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(1998) 05 CAL CK 0011

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction, M.A.T. No. 829 of 1998

Swapan Kumar Acharjya and Others — APPELLANT

Vs

Subhas Chandra Bhattacharjee and Others — RESPONDENT

Date of Decision : 15-05-1998

Acts Referred:
West Bengal Co-operative Societies Act, 1983 — Section 21, 25, 25(1), 31

Citation : AIR 1998 Cal 271 : (1998) 2 CALLT 378 : (1999) 1 ILR (Cal) 304

Hon'ble Judges : Satyabrata Sinha, J;Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Mr. Dinesh Chandra Nandi, for the Appellant;Mr. Subhas Medda, for the Respondent

Judgement

S. B. Sinha, J.—Although I agree with the operative portion of the draft judgment of my learned brother Sengupta, J, keeping in view the importance of the question involved, intend to add a few words of mine.

2. Section 31 of the West Bengal Co-operative Societies Act reads thus :--

"Section 31. Dissolution of the board in certain cases and appointment of special Officer.--Notwithstanding anything to the contrary contained elsewhere in this Act or in any other law for the time being in force--

(a) the board of Directors of any of the cooperative societies mentioned in the Fifth Schedule shall, if the election of its Directors has not been held within a period of thirty-six months from the date of their election under sub-section (1) of section 25, stand dissolved on and from the date immediately following the date of expiry of the said period:

(b) with effect from the date of dissolution of the Board under clause (a), the Directors thereof shall be deemed to have vacated their offices;

(c) upon the dissolution of the board under clause (a), the Registrar shall, by notification, appoint a special officer for managing the affairs of the co-operative

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society and for making arrangements for reconstitution of the board in accordance with the provisions of this Act, the rules and the by-laws of the co-operative society within a period not exceeding one year from the date of dissolution and, notwithstanding the provisions of section 25, a board reconstituted under this section shall be deemed to have been validly reconstituted u/s 25 for the purposes of this Act;

Provided that until a special officer is appointed under this clause, the highest paid executive of the co-operative society, by whatever designation called, shall manage the affairs of the co-operative society.

Explanation.--If there is any dispute as to who is the highest paid executive of the co-operative society, Registrar''s decision thereon shall be final :

[Provided further that if the special officer falls to reconstitute the board within one year from the date of dissolution of the board, the Registrar shall remove him from office and shall reconstitute the board in the manner laid down in the proviso to clause (a) of subsection (1) of section 25. and the board so reconstituted shall function till the directors of the board elected u/s 25 assume charge;]

(d) with effect from the date of dissolution of the board under clause (a)--

(i) all properties of the co-operative society shall vest in the Registrar and shall remain vested till a new board assumes office; and

(ii) subject to the control and direction of the Registrar, the highest paid executive of the co-operative society or the special officer, as the case may be, shall exercise all the powers and perform all the duties which may, under this Act or the rules or the by-laws, be exercised or performed by the board or any officer of the co-operative society :

(e) where a special officer has been appointed under clause (c), the Registrar may, by order, fix the remuneration of the special officer and the remuneration fixed shall be paid out of the funds of the cooperative society;

(f) the special officer appointed under clause (c) shall hold office until the board is reconstituted."

3. The said provision contains a non-obstanie clause which is of wide amplitude. It not only overrides the provision of the said Act but also overrides the provision of any other for the time in force. Such a non-obstante clause must be given its full effect. See decision of the apex court in the case of M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another,

4. The purport of the said provision is clear from not only the fact that the legislature in its wisdom while fixing the period during which the Board of Director shall hold their offices has used the word ''shall'' which is prima facie mandatory, it has laid the consequence therefore. See K.G. Patel & Co. v. Smt.

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Chandra Devi Bothra & Ors. reported n 1997(1) CHN 156 and a decision reported in 1995(5) JT 151.

