied on dealers in the State of

*C.A. No. 2186 of 1968. 2nd September, 1971.

Madras under the provisions of the Madras Sales Tax Act, 1939. The turnover of the assessee, a dealer in hides and skins, for the year 1958-59 stood charged with the liability to pay tax as leviable under the 1939 Act. The 1939 Act was repealed by the Madras General Sales Tax Act, 1959. That Act came into force on 1st April, 1959. For the year 1958-59 the assessee was assessed after the 1959 Act came into force. Against this order the assessee filed an appeal under section 31 of the 1959 Act. The Appellate Assistant Commissioner enhanced the assessment while disposing of the appeal. Aggrieved by that order, the assessee took up the matter in appeal to the Tribunal. The Tribunal held that the appellate authority was incompetent to enhance the assessment. This was upheld by the High Court in revision. The High Court opined that under the 1939 Act, the appellate authority while exercising its appellate powers could not have enhanced the assessment of the assessee. That was an immunisation protection afforded to the assessee under the 1939 Act. Such an immunity or protection was a vested right of the assessee. The same not having been taken away either expressly or by necessary implication by the provisions of the 1959 Act, the Appellate Assistant Commissioner could not have enhanced the assessment. It further held that the immunity or protection of the assessee is protected by section 61 (1) of the 1959 Act as amended in 1963, with retrospective effect. On appeal to the Supreme Court :

Held : The High Court was wrong in holding that the Appellate Assistant Commissioner had no power to enhance the assessment. [*Para.* 20.]

The power conferred on the Appellate Assistant Commissioner under section 31 of the 1959 Act combined to an extent both the appellate power as well as the special power of the Commercial Tax Officer had under sections 11 and 12 (1) of the 1939 Act. Hence the changes effected by the 1959 Act in the machinery provisions did not touch the substance of the matter. There was no basis for saying that the provisions of the 1959 Act relating to the determination of the assessment were more onerous than those in the 1939 Act. The 1959 Act merely simplified the procedure without touching the substance of the right of the parties. No benefit that was available to an assessee as regards the procedure was taken away by the 1959 Act. It cannot therefore be said that any vested right of the assessee had been in fact affected by the 1959 Act. [*Para.* 12.]

Deputy Commissioner of Commercial Taxes v. *M. Balasundaram & Co.*, (1963) 14 S.T.C. 996, overruled. Some of the observations in *Deputy Commissioner of Commercial Taxes* v. *Sri Swami & Co.*, (1962) 13 S.T.C. 468, held not correct though the decision itself was not open to question. [*Para.* 18.]

Cases referred to :—

Deputy Commissioner of Commercial Taxes, Madras Division v. *Sri Swami and Company*, (1962) 13 S.T.C. 468 ; *Deputy Commissioner of Commercial Taxes, Madras Division* v. *M. Balasundaram & Co.*, (1963) 14 S.T.C. 996 ; *Vellukutty* v. *Kerala Sales Tax Appellate Tribunal, Trivandrum and others*, (1967) 20 S.T.C. 28.

Appeal from the judgment and Order, dated the 3rd July, 1967 of the Madras High Court in Tax Case No. 250 of 1964 (Revision No. 172.)

S. T. Desai, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Appellant.

M/s. R. P. K. S. Shankardass, R. Vasudeva Pillai, P. Keshava Pillai and *Rajiv Sawhney*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Hegde, J.—This appeal by certificate arises from the decision of the High Court of Madras. It raises two questions for decision *viz.* : (1) whether the High Court was right in its opinion that the Appellate Assistant Commissioner of Commercial Taxes was incompetent to enhance the assessment of the assessee, the respondent herein; and (2) whether the High Court was justified in holding that the additional exemptions granted by the Tribunal were justified by the evidence on record.

2. There is no merit in the second contention Therefore it will be convenient to dispose it of even before going to the facts of the case. The assessing Officer as well as the Appellate Assistant Commissioner of Commercial Taxes disallowed the two exemptions asked for by the assessee on the ground that there was interpolation in the relative documents covering the turnover. The Tribunal reversed that finding of those authorities and allowed the exemptions asked for. It appears from the order of the Tribunal that it proceeded on the basis that there was no interpolation. This finding of the Tribunal is essentially a finding of fact and hence we will not be justified in interfering with that finding and more so as the High Court has declined to interfere with that finding.

3. This takes us to the real controversy in the appeal namely whether the Appellate Assistant Commissioner had power to enhance the assessment of the assessee. The assessee is a dealer in hides and skins at Madras. We are concerned herein with its assessment for the year 1958-59. That assessment was made on 24th March, 1961. By his order, dated 16th August, 1962 the Appellate Assistant Commissioner enhanced the assessment of the assessee while disposing of the appeal filed by the assessee. Until 31st March, 1959, sales tax was being levied on dealers in the State of Madras under the provisions of the Madras Sales Tax Act, 1939 (to be hereinafter referred to as the "1939 Act"). The assessee's turnover for the year 1958-59 stood charged with the liability to pay tax as leviable under the 1939 Act. The 1939 Act was repealed by the Madras General Sales Tax Act, 1959 (to be hereinafter referred to as the "1959 Act"). That Act came into force on 1st April, 1959. As seen earlier the assessee was assessed after that Act came into force. The assessee filed its appeal under section 31 of that Act and the Appellate Assistant Commissioner dealt with that appeal under that provision.

4. Aggrieved by that order, the assessee took up the matter in appeal to the Tribunal. The Tribunal following the decision of the Madras High Court in *Deputy Commissioner of Commercial Taxes, Madras Division* v. *Sri Swami and Company*[1], accepted the contention of the assessee. As against that decision, the State of Madras went up in revision to the High Court under section 38 of the 1959 Act. That petition was dismissed. Hence this appeal.

5. The High Court has opined that under the 1939 Act, the appellate authority while exercising its appellate powers could not have enhanced the assessment of the assessee. That was an immunisation protection afforded to the assessee under the 1939 Act. Such an immunity or protection was a vested right of the assessee. The same having not been taken away either expressly or by necessary implication by the provisions of the 1959 Act, the Appellate Assistant Commissioner could not have enhanced the assessment. It further held that immunity or protection of the assessee is protected by section 61 (1) of the

1. (1962) 13 S.T.C. 468.

1959 Act as amended in 1963, which amendment was retrospective in its operation.

6. The turnover of the assessee during the year 1958-59 became charged with liability to pay sales tax under the 1939 Act as and when the assessee effected sales and the total sales tax liability of the assessee for that year became fixed under the same Act on 31st March, 1959. Hence the charging section in the 1959 Act is not relevant for determining the liability of the assessee. Herein we have only to consider the effect of the change in the machinery provisions. Before enhancing the assessment the Appellate Assistant Commissioner had given opportunity to the assessee to show cause against the proposed enhancement. The Appellate Assistant Commissioner rejected the contention of the assessee that he had no power to enhance the assessment as the power to enhance assessment conferred on him by section 31 of the 1959 Act was inapplicable to the proceedings before him.

7. We shall now examine the relevant provisions of the 1939 Act and the 1959 Act. We shall first take up the material provisions in the 1939 Act. Section 2 (*a*-2) defines the expression " assessing authority " as meaning any person authorised by the State Government to make any assessment under the Act. The expression "Commercial Tax Officer" is defined in section 2 (*a*-3) as meaning any person appointed to be a Commercial Tax Officer under section 2-B. The Deputy Commissioner is defined in section 2 (*b*-1) as meaning any person appointed to be a Deputy Commissioner of Commercial Taxes under section 2-B. Section 2-B empowers the State Government to make appointments of as many Deputy Commissioners of Commercial Taxes and Commercial Tax Officers as they think fit for the purpose of performing the functions respectively conferred on them by or under the Act. The expression "Appellate Tribunal" is defined in section 2 (*a*-2) as meaning the Tribunal appointed under section 2-A, which empowered the Government to appoint a Tribunal consisting of three members to exercise the functions conferred on the Appellate Tribunal by or under the Act. Section 11 provided for appeal by the assessee objecting to an assessment made on him under section 9 (2) within the prescribed period. Section 9 prescribed the procedure to be followed by the assessing authority. Section 12 (1) conferred certain special powers on the Commercial Tax Officer. It said that " the Commercial Tax Officer" may :

> " (i) *Suo motu* or
>
> (ii) in cases in which an appeal does not lie to him under section 11, on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit."

8. The application under section 12 (1) (*ii*) could have been made even by the assessing authority. It may also be remembered that the Commercial Tax Officer was one of the authorities charged with the duty to see that no taxable turnover went untaxed. The power under section 12 (1) could have been exercised within three years from the date the assessee was served with the assessment order. Power under section 12 (1) (*ii*) could have been exercised by the Commercial Tax Officer simultaneously with the exercise of his appellate powers under section 11 (1).

9. Section 12 (2) conferred special powers on the Deputy Commissioner to call for and examine any order or proceeding recorded under the provisions of the Act for satisfying himself as to the legality or propriety of that order or as to the regularity of such proceeding and to pass such order with respect thereto as he thinks fit. This power he could have exercised within four years from the date on which the assessment order was communicated to the assessee.

10. Section 12-A provided for an appeal by an assessee objecting to an order relating to his assessment passed by the Commercial Tax Officer whether on appeal under section 11, or under section 12, sub-section (1) or by the Deputy Commissioner under section 12, sub-section (2) subject to certain conditions with which we are not concerned in this case. The assessee as well as the Deputy Commissioner were conferred with power to move the High Court under section 12-B within the prescribed period against the order of the Appellate Tribunal on the ground that that order either decided erroneously a question of law or it failed to decide the question of law arising for decision.

11. This takes us to the relevant provisions in the 1959 Act. Therein again "the assessing authority" is defined in section 2 (*c*) as meaning any person authorised by the Government or by any authority empowered by them to make assessment under the Act. Against the order of assessment made by the assessing authority an appeal by any person objecting to the assessment lies to the Appellate Assistant Commissioner appointed under section 28, sub-section (3). Section 31 empowers the Appellate Assistant Commissioner to confirm, reduce, enhance or annul the assessment. The power to enhance the assessment was conferred on the Appellate Authority for the first time by the 1959 Act. Under this Act also the Deputy Commissioner's power to *suo motu* revise the order of assessment is retained, subject to certain conditions. Any person objecting to the order made by the Appellate Assistant Commissioner under section 31 (3) or against the order made by the Deputy Commissioner under section 31 (1) can appeal to the Appellate Tribunal. Under section 38 the assessee or the Deputy Commissioner can take up a revision to the High Court either on the ground that the Tribunal has decided a question of law erroneously or it has failed to decide a question of law arising for decision.

12. In the matter of assessment, the purpose of the 1939 as well as the 1959 Act is identical. That purpose was and is to see that neither the assessee is over-assessed nor the State is deprived of the Revenue to which it is entitled. Under the 1939 Act, an aggrieved assessee could first appeal to the Appellate Authority and then to the Tribunal. Further he could on questions of law go up in revision to the High Court. To protect the interest of the State, special powers were conferred on the Commercial Tax Officer as well as the Deputy Commissioner of Commercial Taxes. If the Deputy Commissioner was not satisfied with the decision of the Tribunal on questions of law, he could have gone up in revision to the High Court. Under the 1959 Act, the procedure was simplified to some extent. The Appellate Assistant Commissioner who primarily took over the quasi-judicial functions of the Commercial Tax Officer was conferred with power not only to confirm, vary or annul the assessment but also the power to enhance the assessment. The power conferred on him under section 31 of the 1959 Act combines to an extent both the appellate power as well as the special

power the Commercial Tax Officer had under sections 11 and 12 (1) of the 1939 Act. Hence the changes effected by the 1959 Act in the machinery provisions do not touch the substance of the matter. Even as regards the time within which the enhancement of assessment can be made the change, excepting in exceptional cases, is in favour of the assessee. The Commercial Tax Officer could have exercised his special powers under section 12 (1) of the 1939 Act within three years from the date the assessment order was served on the assessee. Under the 1959 Act, he can enhance the assessment only during the pendency of the appeal and not thereafter. Herein we are not concerned with the special powers of the Deputy Commissioner nor with the powers of the Tribunal or the High Court. In our opinion there is no basis for saying that the provisions of the 1959 Act relating to the determination of the assessment are more onerous than those in the 1939 Act. The 1959 Act in our opinion merely simplified the procedure without touching the substance of the right of the parties. No benefit that was available to an assessee as regards the procedure was taken away by the 1959 Act, if we ignore the remote possibility of an appeal pending before an Appellate Assistant Commissioner for more than three years and that authority failing to exercise his power to enhance the tax within that period. The assessee before us cannot even have the benefit of such a contingency because the order of assessment in this case was made on 24th March, 1961 and the appellate order was passed on 16th Agust, 1962. In this case it cannot be said that any vested right of the assessee had been in fact affected by the 1959 Act.

13. Now we shall go to section 61 of the 1959 Act on the basis of which the Tribunal and the High Court have upheld the contention of the assessee. Section 61 (1) to the extent material for our purpose reads:

> "61 (1) (*i*) The Madras General Sales Tax Act, 1939 (Madras Act IX of 1939), (hereinafter in this section referred to as the said Act), is hereby repealed.
>
> (*ii*) The repeal of the said Act by clause ( ) shall not affect :—
>
> (*a*) anything done or any offence committed, or any fine or penalty incurred or any proceedings begun before the commencement of this Act; or
>
> (*b*) the previous operation of the said Act or anything duly done or suffered thereunder ; or
>
> (*c*) any right, privilege, obligation or liability acquired, accrued or incurred under the said Act: or
>
> (*d*) any fine, penalty, forfeiture or punishment incurred in respect of any offence, committed against the said Act; or
>
> (*e*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such fine, penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.
>
> (*iii*) Subject to the provisions of clause (*ii*) anything done or any action taken including any appointment made, notification, notice or order issued, rule, form or regulation framed, certificate, licence or permit granted, under the said Act shall be deemed to have been done or taken under the corresponding provision of this Act and shall continue

in force accordingly, unless and until superseded by anything done or any action taken under this Act.

(2) Notwithstanding anything contained in sub-section (1) any application, appeal, revision or other proceeding made or preferred to any officer or authority under the said Act and pending at the commencement of this Act, shall after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceeding under this Act if it had been in force on the date on which any application, appeal, revision or other proceeding was made or preferred."

14. The rules framed under the 1939 Act (the Madras General Sale Tax Rules, 1939), provide for the appointment of Assistant Commercial Tax Officers and the Deputy Commercial Tax Officers. By his order dated 15th September, 1939, in exercise of the powers conferred on him by clause (*a*) of section 2 and sub-sections (1) and (2) of section 14 of the 1939 Act, the Governor of Madras authorised the Assistant Commercial Tax Officers to exercise the powers of the assessing authority in the case of dealers whose turnover does not exceed Rs. 20,000 and Deputy Commercial Tax Officers to exercise the powers of an assessing authority in the case of dealers whose turnover exceeds Rs. 20,000. It is not necessary to refer to the exceptional cases for which provision is made in the provisos to clause (1) of that order. Rule 13 (1) of the rules prescribed that subject to the provisions of section 11 any person aggrieved by any original order of an assessing authority may appeal to the Commercial Tax Officer of the District. The proviso to that section permits the Board of Revenue to transfer an appeal pending before a Commercial Tax Officer to another Commercial Tax Officer for reasons to be recorded in writing. But the usual appellate authority is the Commercial Tax Officer of the District. Hence the Commercial Tax Officer had both the powers of the appellate authority as well as the special powers conferred on him under section 12 (1) of the 1939 Act. By the exercise of those two powers, he could have confirmed, altered, amended or enhanced the assessment made. The power conferred on the appellate authority under the 1959 Act is not wider than what the Commercial Tax Officer had under the 1939 Act. Hence the 1959 Act does not adversely affect in any manner the right of appeal an assessee had under the 1939 Act. If one probes into the grievance of the assessee before us, it would be obvious that it is wholly imaginary. No assessee has any vested right in the procedure prescribed under the 1939 Act. So long as the new procedure laid down in the 1959 Act does not interfere with any of his vested rights, an assessee has no right to claim that his case must be dealt with under the provisions of the repealed Act. It is well settled that the new procedure prescribed by law governs all pending cases. As seen earlier, the assessee filed its appeal under section 31 of the 1959 Act and not under section 11 of the 1939 Act. But that is a minor aspect. What is of the essence is that his right of appeal under the 1959 Act does not take away in any manner any of his vested rights under the 1939 Act.

15. In view of what we have said hereinbefore, it is not necessary for us to consider the meaning of the words " any right, privilege........ accrued...... under the Act" in section 61 (1) (*ii*) (*c*). We repeat that no right of the assessee was infringed by the provisions of the 1959 Act. In this view, it is not necessary to examine the scope of sec-

tion 61 (2) of the 1959 Act about which there was considerable argument before us.

16. The decision under appeal is based on the earlier two decisions of that High Court *i.e.*, in *Deputy Commissioner of Commercial Taxes, Madras Division* v. *Sri Swami & Co.*[1] and *Deputy Commissioner of Commercial Taxes, Madras Division* v. *M. Balasundaram & Co.*[2] Hence it is necessary to examine the correctness of those decisions. In *Swami & Co. Case*[1] the assessee was assessed by the Deputy Commercial Tax Officer for its turnover for the year 1955-56 under the 1939 Act. The order of assessment was passed on 15th December, 1956. The assessee filed an appeal before the Commercial Tax Officer on 15th February, 1957. During the pendency of the appeal, the 1959 Act came into force on 1st April, 1959. Thereafter the appeal was transferred to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner reduced the turnover of the assessee to a certain extent. Not being satisfied with the order of the Appellate Assistant Commissioner, the assessee preferred a further appeal to the Appellate Tribunal. In the course of the hearing of the appeal by the Tribunal the State representative filed a petition seeking enhancement of the turnover of the assessee on certain grounds. The Tribunal rejected that plea holding that the assessee had a vested right to have his appeal disposed of under the provisions of the 1939 Act. It may be noted that under the 1939 Act, only an assessee could have appealed to the Tribunal against the order of the Appellate Assistant Commissioner but under the 1959 Act both the assessee as well as the Deputy Commissioner can appeal against his order. Aggrieved by the order of the Tribunal, the Deputy Commissioner took up the matter in revision to the High Court. The High Court allowed the revision petition. It held that the Tribunal went wrong in holding that the petition filed by the State representative for enhancement of the assessment was not maintainable. In the course of its judgment the High Court observed :

> " The immunity or protection which the assessee had under the 1939 Act so as to save the assessment made by the Deputy Commercial Tax Officer, the primary assessing authority from being enhanced by the exercise of the appellate power by the Commercial Tax Officer, is a vested right, which cannot be interfered with or in any way impaired having regard to the specific provisions of section 61 (1) of the Madras Act I of 1959. The order of the Appellate Assistant Commissioner only reduced the turnover to the benefit of the assessee, and it is clear that there was no violation of the vested right of the assessee by reason of the said order. The order of the Appellate Assistant Commissioner was passed after the coming into force of the 1959 Act and on that date the assessee had no vested right to prevent an enhancement of his assessment by the future appellate authority, namely the Tribunal. The Tribunal entertained an appeal at the instance of the assessee only under the new Act as the order appealed against was one passed after the coming into force of the new Act, and by a Tribunal which functioned under the new Act. It is impossible for the assessee to maintain the position that any order of the Appellate Tribunal enhancing the assessment made by the Appellate Assistant Commissioner would amount to deprivation of their vested rights or violation

1. (1962) 13 S.T.C. 468.
2. (1963) 14 S.T.C. 996.

of the provisions of section 61 (1) of the 1959 Act."

17. These observations appear to us to be somewhat incongruous. As seen earlier under the 1939 Act the Revenue could not have appealed either against the order of the assessing authority or against that of the appellate authority. If the non-existence of the right of appeal on the part of the Department is considered as an immunity or protection and if that immunity or protection is considered as a vested right, the assessee will have that right both at the stage of the appeal to the Appellate Assistant Commissioner as well as at the stage of the appeal to the Tribunal. It is difficult to follow how the High Court was able to make a dichotomy as between the powers of the Appellate Assistant Commissioner and that of the Tribunal in that regard. If the newly constituted Tribunal were clothed with wider and larger powers as opined by the High Court, the same would be the case with the Appellate Assistant Commissioner. In our opinion, the true test to be applied to the case was whether in fact any vested right of the assessee had been taken away under the 1959 Act because of the enlargement of the powers of the first appellate authority or that of the Tribunal. As seen earlier, no real right of the assessee was infringed by the 1959 Act because of the enlargement of the powers of those authorities.

18. This takes us to the decision in *Balasundaram & Co.'s case*[1]. This case was decided by the same Bench which decided *Swami & Co's case*[2]. Therein the assessee was assessed to sales tax under the 1939 Act. During the pendency of its appeal to the Commercial Tax Officer, the 1959 Act came into force. Its appeal was transferred to the Appellate Assistant Commissioner who enhanced the assessment. But on a further appeal, the Tribunal came to the conclusion that the Appellate Assistant Commissioner had no jurisdiction to enhance the assessment. As against that order, the Deputy Commissioner of Commercial Taxes went up in revision to the High Court. The High Court held that the assessee had a vested right at the time when the 1959 Act came into force to prevent the Commercial Tax Officer from enhancing the assessment in the course of the appeal preferred by him. However there was always the peril of the Commercial Tax Officer, who was also the revising authority, revising the assessment to his prejudice in exercise of his revisional power, but that peril effectively disappeared when under the 1959 Act, the revisional power was conferred upon the Deputy Commissioner of Commercial Taxes and not upon the Appellate Assistant Commissioner. Therefore the interference by the Appellate Assistant Commissioner with the assessment order passed by the Deputy Commercial Tax Officer to the prejudice of the assessee in the purported exercise of his appellate power, was clearly violative of the assessee's vested rights. In our opinion this decision proceeded on a wrong basis. The question before the High Court was whether there was a vested right in the assessee not to have his assessment enhanced, under the 1939 Act and whether that vested right had been in any manner infringed by the 1959 Act. As seen earlier he had no such vested right under the 1939 Act. The fact that a different procedure is prescribed under the 1959 Act for enhancing the assessment cannot be said to be an infringement of a vested right. No one can have a vested right in a mere procedure. We are of opinion that *Balasundaram's case*[1] was wrongly decided

1. (1963) 14 S.T.C. 996.
2. (1962) 13 S.T.C. 468.

and some of the observations in *Swami & Co.'s case*[1], are not correct though the decision in that case is not open to question.

19. Mr. S. T. Desai, learned Counsel for the Revenue placed strong reliance on the decision of a Division Bench of the Kerala High Court in *Vellukutty* v. *Kerala Sales Tax Appellate Tribunal, Trivandrum and others*[2]. Therein, interpreting a provision similar to section 61 (2) of the Act, the High Court came to the conclusion that the clause "be transferred to and disposed of by the Officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceeding under this Act, if it had been in force on the date on which any application, appeal, revision or other proceeding was made or preferred" conferred power on the appellate authority to enhance assessment. The correctness of this conclusion was contested by Mr. Shankar Das, learned Counsel for the assessee. According to him that clause merely provided for transference of the appeals pending before the authorities under the 1939 Act to the authorities under 1959 Act without enlarging their powers. In view of our conclusion that no vested right of the assessee had been interfered with, it is not necessary for us to go into this controversy.

20. For the reasons mentioned above, this appeal is allowed, orders of the High Court as well as that of the Tribunal are set aside and the case is remitted to the Tribunal for disposal according to law. In the circumstances of the case we direct the parties to bear their own costs both in this Court as well as in the High Court.

V.K. ——— *Appeal allowed.*

1. (1962) 13 S.T.C. 468.
2. (1967) 20 S.T.C. 28.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*K. S. Hegde, P. Jaganmohan Reddy and D. G. Palekar, JJ.*

State of Tamil Nadu and others etc. .. *Appellants**

v.

S. K. Krishnamurthy etc. .. *Respondents.*

Madras Education Rules and the Text Book Committee Rules—Scope—Rules in the nature of Departmental instructions not conferring any right on the Publishers—Rules, if in the nature of an assurance to publishers that books once prescribed for a period will not be changed.

There is no warrant for concluding that the Madras Education Rules and the Text Book Committee Rules hold out any representation or even an assurance to the publishers that the books once prescribed will not be changed nor is there any justification for the assumption that these rules envisage the participation of the publishers in the scheme and as such the Government will be estopped from resiling from the representation that the period will not be altered. The Madras Education Rules though called rules are really administrative instructions for the guidance of the Department. A perusal of these rules show that they are in the nature of Departmental instructions and do not confer any right on the publishers. Nor are they designed to safeguard the interests of the publishers but are conceived in the public interest. The Government is at liberty to change the text-books or to delete from or add to the list or even prescribe books which are not in the list. When once it is accepted that the instructions do not confer any right on or create an interest

* C. As. Nos. 557 to 575 of 1971.
18th January, 1972.

in the publishers but are conceived in the public interest and the Government has full liberty in the matter of approval as well as the power of control over the kind of books that should be prescribed in the schools, the publishers cannot say that they cannot be changed within the period for which they are stated to be current. The period during which a Text book once prescribed is to continue is more an injunction to the Managers of the schools than an assurance to the publishers that they will not be changed because that power, even if it be conferred by administrative rules made under Article 162, empower the Managers subject to the approval of the authority concerned to change them within the period specified therein or the Government to forbid or prescribe the use of any book or books in the recognised schools. The impugned letter in this case can, therefore, be said to have been issued by the Government in exercise of the power reserved to it under those very rules. [*Para.* 3.]