5. It is true that normally a time fixed by a public authority for carrying out its statutory function is not to be considered as a mandatory provision but as a directory one, the same has its own limitations. See Shiveshwar Prasad Sinha Vs. The District Magistrate of Monghyr and Another, .

6. Furthermore, in this case a legal fiction has been created. Such a legal fiction, an actual state of affair is to be treated as a putative state of affairs.

7. In East End Dwellings Co. Ltd. v. Finsbury Borough Council reported in 1951(2) All ER 587 it is stated:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The Statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

8. The said decision has been followed by the Patna High Court in Chief Medical Officer Vs. Khadeer Khadri, .

9. The aforementioned decision leaves no manner of doubt that upon a true and proper construction of section 31 of the West Bengal Co-operative Societies Act it has to be held that the same is a mandatory in nature. Reliance places by Mr. Banerjee in a decision in Garbari Union Co-operative Agricultural Credit Society Limited & Anr. v. Swapan Kumar Jana & Ors. reported in 1997(1) CHN 189 (of which I was a member) has no application in the fact of this case. In that case a question arose as regard interpretation of section 25 of the said Act read with the rules framed thereunder, the scope and purport of sections 25 and 31 are absolutely different Furthermore, in that case the court has held that even if provision is mandatory, the rule may exclude a situation where the statute is given effect to, would result in undue hardship. In the said decision itself the court followed a decision of the Patna High Court in Shiveshwar Prasad Sinha Vs. The District Magistrate of Monghyr and Another, wherein it was held that the provision of section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act was not mandatory. This court held :

"There cannot be any doubt whatsoever that when a public functionary in terms of the provisions of a statute is asked to perform a public duly within a particular time the same in absence of any penal provision or the consequence ensuing therefore must be held to be a directory and not mandatory."

10. In Maxwell on interpretation of Statutes, 11th Edn. page, 369, it is stated :--

"It has often been held, for instance, when an Act ordered a thing to be done by

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a public body or public officers and pointed out the specific time when it was to be done, that the Act was directory only and might be complied with after the prescribed time."

(See Smith v. Jones (1830) 109 ER 809 and the other decisions cited in Maxwell).

11. In America also the law seems to be the same. Thus in Sutherland''s Statutory Construction, 3rd edition, Volume 3, at page 102, the law is stated as follows :--

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the Officer." At p.107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p.109, it is pointed out that often the question as to whether mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. III it is stated as follows :--

''''As A corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive."

See also Crawford on Statutory Construction, Article 269 at p. 535.

Following the aforesaid authorities it appears that the under mentioned factors have to be considered in deciding whether the time limit provided in clause (a) of section 31 of the Act is directory or mandatory :

(1) The general scheme of the Act and the context of the other provisions.

(2) Whether the time limit is insisted upon as a protection for safeguarding the right of properly of a person.

(3) Whether the statute relates to the performance of a public duty by a pubic officer.

(4) Whether serious general inconvenience or injustice to persons who have no control over those entrusted with the duty would arise if the provision held mandatory and not directory.

(5) Whether such a decision would not promote the main object of the Legislature.

(6) Where the statute itself expressly provides for the result of non-compliance with the statutory provision, what can reasonably be held to be the intent of the Legislature?"

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12. In Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others, , it has been stated :--

"The governing factor is the meaning and intent of the legislature, which should be gathered not merely from the words used by the legislature but from a variety of other circumstances and considerations. In other words, the use of the word ''shall'' or ''may'' is not conclusive on the question whether the particular requirement of law is mandatory of directory. But the circumstances that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary to the context indicating that a permissive interpretation is permissible the statute ought to be construed as peremptory.