Cases referred to :—

Union of India and others v. *M/s. Indo-Afghan Agencies Ltd.*, (1968) 2 S.C.R. 366 : (1968) 2 S.C.J. 889 : A.I.R. 1968 S.C. 718 ; *Sankaranarayanan* v. *The State of Kerala*, (1971) 2 S.C.C. 361 ; *M/s. Naraindarchand Hemraj* v. *Lt. Governor, Union Territory, Himachal Pradesh*, C.A. No. 1313 of 1970 decided on 5th October, 1971 (Unreported) ; *The State of Asssam* v. *Ajit Kumar Sharma*, (1965) 1 S.C.R. 890 : A.I.R. 1965 S.C. 1196.

Appeals from the judgment and Order dated the 3rd Spetember, 1970 of the Madras High Court in Writ Petitions Nos. 768, 1465 and 1467 to 1483 of 1970.

S. Govind Swaminadhan, Advocate-General for the State of Tamil Nadu, (*S. Mohan* and *A. V. Rangam*, Advocates, with him), for Appellants (in all the Appeals).

M/s. K. K. Venugopal and *K. R. Nambi'ar*, Advocates, for Respondents (In C.As. Nos. 557 to 559 and 561 to 575 of 1971).

The Judgment of the Court was delivered by

Jaganmohan Reddy, J.— 22 writ petitions were filed in the High Court of Madras by publishers of text books for Government schools, district board and municipal council schools challenging the directions of the Deputy Secretary to Government, Education Department, contained in his D.O. Letter No. 54582/E5/69, Education, dated 12th August, 1969 addressed to District Collectors and local board authorities that they should intimate to the publishers of the books which are prescribed for the year 1969-70 that after the end of the school year they will no longer be prescribed. A Division Bench of the High Court allowed the writ petitions. From this decision, 19 appeals are before us by certificate. It appears that the Government of Tamil Nadu in furtherance of its policy to nationalise text-books for schools, was intending to publish them through the Tamil Nadu Text Books Corporation pursuant to which it has issued the impugned D.O. letter. The writ petitions which are the subject-matter of these appeals raise similar grounds and we will adopt the averments in Writ Petition No. 768 of 1970, as being typical of the other writ petitions, which course was also adopted by the High Court.

2. The respondent in that appeal alleged that the impugned D.O. letter giving the aforesaid directions is illegal and void as being contrary to the Madras Educational Rules and the Text Book Committee Rules made by the Governor of Tamil Nadu in pursuance of the powers vested under Article 162 of the Constitution and affected respondent's fundamental rights under Article 19 (1) (*g*) of the Constitu-

tion inasmuch as his business of publishing text books has been seriously jeopardised and has practically been brought to a standstill; that it is not open to the Government of Tamil Nadu to act contrary to the general rules made under Article 162 of the Constitution; that the policy of nationalisation of the text-books is itself illegal and void; that the principles of natural justice have been violated in that under the rules once text books have been approved and selected for the schools and have been prescribed, they remained current for three years; as such to cancel this continuance for the remaining period without notice and without hearing would result in heavy financial loss; and that as under Article 19 (6) of the Constitution the trade carried out by the private citizens can be restricted only in pursuance of a law which enables the State to have a monopoly of that trade, it will not be open to the State to set up a text-books society to have a monopoly over the text-books trade without the authority of law and an executive order purporting to do this would be violative of Article 19 (1) (*f*) and (*g*) of the Constitution. It was further averred that even if it is assumed that Article 19 (6) does not apply to their case, their fundamental rights cannot be restricted only for the purpose of enabling a State or the corporation owned or controlled by the State to carry on the particular trade to the exclusion of private citizens. The High Court disposed of the writ petitions merely on the ground that even though the Madras Education Rules like the Text Book Committee Rules have been issued in exercise of the administrative powers vested in the Government, the inhibition against change of selected text books within a period of three years is not for the purposes of safeguarding the interest of the publishers but is conceived in public interest, namely, that the institution concerned should not be at liberty to change the books every year which may involve hardships to the students. Nonetheless it was of the view that a publisher of text books could proceed on the basis that he has some sort of assurance that once his books have been selected and prescribed as text books, those books will remain to be so prescribed for three years, on which expectation he may, from a business point of view, have the requisite number of text books printed in advance or stock the same. It further observed that the publisher can well say unless the rules are changed, by no administrative instructions, the three years' period can be curtailed to his prejudice. On this assumption it held that "if a representation is made to some one of a particular state of affairs to continue over a time and he acts on it and as a result does something which has cost him time and money the representator or the person who induced the belief and expectation will not be at liberty to go back upon his representation or holding out of expectation and withdraw his stand to the prejudice of the one who has acted upon it". The petitioner was, therefore, entitled to invoke this principle in his favour in the instant case. The contention urged on behalf of the State of Tamil Nadu that the rules being merely in the nature of administrative instructions, do not have the force of law and cannot be enforced in Courts was negatived on two grounds firstly, that even as an administrative instruction, if it has the force of representation, which a publisher may well rely on and commit himself to a certain position, it is not open to the authority to resile from it to his prejudice and secondly, that the rules referred to are obviously traceable to the executive power of the Government under Article 162 of the Constitution and provide for the procedure for registration of publishers, submission of books by them for approval and their selection, which books if approved and selected, are to be valid for a certain duration. For these reasons the

High Court observed that "even as an administrative instruction when it is codified in that form, it is bound to be followed", and therefore, the executive cannot say that because they have the administrative power they are entitled to use and invoke such administrative power and act for the purpose of its adoption in individual cases contrary to the generality and tenor of the rules.

3. Before us it is submitted on behalf of the State of Tamil Nadu by the learned Advocate-General that the High Court adopted two contradictory positions in that while holding that the rules approving the text-books and prescribing them for schools though administrative in character are not for the benefit of the publishers nonetheless a representation is said to have been made to them that once they are prescribed they will not be changed for three years. There is in our view no warrant for concluding that the Madras Education Rules and the Text Book Committee Rules hold out any representation or even an assurance to the publishers that the books once prescribed will not be changed nor as contended by the respondent's Advocate is there any justification for the assumption that these rules envisage the participation of the publishers in the scheme and as such the Government will be estopped from resiling from the representation that the period will not be altered. The Madras Education Rules though called rules are administrative instructions for the guidance of the Department. Rule 58 which deals with the text-books, states that a consolidated list of text-books authorised by the Government to be used under the several subjects is published annually in the *Fort St. George Gazette*; that managers of schools are at liberty to select from the lastest list such books as they may deem most suitable provided that the text-book also selected shall not be changed within three years of their introduction in any of the schools except with the previous approval of the District Education Officer in the case of boys' schools and the Inspectress in the case of girls' schools. It further states that no books (other than books for religious instruction) not authorised by the Government shall be used in any recognised school. The Government, however, reserve to itself the right to forbid or to prescribe the use of any book or books in the recognised schools. The rules relating to Madras Text-books Committee which were issued on 26th November, 1965, set out the objects of the Committee, its constitution, the general grounds on which the books may be described as unsuitable, expression, printing and get-up, registration of publishers, rules relating to recognised schools, fees for scrutiny of books submitted for approval of the text-book committee, etc. In rule 27, it is provided that any book approved for use in recognised schools as text-book shall retain its approval for five years and in rule 30 it is provided that all text-books used in recognised schools shall be selected only from the approved list of text-books issued during the year excepting books published by or on behalf of the Government. It is also provided in rule 32 that under the powers delegated to him by the Government, the Director retains on behalf of the Government the right to prescribe text-books in a particular subject for use in recognised schools even though such books have not been approved by the text-book committee. A perusal of these rules show that they are in the nature of departmental instructions and do not confer any right on the publishers. Nor are they, as held by the High Court, designed to safeguard the interests of the publishers but are conceived in public interest. The Government is at liberty to change those text-books or to delete from or add to the list or even prescribe books which are not in the list. When once it is accepted

that those instructions do not confer any right on nor create an interest in the publishers but are conceived in the public interest and the Government has full liberty in the matter of approval as well as the power of control over the kind of books that should be prescribed in the schools, the publishers cannot say that once they are prescribed they cannot be changed within the period for which they are stated to be current. The period during which a text-book once prescribed is to continue is more an injuntion to the managers of the schools than an assurance to the publishers that they will not be changed because that power, even if it is conferred by administrative rules made under Article 162, which in our view they are not, empower the managers subject to the approval of the authority concerned to change them within the period specified therein or the Government to forbid or prescribe the use of any book or books in the recognised schools. The impugned letter in this case can, therefore, be said to have been issued by the Government in exercise of the power reserved to it under those very rules.

4. Even *de hors* these provisions the instructions do not extend to the publishers any kind of representation or assurance. The selection of any text-books by the Committee does not confer any rights on the publishers that their text-books will be prescribed. All that the selection implies is that the books have been approved as fit and of the standard which can be prescribed for respective classes in the schools by their managers. There is no undertaking that they will be prescribed. If any of the schools prescribe the books in the approved list for their classes, there is no assurance or a holding out by them that a particular number of books will be required. If the books that are printed are not sold the risk is that of the publishers. Nor can the schools which have prescribed the book hold the publishers responsible if they cannot at any time supply sufficient number of books to cope with the needs of the school. All that the instructions that a book prescribed should not be changed for three years imply, as the High Court rightly recognised, is to avoid any hardship to the students. Students may fail and have to repeat the course the next year, or those who are promoted may not afford new books but might go in for second-hand books used in the previous years. These are some of the hardships that may be sought to be avoided by requiring the books prescribed to be current for three school years.

5. It is true that a representation can be made to a person either directly or indirectly if it was intended to be made to him when it is brought to his notice. But that is not the case here as it was in the *Union of India and others* v. *M/s. Indo-Afghan Agencies Ltd.*[1] where under a scheme to increase exports of woollen textiles, as an incentive it was provided that an exporter will be granted certificates to import raw materials of a total amount equal to 100 per cent of the f.o.b. value of his exports. The scheme was under the Imports (Control) Order, 1955 made pursuant to section 3 of the Imports and Exports (Control) Act, 1947. Clause 10 of the scheme provided that the Textile Commissioner could grant an import certificate for a lesser amount if he is satisfied, after holding an enquiry, that the declared value of the goods exported is higher than the real value of the goods. The Textile Commissioner collected evidence *ex parte* and acting upon the report of a committee appointed by him, passed orders reducing the import entitlements of the respondents without informing them or giving them an opportunity to explain

1. (1968) 2 S.C.R. 366 : (1968) 2 S.C.J. 889 : A.I.R. 1968 S.C. 718.

the materials on the basis of which the said action was taken. This Court held that it could not be assumed merely because the policy is general in terms and deals with the grant of licences for import of goods and related matters, that it is statutory in character. But even if it is only executive or administrative in character, Courts have power in appropriate cases to compel performance of the obligations imposed by the scheme upon the departmental authorities. On the terms of the scheme and the facts of the case, the action of the Textile Commissioner in reducing the "import entitlement" was considered to be bad and struck down. This case was later considered and explained in *Sankaranarayanan*, etc. v. *The State of Kerala*[1] and in an unreported decision in *M/s. Narainderchand Kemroj and others* v. *Lt. Governor, Union Territory, Himachal Pradesh and others*[2] to both of which one of us (Hegde, J.) was a party. In the former case it was pointed out that "there is no question of any representation having been made by the Government which was acted upon to their detriment by the appellants". In the later case one of us, Hegde, J. pointed out that in the *Indo-Afghan Agencies' case*[3].

> "This Court did not hold that the Government was not competent to change the scheme. If the scheme has statutory force, it bound the Government as much as it bound the exporters. In that event the Court was competent to compel the Government to act according to the scheme. If on the other hand the scheme contained merely administrative instructions then the Government having made the representation referred to earlier, on the basis of which the exporters had exported certain goods, the Government was estopped from going back on the representation made by it."

1. (1971) 2 S.C.C. 361.
2. C.A. No. 1313 of 1970, decided on 5th October, 1971 (unreported.)
3. (1968) 2 S.C.J. 889 : (1968) 2 S.C.R. 366.

6. The case which is more analogous to the one before us is *The State of Assam and another* v. *Ajit Kumar Sharma and others*[1], where a Constitution Bench of this Court which considered the claim of the teacher of a private college affiliated to the Gauhati University in Assam which received grants-in-aid from the State on certain conditions set out in the form of rules held that he was not entitled to maintain a writ petition under Article 226 of the Constitution. In that case rule 7 of the Rules provided that if a teacher stood for elections to the Legislature, he should be on compulsory leave without pay from the date of the filing of his nomination till the end of the next academic session or till the termination of the term of office to which he may be elected as the case may be. The respondent who had recourse to this Rule had after obtaining permission, stood as a candidate for Parliament and was defeated. Thereafter, he rejoined his post but was informed that he had been granted compulsory leave without pay till the end of the academic session. It was against this direction that he filed a writ petition challenging the Rule as being without legal force and not binding on the governing body or the respondent, which contention was negatived on the ground that the rules were merely administrative instructions not having the force of the law as statutory rules and govern matters between private colleges and the Government. In any view of the matter, the claim of the respondents that there was any representation made to them or intended to be made is not justified. In this view, the appeals are allowed but as some of the contentions raised in the petitions have not been considered by the High Court, the matter is remanded to it for disposal according

1. (1965) 1 S.C.R. 890 : A.I.R. 1965 S.C. 1196.

to law. There will be no order as to costs.

V.M.K. ——— *Appeals allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*D. G. Palekar and A. Alagiriswami, JJ.*

Durai Muthuswami .. *Appellant**

v.

N. Nachiappan and others .. *Respondents.*

(A) *Representation of the People Act (XLIII of* 1951), *sections* 83 (1) (a) *and* 100 (1) (d) (*i*)—*Only two candidates contesting election to Legislative Assembly—Election petition challenging election of returned candidate on the ground that his nomination had been improperly accepted—No allegation in the petition that election had been materially affected due to such improper acceptance—Election tribunal if barred from considering the question of improper acceptance of nomination.*

What section 100 (1) (*d*) (i) of the Representation of the People Act of 1951 requires is that the High Court before it declares the election of a returned candidate as void should be of opinion that the result of the election in so far as it concerns a returned candidate has been materially affected by the improper acceptance of any nomination. Under section 83 all that was necessary was a concise statement of the material facts on which the petitioner relies. That the appellant in this case has done. He has also stated that the election is void because of the improper acceptance of the respondent's nomination and the facts given showed that the respondent was suffering from a disqualification which will fall under section 9-A. That was why it was called improper acceptance. In the circumstances of this case it was not necessary for the petitioner to have also further alleged that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper acceptance of the respondent's nomination. That is the obvious conclusion to be drawn from the circumstances of this case. There was only one seat to be filled and there were only two contesting candidates. If the allegation that the respondent's nomination has been improperly accepted is accepted the conclusion that would follow is that the appellant would have been elected as he was the only candidate validly nominated. [*Para.* 3.]

In the case of election to a single member constituency, if there are more than two candidates and the nomination of one of the defeated candidates had been improperly accepted the question might arise as to whether the result of the election of the returned candidate had been materially affected by such improper reception. In such a case the question would arise as to what would have happened to the votes which had been cast in favour of the defeated candidate whose nomination had been improperly accepted if it had not been accepted. In that case it would be necessary for the person challenging the election not merely to allege but also to prove that the result of the election had been materially affected by the improper acceptance of the nomination of the other defeated candidate. Unless he succeeds in proving that the votes cast in favour of the candidate whose nomination had been improperly accepted would have gone in the petitioner's favour and he would have got a majority he cannot succeed in his election petition. Section 100 (1) (*d*) (i) deals with such a contingency. It is not intended to provide a convenient technical plea in a case like the present where there can be no dispute at all about the election being materially affect-

* C.A. No. 646 of 1972. 23*rd April*, 1973.

ed by the acceptance of the improper nomination. [*Para.* 3.]

(B) *Representation of the People Act (XLIII of* 1951), *section* 100 (1) (a)—*Scope.*

In order to declare the election of a returned candidate void under section 100 (1) (*a*) it is not necessary that the election petition should state that the result of the election was materially affected thereby. The question of the election being materially affected does not arise in a case falling under section 100 (1) (*a*). [*Para.* 4.]

Cases referred to :—

Balakrishna v. *Fernandez*, (1969) 2 S.C.J. 598 : (1969) 3 S.C.R. 603 : A.I.R. 1969 S.C. 1201 ; *Vishwanatha* v. *Konappa*, (1969) 2 S.C.R. 90 : (1969) 1 S.C.J. 818 : A.I.R. 1969 S.C. 604.

The Judgment of the Court was delivered by

Alagiriswami, J.—This appeal arises out of the election held to fill up a seat in the Tamil Nadu Legislative Assembly from the Sankarapuram Constituency, South Arcot District, held in March, 1971 in which the first respondent obtained 28,544 votes as against 28,472 votes obtained by the petitioner and was thus declared elected. This appeal arises out of the dismissal of the election petition filed by the appellant for setting aside the result of that election. Though many grounds had been urged before the High Court as well as in the petition of appeal in this Court, we are now concerned only with one ground which the High Court refused to go into and was the only one which Shri Natesan appearing for the appellant urged before us.

2. Before the Returning Officer another candidate by the name Ramaswami had presented an objection petition to the reception of the 1st respondent's nomination on the ground that he had a subsisting contract with the Highways Department of the State of Tamil Nadu, and with the Panchayat Union, Thiagadurgam, and was also an agent for selling tickets in the raffle conducted by the State of Tamil Nadu. The Returning Officer rejected those contentions and accepted the nomination papers of the 1st respondent. Subsequently, Ramaswami withdrew from the contest and the appellant and the 1st respondent were the only candidates in the election. In his election petition the appellant had mentioned that on the date of presenting his nomination papers the 1st respondent had a subsisting contract with the State Government to widen and black-top the Ulundurpet-Salem Road between 74 km. and 86 km. at an estimated cost of Rs. 2 lakhs, that on the eve of presentation of nomination papers he purported to surrender the contract by submitting an application for cancellation to the Division Engineer, Highways, Cuddalore, whereas the contract was signed by the Superintending Engineer, Madras Circle on behalf of the Government of Tamil Nadu, that this letter of cancellation was not valid and therefore there was no valid cancellation of the contract. He, therefore, specifically urged that the election of the 1st respondent was void on that ground. The 1st respondent on the other hand maintained that the cancellation of the contract was valid and there was no subsisting contract on the date of filing of the nomination and that the contention of the petitioner that his election was void on that ground was not legally sustainable. He also contended that as the petitioner had not alleged that by reason of such improper acceptance the result of the election, in so far as it concerned the 1st respondent, had been materially affected, that allegation cannot be inquired into. He also contended that in any case the result of the election had not been materially affected. The learned Judge who dealt with this matter upheld the conten-

tion of the respondent on the ground that the allegations in the petition had not stated that the result had been materially affected by the alleged improper reception of the (1st respondent's) nomination papers. He was of the opinion, that this allegation relating to the improper acceptance of the nomination of the first respondent cannot be considered a valid ground, which could be gone into in the absence of a specific averment that the election had been materially affected. To complete the narrative it is necessary to mention that the appellant had filed an application for summoning the necessary documents in order to sustain his case. The documents necessary to be referred to, so far as the present appeal is concerned, are only four in number :

(1) Objections to the nomination of the 1st respondent (N. Nachiappan) by A. Ramaswami.

(2) Documents produced by the 1st respondent (N. Nachiappan) at the time of the scrutiny of nomination.

(3) The signed agreement between the Superintending Engineer, Highways, Madras Circle and N. Nachiappan in respect of the contract for widening the existing black top surface to 22 ft. with Ulundurpet—Salem Road — kilometre 74/2 to 86/4.

(4) Proceedings of the Divisional Engineer, Highways and Rural Work, Cuddalore of termination of the contract made by Rec. No. 8280/70-B-3, dated 28th January, 1971.

The first two documents were to be summoned to be produced by the District Election Officer and the other two by the Superintending Engineer, Highways, Madras Circle.

3. Before dealing with the question whether the learned Judge was right in holding that he could not go into the question whether the 1st respondent's nomination has been improperly accepted because there was no allegation in the election petition that the election had been materially affected as a result of such improper acceptance, we may look into the relevant provisions of law. Under section 81 of the Representation of the People Act, 1951 an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101. It is not necessary to refer to the rest of the section. Under section 83 (1) (*a*), in so far as it is necessary for the purposes of this case, an election petition shall contain a concise statement of the material facts on which the petitioner relies. Under section 100 (1) if the High Court is of opinion—

(*a*) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act ....

(*b*) ....

(*c*) ....

(*d*) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) ....

(iii) ....

the High Court shall declare the election of the returned candidate to be void. Therefore, what section 100 requires is that the High Court before it declares the election of a returned candidate as void should be of opinion that the result of the election in so far as it concerns a returned candidate has been materially affected by the improper acceptance of any nomination. Under section 83 all that was necessary was a concise statement of the material facts on which the

petitioner relies. That the appellant in this case has done. He has also stated that the election is void because of the improper acceptance of the 1st respondent's nomination and the facts given showed that the 1st respondent was suffering from a disqualification which will fall under section 9-A. That was why it was called improper acceptance. We do not consider that in the circumstances of this case it was necessary for the petitioner to have also further alleged that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper acceptance of the 1st respondent's nomination. That is the obvious conclusion to be drawn from the circumstances of this case. There was only one seat to be filled and there were only two contesting candidates. If the allegation that the 1st respondent's nomination has been improperly accepted is accepted the conclusion that would follow is that the appellant would have been elected as he was the only candidate validly nominated. There can be, therefore, no dispute that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper acceptance of his nomination because but for such improper acceptance he would not have been able to stand for the election or be declared to be elected. The petitioner had also alleged that the election was void because of the improper acceptance of the 1st respondent's nomination. In the case of election to a single member constituency if there are more than two candidates and the nomination of one of the defeated candidates had been improperly accepted the question might arise as to wheth r the result of the election of the returned candidate had been materially affected by such improper reception. In such a case the question would arise as to what would have happened to the votes which had been cast in favour of the defeated candidate whose nomination had been improperly accepted if it had not been accepted. In that case it would be necessary for the person challenging the election not merely to allege but also to prove that the result of the election had been materially affected by the improper acceptance of the nomination of the other defeated candidate. Unless he succeeds in proving that if the votes cast in favour of the candidate whose nomination had been improperly accepted would have gone in the petitioner's favour and he would have got a majority he cannot succeed in his election petition. Section 100 (1) (*d*) (i) deals with such a contingency. It is not intended to provide a convenient technical plea in a case like this where there can be no dispute at all about the election being materially affected by the acceptance of the improper nomination. "Materially affected" is not a formula that has got to be specified but it is an essential requirement that is contemplated in this section. Law does not contemplate a mere repetition of a formula. The learned Judge has failed to notice the distinction between a ground on which an election can be declared to be void and the allegations that are necessary in an election petition in respect of such a ground. The petitioner had stated the ground on which the 1st respondent's election should be declared to be void. He had also given the material facts as required under section 83 (1) (*a*). We are, therefore, of opinion that the learned Judge erred in holding that it was not competent for him to go into the question whether the 1st respondent's nomination had been improperly accepted.

4. One other point which the learned Judge failed to notice is that on the allegations contained in the petition, if they were established, the respondent must be deemed to suffer the disqualification under section 9-A of the Act and all that section 100 (1) (*a*) requires is that on the

date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Constitution or this Act. In order to declare his election void it is not necessary that the election petition should state that the result of the election was materially affected thereby. The question of the election being materially affected does not arise in a case falling under section 100 (1) (*a*).

5. Though it is not necessary to cite any authorities we may refer to a few decisions. In *Balakrishna* v. *Fernandez*[1], this Court pointed out that the first sub-section of section 100 lays down the grounds for declaring an election to be void, that sections 100 and 101 deal with the substantive law on the subject of election, that these two sections circumscribe the conditions which must be established before an election can be declared void or another candidate declared elected. It further observed :

> "The heads of substantive rights in section 100 (1) are laid down in two separate parts : the first dealing with situations in which the election must be declared void on proof of certain facts, and the second in which the election can only be declared void if the result of the election, in so far as it concerns the returned candidate, can be held to be materially affected on proof of some other facts .... In the first part they are that the candidate lacked the necessary qualification or had incurred disqualification ...... These are grounds on proof of which by evidence, the election can be set aside without any further evidence. The second part is conditional that the result of the election, in so far as it concerns a returned candidate, was materially affected by the improper acceptance of a nomination .... This condition has to be established by some evidence direct or circumstantial. It is, therefore, clear that the substantive rights to make an election petition are defined in these sections and the exercise of the right to petition is limited to the grounds specifically mentioned.
>
> Having dealt with the substantive law on the subject of election petitions we may now turn to the procedural provisions in the Representation of the People Act. Here we have to consider sections 81, 83 and 86 of the Act. The first provides the procedure for the presentation of election petitions. The proviso to the sub-section alone is material here. It provides that an election petition may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101. That as we have shown above creates the substantive right. Section 83 then provides that the election petition must contain a concise statement of the material facts on which the petitioner relies......... The section is mandatory and requires first a concise statement of material facts ...... What is the difference between material facts and particulars ? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet."