K. J. Sengupta, J.

13. Two appeals being No. MAT 829 of 1998 and MAT 948 of 1998 have been heard analogously, as by both the appeals the same judgment and order passed by the learned single Judge of this court in writ petition No. 379(W) of 1998 has been challenged. The appellants in appeal No. MAT 829 of 1998 (hereinafter referred to as the first appeal) are not parties to the above writ petition. As such the leave was granted to them to prefer the said appeal as a third parties. Another appeal being No. MAT 948 of 1998 (hereinafter referred to as the second appeal) has been preferred by the State of West Bengal and other officials appointed under the Cooperative Societies Act, 1983.

14. By the impugned judgment and order the learned trial judge has been pleased to direct the Assistant Registrar of the Co-operative Societies to expedite disposal of the disputes within a period of three weeks in accordance with law and after disposal without wasting any further time to give direction to the present Board of Directors to hold the Annual General Meeting within four weeks from date of finalization of such dispute. The learned trial Judge was pleased to give further direction upon the Registrar of the Co-operative Societies, Nadia to keep the letter of Assistant Registrar dated 16th February, 1998 appointing Special Officer in abeyance till the Annual General Body Meeting is over. In case the Special Officer who has been appointed by the Assistant Registrar has assumed charge, he shall hand over the charge to the Member of the Present Board of Directors.

15. The learned counsel, appearing for the appellants in first appeal, submits that the said impugned judgment and order has been passed behind the back of the appellants and without making them as parties to the writ petition knowingly well that they might be adversely affected. The writ petitioner/respondents have obtained the said order upon suppression of the material fact that by an award dated 13th February, 1998 passed by the learned Arbitrator in a dispute case No. 42/97-98 the said letter dated 16th February, 1998 appointing Special Officer was issued by Assistant Registrar. In terms of the said appointment the Special Officer had assumed charge. In the said dispute case the writ petitioners/

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respondents were very much parties and by the said award it has been declared that Board of Directors elected in the Annual General Meeting dated 23rd January, 1994 stood dissolved. The writ petitioners/respondents were the Directors of the said dissolved Board. It is further submission of the learned counsel for the first appeal that by virtue of the provision of section 31 of the West Bengal Co-Operative Societies Act, 1983 the Board of Directors constituted by the writ petitioner /respondents stood automatically dissolved and had become defunct by operation of the law inasmuch as admittedly no election was held within the time stipulated in the said section 31 read with 25(g) of the West Bengal Co-operative Societies Act, 1983. So the learned trial Judge has passed the impugned order amongst other directing the Special Officer to hand over charges to the defunct Board of Directors. He submits that the said existing Board of Directors under the law cannot get back the charges nor they have any right to manage the affairs of the Co-operative Society. This order passed by the learned trial Judge is patently illegal as the same is contrary to and inconsistent with the provision of section 31 of the said Act. Moreover, this order is conflicting with and/or contrary to the another lawful subsisting valid order passed by the said award dated 13th February, 1998 which is not challenged by any of the parties. So the learned trial Judge cannot have any jurisdiction to pass the impugned order which is inconsistent with and contrary to the another subsisting order. The learned counsel draws our attention to the provision of section 31 of the West Bengal Co-operative Societies Act, 1983. He argues that it is ex facie clear from the plain reading of the aforesaid section and on the admitted fact that the present Board of Directors have now become defunct and have no manner of right under the law to continue in management and affairs of the said co-operative society or for that matter they do not have any right to get back the charges from the Special Officer under the aforesaid provision. Therefore, the said impugned order is non est and liable to be set aside. The charges should also be given back to the Special Officer who was compelled to hand over charges on the face of threat of contempt proceedings.

16. The learned lawyer, appearing on behalf of the appellants in the second appeal, supports the submission and contention of the learned lawyer appearing for the appellants in the first appeal. He submits that the election of the said impugned Board of Directors was held on 23rd January, 1994. Under the provisions of the section 31(a) of the said Act of 1983 unless the election of the Directors of the Co-operative Society is held within 36 months from the date of the last election the Board of Directors after expiry of 36 months will stand automatically dissolved. Therefore, in this case after 23rd January, 1997 the present Board of Directors consisting amongst other of the writ petitioner/ respondents stood dissolved and has become non-existent. The learned trial Judge has no power to revive the defunct and/or dissolved Board of Directors aiming at to rejuvenate its life.