That lays down the proper test. In *Vishwanatha* v. *Konappa*[1], this Court pointed out that :

1. (1969) 2 S.C.J. 598 : (1969) 3 S.C.R. 603 ; A.I.R. 1969 S.C. 1201.

1. (1969) 2 S.C.R. 90 ; (1969) 1 S.C.J. 818 : A.I.R. 1969 S.C. 604.

"Where by an erroneous order of the Returning Officer poll is held which, but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected who, but for that order, would have been declared elected."

6. It was urged before us by Mr. Natesan that we should summon the documents which were only four in number and decide the case ourselves. We do not know whether any further material would or would not be necessary to establish the ground sought to be made out by the appellant or whether any oral evidence would be necessary. In any case we do not consider it either necessary or expedient that we should deal with the matter directly ourselves.

7. The appeal is, therefore, allowed and the order of the learned Judge is set aside. He will now proceed to determine only the question regarding the disqualification of the first respondent and, therefore, whether the acceptance of his nomination was improper. The first respondent will pay the appellant's costs.

V.K. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—*K. K. Mathew and M. H. Beg, JJ.*

State of Madras .. *Appellant**

v.

Rev. Brother Joseph .. *Respondent.*

Land Acquisition proceedings—Acquisition of topes—Market value of topes (coconut and orange trees)—Capitalisation of net income at 20 years' purchase—Method of valuation, if unreasonable.

On the question whether the High Court was right in capitalizing the net income of the topes under acquisition at 20 years' purchase,

Held: The Land Acquisition Officer found in his award that all the fruit bearing trees will yield for more than 20 years and for that reason he capitalised the net income of the topes at 20 years' purchase to find out their market value. It cannot be said that the method of valuation adopted for finding out the market value of the topes was, in the circumstances, in any way unreasonable. [*Para.* 12.]

Cases referred to:

Shanmuga Velayudha Mudaliar v. *Collector of Tanjore*, A.I.R. 1926 Mad. 945 (2); *Rajammal* v *Head Quarters Deputy Collector, Vellore*, 25 I.C. 393 : A.I.R. 1915 Mad. 356 (2); *Kompalli Nageshawara Rao* v. *Special Deputy Collector, Land Acquisition, Bapatla*, (1958) 1 An.W.R. 116 : A.I.R. 1959 A.P. 52; *Elias M. Cohen* v. *Secretary of State*, A.I.R. 1918 Pat. 625 (2).

The Judgment of the Court was delivered by

Mathew, J.—These two appeals, by certificate, are directed against the judgment and decree of the High Court of Madras in A.S. Nos. 63 and 78 of 1959 dated 10th April, 1962.

2. The appellant, the Government of Madras, acquired 9 acres and 86 cents of land in Tirunelveli District as it was needed for reserve area in Block III of Manimuthar Project. The notification under section 4 (1) of the Land Acquisition Act was published on 7th March, 1956.

3. The area of the land with which we are concerned in this appeal is one acre and 59 cents comprised of 3 topes of coconuts and oranges.

4. The Land Acquisition Officer, by his award, gave a total compensation of Rs. 28,572-15-6 inclusive of solatium. The method adopted by him for valuing

* C.A. Nos. 1468-69 of 1967.

3rd August, 1973.

coconut and orange topes was to capitalize the net income from these topes at 20 years' purchase.

5. Dissatisfied with the award, the respondent moved for reference under section 18 of the Land Acquisition Act and the case was referred to the Subordinate Judge, Tirunelveli.

6. The learned Subordinate Judge increased the estimated yield from the coconut and orange trees as well as the price of the yield but capitalized the net income at 20 years' purchase. Against this decision, the State of Madras filed A.S. No. 63 of 1959, while the respondent filed A.S. No. 78 of 1959 claiming a further enhancement.

7. The High Court, by the common judgment under appeal, allowed the appeals in part and dismissed them in other respects. As regards the coconut and orange topes, the High Court held that capitalization of the net income at 20 years' purchase was a fair method for arriving at their market value.

8. In this appeal the only point argued by Counsel was that the High Court went wrong in capitalizing the net income of the topes at 20 years' purchase. Counsel relied on the decision of the Madras High Court in *Shanmuga Velayuda Mudaliar* v. *Collector of Tanjore*[1], where it was held that the proper method to find out the market value of a coconut garden would be to capitalize the net income from the garden at 10 years' purchase and said that there was no reason for the High Court to depart from the principle there laid down.

9. It may be noted that no reason was given in that ruling why capitalization of the net income should be at 10 years' purchase. All that the Court said was:

"In *Rajammal* v. *Head Quarters Deputy Collector, Vellore*[2], a Bench of this Court estimated the value of a tope of trees at 20 years' annual rental; but those were mango trees which as stated by the learned Judges, are long lived and yield produce for a number of years".

10. There was no discussion in the judgment of the principle on the basis of which such a mode of calculation was adopted.

11. In *Kompalli Nageshwara Rao* v. *Special Deputy Collector, Land Acquisition, Bapatla*[1], the Court said that the approved method for valuing orchards is to capitalize their net income at a number of year's purchase which has to be fixed with reference to the nature of the trees and other circumstances and capitalized the net income at 15 years' purchase for finding out the market value of the coconut garden and the orange orchard in question in that case. In *Elias M. Cohen* v. *Secretary of State*[2], the net income from an orchard was capitalized at 15 years' purchase to find out its market value.

12 In this case, the Land Acquisition Officer found in his award that all the fruit bearing trees will yield for more than 20 years. That was the reason which weighed with him to capitalize the net income of these topes at 20 years' purchase to find out their market value. We do not think that the learned Subordinate Judge and the High Court went wrong in accepting this estimate of the average yielding life of coconut and orange trees. Therefore, we do not think that the capitalization of the net yield from these topes at 20 years' purchase was not a fair method to arrive at the market value of these topes. We are not satisfied that the method of valuation adopted for finding out the market value of the topes was, in the circumstances, in any way unreasonable.

1. A.I.R. 1926 Mad. 945 (2).
2. 85 Ind. Cas. 993 : A.I.R. 1950 Mad. 356 (2).

1. (1958) 2 An.W.R. 116 : A.I.R. 1959 A.P. 52 at 62.
2. A.I.R. 1918 Pat. 625 (2).

13. The appeals fail and they are dismissed with costs.

V.M K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*K. K. Mathew, M. H. Beg and A. K. Mukherjea, JJ.*

Silver Jubilee Tailoring House and others .. *Appellants* *

v.

Chief Inspector of Shops and Establishments and another.. *Respondents.*

Andhra Pradesh (Telangana Area) Shops and Establishments Act (X of 1951), section 2 (14)—'Person employed'—Determination of—Relevant factors—"Control" test—Value of—Tailoring shop employing piece rate workers to stitch cloth—Stitching done at shop premises on machines belonging to proprietor of shop—Right given to employer to reject work not according to specifications—Held, employer-employee relationship was established—Act held applicable.

In the appellant tailoring establishment all the workers were paid on piece-rate basis. The workers generally attended the shop every day if there was work. The rate of wages paid to the workers was not uniform. The rate depended upon the skill of the worker and the nature of the work. When cloth was given for stitching to a worker after it had been cut, the worker was told how he should stitch it. If he did not stitch it according to the instruction, the employer rejected the work and he generally asked the worker to restitch the same. When the work was not done by a worker according to the instructions, generally no further work would be given to him.

Held : On the facts and circumstances of the case the Chief Inspector of Shops and Establishments and the High Court came to the right conclusion that employer and employee relationship existed between the parties and that the Act was therefore applicable. [*Para.* 39.]

It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors referred to in the decided cases. Clearly, not all of these factors would be relevant in all cases. It is equally clear that no magic formula can be propounded which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. [*Para.* 29.]

During the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of 'control'. It is now no more than a factor although an important one. [*Para.* 30.]

In the present case, the fact that sewing machines on which the workers did the work generally belonged to the employer was an important consideration for deciding that the relationship was that of master and servant. [*Para.* 34.]

Further, as the employer had the right to reject the end product if it did not conform to the instruction, the element of control and supervision was also present. [*Para.* 35.]

That some of the employees took up work from other tailoring establishments and did that work also in the shop would not in any way militate against their being employees of the shop where they attended for work. A person can be a servant of more than one employer. [*Para.* 37.]

*C.A. No. 1706 of 1969. *25th September*, 1973.

That the workers were not obliged to work for the whole day in the shop was not very material. [*Para.* 38.]

Cases referred to :—

Dharangadhra Chemical Works Ltd. v. *State of Saurashtra*, 1957 S.C.R. 152 : 1957 S.C.J. 208 : A.I.R. 1957 S.C. 264 ; *Birdhichand Sharma* v. *First Civil Judge, Nagpur*, (1963) M.L.J. (Crl.) 112 : (1963) 1 S.C.J. 178 : (1961) 3 S.C.R. 161 : A.I.R. 1961 S.C. 644 ; *D. C. Dewan Mohideen Sahib & Sons* v. *Industrial Tribunal, Madras*, (1964) 7 S.C.R. 646 : A.I.R. 1966 S.C. 370 ; *Shankar Balaji* v. *State of Maharashtra*, (1962) 1 S.C.R. (Supp.) 249 : (1962) 2 S.C.J. 426 : (1962) M.L.J. (Crl.) 577 : A.I.R. 1962 S.C. 517 ; *V. P. Gopala Rao* v. *Public Prosecutor, Andhra Pradesh*, (1969) 3 S.C.R. 875 : A.I.R. 1970 S.C. 66 ; *Cassidy* v. *Ministry of Health*, (1951) 1 All E.R. 574 ; *Montreal* v. *Montreal Locomotive Works Ltd.*, (1947) 1 D.L.R. 161 ; *Bank Voor Handel en Scheepvaart N. V.* v. *Slatford*, (1952) 2 All E.R. 956 ; *U. S.* v. *Silk*, (1947) 331 U.S. 704 ; *Market Investigations Ltd.* v. *Minister of Social Security*, (1968) 3 All E.R. 732 ; *Argent* v. *Minister of Social Security*, (1968) 1 W.L.R. 1749 ; *Harrison* v. *Macdonald and Evans*, (1952) 1 T.L.R. 101 ; *Humberstone* v. *Northern Timber Mills*, (1949) 79 C.L.R. 389; *Patwardhan Tailors, Poona* v. *Their Workmen*, (1960) 1 Lab.L.J. 722.

The Judgment of the Court was delivered by

Mathew, J.—In this appeal, by Special Leave, the question for consideration is whether the High Court of Andhra Pradesh was right in accepting the conclusion arrived at by the Chief Inspector of Shops and Establishments, Hyderabad, that employer and employee relationship existed between the Silver Jubilee Tailoring House and others, the appellants, and the workers represented by the second respondent, and that the provisions of Andhra Pradesh (Telangana Area) Shops and Establishments Act, 1951, hereinafter referred to as the Act, was therefore applicable to the establishments in question.

2. The second respondent representing the workers, made certain claims before "the competent authority" under section 37-A of the Act read with section 15 of the Payment of Wages Act, 1936, against the Silver Jubilee Tailoring House and others, the appellants. Thereafter, "the competent authority" referred for the decision of the State Government under section 49 of the Act, the question whether the provisions of the Act are applicable to the establishments. The Government in turn referred the matter to the Commissioner of Labour to whom the power to decide the question was delegated under section 46 of the Act. He enquired into the matter, heard the parties, but before he could pass the order, the power to decide the question by the State Government under section 49 was delegated to the Chief Inspector of Shops and Establishments, Hyderabad. The Chief Inspector of Shops and Establishments thereafter heard the parties and came to the conclusion that the provisions of the Act were applicable to the establishments, as employer and employee relationship existed between the appellants and the workers represented by the second respondent.

3. The appellants filed a writ petition before the High Court to quash this order. The writ petition was dismissed by a learned single Judge on the basis of his finding that the workers represented by the second respondent union were employed in the establishment within the meaning of section 2 (14) of the Act, and, therefore, the Act was applicable.

4. The appellants filed an appeal against the decision to the Division Bench of the same Court. The Division Bench dismissed the appeal *in limine*.

5. The material part of section 2 (14) reads as follows :

> " 'person employed' means — (1) in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop."

6. Two witnesses were examined to show the nature and character of the work done by the workers. One was the proprietor of one of the establishments and the other the Assistant Inspector of Labour.

7. The following facts appear from the finding of the learned single Judge. All the workers are paid on piece-rate basis. The workers generally attend the shops every day if there is work. The rate of wages paid to the workers is not uniform. The rate depends upon the skill of the worker and the nature of the work. When cloth is given for stitching to a worker after it has been cut, the worker is told how he should stitch it. If he does not stitch it according to the instruction, the employer rejects the work and he generally asks the worker to restitch the same. When the work is not done by a worker according to the instructions, generally no further work would be given to him. If a worker does not want to go for work to the shop on a day, he does not make any application for leave, nor is there any obligation on his part to inform the employer that he will not attend for work on that day. If there is no work, the employee is free to leave the shop before the shop closes. Almost all the workers work in the shop. Some workers are allowed to take cloth for stitching to their homes on certain days. But this is done always with the permission of the proprietor of the shop. The machines installed in the shop belong to the proprietor of the shop and the premises and the shop in which the work is carried on also belong to him.

8. The question is whether from these circumstances, the conclusion drawn by the Chief Inspector of Shops and Establishments and the High Court that there existed employer and employee relationship between the appellants and the workers represented by the 2nd respondent was correct.

9. It was argued for the appellants that according to the decisions of this Court the test to determine whether employer and employee relationship existed between the parties is to see whether the so-called employer has the right to control and supervise the manner of work done by the workers and from the facts found by the High Court it is impossible to come to the conclusion that the appellants had any right to control the manner of work or that they had actually exercised any such control. It is therefore necessary to examine the question whether the right to control the manner of work is an exclusive test to determine the nature of the relationship and even if it is found that that is the test, whether facts proved would satisfy the requirements of the test.

10. In *Dharangadhara Chemical Works Ltd.* v. *State of Saurashtra*,[1] the appellants before this Court were lessees holding a licence for the manufacture of salt on the lands in question there. The salt was manufactured by a class of professional labourers known as agarias from rain water that got mixed up with saline matter in the soil. The work was seasonal in nature and commenced in October, after the rains and continued till June. After the manufacture of salt the agarias were paid at the rate of 5 annas 6 pies per maund. At the end of each season the accounts were settled and the agarias paid the balance due to them. The agarias who worked themselves with the members of their families were free to engage extra labour on their own account and the appellants had no concern therewith. No hours of work were prescribed,

1. 1957 S.C.J. 208 : 1957 S.C.R. 152 : A.I.R. 1957 S.C. 264.

and no muster rolls were maintained. The appellants had also no control over the working hours. There were no rules as regards leave or hoildays and the agarias were free to go out of the factory after making arrangements for the manufacture of salt.

11. The question for declision was whether the agarias were workmen as defined by section 2 (*s*) of the Industrial Disputes Act of 1947, or whether they were independent contractors. The Court said that the *prima facie* test to determine whether there was relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the employee is to do but also the manner in which he had to do the work. In other words, the proper test according to this Court is, whether or not the master has the right to control the manner of execution of the work. The Court further said that the nature of extent of the control might vary from business to business and is by its nature incapable of precise definition, that it is not necessary for holding that a person is an employee that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that there are many contracts in which the master could not control the manner in which the work was done.

12. In *Birdhichand Sharma* v. *First Civil Judge, Nagpur*[1], the question was whether the bidi rollers in question there were "workmen" within the meaning of that term in the Factories Act, 1948. The facts found were: The workers who rolled the bidis had to work at the factory and were not at liberty to work at their houses; their attendance was noted in the factory and they had to work within the factory hours, though they were not bound to work for the entire period and could come and go away when they liked; but if they came after midday they were not supplied with tobacco and thus not allowed to work even though the factory closed at 7 P.M. Further, they could be removed from service if absent for eight days. Payment was made on piece rates according to the amount of work done, and the bidis which did not come upto the proper standard could be rejected.

13. On these facts, it was held that the workers were workmen under the Factories Act and were not independent contractors. This Court pointed out that the nature and extent of control varied in different industries and could not by its very nature be precisely defined. The Court said that when the operation was of a simple nature and did not require supervision all the time, the control could be exercised at the end of the day by the method of rejecting bidis which did not come upto the proper standard; such supervision by the employer was sufficient to make the workers, employees of the employer, and not independent contractors.

14. In *D.C. Dewan Mohideen Sahib and Sons* v. *Industrial Tribunal, Madras*[1], the question was again considered by this Court. On the basis of evidence led, the Industrial Tribunal found as follows:

The contractors took leaves and tobacco from the appellant and employed workmen for manufacturing bidis. After bidis were manufactured, the contractors took them back from the workmen and delivered them to the appellants. The workmen took the leaves home and cut them there; however the process of actual rolling by filling the leaves with tobacco took place in what was called contractors' factories. The contractors kept no atten-

1. (1963) M.L.J. (Crl.) 112 : (1963) 1 S.C.J. 178 : (1961) 3 S.C.R. 161; A.I.R. 1961 S.C. 644.

1. (1964) 7 S.C.R. 646 : A.I.R. 1966 S.C. 370.

dance register for the workmen, there was no condition for their coming and going at fixed hours, nor were they bound to come for work every day; sometimes they informed the contractors if they wanted to be absent and sometimes they did not. The contractors said that they could take no action if the workmen absented themselves even without leave. The payment was made to the workmen at piece rates after the bidis were delivered to the appellants. The system was that the appellant paid a certain sum for the manufactured bidis, after deducting therefrom the cost of tobacco and the leaves already fixed, to the contractors, who, in their turn, paid to the workmen who rolled bidis, their wages, whatever remained after paying the workmen would be contractors' commission for the work done. There was no sale either of the raw materials or of the finished products, for according to the agreement, if the bidis were not rolled, raw materials had to be returned to the appellants and the contractors were forbidden from selling the raw materials to anyone else. Further the manufactured bidis could only be delivered to the appellants who supplied the raw materials. Further the price of raw materials and finished products fixed by the appellants always remained the same and never fluctuated according to market rate. The Tribunal concluded that the bidi workers were the employees of the appellants and not of the so-called contractors who were themselves nothing more than employees or branch managers of the appellants. Thereupon, the appellants filed writ petitions in the High Court, which held that neither the bidi-roller nor the intermediary was an employee of the appellants, and allowed the writ petitions. On appeal by the workmen the appellate Court allowed the appeal and restored the order of the Tribunal. On appeal by certificate, this Court said that, on the facts found, the appellate Court was right in holding that the conclusion reached by the Tribunal that the intermediaries were merely branch managers appointed by the management, and that the relationship of employers and employees subsisted between the appellants and the bidis-rollers, was correct. In following the test laid down in *Birdhichand's case*[1], the Court said that since the work is of such a simple nature, supervision all the time is not required, and that supervision was made through a system of rejecting the defective bidis at the end of day.

15. In *Shankar Balaji* v. *State of Maharashtra*,[2], the question again came up for consideration in this Court. The appellant before the Court was the owner of a factory manufacturing bidis and one Pandurang along with other labourers used to roll bidis in the factory with tobacco and leaves supplied to him by the factory. The following facts were established in the evidence: There was no contract of service between the appellant and Pandurang. He was not bound to attend the factory for rolling bidis for any fixed hours or period; he was free to go to the factory at any time during working hours and leave the factory at any time he liked. He could be absent from the work any day he liked and for ten days without even informing the appellant. He had to take the permission of the appellant if he was to be absent for more than 10 days. He was not bound to roll the bidis at the factory. He could do so at home with the permission of the appellant for taking home the tobacco supplied to him. There was no actual supervision of the work done by him in the factory and at the close of the day, rolled bidis were delivered to the appellant. Bidis not upto the standard were rejected. He was paid at fixed rates on the quantity

1. (1961) 3 S.C.R. 161 : (1963) 1 S.C.J. 178 : A.I.R. 1961 S.C. 644.
2. (1962) 1 S.C.R. (Supp.) 249 : (1962) 2 S.C.J. 426 : (1962) M.L.J. (Crl.) 577 : A.I.R. 1962 S.C. 517.

of bidis turned out and there was no stipulation for turning out any minimum quantity of bidis. The questions which arose for decision were whether Pandurang was a workman within the meaning of that expression under the Factories Act and whether he was entitled to any leave wages under seection 80 of that Act.

16. The majority found that Pandurang was not a "workman", and distinguished the decision in *Birdhichand's case*[1], and said that the appellant had no control or supervision over the work of Pandurang.

17. The reasoning of the majority was as follows:

"The appellant could not control his (Pandurang's) hours of work. He could not control his days of work. Pandurang was free to absent himself and was free to go to the factory at any time and leave it at any time according to his will. The appellant could not insist on any particular minimum quantity of bidis to be turned out per day. He could not control the time spent by Pandurang on the rolling of a bidi or a number of bidis. The work of rolling bidis may be a simple work and may require no particular supervision and direction during the process of manufacture. But there is nothing on record to show that any such direction could be given. The mere fact that the person rolling bidis has to roll them in a particular manner can hardly be said to give rise to such a right in the management as can be said to be a right to control the manner of work. The manner of work is to be distinguished from the type of work to be performed. In the present case, the management simply says that the labourer is to produce bidis rolled in a certain form. How the labourer carries out the work is his own concern and is not controlled by the management, which is concerned only with getting bidis rolled in a particular style with certain contents".

18. Subba Rao, J., (as he then was, dissented.). He said: The appellant engages the labourers; he entrusts them with work of rolling bidis in accordance with the sample; he insists upon their working in the factory, maintains registers giving the particulars of the labourers absent, amount of tobacco supplied and the number of bidis rolled by each one of them, empowers the gumasta and supervisor, who regularly attends the factory to supervise the supply of tobacco and leaves and the receipt of the bidis rolled. The nature and pattern of bidis to be rolled is obviously well understood, for, it is implicit in the requirement that the rolled in bidis shall accord with the sample. The rejection of bidis found not in accord with the sample is a clear indication of the right of the employer to dictate the manner in which the labourers shall manufacture the bidis. The fact that a labourer is not compelled to work throughout the working hours is not of much relevance because, for all practical purposes, a labourer will not do so since his wage depends upon the bidis he rolls, and, as he cannot roll them outside the factory, necessarily he will have to do so in the factory. If he absents himself, it is only at his own risk.

19. In *V.P. Gopala Rao* v. *Public Prosecutor, Andhra Pradesh*[1], the Court said that there is no abstract *a priori* test of the work control required for establishing a contract of service and after referring to *Birdhichand's case*[2], observed that the fact that the workmen have to work in the factory implies certain amount of

1. (1963) 1 S.C.J. 178 : (1961) 3 S.C.R. 16 : A.I.R. 1961 S.C. 644.

1. (1969) 2 S.C.J. 806 : (1969) 2 M.L.J. (S.C.) 114: (1969) 2 An.W.R. (S.C.) 114: (1969) M.L.J. (Crl.) 852 : (1969) 3 S.C.R. 875 at p. 880: A.I.R. 1970 S.C. 66.
2. (1961) 3 S.C.R. 161 : (1963) 1 S.C.J. 178: A.I.R. 1961 S.C. 644.

supervision by the management, that the nature and extent of control varied in different industries, and that when the operation was of a simple nature, the control could be exercised at the end of the day by the method of rejecting the bidis which did not come upto the proper standard.

20. In *Cassidy* v. *Ministry of Health*[1], Lord Justice Somerwell pointed out that the test of control of the manner of work is not universally correct, that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a captain of a ship.

21. In many skilled employments, to apply the test of control over the manner of work for deciding the question whether the relationship of master and servant exists would be unrealistic.

22. In *Montereal* v. *Montreal Locomotive Works Ltd.*[2]. *et al*, Lord Wright said that a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior and that in the more complex conditions of modern industry, more complicated tests have often to be applied. He said that it would be more appropriate to apply, a complex test involving: (*i*) control; (*ii*) ownership of the tools; (*iii*) chance of profit; (*iv*) risk of loss, and that control in itself is not always conclusive. He further said that in many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties.

23. In *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford*[3], Denning L.J. said:

1. (1951) 1 All E.R. 574 (579).
2. (1947) 1 D.L.R. 161 at p. 169.
3. (1952) 2 All E.R. 956 at p. 971.

"....the test of being a servant does not rest nowadays on submision to orders. It depends on whether the person is part and parcel of the organisation......"

24. In *U.S.* v. *Silk*[1], the question was whether men working for the plaintiffs, Silk and Greyvan, were "employees" within the meaning of that word in the Social Security Act, 1935. The Judges of the Supreme Court of U.S.A. agreed upon the test to be applied, though not in every instance upon its application to the facts. They said that the test was not "the common law test," *viz.*, "power of control, whether exercised or not, over the manner of performing service to the undertaking," but whether the men were employees "as a matter of economic reality." Important factors were said to be "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation."

25. Silk sold coal by retail, using the services of two classes of workers, unloaders and truck drivers. The unloaders move the coal from railway vans into bins. They came to the yard when they wished and were given a wagon to unload and a place to put the coal. They provided their own tools and were paid so much per ton for the coal they shifted. All the nine judges held that these men were employees:

"Givirg full consideration to the concurrence of the two lower Courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did

1. (1947) 331 U.S. 704.

work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases."

26. In *Market Investigations Ltd.* v. *Minister of Social Security*[1], the Court said:

"I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which *B* was entitled to exercise over *A* in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive".

27. It is in its application to skilled and particularly professional work that control test in its traditional form has really broken down. It has been said that in interpreting 'control' as meaning the power to direct how the servant should do his work, the Court has been applying a concept suited to a past age.

"This distinction (*viz.*, between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization) a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer, *i.e.*, what to modern eyes appears as an imperfect division of labour—See *Prof. Kahn Freund*[1]".

28. It is, therefore, not surprising that in recent years the control test as traditionally formulated has not been treated as an exclusive test.

29. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. *See* Atiyah, P.S., "Vicarious Liability in the Law of Torts", pages 37-38.

1. (1968) 3 All E.R. 732.

1. (1951) 14 Modern Law Rev. 505.

30. During the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor and in many cases it may still be the decisive factor. But it is wrong to say that in every case it is decisive . It is now no more than a factor, although an important one. See *Argent* v. *Minister of Social Security*[1].

31. The fact that generally the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a relevant factor. When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service. It is possible that this is another facet of the incidental feature of employment. This is the sort of situation in which a Court may well feel inclined to apply the "organisation" test suggested by Denning, L. J., in *Stevenson Jordan and Harrison* v. *Macdonald and Evans*[2].

32. The further fact that "a worker can be removed" which means nothing more than that the employer has the liberty not to give further work to an employee who has not performed his job according to the instructions of the employer, or who has been absent from the shop for a long time as spoken to by the Inspector of Labour in his evidence, would be speak of control and supervision consistent with the character of the business.

33. That the workers work on the machines supplied by the proprietor of the shop is an important consideration in determining the nature of the relationship. If the employer provides the equipment, this is some indication that the contract is a contract of service, whereas if the other party provides the equipment, this is some evidence that he is an independent contractor. It seems that this is not based on the theory that if the employer provides the equipment he retains some greater degree of control, for, as already seen, where the control arises only from the need to protect one's own property, little significance can attach to the power of control for this purpose. It seems, therefore, that the importance of the provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor, he expects the contractor to provide all the necessary tools and equipment, whereas if he employs a servant he expects to provide them himself. It follows from this that no sensible inference can be drawn from this factor in circumstances where it is customary for servants to provide their own equipment—*See* Atiyah P.S., "Vicarious Liability in the Law of Torts", page 65.

34. Section 220 (2) of the American Restatement, Agency 2nd includes among the relevant factors:

> "(*e*) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work".

The comment on the first part of this paragraph is in these words:

> "Ownership of instrumentalities: The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value."

It might be that little weight can today be put upon the provision of tools of

1. (1968) 1 W.L.R. 1749 at p. 1759.
2. (1952) 1 T.L.R. 101.

minor character as opposed to plant and equipment on a large scale. But so far as tailoring is concerned, I think the fact that sewing machines on which the workers do the work generally belong to the employer is an important consideration for deciding that the relationship is that of master and servant.

35. Quite apart from all these circumstances as the employer has the right to reject the end product if it does not conform to the instruction of the employer and direct the worker to restitch it, the element of control and supervision as formulated in the decisions of this Court is also present.

36. The reputation of a tailoring establishment depends not only on the cutter but also upon the tailors. In many cases, stitching is a delicate operation when the cloth upon which it is to be carried on is expensive. The defect in stitching might mar the appearance not only of the garment but also of its wearer. So when the tailor returns a garment, the proprietor has got to inspect it to see that it is perfect. He has to keep his customers pleased and he has also to be punctual which means that the sticthing must be done according to the instruction of the employer and within the time specified. The degree of control and supervision would be different in different types of business. If an ultimate authority over the worker in the performance of his work resided in the employer so that he was subject to the latter's direction, that would be sufficient. In *Humberstone* v. *Northern Timber Mills*[1], Dixon, J. said:

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate author ty over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions".

37. That some of the employees take up the work from other tailoring establishments and do that work also in the shop in which they generally attend for work, as spoken to by the proprietor in his evidence, would not in any way militate against their being employees of the proprietor of the shop where they attend for work. A person can be a servant of more than one employer. A servant need not be under the exclusive control of one master. He can be employed under more than one employer. *See* "The Modern Law of Employment" by G.H.L. Fridman, page 18, and also, *Between patwardhan Tailors, poona* v. *Their Workman*[1].

38. That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no reason why a person who is only employed part time, should not be a servant and it is doubtful whether regular part time service can be considered even *prima facie* to suggest anything other than a contract of service. According to the defirition in section 2 (14) of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a "person employed" within the meaning of the sub-section. Therefore, even if he accepts some work from other tailoring establishments or does not work whole time is a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed.

39. We think that on the facts and circumstances of the case the Chief Inspector of Shops and Establishments and the High Court came to the right conclusion that employer and employee relationship exi ted between the parties and that the Act was therefroe applicable. We therefore dismiss the appeal, but in the circumstances we do not make any order as to costs.

V.K. ——— *Appeal dismissed.*

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1. (1949) 79 C.L.R. 389.

1. (1960) 1 Lab. L.J. 722 at p. 726.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—*H. R. Khanna and A. Alagiriswami, JJ.*

State of Andhra Pradesh and another .. *Appellants**

v.

Andhra Provincial Potteries Ltd., and others *Respondents.*

Companies Act (I of 1956), *section* 220—*General body meeting not held—Hence balance-sheet and profit and loss account not laid before it—Failure, under the circumstances, to file with the Registrar the balance-sheet and profit and loss account—If an offence under section* 220 (3).

If no balance-sheet and profit and loss account is laid before a general body, there can be no question of that balance-sheet not being adopted nor of complying with the requirements of section 220 and though wilful omission to call a general body meeting and to lay the balance sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Companies Act, it certainly does not make him liable under section 220 of the Companies Act, 1956, *A.P. Potteries* v. *Registrar of Companies* A.I.R. 1970 A.P. 70, affirmed.

[*Paras.* 2, 7.]

Under section 220 of the Act the responsibility for sending three copies of the balance-sheet and profit and loss account arises only after they have been laid before the company at the general meeting. Without laying, copies could not be sent to the Registrar and even if they are sent it would not be a compliance with the provisions of the section. Therefore, the condition precedent or the essential pre-requisite of the balance-sheet and the profit and loss account being laid before the general meeting being fulfilled, the requirement of section 220 cannot be complied with. [*Para.* 7.]

Where the words of the section are very clear it is unnecessary to consider whether it embodies any principle as embodied in certain other sections which are differently worded. In interpreting a penal provision it is not permissible to give an extended meaning to the plain words of the section on the ground that a principle recognised in respect of certain other provisions of law requires that this section should be interpreted in the same way. [*Para.* 7.]

State of Bombay v. *Bandhan Ram Bhandari and others,* (1961) 1 S.C.R. 801, distinguished.

(Difference of opinion amongst the various High Courts on this point resolved and the decisions of the Calcutta, Allahabad, Rajasthan, Madras, Patna and Kerala High Courts taking a contrary view, overruled. For full details of the decisions so overruled, see judgment).

Cases referred to :—

State of Bombay v. *Bandhan Ram Bhandari*, (1961) 1 S.C.R. 801 : A.I.R. 1961 S.C. 186; *Emperor* v. *Pioneer Clay and Industrial Works Ltd.*, I.L.R. (1948) Bom. 86 : A.I.R. 1948 Bom. 357; *Gibson* v. *Barton,* (1875) 10 Q.B. 329; *Edmonds* v. *Foster,* (1875) 45 L.J. M.C. 41; *Park* v. *Lawton,* (1911) 1 K.B. 588; *Dulal Chandra* v. *State of West Bengal,*(1962) 32 Com. Cas. 1143 (Cal.); *Gopal Khaitan* v. *State,*(1969) 39 Com. Cas. 150: A.I.R. 1969 Cal. 132; *Ramachandra & Sons (P.) Ltd.* v. *State,* (1967) 2 Com.L.J. 92 : (1966) 36 Com.Cas. 585 (All.); *State* v. *T. C. Printers (P.) Ltd.,* A.I.R. 1963 Raj. 134; *India Nutriments Ltd.* v. *Registrar of Companies,* (1964) 34 Com. Cas. 160 (Mad.); *P. S. N. S. Al. Chettiar &*

* Crl.A. No. 34 of 1970.

17*th August,* 1973.

Co. v. *Registrar of Companies*, (1966) M.L.J. (Crl.) 36: (1966) 1 Comp.L.J. 17: (1966) 1 M.L.J. 48: A.I.R. 1966 Mad. 415; *Registrar of Companies* v. *H. Misra*, A.I.R. 1969 Orissa 234; *Vulcan Industries (P.) Ltd.* v. *Registrar of Companies, Orissa*, I.L.R. (1972) Cut. 373 : (1972) Tax. L.R. 2264; *State* v. *Linkers (P.) Ltd.*, A.I.R. 1968 Pat. 445 : 40 Com. Cas. 17; *Registrar of Companies* v. *Gopala Pillai*, (1961) Ker.L.J. 490; *Debendra Nath Das Gupta* v. *Registrar of Joint Stock Companies*, I.L.R. 45 Cal. 486 : A.I.R. 1917 Cal. 1; *Ballav Dass* v. *Mohan Lal Sadhu*, (1935) 39 Cal.W.N. 1152 ; *Bhagirath* v. *Emperor*, A.I.R. 1948 Cal. 42; *In re Narasimha Rao*, A.I.R. 1937 Mad. 341 ; In re *Appayya*, (1952) 1 M.L.J. 608 : A.I.R. 1952 Mad. 800.

The Judgment of the Court was delivered by

Alagiriswami, J.—This is an appeal against the judgment of the Full Bench of the Andhra Pradesh High Court reported in *A. P. Potteries* v. *Registrar of Companies*[6]. It arises out of a complaint filed against the 1st respondent company and its directors for failure to file with the Registrar of Companies on or before 30th October, 1967, the balance-sheet and profit and loss account of the company as required under section 220 (1) of the Companies Act, 1956, which is punishable under sub-section (3) of that section. Admittedly no general body meeting had been held and, therefore, the balance-sheet and profit and loss account had not been laid before a general body meeting nor could it be so laid.

2. The Full Bench speaking through Jaganmohan Reddy, C.J. as our learned brother then was, held that if no balance-sheet is laid before a general body, there can be no question of that balance-sheet not being adopted nor of complying with the requirements of section 220 and though wilful omission to call a general body meeting and to lay the balance-sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act, it certainly does not make him liable under the provisions of section 134 (2) of the Companies Act, 1913 or section 220 of the Companies Act, 1956. In this the Bench was taking a view contrary to that of most of the High Courts after the decision of this Court in *State of Bombay* v. *Bandhan Ram Bhandani*[1]. In that case this Court had taken the view that a person charged with an offence cannot rely on his default as an answer to the charge and so, if he was responsible for not calling the general meeting, he cannot be heard to say in defence to the charges brought against him that because the general meeting had not been called, the balance-sheet and profit and loss account could not be laid before it. In that case the directors of a company were prosecuted under sections 32 (5) and 133 (3) of the Companies Act, 1913, for breaches of sections 32 and 131 of that Act, for having knowingly and wilfully authorised the failure to file the summary of share capital for the year 1953 and being knowingly and wilfully parties to the failure to lay before the company in general meeting the balance-sheet and profit and loss account as at 31st March, 1953.

3 The Bombay High Court, however, following its earlier decision in *Emperor* v. *Pioneer Clay and Industrial Works Ltd.*[2] had upheld the acquittal of the directors by the Presidency Magistrate. Referring to the decision of the Bombay High Court in that case this Court pointed out that that decision turned on section 134 of the Companies Act, 1913 the language of which was to a certain extent different from the language used in sections 32 and 131 and refrained from going into

6. A.I.R. 1970 A.P. 70.

1. (1961) 1 S.C.R. 801 : A.I.R. 1961 S.C. 186.
2. I.L.R. (1948) Bom. 86 : A.I.R. 1948 Bom. 357.

the question whether the difference in language in section 134 on the one hand and sections 32 and 131 on the other made any difference to the decision of the case. After referring to the decisions in *Gibson* v. *Barton*[1], *Edmonds* v. *Foster*[2], and *Park* v. *Lawton*[3], where it was held than a person charged with an offence could not rely on his own default as an answer to the charge, and so, if the person charged was responsible for not calling the general meeting, he cannot be heard to say in defence to the charge that the general meeting had not been called, and that the company and its officers were bound to perform the condition precedent if they could do that, in order that they might perform their duty, this Court considered that as the correct view to take.

4. As we have noticed, this Court was not dealing there with the provisions of section 134 of 1913 Act which corresponds to section 220 of the 1956 Act. That question now directly arises for decision in this case. As we said earlier, most of the High Courts which have considered this question after the decision of this Court have proceeded on the basis that the decision necessarily led to the conclusion that even in a prosecution under section 134 of the 1913 Act (corresponding to section 220 of the 1956 Act) the company and its directors could not rely upon their failure to call the general body meeting as a defence to the prosecution. Under this category fall the decisions in *Dulal Chandra* v. *State of West Bengal*[4], and *Gopal Khaitan* v. *State*[5], of the Calcutta High Court *Ramachandra & Sons (P.) Ltd.* v. *State*[6], of the Allahabad High Court, *State* v. *T. C. Printers (P.) Ltd.*[1] of the Rajasthan High Court, *India Nutriments Ltd.* v. *Registrar of Companies*[2], and *P.S.N.S.Al. Chettiar & Co.* v. *Registrar of Companies*[3], of the Madras High Court. The Orissa High Court had taken a similar view in *Registrar of Companies* v. *H. Misra*[4], but in a later decision in *Vulcan Industries (P.) Ltd.* v. *Registrar of Companies, Orissa*[5], it has taken a contrary view and followed the decision of the Andhra Pradesh High Court in the judgment under appeal. That decision is also pending in appeal before this Court. The Patna High Court in *State* v. *Linkers Private Ltd.*[6], and the Kerala High Court in *Registrar of Companies* v. *Gopala Pillai*[7], have also taken a similar view.

5. We may now refer to some of the earlier decisions on this point. The earliest decision is the one in *Debendra Nath Das Gupta* v. *Registrar of Joint Stock Companies*[8], In that case the principle laid down in *Park* v. *Lawton*[9], was applied and it was held that it is not open to the petitioner to plead in answer to a charge under section 134 his prior default in respect of the calling of the prescribed general meeting and of placing before the company at such meeting a duly, prepared and audited balance-sheet. The decision in *Ballav Dass* v. *Mohan Lal Sadhu*[10], did not refer to the wording of the section but merely stated that the provisions of section 134 were not complied with. The same Court in *Bhagirath* v. *Emperor*[11], took the same view. In re *Narasimha Rao*[12], a learned single Judge

1. (1875) 10 Q.B. 329.
2. (1875) 45 L.J. M.C. 41.
3. (1911) 1 K.B. 588.
4. (1962) 32 Comp. Cas. 1143 (Cal.).
5. (1969) 39 Comp. Cas. 150 : A.I.R. 1969 Cal. 132.
6. (1967) 2 Comp.L.J. 92 : (1966) 36 Comp. Cas. 585 (All.).

1. A.I.R. 1963 Raj. 134.
2. (1964) 34 Comp. Cas. 160 (Mad.).
3. (1966) M.L.J. (Crl.) 36 : (1966) 1 Comp. L.J. 17 : (1966) 1 M.L.J. 48 : A.I.R. 1966 Mad. 415.
4. A.I.R. 1969 Orissa 234.
5. I.L.R. (1972) Cut. 373: 1972 Tax L.R. 2264.
6. 40 Comp. Cas. 17 : A.I.R. 1968 Pat. 445.
7. (1961) Ker.L.J. 490.
8. I.L.R. 45 Cal. 486 : A.I.R. 1917 Cal. 1.
9. (1911) 1 K.B. 588.
10. (1935) 39 Cal.W.N. 1152.
11. A.I.R. 1948 Cal. 42.
12. A.I.R. 1937 Mad. 341.

of the Madras High Court took the view that the same persons cannot be charged in respect of the same years with offences punishable both under sections 131 and 134, Companies Act because section 134 clearly contemplates the sending of a copy of the balance-sheet only after it has been placed before the company at a general meeting under section 131 and that where in a case there is no such placing of the balance-sheet before the company at a general meeting, the offence under section 134 cannot be committed. In re, *Appayya*[1], a view contrary to the one taken earlier by a Judge of that High Court was taken.

6. We may now set out the reasoning which weighed with the Andhra Pradesh High Court in the decision under appeal:

> "The reference to section 210 by the use of the word "aforesaid" and the emphasis indicated by the words "were so laid" make the filing of copies of those balance-sheets and the profit and loss accounts which are laid before the general body meeting an essential pre-requisite. If no general body meeting is held, it is obvious that no copies of the balance-sheet and profit and loss account can be filed even though the default may be wilful. Both under section 134 of the old Companies Act and section 220 of the Act, the laying of the balance-sheet and the profit and loss account before an annual general meeting is a condition precedent to the requirement that copies of such documents so laid should be filed before the Registrar. The intention is made further clear by the provision under sub-section (2) of the respective sections of both the Acts that if the balance-sheet is not adopted at the general meeting before which it is laid, a statement of that fact and of the reasons therefor have to be annexed to the balance-sheet and to the copies thereof required to be filed with the Registrar. If no balance-sheet is laid before a general body, there can be no question of that balance-sheet not being adopted nor of complying with the requirements of the sub-section (2) of section 134 of the old Companies Act or section 220 of the Act as the case may be, while wilful omission to call a general body meeting and omit to lay the balance-sheet and profit and loss account before it may expose the person responsible to punishment under other provisions of the Act, it certainly does not make him liable under aforesaid provisions. The punishment under these sections is for default in filing copies of the balance-sheet or the profit and loss account which are laid before a general body and for not sending a statement of the fact that the balance-sheet was not adopted. It may be that copies of the balance-sheet so laid before the general body may have been forwarded under sub-section (1) of section 134 of the old Companies Act or sub-section (1) of section 220 of the Act but nonetheless if the requirements of sub-section (2) of the respective sections have not been complied with even then, the persons concerned would be liable for punishment for that default
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> In our view, these provisions unmistakably indicate, as we said earlier, that the holding of the annual general meeting and the laying before it of the balance-sheet and the profit and loss account is a *sine qua non* for filing of the copies thereof before the Registrar If no general body meeting is held, the persons concerned cannot be said to have committed a default in complying with those provisions"

7. In this state of difference of opinion among the various High Courts and the

1. (1952) 1 M.L.J. 608 : A.I.R. 1952 Mad. 800.

absence of a decision of this Court on section 134 this appeal has been filed. Though the respondent was not represented before this Court the learned Additional Solicitor-General who appeared for the State of Andhra Pradesh and the learned Solicitor-General who appeared for the Advocate-General of Andhra Pradesh fairly placed before this Court all the decisions for and against, which we have already referred to, and also placed before us all the relevant considerations. It was urged before us that the principle accepted by this Court in *State of Bombay* v. *Bandhan Ram Bhandani*[1], that a company or its directors in a prosecution under section 32 and section 133 of the 1913 Act could not in defence to such prosecution rely upon their own failure to call the general body meeting, applies with equal force to a prosecution under section 134 of the Act. But it appears to us that there is a very clear distinction between sections 32 and 133 on the one hand and section 134 on the other. Section 32 relates to the preparation of a list of members of the company and of persons who have ceased to be members as well as a summary, and also provides that it shall be completed within 21 days after the day of the first or only ordinary general meeting in the year. It also provides that the company shall forthwith file with Rthe egistrar a copy of the list and summary, and any default in complying with the requirements of the section is made punishable. Under section 131 the laying of a balance-sheet and profit and loss account before the company in the general meeting is made obligatory. Under section 133 the failure to comply with section 131 is made punishable. But section 134 lays down that after balance-sheet and profit and loss account or the income and expenditure account, as the case may be, have been laid before the company at the general meeting three copies thereof shall be filed with the Registrar, and a failure to do so is made punishable under sub-section (4) of that section. The difference in language is very clear and pointed. The responsibility of sending three copies of the balance-sheet and profit and loss account or the income and expenditure account, as the case may be, arises only after they have been laid before the company at the general meeting. Without so laying copies could not be sent to the Registrar and even if they are sent it would not be a compliance with the provisions of the section. It is possible to conceive of the law providing that the balance-sheet and profit and loss account shall be sent to the Registrar even without the necessity of their being laid before the general body meeting of the company. In that case any failure to do so would be punishable and the question whether a general body meeting had been held and the balance-sheet and profit and loss account have been laid before it will not arise. Therefore the condition precedent or the essential pre-requisite of the balance-sheet and the profit and loss account being laid before the general meeting of the company not being fulfilled, the requirement of section 134 cannot be complied with. While the appeal to a question of principle might be attractive we cannot ignore the clear words of the section: Where the words of the section are very clear it is unnecessary to consider whether it embodies any principle and whether that principle is consistent with the principle as embodied in certain other sections which are differently worded. In interpreting a penal provision it is not permissible to give an extended meaning to the plain words of the section on the ground that a principle recognised in respect of certain other provisions of law requires that this section should be interpreted in the same way.

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1. (1961) 1 S.C.R. 801: A.I.R. 1961 S.C. 186.

8. We may also point out that in *Park* v. *Lawton*[1] the principle laid down which has been adopted in this Court's decision in *State of Bombay* v. *Bandhan Ram Bhandani*[2], it is realised that there might be circumstances where the principle laid down in that decision will not apply. The Court there observed:

> "If it were the case that everything required to be inserted in the list was dependent on the fact of the general meeting having been held, it might perhaps have been contended with some force that it is impossible to calculate a continuing penalty from a day which has never come into existence; but when one sees that section 26 requires a number of most important matters to be included in the list of members *which are entirely independent of the holding of a general meeting,* this very much weakens the contention that no list need be compiled if, owing to the failure to hold a general meeting it is impossible to say what day is the fourteenth day thereafter".

This observation may provide no defence to a prosecution under section 133 but it might well do so in a prosecution under section 134. This was what the learned Solicitor-General was fair enough to point out with regard to the difficulty of working out the daily penalty under section 162 after the thirtieth day mentioned in section 220 (1) of the 1956 Act. He pointed out that where no meeting has been held it was not possible to calculate the period of 30 days specified in that section and it would not be possible to give effect to the provisions of that section. The Bombay High Court pointed out in *Emperor* v. *Pioneer Clay and Industrial Works Ltd.*[3], that the decision in *Park* v. *Lawton*[1], is based on section 36 (it is a mistake for section 26) of the English Act, which in its scheme and terms is entirely different from the section with which they (the Bombay High Court) were concerned, and that the section in the English Act is a composite one which lays down various requirements which are to be complied with by the company under its first four sub-clauses and sub-clause (5) is the penal sub-section which penalises the failure to comply with any of the requirements contained in any of the four preceding sub-sections. In our Act various stages have to be gone through before we reach the stage of a copy of the balance-sheet and the profit and loss account being filed with the Registrar and the failure to reach any one of the stages within the time prescribed is made penal by the Act. The Court pointed out that this is not a case where an accused person relies on his default and pleads his innocence. What he says is, I may have committed an offence, but the offence that I have committed is not the one with which I am charged. On the facts proved by the prosecution an offence is not disclosed under section 134 (4). A different offence might have been committed either under section 76 (2) or under section 133 (3).

9. It is interesting to note that it was argued in *Park* v. *Lawton*[1], that the fact that section 26 makes the offence a continuing one also shows that the obligation to file the list is independent of the holding of a general meeting. The observations which we have extracted earlier will show that the submission on behalf of the prosecution that provisions of section 26 show that the obligation to file the list is independent of the holding of the general meeting was accepted. But under section 134 of the 1913 Act the obligation to send a copy of the balance-sheet and profit and loss account is dependent

1. (1911) 1 K.B. 588.
2. (1961) 1 S.C.R. 801 : A.I.R. 1961 S.C. 186.
3. I.L.R. (1948) Bom. 86 : A.I.R. 1948 Bom. 357.

1. (1911) 1 K.B. 588.

completely on its being laid before a general meeting. It is clear, therefore, that on principle and authority it should be held that no offence was committed by the directors in this case under section 134. They might have been guilty of offences under sections 76 and 133 but not under section 134. We say nothing about section 32 about which this Court has already laid down the law.

10. The appeal is dismissed.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*K. K. Mathew and M. H. Beg, JJ.*

K. M. Sengoda Gounder and others .. *Appellants**

v.

State of Madras and another .. *Respondents.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), sections 2 (4), 2 (11) and (3)—Scope—Hamlet in question, inam or village inam.