17. Mr. Asoke Banerjee, Senior Advocate, appearing for the contesting respondent writ petitioners, submits that because of unavoidable circumstances

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and reasons no Annual General Meeting could be held within 12 months from the date of the last Annual General Meeting. Having satisfied with the reasons the Assistant Registrar, Co-operative Society on application being made to him by an order dated 6th January, 1997 authorised the inspector of the Co-operative Societies to convene Annual General Meeting within 26th April, 1997. He submits all steps were being taken for convening the Annual General Meeting in pursuance of the aforesaid order dated 6th January, 1997. Unfortunately, the same could not be completed because of a dispute case, being No. 2/97-98 was initiated by one Sri Manabendra Nath Dutta and Sri Sitanshu Banerjee in the court of the Assistant Registrar, Co-operative Societies, Krishnanagar, Nadla. An interim order of injunction was passed against his clients in the said dispute case. Thereafter his clients duly made an application for vacating ex parte order of injunction passed by the learned Arbitrator in the aforesaid dispute case but the said interim order of injunction was not vacated. Accordingly, an appeal was preferred from the said order of refusal to vacate the interim order of injunction. The said appeal was preferred before the Co-operative Tribunal, West Bengal. Then the said learned Tribunal was pleased to fix the date of hearing of the appeal on !7th November, 1997. Mr. Banerjee further highlights that when the said appeal was pending the Assistant Registrar, Co-operative Society being the respondent No.4 all of a sudden passed two orders on 11th August, 1997 whereby and whereunder the earlier order dated 6th January, 1997 was revoked and further Special Officer was appointed. Mr. Banerjee submits that the order revoking the earlier order dated 6th January, 1997 was illegal, invalid and the same was passed without affording any opportunity of being heard to his clients. Challenging the said impugned order revoking the earlier order dated 6th January, 1997 his clients filed a writ petition in this court. On 19th August, 1997 His Lordship the Hon''ble Mr. Justice Pinaki Chandra Chose was pleased to pass an order directing the said Special Officer to hold election and further directed to take all necessary steps to complete the formalities in the matter. By the said order his clients were allowed to continue in the office of the Board of Directors till 26lh July, 1997. In the said writ petition His Lordship was pleased to pass further order on 26th July, 1997 whereby on Manabendra Nath Dutta and Sltanshu Banerjee were added as parties to the said writ petition and the same was disposed of finally by directing the said learned Tribunal being appellate forum to decide disputes within a period of three weeks from the date of passing of the said order. By the self-same order the interim order passed on 19th August, 1997 was directed to continue until the matter was disposed of by the appellate authority. Being aggrieved by the said order the added parties preferred an appeal therefrom. The said appeal being No. MAT 3098 arising out of the said writ petition No.18786(w) of 1997 was entertained aad admitted by their Lordships the Hon''ble Mr. Justice Sinha and the Hon''ble Mr. Justice Ronojit Kumar Mitra by passing an order dated 1st December, 1997 whereby their Lordships were pleased to direct the said appellate authority to dispose of the appeal being No.26 of 1997 within ten days. In terms of the said judgment and order passed by the appeal court on 1st December, 1997 the Co-operative

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Tribunal have disposed of the appeal and was pleased to set aside the order passed by the learned Arbitrator in the said dispute case and pleased to hold that the election has been done properly by his clients. In view of the said appeal being allowed by the learned Tribunal the appeal in this Hon''ble Court in its Constitutional Appellate Jurisdiction was dismissed. So Mr. Banerjee urges, the writ petitioner/respondents were not at all fault, and their holding of office cannot be termed as illegal because they were continuing in office by under coverage of order of this court. He argues that the subsequent order being order dated 16th February, 1998 is in conflict with the order passed by the learned Tribunal in the aforesaid dispute case. On the aforesaid background of the case the learned Trial Judge has rightly and lawfully passed the said impugned order. He submits that when this Hon''ble Court has allowed his clients to continue in office the State respondent cannot pass any order without leave of this court, contrary to and inconsistent with the order passed by this court.