On the question whether the High Court was right in holding Komarapalayam Agraharam was not an inam within the meaning of section 2 (4) or part of an inam village within section 2 (11) of the Madras Inam Estates (Abolition and Conversion into Ryotwari Act,

Held, that the original grant was made in consideration of the payment of a sum by the grantees. The grant was not, therefore, an inam grant. The circumstance that the grant was treated as an inam at the time of the Inam Settlement proceedings and that title deeds were issued on that basis, cannot affect the original character of the grant. An inam title deed does not operate either to enlarge or abridge the rights of the inamdars under the original grant.

[*Paras.* 3, 4.]

When once it is found that Tippu Sultan did not make a regrant, but only confirmed the previous grant, there is no difficulty in holding that there was no change in the original character of the grant which was one for consideration. Therefore, the High Court was correct.

[*Para.* 5.]

Case referred to :

Sellappa Goundar v. *Bhaskaran*, I.L.R. (1960) Mad. 796: (1960) 2 M.L.J. 363.

The Judgment of the Court was delivered by

Mathew, J.—The second respondent filed a writ petition before the High Court of Madras challenging the validity of a notification issued by the State Government under section 3 of the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), on the ground that Komarapalayam Agraharam, Tiruchengoda Taluk, Salem District, is not inam and therefore the notification can have no application to that hamlet. He also challenged the constitutional validity of the aforesaid Act. During the pendency of the writ petition, the appellants, claiming to be the tenants under the inamdar got themselves impleaded as respondents 2 to 31 to the writ petition. The High Court came to the conclusion that the Act is constitutionally valid but that the hamlet in question is not an inam or part of village inam and, therefore, the Act can have no application to it, and allowed the writ petition. This appeal, by certificate, is from the judgment of the High Court.

2. Komarapalayam Agraharam is comprised in Jadagapady village. The question whether Komarapalayam Agraharam

* C.A. No. 1287 of 1967.

17th August, 1973.

is inam was raised at an earlier stage by some of the tenants of the hamlet and the matter came up before the High Court and the decision of the High Court is reported in *Sellappa Goundar* v. *Bhaskaran*[1]. There the history of this village as gathered from the inam papers was set out thus:

"Whether Komarapalayam village was an inam village or not would depend on the terms of the grant. The grant, however, is not in evidence. The copper plate which was produced at the time of inam settlement proceedings is not now available. What we have is only Exhibit A-1 the extract from the fair inam register relating to the village. From Exhibit A-1 it appears that in the year 1760, Krishna Raja Udayar, the Rajah of Mysore granted the village of Jagadapady or Nattapatti, together, with 12 hamlets to certain Brahmins. Komarapalayam was one of the 12 hamlets. The grant, however, was not by way of gift of either the land or any portion of the assessment thereon. A number of Brahmins subscribed and collected a sum of 50,000 Rajagopala Pagodas. Four of them who represented the others as well paid the amount into the treasury and obtained a grant of Jagadapady and the 12 hamlets rent free from the ruler. Presumably, the grant was the result of a consideration paid by the grantees and was not really attributable to any benefaction by the ruler. When Tippu Sultan came to power, he resumed six of the 12 hamlets, allowing the successors of the original grantees to remain in possession of the rest without any obligation to pay any rent on that portion of the village. On the assumption of sovereignty by the British, Captain Macleod confirmed the title on the successor of the grantees in regard to the lands in their possession. During the enquiry by the Inam Commission, it was found that the inam was enjoyed in 110 vrittis; however only persons holding 90 vrittis appeared and filed statements and there was no claim for about 20 vrittis. The Inam Commissioner confirmed the inam subject to an assessment of Rs. 566.11.3 in addition to quit rent of Rs. 299.12. There is no evidence to indicate as to what happened to that portion of the grant which was taken over by Tippu Sultan".

3. We think that the original grant was made in consideration of the payment of the sum by the grantees and the grant was not therefore an inam grant.

4. The circumstance that the grant was treated as an inam at the time of the inam settlement proceedings and that title deeds were issued on that basis, cannot affect the original character of the grant. An inam title deed does not operate either to enlarge or abridge the rights of the inamdars under the original grant.

5. Learned Counsel for the appellants contended that even assuming that the original grant in favour of the predecessors-in-interest of the second respondent was for consideration, when Tippu Sultan resumed the 6 hamlets comprised in the village of Jadagapady, it must be presumed that he made a fresh grant of the other 6 hamlets comprised in the village and, therefore, the original character of the grant has no relevancy in determining the tenure of the Agraharam, as the fresh grant was an Act of State by a new Sovereign which destroyed its original character. The inam register does not show that Tippu Sultan resumed Komarapalayam Agraharam. On the other hand, it definitely shows that he confirmed the previous grant in respect of the 6 hamlets including Komarapalayam Agraharam. When the inam register shows that 6 hamlets included in Jagadapady village were resumed and the grant

1. I.L.R. (1960) Mad. 796 : (1960) 2 M.L.J 3 at 367.

in respect of the remaining 6 hamlets was confirmed, the inference is irresistible that there was no change in the character or tenure of the 6 hamlets which were not resumed. In other words, confirmation can only mean that the title under which these hamlets were being held was accepted and recognised by Tippu Sultan. It cannot therefore be said that there was a regrant by Tippu Sultan in respect of Komarapalayam Agraharam. There was no case for the appellants that the British Government did not confirm what Tippu Sultan did. On the other hand, their positive case was that there was a regrant of the 6 hamlets including Komarapalayam Agraharam by Tippu Sultan and that British Government confirmed the regrant by Tippu Sultan. When once it is found that Tippu Sultan did not make a regrant, but only confirmed the previous grant, there is no difficulty in holding that there was no change in the original character of the grant which was one for consideration. The fact that the inam register would indicate that the hamlet in question along with some others was resumed by William Macleod in 1207 Fasli and that the hamlets were granted as inam would not be decisive in view of the statements in the inam register showing that the hamlets were given rent free and patta issued for them. However, it is not necessary to go into that aspect of the case because the 1st respondent, the State of Madras, had no case that the British Government resumed Komarapalayam Agraharam and made a regrant. Their only case before the High Court and in their statement of case here was that the previous grant was confirmed. In these circumstances we see no reason to differ from the finding of the High Court that Komarapalayam Agraharam is not an inam within the meaning of section 2 (4) or part of an inam village within section 2 (11) of the Act in question.

6. We think the conclusion of the High Court was correct and we dismiss the appeal but in the circumstances without any order as to costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*D. G. Palekar and A. Alagiriswami, JJ.*

P. Malai Chami .. *Appellant**

v.

M. Andi Ambalam and others .. *Respondents.*

(A) *Representation of the People Act (XLIII of* 1951), *sections* 93, 97, 100, 101 (a), 117 *and* 118—*Scope—Election petition of the respondent questioning the election of the appellant and claiming seat for the respondent—Appellant failing to file recrimination petition —Appellant, if can claim to lead evidence*

The appellant was declared elected to the Tamil Nadu Legislative Assembly to fill a seat from the Melur (North) Constituency by a majority of 127 votes receiving 37,337 votes as against 37,210, received by the respondent. 3,381 votes were held invalid. The respondent filed an election petition on 23rd April, 1971, not only questioning the election of the appellant but also claiming the seat for himself. The respondent filed an interlocutory application for directing a scrutiny and recounting of all the votes. To this no counter-affidavit was at all filed by the appellant. Recount was ordered and it was found that the appellant had got 37,372 votes and the respondent 37,297 votes. Thus the majority obtained by the appellant was reduced from 127 to 75. The learned Judge took the view that in the absence of a recrimination

* C.A. No. 649 of 1972. *18th April,* 1973.

petition under section 97 of the Representation of the People Act the appellant was not entitled to question any votes which might have been improperly received on behalf of the respondent. If that had been done, the appellant would still have won by a majority of 75 votes. But as he was not entitled to do so the result of leaving out of account votes improperly received on behalf of the respondent and taking into account only the votes which ought to have gone to the respondent, which had been improperly rejected was that the respondent had 96 votes more than the appellant and he was declared elected. Hence the appeal by the appellant.

Held that,

The only ground on which the defeated candidate could be declared elected is under section 101 (*a*) of the Act that in fact he had received a majority of valid votes. But it is in deciding who has got the majority of valid votes that section 97 comes into play. When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in quesiton his election. This right which the appellant had is subject to the provision that he shall not be entitled to give evidence to prove that the election of the petitioner, in this case the respondent, would have been void if he had been the returned candidate and the petitioner had presented a petition calling in question the election unless he had given notice of his intention to give such evidence and also given security and further security referred to in sections 117 and 118 respectively. And every such notice has to be accompanied by the statement and particulars required under section 83 in the case of an election petition and shall be signed and verified in the like manner. None of these things was done in this case. [*Para.* 9.]

(B) *Representation of the People Act* (*XLIII of* 1951), *sections* 97 *and* 100 (1) (d) (*iii*) *and Conduct of Election Rules*, (1961), *rule* 56 (2), *clauses* (a) *to* (h) *and rule* 88 (2), *clauses* (a) *to* (h)—*Scope—Election petition, not action in law or suit in equity—Recount of votes —Improper reception or rejection of votes—Failure of the elected candidate to avail himself of the provisions of section* 97—*Effect.*

An election petition is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant breaches of that law or by corrupt practices. [*Para.* 9.]

When the election petitioner, the respondent herein, wants a recount for the purpose of setting aside the appellant's election he necessarily has got to have not merely the benefit of votes which would have originally gone to him but which had been wrongly given to the appellant but also all votes which had been cast in his favour (the respondent) but had been rejected wrongly on one or other of the grounds mentioned in rule 56 (2), clauses (*a*) to (*h*) of the Conduct of Election Rules. So, it was necessary for the purpose of the respondent's case not merely that votes which were held invalid should be rescrutinised but also the votes which had been held to have been cast in favour of the appellant. The improper reception or rejection, therefore, would include not merely cases where a voter appears before the presiding officer at

the time of polling and his vote is received where it should not have been received and his vote rejected where it should not have been rejected. The improper rejection or reception contemplated under section 100 (1) (*d*) (iii) would include mistakes or wrong judgments made by the returning officer while counting and exercising his powers under rule 88 (2) clauses (*a*) to (*h*). The fact, therefore, that the respondent asked for recounting of all the votes does not mean that he wanted also that votes which had been wrongly held to have been cast in his favour but should have gone to the appellant should be taken into account. The respondent was interested in no such thing. He made no such prayer. It was only the appellant that was interested and bound to do it if he wanted to defeat the respondent's claim that he should be declared elected and section 97 is intended for just such a purpose.

[*Para.* 10.]

Cases referred to :—

Ram Sevak v. *H. N. Kidwai*, (1964) 6 S.C.R. 238 : A.I.R. 1964 S.C. 1249 ; *Jagjit Singh* v. *Kartar Singh*, (1967) 1 S.C.J. 762 : A.I.R. 1966 S.C. 773 : *Jitendra Bahadur* v. *Krishna Behari*, (1970) 1 S.C.J. 353 : (1970) 1 S.C.R. 852 : A.I.R. 1970 S.C. 276 ; *Sami Rameshwara Nand* v. *Madho Ram*, (1968) 8 D.E.C. 153 ; *Nathuram Ram Mirdha* v. *Gordhaban Soni*, (1968) 8 D.E.C. 286 ; *Jabar Singh* v. *Genda Lal*, (1964) 6 S.C.R. 54 : A.I.R. 1964 S.C. 1200 ; *Bhim Sen* v. *Gopali*. (1960) 22 E.L.R. 288 ; *Shankar* v. *Sakharam*, (1965) 2 S.C.R. 403 : 68 Bom.L.R. 105 : (1965) 2 S.C.J. 684 : A.I.R. 1965 S.C. 1244 ; *Ravindranath* v. *Raghbir Singh*, (1968) 1 S.C.R. 104 : (1968) 1 S.C.J. 705 : A.I.R. 1968 S.C. 300 : *Kamaraja Nadar* v. *Kunju Thevar*, (1959) S.C.R. 583 : 1958 S.C.J. 680 : (1958) 2 An.W.R. (S.C.) 52 : (1958) 2 M.L.J. (S.C.) 52 : A.I.R. 1958 S.C. 687 ; *Venkateswara* v. *Narasimha*, (1969) 1 S.C.R. 679 : (1969) 2 S.C.J. 505 : (1970) 1 An.W.R. (S.C.) 8 : (1970) 1 M.L.J. (S.C.) 8 : A.I.R. 1969 S.C. 872 : *Ch. Subba Rao* v. *Member, Election Tribunal*, (1964) D.E.C. 270.

The Judgment of the Court was delivered by

Alagiriswami, J.—This appeal arises out of the election held in March, 1971 to the Tamil Nadu Legislative Assembly to fill a seat from the Melur (North) constituency in Madurai district in which the appellant was declared elected by a majority of 127 votes receiving 37,337 votes as against 37,210 received by the respondent. 3,381 votes were held invalid. The respondent filed an election petition on 23rd April, 1971 not only questioning the election of the appellant but also claiming the seat for himself. He made various allegations in his petition which related to infraction of many of the rules regarding the conduct of election. But we may refer to four important matters, which he had referred to in his petition, the importance of which would become clear in due course. In paragraph (*g*) of his petition he has stated :

> "The mixing of the papers, with rapid counting, has resulted in large number of votes polled in favour of the petitioner erroneously added and bundled in the votes polled by the respondent. This has also resulted in wrong counting".

In paragraph (1) he has stated :

> "Therefore the petitioner submits that the ballot papers may be directed to be arranged according to the serial number and then counted. The petitioner submits that this will reveal the introduction of unauthorised ballot

papers, if any, and use of different inks for marking."

Paragraph (*n*) runs as follows :

"The petitioner states that a number of votes have been declared invalid without any justification whatsoever. Many of the votes declared invalid were cast in favour of the petitioner. In the counting, some of the invalid votes were taken in favour of the first respondent. In view of the mixing of the ballot papers counting was done hastily and rapidly, without any opportunity to the candidate or his agent to supervise the counting. In fact, some of the numbers of counting were wrongly mentioned and went to the respondent instead of counting in the name of the petitioner. If recount had been taken the petitioner would have been declared elected."

In paragraph (*s*) it is stated :

"The petitioner also states that at the time of counting the votes in favour of the petitioner were bundled in the bundles containing the votes in favour of the respondent and they were counted for the first respondent. Number of ballot papers were found outside the counting place."

Finally, he prayed to the Court to :

(*a*) direct recounting of the votes ;

(*b*) declare the petitioner duly elected ;

(*c*) declare the election of the 1st respondent to Melur North Constituency void, and

(*d*) ...."

2. The appellant in his counter-affidavit denied all the allegations in the petition. The respondent filed an interlocutory application for directing a scrutiny and recounting of all the votes. To this application no counter-affidavit was at all filed by the appellant. Five witnesses including the petitioner were examined on his side and on the respondent's side also five witnesses including the Returning Officer, the Assistant Returning Officer as well as the successful candidate were examined at great length. The learned Judge after an elaborate, careful, thorough and meticulous examination, which are almost a model of judical balance and propriety, passed an order for recount of the votes. We consider it unnecessary to set them out at length. It may be useful to set out the main grounds on which he ordered recount. These are found in paragraph 22 of his order.

"22. From the foregoing discussion, the following facts emerge :

i. Over-worked and tired personnel were employed for the counting. There are reasonable grounds to think that the counting was not done properly.

ii. When the counting was in progress, the petitioner admitttedly complained about the hasty counting, and there are reasonable grounds to think that on account of the hurry and haste, in which counting was done, the counting was not likely to be correct or proper.

iii. The unlawful entry of Mr. O. P. Raman into the counting hall, when the counting was going on, caused dislocation and disturbance to the counting which was likely to have affected the accuracy in the counting.

iv. The Assistant Returning Officer could not have checked each of the ballot papers brought to him in the doubtful bundles in the way in which such papers should have been checked by him, having regard to the time within which he claims to have completed the checking and counting, whereas much longer time would be

requred to check up these bundles in the proper and prescribed way. This leads to the resonable inference that each of the ballot papers contained in the doubtful bundles was not checked.

v. The order of the Returning Officer directing recounting of the ballot papers treated as invalid lends support to the contention of the petitioner that the votes were not properly scrutinised.

vi. The failure of the Returning Officer to implement his order to recount has vitiated the declaration of the result.

vii. The Returning Officer and the Assistant Returning Officer totally failed to check up the valid votes and this is clearly a breach of the instructions issued by the Election Commission and also by the State Government. There is no assurance that the votes were properly sorted and counted. There is reasonable possibility to hold that the counting was not proper ; and

viii. The test check conducted by me of some of the ballot papers treated as invalid clearly shows that some valid votes secured by the petitioner and some secured by the respondent have been treated as invalid and rejected. This clearly shows that the counting was wrong."

It would be noticed that the main attack was in respect of the counting and the findings of the learned Judge also related to the same question. The appellant had very hotly contested the propriety of the request for recount. The learned Judge considered the decisions in *Ram Sevak* v. *H. K. Kidwai*[1], *Jagjit Singh* v. *Kartar Singh*[2], *Jitendra Bahadur* v. *Krishna Behari*[1], *Swami Rameshwara Nand* v. *Madho Ram*[2], *Nathu Ram Mirdha* v. *Gordhan Soni*[3], and after a very elaborate consideration of the facts as well as the principles involved in those decisions had held that recount should be ordered. We are satisfied that the High Court has taken into consideration all the material circumstances and has appreciated the evidence from the correct perspective in coming to the conclusion that the circumstances under which the counting was carried out necessitated a recount.

3. The recount was ordered to be done by four advocates acting as tellers, two from each side out of a list of four furnished by each side. Both the parties and their respective Counsel were permitted to be present along with four counting agents for petitioner as well as the respondent and an Assistant Registrar of the High Court was appointed to preside over the recount of the ballot papers and to be assisted by the members of staff dealing with election cases. He was ordered to submit his report within two days after the completion of the recounting. It was ordered that on receipt of that report an opportunity will be given to both parties to be heard on that report and necessary orders will be passed thereon. The Assistant Registrar submitted his reports on 19th February, 1972, and on 23rd February, 1972, 24th February, 1972, 25th February, 1972 and 28th February, 1972 the Judge himself took up for decision the validity or otherwise of the various votes which were disputed and dictated orders then and there. Even before him some concessions were made in respect of certain votes by both the parties and some the Judge decided by himself. The Assistant Registrar himself dealt

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1. (1964) 6 S.C.R. 238 : A.I.R. 1964 S.C. 1249.
2. (1967) 1 S.C.J. 762: A.I.R. 1966 S.C. 773.

1. (1970) 1 S.C.J. 353 : A.I.R. 1970 S.C. 276.
2. (1968) 8 DEC 153 (S.C.).
3. (1968) 8 DEC 286 (S.C.).

merely with votes which were conceded by one side or the other as having been validly cast in favour of the opposite side. Before him out of the votes which were held invalid by the Returning Officer, 2,583 were agreed as rightly held invalid but there was dispute about 804 votes (It thus appears that there was a mistake even in the counting of the invalid votes). From out of the votes counted in rounds 8 to 11, 11,301 votes in favour of the respondent were conceded as valid and 395 were disputed; 11,951 were conceded as valid in favour of the appellant and 567 were disputed. Thus the total of these disputed votes amounting to over 1,700 were decided by the Judge himself in the presence of the parties and their advocates, some on the basis of concessions, some as decided by the Judge himself, as already mentioned. It is necessary to mention also that as in the recount from among the votes held invalid by the Returning Officer petitioner conceded 65 were valid votes cast for the respondent. He also conceded that 11 votes counted by the Returning Officer in his favour were valid votes cast for the respondent. 19 votes held by the Returning Officer as validly cast for the petitioner were conceded by him to be invalid. The total came to 95. Similarly 126 votes cast for the petitioner but rejected by the Returning Officer were found valid and 14 votes counted by the Returning Officer as cast for the respondent were found to have been really cast for the petitioner. These facts clearly establish large scale mistakes in counting. As a result of all this it was finally found that the appellant had got 37,372 votes and the respondent 37,297 votes. Thus the majority obtained by the appellant was reduced from 127 to 75.

4. It may be remembered that one of the grounds on which the learned Judge had come to the conclusion that recount should be ordered was that the unlawful entry of a Minister, Mr. O. P. Raman into the counting hall when the counting was going on, had caused dislocation and disturbance to the counting which was likely to affect the accuracy of the counting. The learned Judge had discussed this question at length and before us a Special Leave Petition was filed by the Returning Officer questioning the decision of the learned Judge in the petition for recount as well as in the main election petition. We had rejected that petition. But we should make it clear that the learned Judge has been very fair in his discussion of this matter. It seems to have been contended before him that Mr. Raman had a right to enter the place where the counting was going on, under rule 66 of the Conduct of Elections Rules in order to get the certificate. The Minister concerned was the successful candidate for the Melur (South) Constituency, the counting for which was over at 5 A.M. on 11th March, 1971 in the same building. At 8 A.M. began the counting of the votes for the Melur (North) Constituency, *i.e.* the election in dispute. Mr. Raman was not a candidate in that election who was entitled under rule 53 to be present in the room where the counting was going on. We cannot understand the anxiety of the Returning Officer in questioning the orders of the learned Judge in the petition for recount as well as the main election petition. After all the concerned parties were fighting it out under the ostensible excuse of questioning the decision of the learned Judge regarding his interpretation of rules 53 and 66. It has been filed really due to the hypersensitiveness on the part of the Minister. Indeed the learned Judge has made fairly strong remarks against the Returning Officer in other respects. He has stated at one place that the Returning Officer had failed in his duty,

and at another place that the Returning Officer and the Assistant Returning Officer came forward with a story totally devoid of truth. Nothing is said in the petition about all this which shows that our inference on this point is correct. The petition on behalf of the Returning Officer was wholly uncalled for. It would appear that he is not a free agent.

5. After the counting was over, as already shown the majority in favour of the appellant was reduced from 127 to 75. Even so his election would have had to be sustained. But on behalf of the respondent it was urged before the learned Judge that in a case where an election petitioner had applied not merely for setting aside the election of the successful candidate but also for declaring himself (the defeated candidate) as elected, it was the duty of the successful candidate to have filed a recrimination application under section 97 of the Representation of the People Act. This argument was based on the decision of this Court in *Jabar Singh* v. *Genda Lal*[1]. This Court there referred to the earlier decisions on the subject and by a majority of 4 to 1 held that in such a case it was the successful candidate's duty to have filed a recrimination petition under section 97 which would be like a counter-petition. It is unnecessary to set out the very instructive discussion in that case at length. It would be enough if the head-note alone is set out :

"The appellant was declared elected having defeated the respondent by 2 votes. Thereafter, the respondent filed an election petition. The respondent challenged the validity of the appellant's election on the ground of improper reception of votes in favour of the appellant and improper rejection of votes in regard to himself. His prayer was that the appellant's election should be declared void and a declaration should be made that the respondent was duly elected.

The appellant urged before the Tribunal that there had been improper rejection of the votes, and improper acceptance of the votes of the respondent, and his case was that if recounting, and re-scrutiny was made, it would be found that he had secured a majority of votes. The respondent objected to this course; his case was that since the appellant had not recriminated nor furnished security under section 97 of the Act, it was not open to him to make this plea. The Tribunal rejected the objection of the respondent and accepted the plea of the appellant. The Tribunal re-examined the ballot papers of the respondent as well as the appellant and came to the conclusion that 22 ballot papers cast in favour of the respondent had been wrongly accepted. The result was that the respondent had not secured a majoriy of votes. The Tribunal declared that the election of the appellant was void and refused to grant a declaration to the respondent that he had been duly elected. Both the appellant and the respondent preferred appeals before the High Court against the decision of the Tribunal. The High Court dismissed both the appeals and the decision of the Tribunal was confirmed. Hence the appeal.

Held : (i) The scope of the enquiry in a case falling under section 100 (1) (*d*) (iii) is to determine whether any votes have been improperly cast in favour of the returned candidate or any votes have been improperly refused or rejected in regard to any other candidate. These are the only

1. (1964) 6 S.C.R. 54 : A.I.R. 1964 S.C. 1200.

two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry the onus is on the petitioner to prove his allegation. Therefore, in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of section 100 (1) (*d*) itself. In fact section 97 (1) has no application to the case falling under section 100 (1) (*d*) (iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else.

(*ii*) There are cases in which the election petition makes a double claim ; it claims that the election of a returned candidate is void and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that section 100 as well as section 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that section 97 comes into play. Section 97 (1) thus allows the returned candidate to recriminate and raise pleas in support of his case. The result of section 97 (1) therefore, is that in dealing with a composite election petition the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. In this connection the returned candidate is required to comply with the provisions of section 97 (1) and section 97 (2) of the Act. If the returned candidate does not recriminate as required by section 97, then he cannot make any attack against the alternative claim made by the petitioner. In other words the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate.