18. We have heard and considered the submissions of the learned lawyers. We have also gone through the records and materials placed before us. The point which has fallen for consideration is whether the impugned judgment and order passed by the learned trial Judge on the face of the provision of section 31 of the aforesaid Act vis-a-vis the admitted position of the writ petitioner/respondents not having held any election within the period of 36 months is liable to be sustained or not. From the records the following admitted position emerge:--

(i) The writ petitioner respondents were the last elected Directors of the Board.

(ii) Last election of the director was held on 23rd January. 1994.

(iii) An award dated 13lh February, 1998 has been passed by the learned Arbitrator holding and declaring that the Board of Directors elected in the Annual General Meeting dated 23rd January. 1994 consisting amongst other of the writ petitioners stood already dissolved by operation of the law.

19. This fact of passing award dated 13th February, 1998 has not been mentioned in the writ petition which according to us is a total suppression of material facts. This award as on today has not been challenged. It appears from the award that the disputes and question raised by the writ petitioner in the present writ petition have been considered and/or dealt with by the learned Arbitrator. In our view the Special Officer has been appointed by the Assistant Registrar, Co-operative Society lawfully and in strict compliance of the aforesaid subsisting and valid award. The order passed by Mr. Justice P.C. Chose in the previous writ petition being No. W.P. No. 18786(W) of 1997 ceased to be operative upon disposal of the appeal being No.26 of 1997 by the Co-operative Tribunal on 19th December, 1997. Admittedly there is no election within 23rd January, 1997. Therefore, we are unable to accept the submission of Mr. Banerjee that his client is entitled to continue in office because of the order of this court and order of the Tribunal.

20. Now question remains whether by virtue of the previous orders passed by

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this court in the writ petition the writ/petitioner/respondents can claim any legitimate right to remain in office which is deemed to have been vacated by operation of law, or not. In the previous proceedings this question as to continuance of the writ petitioner/respondents in the office of the Board of Directors was not raised and court did not have any occasion to deal with the same. It is now settled law that any order passed by the court contrary to the mandatory provision of the statute is an invalid and void ab initio. Now it has to be examined whether provision of section 31 is of mandatory in nature or not So we quote the said section as follows :--

"31. Dissolution of the board in certain cases and appointment of special officer. Notwithstanding anything to the contrary contained elsewhere in this Act or in any other law for the time being in force,--

(a) the board of directors of any of the co-operative societies mentioned in he Fifth Schedule shall. If the election of its directors has not been held within a period of thirty-six months from the date of their election under sub-section (1) of section 25, stand dissolved on and from the date immediately following the date of expiry of the said period;

(b) with effect from the date of dissolution of the board under clause (a), the directors thereof shall be deemed to have vacated their offices;

(c) upon the dissolution of the board under clause (a) the Registrar shall, by notification, appoint a special officer for managing the affairs of the co-operative society and for making arrangements for reconstitution of the board in accordance with the provisions of this Act, the rules and the by-laws of the co-operative society within a period not exceeding one year from the date of dissolution and, notwithstanding the provisions of section 25, a board reconstituted under this section shall be deemed to have been validly reconstituted u/s 25 for the purposes of this Act :

Provided that until a special officer is appointed under this clause, the highest paid executive of the co-operative society, by whether designation called, shall manage the affairs of the co-operative society.