(*iii*) The pleas of the returned candidate under section 97 of the Act, have to be tried after a declaration has been made under section 100 of the Act. The first part of the enquiry in regard to the validity of the election of the returned candidate must be tried within the narrow limits prescribed by section 100 (1) (*d*) (iii) and the latter part of the enquiry which is governed by section 101 (*a*) will have to be tried on a broader basis permitting the returned candidate to lead evidence in support of the pleas which he may have taken by way of recrimination under section 97 (1). But even in cases to which seetion 97 applies, the enquiry necessary while dealing with the dispute under section (101) (*a*) will not be wider if the returned candidate has failed to recriminate and in a case of this type the duty of the Election Tribunal will not be to count and scrutinise all the votes cast at the election. As a result of rule 57, the Election Tribunal will have to assume that every ballot paper which had not been rejected under rule 56 constituted one valid vote and it is on that basis the finding will have to be made under section 101 (*a*). Therefore it is clear that in holding an enquiry either under section 100 1 (*d*) (iii) or under section 101 where section 97 has not been complied with it is not competent to the Tribunal to order a general recount of the votes preceded by a scrutiny about their validity."

Rajagopala Ayyangar, J. was the solitary Judge who dissented from the majority judgment and we have gone through his judgment with all the care and the respect that it deserves and we do not see that it throws much light on the subject. It seems to ignore section 97. We may also point out that in *Bhim Sen* v. *Gopali*[1], which was considered in the above decision it was observed:

"As we have already pointed out, in his first written statement respondent 1 made a positive averment that no void votes had been allowed to be used by the returning officer and that the returning officer had fully discharged his duties under section 63. It is true that after it was discovered that he had received 37 void votes respondent 1 attempted to make an allegation that the appellant may likewise have received similar void votes, but it was too late then, because the time for making such an allegation by way of a recriminatory proceeding had elapsed and respondent 1 had failed to furnish the security of Rupees 1,000 as required by section 97 (2) of the Act. If under these circumstances respondent 1 was not allowed to pursue his allegation against the appellant, he is to blame himself."

It was urged before this Court that in a subsequent decision in *Shankar* v. *Sakharam*[1], this Court itself had differed from the earlier decision. The relevant sentence reads like this:

"We also think that the enquiry under section 100 (1) (*d*) (iii) is outside the purview of section 97. On an enquiry under section 100 (1) (*d*) (iii) with regard to improper refusal of votes, the respondent to the election petition is entitled to dispute the identity of the voters without filing any recrimination under section 97."

1. (1960) 22 E.L.R. 288 (S.C.).

This argument is clearly based on a misapprehension. The question that arises in this case did not arise there nor was the earlier decision in *Jabar Singh's case*[1], referred to or distinguished. Indeed it was not necessary because they were dealing only with a case falling under section 100, *i.e.*, a case where the election of the successful candidate was sought to be set aside and not one also falling under section 101 where the defeated candidate also wants that he should be declared to have been elected.

6. In the present case apparently neither party was aware of the decision in *Jabar Singh* v. *Genda Lal*[2], till after the counting was over. The learned Judge took the view that in the absence of a recrimination petition under section 97 the appellant was not entitled to question any votes which might have been improperly received on behalf of the respondent. If that had been done the appellant, as indicated earlier, would still have won by a majority of 75 votes but as he was not entitled to do so the result of leaving out of account votes improperly received on behalf of the respondent and taking into account only the votes which ought to have gone to the respondent, which had been improperly rejected it was found that the respondent had 96 votes more than the appellant and he was declared elected.

7. The decision in *Jabar Singh* v. *Genda Lal*[1], has received re-consideration at the hands of this Court with approval again in *Ravindra Nath* v. *Raghbir Singh*[3], where it was observed :

"The object of section 97 is to enable recrimination when a seat is claimed

1. (1965) 2 S.C.J. 684: (1965) 2 S.C.R. 403 : A.I.R. 1965 S.C. 1424.
2. (1964) 6 S.C.R. 54 : A.I.R. 1964 S.C. 1200.
3. (1968) 2 S.C.J. 705 : (1968) 1 S.C.R. 104 : A.I.R. 1968 S.C. 300.

for the petitioner filing the election petition or any other candidate. In his election petition the petitioner may claim a declaration that the election of all or any of the returned candidates is void on one or more of the grounds specified in sub-section (1) of section 100 and may additionally claim a further declaration that he himself or any other candidate has been duly elected on the grounds specified in section 101 (*see* sections 81, 84, 98, 100 and 101). It is only when the election petition claims a declaration that any candidate other than the returned candidate has been duly elected that section 97 comes into play. If the respondent desires to contest this claim by leading evidence to prove that the election of the other candidate would have been void if he had been the returned candidate and an election petition had been presented calling in question his election, the respondent must give a formal notice of recrimination and satisfy the other conditions specified in the proviso to section 97. The notice of recrimination is thus in substance a counter petition calling in question the claim that the other candidate has been duly elected. In this background, it is not surprising that the legislature provided that notice of recrimination must be accompanied by the statement and particulars required by section 83 in the case of an election petition and signed and verified in like manner and the recriminator must give the security and the further security for costs required under sections 117 and 118 in the case of an election petition.

Looking at the object and scheme of section 97 it is manifest that the provisions of sections 117 and 118 must be applied *mutatis mutandis* to a proceeding under section 97. The recriminator must produce a Government Treasury receipt showing that a deposit of Rupees 2,000 has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commissioner as costs of the recrimination. As the notice of recrimination cannot be sent by post, it must be filed before the Tribunal, and reading section 117 with consequential adaptations for the purposes of the proviso to section 97 (1), it will appear that the treasury receipt showing the deposit of the security must be produced before the Tribunal along with the notice of recrimination. It follows that the recriminator must give the security referred to in section 117 by producing the treasury receipt showing the deposit of the security at the time of the giving of the notice under the proviso to section 97 (1).

If the recriminator fails to give the requisite security under section 117 at the time of giving the notice of recrimination he loses the right to lead evidence under section 97 and the notice of recrimination stands virtually rejected.

8. Mr. K. K. Venugopal, appearing on behalf of the appellant made four submissions:

1. Section 97 has no application to a case where a prayer is for total count and rescrutiny.

2. Section 97 has no application to the present case where the returned candidate let in or did not have to let in any evidence on any single vote all of which were produced and tendered in evidence by the election petitioner notwithstanding the respondent's protest.

3. Since no case has been made out in respect of individual votes and no finding given for inspecting individual votes the petitioner would not be entitled to the benefit of the decision in

Jabar Singh's case[1], and his right is only to a general recount or none at all.

4. The respondent is estopped from questioning the result of the recount because of mutual concessions. Though stated in a different form the sum and substance of the very vigorous attempt on behalf of the appellant is to question in effect the validity of the decision in so far as it is held that section 97 is applicable to the facts of this case. He even went so far as to suggest that this case is totally different from the one in *Jabar Singh* v. *Genda Lal*[1], and the whole question if necessary should be reconsidered by a much larger Bench in view of Justice Rajagopala Ayyangar's dissenting judgment. He finally urged that the democratic process should be allowed to have full sway and no mere technicality should be allowed to come in the way of justice being done.

9. The last appeal is particularly interesting. Courts in general are averse to allow justice to be defeated on a mere technicality. But in deciding an election petition the High Court is merely a tribunal deciding an election dispute. Its powers are wholly the creature of the statute under which it is conferred the power to hear election petitions. An election petition, as has been pointed out again and again, is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant breaches of that law or by corrupt practices (see the decisions in *Kamaraja Nadar* v. *Kunju Thevar*[1], *Venkateswara* v. *Narasimha*[2], and *Ch. Subbarao* v. *Member, Election Tribunal*[3], We may, therefore, look into the law regarding this matter. Under section 81 of the Representation of the People Act, 1951, "an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidates at the election and the dates of their election are different, the later of those two dates." Section 83 reads :

> (1) An election petition—
>
> (*a*) shall contain a concise statement of the material facts on which the petitioner relies :
>
> (*b*) ....
>
> (*c*) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (V of 1908), for the verification of pleadings.
>
> (2) ....

Section 84 reads :

> " A petitioner may, in addition, to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

Section 97 reads :

> (1) When in an election petition a declaration that any candidate other than the returned candidate has been

1. (1964) 6 S.C.R. 54: A.I.R. 1964 S.C. 1200.

1. 1959 S.C.R. 583 at p. 596 : 1958 S.C.J. 680 : A.I.R. 1958 S.C. 687.
2. (1969) 1 S.C.R. 679 at p. 685 : A.I.R. 1969 S.C. 872 : (1969) 2 S.C.J. 505.
3. (1964) DEC 270 (S.C.).

duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the High Court of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively.

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner.

Section 100 reads :

(1) subject to the provisions of sub-section (2) if the High Court is of opinion—

(*a*) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 ; or

(*b*) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent ; or

(*c*) that any nomination has been improperly rejected ; or

(*d*) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination ; or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent ; or

(iii) by the improper reception ; refusal or rejection of any vote or the reception of any vote which is void; or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied—

(*a*) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent ;

(*c*) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election ; and

(*d*) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the High Court may decide that the election of the returned candidate is not void.

Section 101 reads :

"If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

(*a*) that in fact that the petitioner or such other candidate received a majority of the valid votes ; or

(*b*) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes ;

the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

In the present case the grounds for setting aside the election of the petitioner are that the result of the election in so far as the appellant was concerned has been materially affected:

(*i*) ....

(*ii*)...........

(*iii*) by improper reception, refusal or rejection of votes which is void, or

(*iv*) by non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act.

The only ground on which the defeated candidate could be declared to be elected is under section 101 (*a*) that in fact he had rceived a majority of valid votes. But it is in deciding who has got the majority of valid votes that section 97 comes into play. When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election. This right the appellant had but this right is subject to the provision that he shall not be entitled to give evidence to prove that the election of the petitioner in this case *i.e.*, the respondent would have been void if he had been the returned candidate and the petitioner had presented a petition calling in question the election unless he had given notice of his intention to give such evidence and also given security and the further security referred to in sections 117 and 118 respectively, and every such notice has to be accompanied by the statement and particulars required under section 83 in case of an election petition and shall be signed and verified in the like manner. None of these things was done in this case . The petition by the respondent had been filed on 23rd April, 1971. The orders for the appearance of the respondent were passed on 12th July, 1971. The appellant, who was the respondent in that petition, should have given notice under section 97 within 14 days of his appearance *i.e.*, on 26th July, 1971, and also complied with the other requirements specified therein. The issues were framed on 27th July, 1971, the recount was ordered on 3rd February, 1972, and the judgment itself was pronounced on 13th March, 1972. It was on 10th March, 1972, that an attempt was made to file a recrimination petition with a petition to excuse the delay. But even then the other requisites of section 97 like giving security or the petition being accompanied by statement and particulars required by section 83 were not complied with. A Special Leave petition was filed in this Court again applying for permission to receive a recrimination petition. There is, thus, no doubt at all that the appellant did not comply with the requirements of section 97.

10. The question still remains whether the requirements of section 97 have to be satisfied in this case. It is argued by Mr. Venugopal that the gravamen of the respondent's petition was breach of

many of the election rules and that he asked for a total recount, a request to which the appellant had no objection and that there was, therefore, no rule or need for filing a recrimination petition under section 97. This, we are afraid, is a complete misreading of the petition. No doubt the petitioner has asked for a recount of votes. It may legitimately be presumed to mean a recount of all the votes, but such a recount is asked for the purpose of obtaining a declaration that the appellant's election was void and a further declaration that the respondent himself had been elected. This aspect of the matter should not be lost sight of. Now, when the respondent asked for a recount, it was not a mere mechanical process that he was asking for. The very grounds which he urged in support of his petition (to which we have referred at an earlier stage) as well as the application for recount and the various grounds on which the learned Judge felt that a recount should be ordered showed that many mistakes were likely to have arisen in the counting, and as revealed by the instances which the learned Judge himself looked into and decided. It may be useful at this stage to set out Rs. 56 of the Conduct of Election Rules, 1961 :—

56. *Counting of Votes.*—(1) Subject to such general or special directions , if any, as may be given by Election Commission in this behalf, the ballot papers taken out of all boxes used in a constituency shall be mixed together and then arranged in convenient bundles and scrutinised.

(2) The returning officer shall reject a ballot paper—

(*a*) if it bears any mark or writing, by which the elector can be identified, or

(*b*), if, to indicate the vote, it bears no mark at all or bears a mark made otherwise than with the instrument supplied for the purpose, or

(*c*) if votes are given on it in favour of more than one candidate, or

(*d*) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

(*e*) if it is a spurious ballot paper, or

(*f*) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established, or

(*g*) if it bears a serial number, or is of a design, different from the serial number, or, as the case may be, design, of the ballot papers authorised for use at the particular polling station, or

(*h*) if it does not bear both the mark and the signature which it should have borne under the provisions of sub-rule (1) of rule 38:

Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (*g*) or clause (*h*) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect:

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(3) Before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The returning officer shall endorse on every ballot paper which he rejects the word "Rejected" and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall initial such endorsement.

(5) All ballot papers rejected under this rule shall be bundled together.

(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote:

Provided that no cover containing tendered ballot papers shall be opened and no such paper shall be counted.

(7) After the counting of all ballot papers contained in all the ballot boxes used in a constituency has been completed the returning officer shall make the entries in a result sheet in Form 20 and announce the particulars.

Explanation.—For the purpose of this rule, the expression "constituency" shall, in relation to an election from a parliamentary constituency, mean the assembly constituency comprised therein.

So, when counting goes on the returning officer may have rejected a ballot paper on any one of the grounds mentioned in sub-rule (2) of that rule. He might have made a mistake or his decision may be wrong on any one of the points. That is what explains the large number of concessions made by either side when the recount was made before the Assistant Registrar of the High Court as well as before the learned Judge. So, it is not proper to interpret the respondent's prayer for recount as a request for a mere mechanical process of counting. It was counting contemplated under Rule 56 with all its implications that he was asking for. The very grounds on the basis of which the recount was ordered by the learned Judge show that there was a possibility of mistakes having arisen under anyone of the grounds set out in Rule 56 (2) clauses (*a*) to (*h*) and it is to have them taken into account and decided correctly that the respondent wanted a recount. Now, when he wants a recount for the purpose of setting aside the appellant's election he necessarily has got to have not merely the benefits of votes which would have originally gone to him but which had been wrongly given to the appellant but also all votes which had been cast in his favour (the respondent) but had been rejected wrongly on one or other of the grounds mentioned in Rule 56 (2) clauses (*a*) to (*h*). So, it was necessary for the purpose of the respondent's case not merely that votes which were held invalid should be re-scrutinised but also votes which had been held to have been cast in favour of the appellant. The improper reception or rejection, therefore, would include not merely cases where a voter appears before the presiding officer at the time of polling and his vote is received where it should not have been received and his vote rejected where it should not have been rejected. The improper rejection or reception contemplated under section 100 (1) (*d*) (iii) would include mistakes or wrong judgments made by the returning officer while counting and exercising his powers under Rule 56 (2), clauses (*a*) to (*h*). The fact, therefore, that the respondent asked for recounting of all the votes does not mean that he wanted also that votes which had been wrongly held to have been cast in his favour but should have gone to the appellant as also votes which had been rejected, but which should have gone to the appellant should be taken into account. The respondent was interested in no such thing. He made no such prayer. It was only the appellant that was interested and bound to do it if he wanted to defeat the respondent's claim that he should be declared elected and section 97 is intended for just such a purpose. It was asked

what was the purpose and where was the need for the appellant to have filed a recrimination under section 97 and what he could have filed when the respondent had asked for a total recount. What we have stated above furnishes the necessary answer. The appellant knew not only that the respondent, wanted his election to be set aside but also that he wanted himself (the respondent) to be declared elected. He should have, therefore, stated whatever material was necessary to show that the respondent, if he had been the successful candidate and the petition had been presented calling in question his election, his election would have been void, in other words comply with section 83. He could have stated therein setting out that while he had no objection to a recount to be ordered (we have already shown that he strongly opposed the recount) there were many votes which would have rightly gone to him (the appellant) which have wrongly been given to the respondent, that there were many votes which should have rightly gone to him but which have been improperly rejected. He should also have complied with the other requirements of section 97. If he had done that that could have been taken into consideration. There was no difficulty at all about his doing all this. His contention that he had no objection to the recount and there was no rule or any need for him to file a recrimination is wholly beside the point. He had in his counter to the main election petition repudiated every one of the allegations in the election petition. It was at that stage that he should have filed the petition under section 97 (of course, within 14 days of his appearance). It was not at the stage when the petitioner filed his application for recount that the opportunity or need for a petition under section 97 arose.

11. It was then urged that when all the material was before the Court it was unnecessary for him to have done so. As we have already pointed out this is not an action at law or a suit in equity but one under the provisions of the statute which has specifically created that right. If the appellant wanted an opportunity to question the respondent's claim that he should be declared elected he should have followed the procedure laid down in section 97. In this connection it is interesting to note that in the decision in *Jabar Singh* v. *Genda Lal*[1] the successful candidate in his own petition had pleaded that many votes cast in favour of himself had been wrongly rejected, in regard to which details were given, and that similarly several votes were wrongly accepted in favour of the election petitioner and in regard to which also details were given, and it ended with the prayer that if a proper scrutiny and recount were made of the valid votes received by each, it would be found that he — the returned candidate — had in fact, obtained a larger number of votes than the election-petitioner and for this reason he submitted that the election petition ought to be dismissed. In spite of this it was held that he had to fail because he had not filed a recrimination petition under section 97. So it is not enough to say that what ought to be looked into is the substance and not the form. If a relief provided under a statute could be obtained only by following a certain procedure laid therein for that purpose, that procedure must be followed if he is to obtain that relief.

12. What we have pointed out just now shows that it is not a question of mere pleading, it is a question of jurisdiction. The Election Tribunal had no jurisdiction to go into the question whether any wrong votes had been counted in favour of the election-petitioner, who had claimed the seat for himself unless the successful candidate had filed a petition under section 97. The law reports are full of cases where

1. (1964) 6 S.C.R. 54 : A.I.R. 1964 S.C. 1200.

parties have failed because of their failure strictly to conform to the letter of the law in regard to the procedure laid down under the Act and the rules.

13. Point 3 raised by the appellant has no substance because it was not necessary to lead evidence in respect of any individual vote about improper reception or improper rejection. The decision about improper reception or improper rejection has been given in this case mostly on concessions by both the parties and in a few cases by the Judge himself scrutinising and deciding about all disputed cases. Indeed, there was no need for any evidence except a proper scrutiny of the votes and a correct decision based on such scrutiny as to the candidate for whom it was cast or whether it was invalid. We may at the risk of repetition point out that the process of recounting included decision regarding the question of improper reception or improper rejection and there is no such thing as a general recount and there is no authority in law for suggesting that all that the respondent could have asked for was either a general recount or none at all. Indeed there is no provision in the Act for a petition to be filed alleging "Let all votes be recounted and whoever gets more votes be declared elected." Nor do we think that any question of estoppel arises. Estoppel may arise in respect of each individual vote conceded by one party or the other as valid and given in favour of the other in the sense that having conceded that a disputed vote should have gone to one or other of the parties the party who made that concession cannot go back on it. But where the law provides that no evidence can be given about the improper reception of votes in favour of the defeated candidate who had claimed a seat for himself unless the successful candidate had complied with section 97, no question of estoppel arises. Concession is akin to admission and the use of such an admission would be evidence. What is barred under the proviso to section 97 is the giving of evidence by the appellant. Appellant can give evidence either by relying on the respondent's admissions or leading independent evidence. In either case it would be giving evidence. And, since giving of evidence is barred, the concessions cannot be used as evidence in favour of the appellant. This is what the learned Judge has very clearly pointed out in his order. We have earlier quoted from the decision in *Bhim Sen* v. *Gopali*[1] where the provisions of section 97 had not been complied with. Even though as a matter of fact the valid as well as the invalid votes in favour of both the petitioner as well as the respondent might have been counted, the evidence furnished by such votes was not admissible because of failure to comply with the provisions of section 97.

14. Finally, we must deal with the appeal made to us that the justice should be done irrespective of technicalities. Justice has got to be done according to law. A Tribunal with limited jurisdiction cannot go beyond the procedure laid down by the statute for its functioning. If it does so it would be acting without jurisdiction.

15. We are, therefore, satisfied that the learned Judge was right in holding that though a general recount had been ordered and an account taken of the valid votes given for both the candidates, it was not possible to take into account any vote in favour of the appellant because of his failure to comply with section 97. Nor are we satisfied that we would be justified in ordering that this case should be reconsidered by a larger Bench.

16. This appeal is, therefore, dismissed. The appellant will pay the 1st respondent's costs. S.L.P. No. 1347 of 1972 preferred against Application. No. 648 of 1972 in Election Petition O.S. No. 2 of 1971 is dismissed.

V.M.K. ——— *Appeal dismissed.*

1. (1960) 22 E.L.R. 288.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*D. G. Palekar and A. Alagiri-swami, JJ.*

R. Chandran .. *Appellant**

v.

M. V. Marappan .. *Respondent.*

Madras Village Panchayats Act (**XXXV** *of* 1958), *sections* 20 *and* 22—*Electoral roll for a Panchayat—Finality of—Election of President of Panchayat—His name included in the electoral roll for the Panchayat —Election if could be questioned on the ground that his age was below* 21.

Section 20 of the Madras Village Panchayats Act does not lay down the qualification for a voter ; it only adopts the qualification laid down for persons to be included in the electoral roll of the Legislative Assembly constituency of which that village may be a portion. It follows therefore, that all the decisions of the Supreme Court holding that when once a person's name has been included in the electoral roll, his right to vote cannot be questioned would be applicable in interpreting section 20 of the Madras Panchayats Act. [*Para.* 5.]

The provisions of Article 326 of the Constitution are not attracted in deciding upon the validity of the inclusion of a person's name in the electoral roll for a Panchayat merely because the Panchayats Act has adopted a part of the electoral roll for an Assembly Constituency as the electoral roll for the Panchayat. And in any case all the decisions of the Supreme Court on the finality of the electoral roll and its not being liable to be questioned would equally apply to the electoral roll of local bodies. [*Para.* 7.]

Thus, where a person whose name has been included in the electoral roll of a panchayat has been elected as president of the panchayat, his election cannot be questioned on the ground that he was below 21 years of age. [*Para.* 7.]

Cases referred to :—

Viswanathan v. *Rangaswamy*, I.L.R. (1968) 1 Mad. 1 : (1966) 2 M.L.J. 560 : A.I.R. 1967 Mad. 244 ; *Roop Lal Mehta* v. *Dhan Singh*, A.I.R. 1966 Punj. 1 (F.B.); *C. Goverdhanareddy* v. *Election Tribunal, Bapatla*, (1969) 1 An.W.R. 52 : A.I.R. 1970 A.P. 56 (F.B.) ; *P. Kumhiraman* v. *R. Krishna Iyer*, A. I. R. 1962 Ker. 190 (F.B.) ; *Durga Shankar Mehta* v. *Raghuraj Singh*, 1954 S.C.J. 723 : (1954) 2 M.L.J. 385: (1955) 1 S.C.R. 267: A.I.R. 1954 S.C. 520 ; *S. K. Choudhary* v. *Baidyanath Panjiar*, (1973) 1 S.C.R. 95 : A.I.R. 1973 S.C. 717 ; *Ramaswamy* v. v. *Krishnamurthy*, (1963) 2 S.C.R. 479 : (1964) 2 S.C.J. 268 : A.I.R. 1963 S.C. 458 ; *Mahmadhusein* v. *O. Fidaali*, A.I.R. 1969 Guj. 334 ; *Mohiuddin* v. *Election Tribunal*, A.I.R. 1959 All. 357 (F.B.) ; *Jagannath* v. *Sukhdeo*, A.I.R. 1967 Bom. 317 ; *P. Subramaniam* v. *S. Pachamuthu*, (1972) 85 M.L.W. 567 : A.I.R. 1973 Mad. 366.

The Judgment of the Court was delivered by

Alagiriswami, J.—This appeal arises out of the election to the office of President of the Muthugapatti Village Panchayat in Salem district of Tamil Nadu held on 31st July, 1970 in which the appellant secured 1,256 votes as against 1,015 secured by the respondent and was declared elected. Thereupon the respondent filed an election petition before the Election Tribunal questioning the election. His contention was that the appellant had just completed 19 years of age and was, therefore, incompetent to be elected as president. The Election Tribunal held that it was not established that the appellant was below 21 years of age. It was contended before the Election Tribunal on behalf of the

* C.A. No. 1724 of 1972. 23rd April, 1973.

appellant that once his name was found in the electoral rolls his election cannot be questioned on the ground that his age was below 21. Relying upon the decision of the Madras High Court in *Viswanathan* v. *Rangaswamy*[1], the Election Tribunal rejected this contention, but as it had held in favour of the appellant on the question of age, it dismissed the election petition. On an application filed before the High Court of Madras by the respondent under Article 227 of the Constitution to revise the order of the Election Tribunal, a learned single Judge took the view that the age of the appellant was not above 21. He went further and held that his age was below 19 though the election petitioner himself had contended that he was just above 19 and had produced an extract purporting to be from the birth register of the village. According to the election petitioner the successful candidate's father had only two sons and the successful candidate was the second of them and the extract from the birth register related to him. According to the appellant his father had four sons, of whom he was the 3rd and he was aged 21. The learned Judge held by a process of reasoning, which is a little difficult to follow, that the extract from the birth register produced before the Court did not relate to the appellant but related to the appellant's elder brother and therefore the appellant was below 19. The High Court treated the matter as though it was dealing with a first appeal under section 96, Civil Procedure Code, and not its powers under Article 227 of the Constitution. It did not deal with the question of law which would have been its legitimate province.

2. However, the important question for decision in this case is whether once a person's name is found in the electoral roll of the village panchayat it is open to the Election Tribunal or any other authority to question the fact that he was above the age of 21. The decisions of this Court which have held that in the case of an election to the Legislative Assembly the question of age could be gone into were only where Article 173 of the Constitution was attracted and if the candidate was not over 25 it was a breach of the constitutional provision. Otherwise, in respect of the voters whose names are found on the electoral roll, this Court has consistently taken the view that the question of their age cannot be gone into in a petition questioning an election.

3. In regard to elections to village panchayats either of members or of the president there is no constitutional provision laying down any age limit. Article 326 of the Constitution which lays down the principle of adult suffrage lays down that all persons over the age of 21 shall be entitled to vote. But that is because the Article specifically says so; otherwise as pointed out by the Punjab and Haryana High Court in *Roop Lal Mehta* v. *Dhan Singh*[1], any person over the age of 18 would be an adult. That apart, the State Legislature is fully competent to legislate in respect of qualifications of voters and candidates for election to various local bodies in the State and there is no constitutional limitation on them so as to make adult suffrage a requisite for a valid provision of law. They can as well make any person over the age of 18 eligible to vote and stand for election or they might take a retrograde step and provide, as was the situation some years ago, that only rate-payers can be voters or candidates for election. Therefore, decisions of various Courts which held on the basis of Article 326 of the Constitution that

1. I.L.R. (1968) 1 Mad. 1 : (1966) 2 M.L.J. 360 : A.I.R. 1967 Mad. 244.

1. A.I.R. 1968 Punj. 1 (F.B.).

the age limit of 21 years is a requisite qualification for inclusion in the electoral rolls of those local bodies and names included in the roll otherwise would be *non est* are wholly unsustainable. Under this category come the decision of the Madras Madras High Court, already referred to, as well as of the Andhra Pradesh High Court in *C. Goverdhanareddy* v. *Election Tribunal, Bapatla*[1], and of the Kerala High Court in *P. Kunhiraman Iyer*[2].

4. This Court has, in numerous decisions beginning from the one in *Durga Shankar Mehta* v. *Raghuraj Singh*[3], and down to its latest decision in *S. K. Choudhary* v. *Baidyanath Panjiar*[4], consistently held that when once a person's name has been included in the electoral roll his qualifications to be included in that roll cannot be questioned either when he tries to cast his vote or to stand for election or even after the election is over. It is not necessary to refer to all of them or to quote from them. The only exception made has been in respect of the requirement under Article 173 of the Constitution.

5. Let us, therefore, consider the position of law under the Madras Village Panchayat Act. Under section 20 (1) of the Act every person who is qualified to be included in such part of the electoral roll for any Assembly constituency as relates to the village or town or any portion of the said village or town shall be entitled to be included in the electoral roll for the panchayat, and no other person shall be entitled to be included therein. It is not necessary for the purpose of this case to refer to the explanation to that section. Under sub-section (2) of that section any person authorized in this behalf by the Government shall, for the purposes of that Act prepare and publish in such manner and at such time as the Government may direct, the electoral roll for the panchayat or the alterations to such roll, as the case may be. There is a proviso and an explanation to this sub-section which we need not refer to for the purposes of this case. Sub-section (5) of that section provides that :

> "Every person whose name appears in the electoral roll for the panchayat shall so long as it remains in force and subject to any revision thereof which might have taken place and subject also to the other provisions of this Act, be entitled to vote at an election; and no person whose name does not appear in such roll shall vote at an election."

Thus, the section itself does not lay down the qualification for a voter, it only adopts the qualification laid down for persons to be included in the electoral roll of the Legislative Assembly constituency of which that village may be a portion. It follows, therefore, that all decisions of this Court holding that when once a person's name has been included in the electoral roll, his right to vote cannot be questioned would be applicable in interpreting S. 20 of the Madras Panchayats Act. S. 22 lays down that :

> "No person shall be qualified for election as a member of a Panchayat unless his name appears in the electoral roll of the Panchayat."

Ss. 23 to 26 refer to various disqualifications for membership which do not arise in this case. Under S. 30 the President shall be elected by the persons whose names appear in the electoral roll for the Panchayat from among themselves.

1. (1969) 1 An.W.R. 52 : A.I.R. 1970 Andh. Pra. 56 (F.B.).
2. A.I.R. 1962 Ker. 190 (F.B.).
3. 1954 S.C.J. 723 : (1954) 2 M.L.J. 385 : (1955) 1 S.C.R. 267 : A.I.R. 1954 S.C. 520.
4. (1973) 1 S.C.R. 95: A.I.R. 1973 S.C. 717.

6. In *Durga Shankar Mehta* v. *Raghuraj Singh*[1] this Court observed :

> "In other words, the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The electoral roll in the case of Vasant Rao, did describe him as having been of proper age and on the face of it therefore he was fully qualified to be chosen a member of the State Legislative Assembly. As no objection was taken to his nomination before the Returning Officer at the time of scrutiny, the latter was bound to take the entry in the electoral roll as conclusive ; and if in these circumstances he did not reject the nomination of Vasant Rao, it cannot be said that this was an improper acceptance of nomination on his part .... It would have been an improper acceptance, if the want of qualification was apparent on the electoral roll itself .... But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer."

This was a case where "Vasant Rao, was under 25 years of age and, therefore, not qualified under Art. 173 of the Constitution." In *Ramaswamy* v. *Krishnamurthy*[2], this Court had to consider the case of an election to a Panchayat in the State of Mysore. There also the electoral roll was prepared on the basis of the electoral roll for the Assembly constituency in which the panchayat was included. Section 10 of the relevant Act provided that "every person whose name is in the list of voters of any Panchayat constituency shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected as a member of the Panchayat" which is more or less similar to section 22 of the Madras Act. The name of the appellant in that case was admittedly included in the electoral roll of the Mysore Legislative Assembly but it was contended that the Electoral Registration Officer did not follow the procedure prescribed for such inclusion under the Representation of the People Act, 1950. This Court held that though this was not done, the inclusion of his name in the electoral roll was not a nullity and that the non-compliance with the procedure prescribed did not affect the jurisdiction of the Electoral Registration Officer and it could not make the officer's act *non est*. This Court further proceeded to point out :

> "The Act proceeds on the basis that the voters' list is final for the purpose of election........In view of section 10 of the Act it cannot be said that there is any improper acceptance of the nomination of the appellant, for, his name being in the list of voters, he is qualified to be elected as a member of the Panchayat. There is, therefore, no provision in the Act which enables the High Court to set aside the election on the ground that though the name of a candidate is in the list it had been included therein illegally."

The laws of various States regarding the preparation of electoral rolls for various local bodies in the States proceed on the basis of the electoral rolls prepared for the concerned Legislative Assembly constituency. Therefore all the decisions of this Court regarding the finality of the electoral roll apply directly to the electoral rolls of the various local bodies.

7. After the decision of this Court in *Ramaswamy's case*[1] there was no room for

1. (1955) 1 S.C.R. 267 : 1954 S.C.J. 723 : A.I.R. 1954 S.C. 520.
2. (1963) 3 S.C.R. 479 : (1964) 2 S.C.J. 268: A.I.R. 1963 S.C. 458.

1. (1964) 2 S.C.J. 268 : (1963) 3 S.C.R. 479: A.I.R. 1963 S.C. 458.

any further difference of opinion on the matter. It is, therefore, all the more surprising that the Andhra Pradesh High Court in *C. Goverdhana Reddy* v. *Election Tribunal, Bapatla*[1] and the Madras High Court in *Viswanathan* v. *Rangaswami*[2], took a different view even after taking note of the decision of this Court. Both these decisions, as we have pointed out earlier, proceed on a wholly wrong assumption. Their attempt to distinguish the decision of this Court in *Ramaswamy's case*[3] is pointless. The provisions of Art. 326 of the Constitution are not attracted in deciding upon the validity of the inclusion of a person's name in the electoral roll for a Panchayat merely because the Panchayats Act has adopted a part of the electoral roll for an Assembly constituency as the electoral roll for the Panchayat. And in any case all the decisions of this Court on the finality of the electoral roll and their not being liable to be questioned would equally apply to the electoral rolls of local bodies. For the reasons we have already given the view consistently taken by this Court that when once a name is found in the electoral roll its inclusion could not be questioned in any election petition must be followed. The decisions of the Madras, Andhra and Kerala High Courts, already referred to, should be held to be erroneous and that of the Gujarat High Court in *Mahmadhusein* v. *O. Fidaali*[4], Allahabad High Court in *Ghulam Mohiuddin* v. *Election Tribunal*[5], Bombay High Court in *Jagannath* v. *Shukhdeo*[6] and Punjab and Haryana High Court in *Roop Lal Mehta* v. *Dhan Singh*[7], as correct. In this case, therefore, it was not open either for the Election Tribunal or for the High Court to go into the question regarding the appellant's age. The latest decision of Kailasam, J. in *P. Subramaniam* v. *S. Pachamuthu*[1], is consistent with the view we have taken.

1. (1969) 1 An.W.R. 52 : A.I.R. 1970 Andh. Pra. 56.
2. I.L.R. (1968) 1 Mad. 1: (1966) 2 M.L.J. 560: A.I.R. 1967 Mad. 244.
3. (1964) 2 S.C.J. 268 : (1963) 3 S.C.R. 479 : A.I.R. 1963 S.C. 458.
4. A.I.R. 1969 Guj. 334.
5. A.I.R. 1959 All. 357 (F.B.).
6. A.I.R. 1967 Bom. 317.
7. A.I.R. 1968 Punj. 1 (F.B.)

8. The appeal is, therefore, allowed, the High Court's judgment set aside and the order of the Election Tribunal restored. The respondent will pay the appellant's costs.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—*K.K. Mathew, M.H. Beg and A.K. Mukherjea, JJ.*

Sri Mahalinga Thambiran Swamigal *Appellant**

v.

His Holiness Sri La Sri Kasivasi Arulnandi Thambiran Swamigal .. *Respondent.*

(A) *Religious Endowments—Succession to office of head of Mutt—Custom—Kasi Mutt—Nomination of Elavarasu by head of the Mutt by will—If can be revoked by subsequent will.*

(B) *Succession Act (XXXIX of 1925), section 2 (h)—"Will"—Head of Mutt nominating successor by will—If a testamentary document—Nomination if can be revoked.*

Succession to the office of Mahant or Head of a Mutt is to be regulated by the custom of the particular Mutt and one who claims the office by right of succession is bound to allege and prove what the custom of the particular institution is, for the only law regulating succession to such insti-

1 (1972) 85 Mad.L.W. 567 : A.I.R. 1973. Mad. 366.

* C.A. No. 1677 of 1969. 19th October, 1973.

tution is to be found in the custom and practice of that institution. In most cases especially in Southern India, the successor is ordained and appointed by the Head of the Mutt during his own lifetime and in default of such appointment the successor may be appointed by election by the disciples and the Court as representing the sovereign. Where the head of a religious institution is bound by celibacy it is frequently the usage that he nominates his successor by appointment during his own lifetime, or by will. Such a power of nomination must, however, be exercised not corruptly or for ulterior reasons, but *bona fide* and in the interests of the Mutt; otherwise the appointment will be invalid. [*Para.* 13.]

From the decision in *Gnana Sambanda Pandara Sannadhi* v. *Kandasami Thambiran*, (1887) I.L.R. 10 Mad. 375, it is clear that the custom in the Kasi Mutt is for the head of the Mutt for the time being to nominate a successor to succeed him from among the Thambirans of Thirukkuttam of the Dharmapuram Adhinam; that the nomination is made by will and that is attended by certain religious ceremonies. But for a nomination to be valid, performance of any religious ceremony is not necessary, unless of course the usage of the institution had made it mandatory. [*Para.* 14.]

In the present case the High Court was of opinion that as the nomination of the appellant as *Elavarasu* or Junior Head of the Kasi Mutt was made by a will (Exhibit B-1) there was no reason why that will could not be revoked under law and therefore the nomination stood revoked by the execution of the second will (Exhibit B-9). But this view is erroneous. [*Paras.* 17 *and* 18.]

By exercising the power of nomination, the head of a Mutt is not disposing of any property belonging to him which is to take effect after his death. He is simply exercising a power to which he is entitled under the usage of the institution. A nomination makes the nominee stand in a peculiar relationship with the head of the Mutt and the Hindu community and that relationship invests him with the capacity to succeed to the headship of the Mutt. A nomination takes effect *in praesenti*. It is the declaration of the intention of the head of the Mutt for the time being as to who his successor would be. Therefore although it is said that the usage in the Mutt is that the power of nomination is exercisable by will, it is really a misnomer, because, a will in the genuine sense of the term can have no effect *in praesenti*. A nomination need not partake of the character of a will in the matter of its revocability, merely because the power of nomination is exercised by will. In other words the nature or character of a nomination does not depend upon the type of document under which the 'power' is exercised. If a nomination is otherwise irrevocable except for good cause, it does not become revocable without good cause, merely because the power is exercised by a will. It is *pro tanto* a non-testamentary instrument. The fact that in the Kasi Mutt there is no usage that the power of nomination was exercised otherwise than by will does not mean that a nomination will stand cancelled when the will is revoked. [*Paras.* 18 *and* 20.]

Nomination of a successor is not a disposal simpliciter of the office of headship of the Mutt or its properties to take effect after the death of the incumbent. It is the creation of a relationship generating a capacity in the nominee to succeed to the headship of the Mutt on the death of the incumbent. [*Para.* 22.]

Status is something apart from and beyond its incidents. The fact of a person being legally nominated as junior, having a peculiar relationship with the senior is

status and the capacity to succeed to the head is the incident of that status. The status, when created by a nomination cannot be withdrawn or cancelled at the mere will of the parties. [*Para.* 34.]

Even if it is assumed that the position of a junior head is not a status as known to law, the relationship created by the nomination is one which cannot be put an end to by the head at his sweet will and pleasure. [*Para.* 36.]

Further, the power of nomination must be executed not corruptly or for ulterior reason but *bona fide* and in the interest of the Mutt and the Hindu community. It then stands to reason to hold that the power to revoke the nomination must also be exercised *bona fide* and in the interest of the institution and the community. In other words, the power to revoke can be exercised not arbitrarily but only for good cause. [*Paras.* 44 *and* 13.]

Thus a nomination when made can be cancelled or revoked only for a good cause. [*Para.* 45.]

(C) *Specific Relief Act* (*XLVII of* 1963), *section* 34—*Relief under—Court's power to mould relief on account of subsequent event.*

Normally a Court will declare only the rights of the parties as they existed on the date of the institution of the suit. But in this case, on account of the subsequent event, namely the death of the defendant, the Court has to mould the relief to suit the altered circumstances. If the defendant had been alive it would have been sufficient if a declaration is made that the appellant was the Elavarsu of the Kasi Mutt. Now that the defendant is dead a declaration has to be made that the appellant was holding the position of Elavarasu during the life-time of the defendant and that the appellant was entitled to succeed to the headship of the Mutt on the death of the defendant.

[*Para.* 45.]

Cases referred to:—

Gnana Sambanda Pandara Sannadhi v. *Kandasami Thambiran*, (1887) I.L.R. 10 Mad. 375; *Greedharee Doss* v. *Nundokissore Doss*, (1867) 11 Moo. Ind. App. 405 (P.C.); *Ramalingam Pillai* v. *Vythialingam Pillai* (1893) L.R. 20 I.A. 150 (P.C.) : I.L.R. 16 Mad. 490; *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*, (1904) I.L.R. 27 Mad. 435: 14 M.L.J. 105; *Nataraja* v. *Kailasam*, L.R. 48 I.A. 1: A.I.R. 1921 P.C. 84: I.L.R. 44 Mad 283: 39 M L.J. 98; *Ram Prakash Das* v. *Anand Das*, L.R. 43 I.A. 73: A.I.R. 1916 P.C. 256: 31 M.L.J. 1: 33 I.C. 583; *Vaidyanatha* v. *Swaminatha*, L.R. 51 I.A. 282: A.I.R. 1924 P.C. 221 (2): 47 M.L.J. 361: I.L.R. 47 Mad. 884; *M.B. Bhagat* v. *G.N. Bhagat*, (1972) 2 S.C.R. 1005: (1972) 2 S.C.J. 730 : A.I.R. 1972 S.C. 814; *Krishnagiri Trikamgiri* v. *Shridhar Kavlekar*, A.I.R. 1922 Bom. 202; *Raghunath* v. *Ganesh*, A.I.R. 1932 All. 603; *Ram Nath* v. *Ram Nagina*, A.I.R. 1962 Pat. 481; *Kailasam* v. *Nataraja*, 32 M.L.J. 271: A.I.R. 1918 Mad. 1016; *Salvesen* v. *Administrator of Austrian Property*, (1927) A.C. 641; *Niboyet* v. *Niboyet*, (1878) 4 P. D. 1; *Tarak Chandra* v. *Anukul Chandra*, A.I.R. 1946 Cal. 118; *Tiruvambala Desikar* v. *Chinna Pandaram*, I.L.R. 40 Mad. 177: A.I.R. 1917 Mad. 578.

The Judgment of the Court was delivered by

Mathew, J.—The appellant as plaintiff filed a suit for a declaration that he was entitled to continue as the Elavarasu or Junior Head of the Tiruppanandal or the Kasi Mutt and for a perpetual injunction restraining the defendant, the Head of the Mutt, from interfering in any way with his functioning as the Elavarusu or Junior Head of the Mutt.

2. The defendant, who is now dead, contended that the appellant was not validily nominated as the Elavarasu of the Mutt, that even if he was nominated

as the Elavarasu, the appellant acquired no right by the nomination to continue as the Elavarasu, that the appellant's conduct after he became the Elavarasu was such that he was unworthy to become the future head of the Mutt, that he (the defendant) cancelled the nomination and so the appellant had no right to get the declaration prayed for.

3. The questions which arose for consideration in the trial Court were: whether the appellant had been nominated by the defendant as the Elavarasu of the Kasi Mutt; whether, by virtue of the nomination, the appellant was holding an office or had acquired any right or status; whether the appellant was guilty of misconduct which disentitled him to continue as the Elavarasu and whether the appellant's nomination as the Elavarasu was validly cancelled by the defendant.

4. The trial Court found that by Exhibit B-1 will, the defendant nominated the appellant as the Elavarasu of the Kasi Mutt, but that he accquired no status nor did he become the holder of an office by virtue of the nomination. The Court further found that the defendant was competent to cancel the nomination even though the appellant was not guilty of any misconduct and that he had cancelled it by executing Exhibit B-9 will. The trial Court, therefore, dismissed the suit.

5. The District Judge, in appeal by the appellant, confirmed the findings of the trial Court and dismissed the appeal.

6. In the second appeal filed by the appellant, a learned single Judge of the High Court of Madras found that by the nomination of the appellant as the Elavarasu, he became the holder of an office or that, at any rate, he acquired a status and that the defendant could terminate the office or status only for a good cause and in the light of the finding of the trial Court as affirmed by the first appellate Court that the appellant was not guilty of any misconduct, the cancellation of the nomination by Exhibit B-9 will was ineffective. The learned Judge, therefore, granted a decree to the appellant declaring that he was the duly appointed junior head of the Kasi Mutt and that he was entitled to continue as the junior head, subject to the right of the head of the Mutt to remove him for good cause. The learned Judge, however, did not make a declaration that the appellant had a right to succeed to the headship of the Mutt after the lifetime of the defendant, nor was the appellant granted an injunction restraining the defendant from interfering with the appellant exercising the right as the junior head.

7. Appeals were preferred against this decree by both the appellant and the defendant to a Division Bench of the High Court.

8. The Division Bench reversed the decree passed by the learned single Judge on the basis of its finding that the appellant did not become the holder of an office by virtue of the nomination and so it was open to the defendant to cancel the nomination without notice to the appellant and without assigning any reason.

9. It is against this decree that this appeal has been preferred by Special Leave.

10. The questions which fall for consideration in this appeal are: whether, by virtue of the nomination, the appellant obtained a status or a right in law or became the holder of an office, and, whether the defendant was competent to cancel the nomination without good cause.

11. It is not disputed that on 12th September, 1951, the defendant executed a will (Exhibit B-1) reciting that he had nominated the appellant as the Elavarasu of the Kasi Mutt. The will also stated that certain ceremonies were performed on the occasion of the nomination. It then provided that by virtue of the nomi-

nation, the appellant will succeed the defendant as the Head of the Mutt. There is also no dispute that till 2nd January, 1960, when the defendant revoked the will (Exhibit B-1) by Exhibit B-9 stating that "it was not necessary to appoint the appellant as the Elavarasu," the appellant was the Elavarasu by virtue of his nomination.

12. In *Gnana Sambanda Pandara Sannadhi* v. *Kandasami Thambiran*[1], hereinafter referred to as "Sambanda Case," Muttusami Ayyar, J., has traced the historical evolution of the Kasi Mutt and the Dharmapuram Adhinam. The Dharmapuram Adhinam and the Kasi Mutt are monastic institutions. They are presided over by ascetics who have renounced the world. The Mutt at Tiruppanandal *i.e.*, Kasi Mutt was affiliated to the Dharmapuram Adhinam as a disciple Adhinam. An Adhinam is a central institution from which the chief ascetic exercises control and supervision over a group of endowed institutions and religious trusts. A Thambiran is an ascetic attached to an Adhinam and when he becomes the head of the Adhinam, he is referred to as Pandara Sannadhi. A Mutt was originally established at Benares by one Kumaragurupara Thambiran of the Dharmapuram Adhinam. The Dharmapuram Adhinam had come into existence several centuries before the institution of the Mutt at Benares. The Mutt at Tirupanandal was established later in aid of the Mutt at Benares by Tillanayaka Thambiran, a successor of Kumaragurupara Thambiran who functioned between 1720 to 1756. In course of time, the Mutt at Tiruppanandal became the principal Mutt and the Mutt at Benares a subsidiary one. As the Mutt advanced in fame, endowments and trusts began to come in. So, subsidiary institutions came to be established and the Tiruppanandal Mutt ceased to be an isolated institution. It became an important centre exercising supervision and control over several subordinate Mutts in Southern India, over the Mutt in Benares, and over Mutts at Merangi in Nepal and at Achiram in Travancore so much so that in some of the later correspondence one finds that Tiruppanandal is referred to as an Adhinam.. The Dharmapuram Adhinam was regarded by the Thambiran at Tiruppanandal as his Gurupitham, the seat of his religious preceptor. The Thambirans at Tiruppanandal were, in a spiritual sense, subordinate to the Pandara Sannadhi at Dharmapuram. In course of time, a junior Thambiran came to be associated with the senior Thambiran in the management of the Tiruppanandal Mutt. The necessity for the services of a junior at Tiruppanandal was felt, because it would, on the one hand, give an opportunity to the senior to see whether the junior might be relied upon as a competent successor, while, on the other hand, it would enable the junior to acquire experience before he became the head of the Mutt. The practice in the Dharmapuram Adhinam of there being a senior and a junior Pandara Sannadhi at one and the same time was the probable origin of the double agency at Tiruppanandal. But, as only a Pandara Sannadhi could initiate a Thambiran, it came about that the Thambirans for the Mutt at Tiruppanandal and Benares came from the Dharmapuram Adhinam. During the first part of the 19th centruy (1838 to 1841) there were two managing Thambirans both at Benares and at Tiruppanandal, a senior and a junior; and the peculiar feature of this period consisted in this double agency at each centre of control, which was probably due to the considerable increase in the number and value of endowments to be superintended.

13. Succession to the office of Mahant or Head of a Mutt is to be regulated by the custom of the particular Mutt and

1. (1887) I.L.R. 10 Mad. 375.

one who claims office by right of succession is bound to allege and prove what the custom of the particular institution is, for, the only law regulating succession to such institutions is to be found in the custom and practice of that institution (*See* the decisions of the Privy Council in *Greedharee Doss* v. *Nundokissore Doss*[1], and *Ramalingam Pillai* v. *Vythialingam Pillai*[2]. As was observed in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[3], in most cases, especially in Southern India, the successor is ordained and appointed by the Head of the Mutt during his own lifetime and in default of such appointment, the nomination may rest with the head of some kindred institution or the successor may be appointed by election by the disciples and followers of the Mutt or, in the last instance, by the Court as representing the Sovereign. Where the head of a religious institution is bound by celibacy, it is frequently the usage that he nominates his successor by appointment during his own lifetime, or by will. Such a power of nomination must, however, be exercised not corruptly or for ulterior reasons, but *bona fide* and in the interests of the Mutt; otherwise, the appointment will be invalid (see *Nataraja* v. *Kailasam*[4], *Ramalingam Pillai* v. *Vythialingam Pillai*[2], *Ram Prakash Das* v. *Anand Das*[5], and *Vaidyanatha* v. *Swaminatha*[6].