Explanation.--If there is any dispute as to who is the highest paid executive of the co-operative society, the Registrar''s decision thereon shall be final;

(d) with effect from the date of dissolution of the board under clause (a)--

(i) all properties of the co-operative society shall vest in the Registrar and shall remain vested till a new board assumes office; and

(ii) subject to the control and direction of the Registrar, the highest paid executive of the co-operative society or the special officer, as the case may be, shall exercise all the powers and perform all the duties which may, under this Act or the rules or the bylaws, be exercised or performed by the board or any officer of the co-operative society:

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(e) where a special officer has been appointed under clause (c). the Registrar may, by order, fix the remuneration of the special officer and the remuneration fixed shall be paid out of the funds of the cooperative society;

(f) the special officer appointed under clause (c) shall hold office until the board is reconstituted."

21. It will appear from the careful reading of the said section the following salient features :--

By virtue of section 31(a) unless the election of its director is not held within a period of thirty-six months from the date of their election under sub-section (1) of section 25 the said board stand dissolved automatically on and from the date immediately following the date of expiry of the said period. In this case the last election was held admittedly on 24th January, 1994. So on 25th January, 1997 being the first day after expiry of the thirty-six months the said board stood dissolved.

22. Section 31 clause (b) has provided effect of dissolution under clause (a). It is provided that the directors thereof shall be deemed to have vacated their offices. In this case on and from 25th January, 1998 the present writ petitioner respondents shall be deemed to have vacated their offices.

23. In terms of section 31 clause (c) the legislature has made provision after deemed dissolution and vacation of the offices by the directors of the dissolved board for management of the said Co-operative body and follow up action. It provides the Registrar will appoint a special officer for managing the affairs of the Co-operative Society and for making arrangements for reconstitution of the board in accordance with the provisions of this Act, rules and the by-laws.

24. It has been further provided in case of exigencies until a special officer is appointed a highest paid executive of the Co-operative Society shall manage the affairs of the Co-operative Society.

25. by virtue of section 31 clause (d) ft has been provided that with effect from the date of dissolution of the board under clause (a) all the properties of the Co-operative Society shall vest in the Registrar and shall remain vested till a new board assumes office.

26. So the provisions of section 31 is a mandatory in nature because of the words "shall" employed in clauses (a), (b), (c), (d) and (f) of section 31 and further is very comprehensive for dealing with situation when no election was held and consequence thereof. If by and under provision of any act or section any act is not done and if there provides therein consequence of breach and/or non-compliance of the said provision then entire Act or section as the case may be is mandatory. This view of ours is supported by observation of a Bench decision of this court reported in 1997(1) CHN 189. In this case by virtue of operation of the aforesaid section 31 on and from 25th January, 1997 the writ petitioner/respondents are stranger so far as it relates to intermeddling and/or

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managing of the affairs of the co-operative body. By necessary implication in terms of the said section the defunct and dissolved directors of the board are prohibited from managing and/or interfering with the affairs and business of the cooperative Bank, as from the date of dissolution of entire management all properties of the co-operative society has been vested in the Registrar. So all the orders which were passed previously by this court are not in consonance with the mandatory provision of the law.

27. On the facts and in the circumstances the judgment and order passed by the learned trial Judge is patently illegal for the following reasons.

28. Firstly, the impugned order was obtained upon suppression of the material fact as none drew attention of the learned trial Judge to passing of the award on 13th February, 1998 which is still valid and subsisting.

29. The direction for handing over the charges and the management of the said Co-operative Society to the writ petitioner/respondents tantamount or rejuvenation of a defunct and/or dissolved board of directors. In other words, by the impugned judgment and order the learned trial Judge has allowed the writ petitioner/respondents to resume office which has been vacated in terms of the provision of the law by divesting and/or depriving the legitimate holder of the office.

30. On the facts and in the premises as above the said impugned judgment and order passed by the learned trial Judge is not sustainable under the law. Accordingly, the same is hereby set aside.

31. Appeal is allowed, however, without awarding any costs on the fact and circumstances of this case.

32. Appeal allowed

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