14. From the decision in the *Sambanda case*[7], it is clear that the custom in the Kasi Mutt is for the head of the Mutt for the time being to nominate a successor to succeed him from one among the Thambirans of Thirukkuttam of the Dharmapuram Adhinam; that the nomination is made by will and that it is attended by certain religious ceremonies like Manthakashyam, Deeksha, Pooja and Arukatti.

15. There was no contention in the written statement that the necessary ceremonies for a valid nomination of a junior head in the Kasi Mutt were not performed. Exhibit B-1 states in unambiguous language that the ceremonies were performed. Both the trial Court as well as the first appellate Court found, on the basis of the oral evidence, that the religious ceremonies for the nomination were not performed at the time of the nomination, but at an anterior date. When the defendant had himself admitted in Exhibit B-1 will that the nomination was made after the ceremonies were performed there is no scope for any controversy as to whether the ceremonies were performed. The statement in Exhibit B-1 that the ceremonies were performed was made at a time when there was no controversy between the parties. And, it was on the basis that there was a valid nomination that the appellant was associated with the defendant from 1951 to 1960 as the Elavarasu of the Mutt.

16. Quite apart from these circumstances, we do not think that for a nomination to be valid, performance of any religious ceremony is necessary, unless, of course, the usage of the institution has made it mandatory. "In many cases when a successor is appointed by a Mohunt, he is installed in office with certain ceremonies. This cannot be deemed to be essential." (see *B.K. Mukherjea*, "Hindu Law of Religious and Charitable Trusts," 3rd edition (1970) page 257). This observation was quoted with approval by this Court in *M.B. Bhagat* v. *G.N. Bhagat*[1], *See* also the decisions in *Krishnagiri Trikamgiri* v.

1. (1867) 11 Moo. Ind. App. 405 (P.C.)
2. (1893) 20 Ind. App. 150 (P.C); I.L.R. 16 Mad. 490.
3. (1904) I.L.R. 27 Mad. 435 : 14 M.L.J. 105.
4. I.L.R. 44 Mad. 283 : 39 M.L.J. 98 : 48 Ind. App. 1 : A.I.R. 1921 P.C. 84.
5. 31 M.L.J. 1 : 33 I.C. 583 : 43 Ind. App 73: A.I.R. 1916 P.C. 256.
6. 51 Ind. App. 282 : 47 M.L.J. 361 : I.L.R. 47 Mad. 884: A.I.R. 1924 P.C. 221 (2).
7. (1887) I.L.R. 10 Mad. 375.

1. (1972) 2 S.C.J. 730 : (1972) 2 S.C.R. 1005 at p. 1010 : A.I.R. 1972 S.C. 814.

Shariddar Kavlekar[1], and *Raghunath* v. *Ganesh*[2].

17. The Division Bench of the High Court was of the opinion that as the nomination was made by Exhibit B-1 will, there was no reason why that will could not be revoked under law and therefore the nomination stood revoked by the execution of Exhibit B-9 will. In other words, one line of reasoning adopted by the High Court was that, as a will is revocable at the pleasure of the testator at any time before his death, the nomination made by Exhibit B-1 will was revocable without assigning any reason.

18. The definition of "will" in section 2 (*h*) of the Indian Succession Act, 1925, would show that it is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. By exercising the power of nomination, the head of a Mutt is not disposing of any property belonging to him which is to take effect after his death. He is simply exercising a power to which he is entitled to under the usage of the institution. A nomination makes the nominee stand in a peculiar relationship with the head of the Mutt and the Hindu community and that relationship invests him with the capacity to succeed to the headship of the Mutt. A nomination takes effect *in presenti*. It is the declaration of the intention of the head of the Mutt for the time being as to who his successor would be; therefore, although it is said that the usage in the Mutt is that the power of nomination is exercisable by will, it is really a misnomer, because, a will in the genuine sense of the term can have no effect *in presenti*. There can be no dispute that a nomination can be made by deed or word of mouth. In such a case, the nomination invests the nominee with a present status. That status gives him the capacity to succeed to the headship of the Mutt on the death of the incumbent for the time being. If that is the effect of nomination when made by deed or word of mouth, find it difficult to say that when a nomination is made by will, it does not take effect *in presenti*, and that it can be cancelled by a executing another will revoking the former will. Such at any rate, does not seem to be the concept of nomination in the law relating to Hindu Religious Endowments. A nomination need not partake of the character of a will in the matter of its revocability, merely because the power of nomination is exercised by a will. In other words, the nature or character of nomination does not depend upon the type of document under which the power is exercised. If a nomination is otherwise irrevocable except for good cause, it does not become revocable without good cause, merely because the power is exercised by a will. If the power of nomination is exercised by a will, it is *pro tanto* a non-testamentary instrument. A document can be partly testamentary and partly non-testamentary. In *Ram Nath* v. *Ram Nagina*[1], the head of the Mutt for the time being exercised his power of nomination, more or less in terms of Exhibit B-1 here, namely, by making the nomination of a successor and providing that he will be the owner of the properties and charities of the Mutt and also of the other properties standing in the name of the head of the Mutt. The Court held that so far as the nomination and devolution of the properties of the Mutt were concerned, the will operated as a non-testamentary instrument. The Court said that the condition which must be satisfied before a document can be called a will is that there must be some disposition of property and that the document must contain a declaration of the intention of the testator not with respect to anything but with respect to his property.

1. A.I.R. 1922 Bom. 202.
2. A.I.R. 1932 All 603.

1. A.I.R. 1962 Pat. 481.

According to the Court, if there is a declaration of intention with respect to his successor, it cannot constitute a will even if the document were to state that the nominee will become the owner of the properties of the Mutt after the death of the executant of the will as that is only a statement of the legal consequence of the nomination.

19. In *Kailasam* v. *Nataraja*[1], the Court expressed the view that a will making a nomination is only the evidence of a past event. In other words, a will is the record of a nomination and that it is not by the will that a nomination is made.

20. Exhibit B-1 makes it clear that the nomination had already been made. It says:

> "I have nominated as my successor Mahalinga Thambiran, who is one among the Thambirans of Thirukkuttam of Dharmapuram Adinam and obtained Manthakasyam, Deeksha, Pooja and Arukatti and who is performing pooja in our Mutt."

The statement in the will that after the death of the Head, the Junior will be the owner of the properties pertaining to the Mutt is a declaration as to the legal consequence of the nomination. The fact that in the Kasi Mutt there is no usage that the power of nomination was exercised otherwise than by will does not mean that a nomination will stand cancelled when the will is revoked.

21. Mr. Gupte for the respondent argued that Mahantship is property and nomination by a Mahant of a successor is a disposal of that property to take effect after the death of the Mahant and, therefore, the power of nomination can be exercised only by a will, and, if it is exercisable only by a will, it follows that when the will is revoked, the nomination would stand cancelled.

22. We do not think that this contention is correct. As we said, the power of nomination is a concept pertaining to the law of Hindu Religious Endowments. It is not because the Mahantship was treated as property that in the *Sambandha case*[1], it was observed that in the Kashi Mutt nomination is made by a will, but because it was the custom of that Mutt. The Privy Council has said that a nomination can be made by word of mouth (See *Greedharee Doss* v. *Nundo Kissore Doss.*[2]) And there is no reason why it cannot be made by a deed. If the power of nomination is exercised by word of mouth or by deed, it is not clear how the exercise of the power would be valid if Mahantship itself is property and nomination is regarded as the disposition of that property to take effect after the death of the head of the Mutt. For, if nomination is merely a declaration of the intention of the head of the Mutt as to the disposal of the office of Senior Pandara Sannadhi which is generally regarded as property or of the properties appertaining to the office, to take effect after the death of the incumbent of the office for the time being, then the power of nomination can be exercised only by a will. The fact that according to the law of Hindu Religious Endowments a nomination can be made by deed or word of mouth is positive proof that nomination is not merely a disposal of the office or of the properties appertaining to it, but the creation of a present relationship generating the capacity to succeed to the office and to the properties appertaining to the office. In other words, by a word of mouth or deed one cannot dispose of an office, if it is property, to take effect after the death of the person uttering the words or executing the deed and, therefore, nomination is not a disposal

1. 32 M.L.J. 271 : A.I.R. 1918 Mad. 1016 at p. 1018.

1. (1887) I.L.R. 10 Mad. 375.
2. (1867) 11 Moo. Ind. App. 405 (P.C.).

simpliciter of the office of the headship of the Mutt or its properties, to take effect after the death of the incumbent. It is the creation of a relationship generating a capacity in the nominee to succeed to the headship of the Mutt on the death of the incumbent. What, then, is the nature of that relationship ?

23. Mr. Gupte said that so long as no present right or status is conferred or created by a nomination, the Head of the Mutt can cancel or revoke the nomination at any time he pleases and that there is no foundation for the assumption that nomination can be cancelled only for good cause.

24. As already stated, a nomination is a concept pertaining to Hindu Religious Endowments and it is *sui generis*. One cannot put it in the strait-jacket of any jurisprudential concept.

25. The Division Bench was of the view that "the junior as the successor designate of the headship of the Mutt carried with him a certain status on account of that fact and received dignity and honours befitting that status".

26. The question is whether, by the nomination, the appellant acquired a status in law, and, if he acquired a status, whether it was liable to be put an end to by the defendant at his whim.

27. John Austin has said that status is "the most difficult problem in the whole science of jurisprudence." The question whether the junior Pandara Sannadhi or the Second occupies a status, has to be decided with reference to the law relating to Hindu Religious Endowments. It is a well known custom in several Mutts, for the heads to nominate their successors. Junior heads so nominated form a class by themselves and as they stand in a relationship with the Senior heads which is peculiar in the sense that no other class of persons hold that relationship with them, the question is whether, according to the law of Hindu Religious Endowments they acquire a status in law. The custom or usage will certainly govern the question whether the head of the mutt has the power to make a nomination during his lifetime, and the manner of its exercise and the religious ceremonies to be performed at the time of the nomination. But, in the absence of any custom or usage, the question whether nomination would confer a status upon the junior heads so nominated is a matter for the Court to decide in the light of the law relating to Hindu Religious Endowments. And, in deciding it, the interests of the Hindu religious community and of the Mutts in general are of paramount importance. Whether or not a particular condition or relationship is one of status depends primarily on the existence and extent of the social interest in the creation and supervision of such a condition or relationship. The test is not a simple one of the existence or non-existence of the concern of the society, it is also one of the degree of such concern. It is, further, obvious, that the degree and even the existence of this concern in a particular condition will vary from time to time in the same society. It is not possible to draw a clear line of distinction in a dogmatic and *a priori* manner between conditions of status and special conditions not of status. In other words, the picture of status cannot be painted in elemental colours of black and white on any *a priori* considerations. "It is rather a matter for a Court to decide at the time of action whether a particular condition does or does not involve a sufficient degree of social interest to be characterised as status, assuming that all other features of status are present" (*see* R. H. Graveson, "Status in the Common Law", page 127). Bentham's idea of status was that it was a "a quality or condition which generates certain rights and duties (*see* Allen, "Legal Duties" p. 33). Beale

defines status as a personal quality or *relationship* not temporary in nature nor terminable at the mere will of parties with which third parties and even the State are concerned (*see* "Treatise on the Conflict of Laws" (1935), p. 649). C. K. Allen said that status is a condition of belonging to a particular class of persons to whom law assigns (certain capacities and incapacities (*see* "Status and Capacity" 46 Law Quarterly Review, 277.) Status is defined by Graveson as a special condition of a continuous and institutional nature, differing from the legal position of the normal person which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern (*See* "Status in the Common Law", p. 2). The distinguishing mark of a class for the purpose of status is that legal consequences result to its members from the mere fact of belonging to it.

28. In *Salvesen* v. *Administrator of Austrian Property*[1], Lord Haldane asked the question:

> "For what does status mean in this connection?" and answered it by saying that in the case of marriage, it is something more than a mere contractual relation between the parties to the contract of marriage. He also said that status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognizes as having been super-added to it by the authority of the State, something "which the jurisprudence of the State under its law imposes when within its boundaries the ceremony has taken place".

1. (1927) A.C. 641.

29. In *Niboyet* v. *Niboyet*[1], Brett, L.J. said:

> "The status of an individual, used as a legal term means the legal position of the individual in or with regard to the rest of the community".

30. The fundamental difference between status and capacity is that the former is a legal state of being while the latter is a legal power of doing. Status determines a persons' legal condition in community by reference to some legal class or group and cannot normally be voluntarily changed. The imposition of status carries with it attribution of a fixed quota of capacity and incapacities, but it does not directly compel the holder to do or refrain from doing any particular act. Capacity, on the other hand, is a legally conferred power to affect the rights of oneself and other persons to whom the exercise of the capacity is directed, subject to certain generally and legally defined limits—limits which vary in relation to each particular form of capacity. Capacity in this form is an incident of status. And, a distinction therefore must be made between the legal principles applicable to the major conception of status and those affecting the minor conception of its incidents (*See* C. K. Allen, "Legal Duties and Other Essays in Jurisprudence"(1931) pp. 28-ff and also his article "Status and Capacity", 46 Law quarterly Review, 277). The closest approach to a judicial statement of the distinction between status and its incidents is found in the judgment of Gray, C.J. in *Ross* v. *Ross*[2].

> "*The capacity or qualification to inherit or succeed to property, which is an incident of the status* or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others".

1. (1878) 4 P.D. 1 at p. 11.
2. (1880) 129 Mass 243.

31. It would follow that status is a condition imposed by law and not by act of parties, though it may be predicated in certain cases on some private act as the contract of marriage. Whether the condition of status will be imposed as the result of private contract or private or public act depends on the public interest in the relation created by the contract or act. In other words, as we said, the interest and concern of the society of which parties form part determine whether or not status will be imposed or conferred as the result of private contract, or by private or public act. Social interest is a feature of the concept of status, unfortunately, this aspect has been little stressed in the cases. "Austin's neglect of this aspect of status has made no small contribution to the judicial disregard of social interest involved in the concept" (*See* R. H. Graveson, " Status in the Common Law", p. 60).

32. In *Ross* v. *Ross*[1], Chief Justice Gray said:

> "A general principle, *that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified and made capable to take certain rights in that other's property,* is fixed by the law of domicile".

33. In *Tarak Chandra* v. *Anukul Chandra*[2], B. K. Mukherjeea, as he then was, said.

> "Now, legal character is the same thing as status".

34. What is the relationship in which junior heads stand to their seniors ? In *Sambandha case*[3], Muttusami Ayyar, J., said (at p. 493):

> "By appointment as junior, the Tambiran became a spiritual brother or a brotherly companion and by both the senior who appoints and the junior who is appointed belonging to the same Adhinam, they were associates in holiness".

As we said, status is something apart from and beyond its incidents. "The status of a child is not his duties or disabilities in relation to his parents, but the legally recognised fact of being a child" (*See* R. H. Graveson, "Status in the Common Law", pp. 122-127.) The fact of a person being legally nominated as junior, having a peculiar relationship with the senior is status, and the capacity to succeed to the head is the incident of that status. The status, when created by a nomination, cannot be withdrawn or cancelled at the mere will of the parties. The law must determine the condition and circumstances under which it can be terminated. Merely because the status originated from the act of a senior head in making the nomination, it would not follow that the senior head can put an end to it by another act. In other words, the junior heads as a class occupy a position of which the creation, continuance or relinquishment, and its principal incident, namely, succession to the office of the headship of the Mutt are matters of sufficient social or public concern in the sense that the Hindu religious community is vitally interested in all of them.

35. There was some debate at the Bar on the question whether, by nomination, the junior gets a contingent interest in the office or in the properties of the Mutt, the contingency being the survival by the junior of the head of the Mutt. A contingent interest or ownership is a present right. But we do not propose to decide that point in this appeal. As we said the concept of nomination is *sui generis* ; and that makes it rather difficult to bring it under any legal rubric. Perhaps it has its analogue in Canon Law and that was the reason why

1. (1880) 129 Mass 243.
2. A.I.R. 1946 Cal. 118 at p. 119.
3. (1887) I.L.R. 10 Mad. 375.

Bhashyam Ayyangar, J. in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[1], likened the position of a Junior head to that of a co-adjutor in Canon Law. A co-adjutor stands in a peculiar relationship with the Bishop. He has a right to succeed the Bishop; while he is a co-adjutor, he has no administrative functions of his own, but has only to do the work assigned to him by the Bishop. But, nevertheless, during the lifetime of the Bishop he enjoys a status and is accorded honours and regard by the religious community, second only to those accorded to the Bishop.

36. Even if it is assumed that the position of a junior head is not a status as known to law, we think that the relationship created by the nomination is one which cannot be put an end to by the head at his sweet will and pleasure.

37. In *Tiruvambala Desikar* v. *Chinna Pandaram*[2], the question was whether the head of the Dharmapuram Adhinam has, after making a valid nomination, an uncontrolled right to cancel it and nominate another person as the junior head. A Division Bench of the Madras High Court consisting of Wallis, C.J. and Seshagiri Ayyar, J. held that the Head of the Mutt, after making a valid nomination cannot revoke the nomination at his sweet will and pleasure, but only for good cause. Wallis, C.J. said (at p. 190):

> "It has been contended before us that the defendant only held, office at the pleasure of the Pandarasannadhi and that consequently the latter was entitled to dismiss him without giving him any opportunity of being heard. The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts of this kind, and it is not shown that the Pandarasannadhi has any power of arbitrary dismissal, while on the other hand, it has been held in a previous suit relating to the institution that he may dismiss for good cause. In *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[1] where the question was whether a Pandarasannadhi forfeited his position as such by reason of lunacy, recourse was had to the analogies of the Canon Law and applying those analogies to this case, the position of the junior Pandarasannadhi during the lifetime of the elder would appear to be that of a co-adjutor with the right of succession, a right of which he cannot be deprived except for grave cause"

1. 14 M.L.J. 105 : (1904) I.L.R. 27 Mad. 435.
2. I.L.R. 40 Mad. 177 : A.I.R. 1917 Mad. 578.

38. Seshagiri Ayyar, J., after stating that the ordinary mode of succession in Mutts is by appointment by the head either by will or by word of mouth, observed:

> "......I feel no hesitation in holding that the appointer has not the absolute power to dismiss which is claimed for him......I shall refer to what takes place on the nomination of a successor in this Mutt. Exhibit-C..mentions.. the ceremonies that have to be gone through in selecting a successor and also those which the person selected has to undergo. The most important of these is the abishegam. The rites to be observed on this occasion are described by the plaintiff as his thirty-third witness. This may be taken to represent correctly what happens when a junior Pandarasannadhi is appointed. It is also in evidence that the senior Pandarasannadhi himself offers Puja to the junior because by the abishegam the junior attains Godhead. He performs separate puja to Gods Vigneswara and Subramanya. He is called the Sadhaka Acharya, or co-adjutor with the senior......" (pp. 194-195).

1. (1904) I.L.R. 27 Mad. 435 : 14 M.L.J. 105.

39. The learned Judge then said that a person *appointed by will* and on whom abishegam has been performed becomes heir presumptive entitled to succeed to the headship on the happening of a vacancy. He further said that when the nomination carries with it certain dignity and is construed by the worshippers as implying sanctity of the person, it would lead to disastrous results to hold that the appointee is dependent for his position upon the will of the appointer as the conscience of the people regards him as the unquestionable successor. He then summarised his conclusions as follows: (at p. 197).

> "(1) that the head of the Mutt is entitled to appoint a junior Pandarasannadhi; (2) that this junior has a recognised status; (3) that he is entitled to succeed to the headship, if he survives the appointer; (4) that for good cause shown he can be removed; (5) that the tenure of his position is not dependent upon the goodwill of the appointer; and (6) that it is not open to the head of the mutt to dismiss him arbitrarily".

40. Counsel for the appellant argued that this decision lays down the correct law and there is no reason why it should not apply to the case in hand. He said that it is from the Dharmapuram Adhinam that the Kasi Mutt took its origin and that the same principles must apply to the Kasi Mutt. As regards the Dharmapuram Adhinam, Muttusami Ayyar, J. said in *Sambandha case*[1].

> "It should be observed here that there were a senior and a junior Pandara Sannadhi at one and the same time, and that the junior succeeded the senior *unless dismissed for misconduct,* and that a will was left at times by the senior Pandara Sannadhi appointing his junior as his successor. *This indicates probably the source from which the course of succession at Tiruppanandal was originally derived*".

1. (1887) I.L.R. 10 Mad. 375.

41. The Division Bench of the High Court was of the view that the decision in *Tiruvambala Desikar* v. *Chinna Pandaram*[1] was inapplicable to resolve the controversy here for the resaon that Achariya Abishekam ceremony which invested the junior head there with certain spiritual powers was admittedly not performed in the instant case. It was submitted by Mr. Gupte for the respondent that the foundation of the decision in the above case was the finding in that case that there was the ceremony of Achariya Abishekam on nomination and that that had the effect of investing the junior head with certain spiritual powers and as the nomination of the appellant was not attended with Achariya Abishekam, the nomination did not invest the appellant with any spiritual capacity so as to make the nomination irrevocable. In *Sambandha case*[2], Muttusami Ayyar, J. said:

> "....a ceremony called Achariya Abishekam is performed only in the case of Tambirans who are raised to the position of a senior or junior Pandara Sannadhi. It consists in anointing and bathing him as an achariya or preceptor and consecrating him as such with the recitation of religious texts prescribed for the occasion. The belief with which it is performed is that unless a Tambiran is solemnly consecrated as a preceptor, he is not competent to initiate laymen in forms of prayer conducive to their spiritual happiness and to ordain laymen as Tambirans with efficacy" (para. 8 of the judgment).

1. I.L.R. 40 Mad. 177: A.I.R. 1917 Mad. 578.
2. (1887) I.L.R. 10 Mad. 375.

42. What this paragraph says is that Achariya Abhishekam ceremony is performed only for raising a Tambiran to the position of a junior or senior Pandara Sannadhi in the Dharmapuram Adhinam. It would not follow from what Muttusami Ayyar, J. has said that the right to succeed which is the invariable legal incident of a nomination is conferred by virtue of Achariya Abishekam. Nomination must, in logic and in fact, always precede the Achariya Abishekam. The effect of Achariya Abishekam, according to the learned Judge is to confer on the junior head the spiritual capacity to ordain Tambirans or, in other words, to initiate laymen into the spiritual fold (Thirukkuttam) of Tambirans. The learned Judge did not say that Achariya Abishekam has the effect of investing the junior head with an indefeasible right to succeed to the headship of the Mutt. In other words, if revocability is otherwise a characteristic of nomination, it would not cease to be so by virtue of the religious ceremony of Achariya Abishekam. Even if it be assumed that Achariya Abishekam would invest a junior head with the power to ordain Tambirans which he would not otherwise have, it would not follow that by virtue of Acharya Abishekam he would obtain a right, much less an indefeasible right, to succeed if nomination *per se* has no such effect.

43. In the judgment in *Sambandha case*[1], Muttusami Ayyar, J. has referred to a case where the head of the Dharamapuram Mutt—one Sadayappa—made three wills in succession nominating the same person. Counsel for the respondent wanted us to infer from this that a power to nominate, if it is exercised by a will, can also be revoked by another will; but as already stated, the will, in most cases, is only a record of the exercise of the power of nomination and the mere fact that the head of the Mutt in question executed three wills successively naming the same person as the junior head would not in any way militate against the contention of the appellant that nomination once made cannot be revoked arbitrarily. If there was an instance in the particular institution of a head who, after having exercised the power of nomination by a will, executed another will nominating another person, the position would probably have been different.

44. Looking at the matter from another angle, we have come to the same conclusion. We have already said that the power of nomination must be exercised not corruptly or for ulterior reason but *bona fide* and in the interest of the Mutt and the Hindu community. It then stands to reason to hold that power to revoke the nomination must also be exercised *bona fide* and in the interest of the institution and the community. In other words, the power to revoke can be exercised not arbitrarily, but only for good cause. We do not pause to consider what causes would be good and sufficient for revoking a nomination as the defendant had no case before us that he revoked the nomination for a good cause.

45. We hold that a nomination when made can be cancelled or revoked only for a good cause and, as admittedly, there was no good cause shown in this case for cancellation of the nomination by Exhibit B-9, the cancellation was bad in law. Therefore, it must be held that the appellant was holding the status of the Elavarasu of the Kasi Mutt during the lifetime of the defendant. Normally, a Court will declare only the rights of the parties as they existed on the date of the institution of the suit. But in this case, on account of the subsequent event, namely, the death of the defendant, we have to mould the relief to suit the altered

1. (1887) I.L.R. 10 Mad. 375.

circumstance. If the defendant had been alive, it would have been sufficient if we had declared, as the learned single Judge has done, that the appellant was the Elavarasu of the Kasi Mutt. Now that the defendant is dead, we make a declaration that the appellant was holding the position of the Elavarasu during the lifetime of the defendant, that the revocation of the nomination of the appellant as the Elavarasu by Exhibit B-9 was bad; and that the appellant was entitled to succeed to the headship of the Mutt on the death of the defendant.

46. The decree passed by the Division Bench of the High Court is set aside and the appeal is allowed. In the circumstances, we make no order as to costs.

V.K. ——— *Appeal allowed.*

[END OF VOLUME (1973) I M. L. J. (S. C.)]