NATURE OF THE INDIAN CONSTITUTION

Kesavananda Bharati v. *State of Kerala*

AIR 1973 SC 1461

[*The Supreme Court laid down the* ***Theory of Basic Structure*** *in this case. According to this theory, some of the provisions of the Constitution of India form its basic structure which are not amendable by Parliament by exercise of its constituent power under Article 368. See also* ***Indira Nehru Gandhi*** **v.** ***Raj Narain****,* AIR 1975 SC 2299; ***Minerva Mills Ltd.*** **v.** ***Union of India****,* AIR 1980 SC 1789; ***Sanjeev Coke Mfg. Co.*** **v.** ***Bharat Coking Coal Ltd.,*** AIR 1983 SC 239; ***L. Chandra Kumar*** **v.** ***Union of India,*** AIR 1997 SC 1125.]

In this case, the validity of 24th, 25th and 29th amendments to the Constitution of India was challenged. The main question related to the nature, extent and scope of amending power of the Parliament under the Constitution. The views of the majority were as follows:

(1) ***L.C. Golak Nath*** **v.** ***State of Punjab****,* AIR 1967 SC 1643 (which had held that fundamental rights were beyond the amending powers of Parliament) was overruled;

(2) The Constitution (Twenty-fourth Amendment) Act, 1971 (giving power to Parliament to amend any part of the Constitution) was valid;

(3) Article 368, as amended, was valid but it did not confer power on the Parliament to alter the basic structure or framework of the Constitution; The court, however, did not spell out in any exhaustive manner as to what the basic structure/framework was except that some judges gave a few examples.

(4) The amendment of Article 368(4) excluding judicial review of a constitutional amendment was unconstitutional.

(5) The amendment of Article 31C containing the words "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" was held invalid;

S.M. SIKRI C.J. - 90. This Preamble, and indeed the Constitution, was drafted in the light and direction of the Objectives Resolution adopted on January 22, 1947, which runs as follows:

(1) THIS CONSTITUENT ASSEMBLY declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(2) wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States, as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilized nations; and

(8) this ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind.

91. While moving the resolution for acceptance of the Objectives Resolution, Pandit Jawaharlal Nehru said:

> It seeks very feebly to tell the world of what we have thought or dreamt for so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will receive it and ultimately pass it. And may I, Sir, also with all respect, suggest to you and to the House that, when the time comes for the passing of this Resolution let it be not done in the formal way by the raising of hands, but much more solemnly, by all of us standing up and thus taking this pledge anew.

135. The fundamental rights were considered of such importance that right was given to an aggrieved person to move the highest court of the land, i.e. the Supreme Court, by appropriate proceedings for the enforcement of the rights conferred by this part, and this was *guaranteed.* Article 32 (2) confers very wide powers on the Supreme Court, to issue directions or orders or writs including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. Article 32(4) further provides that "the right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution".

302. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic

foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;
(2) Republican and Democratic forms of Government;
(3) Secular character of the Constitution;
(4) Separation of powers between the legislature, the executive and the judiciary;
(5) Federal character of the Constitution.

303. The above structure is built on the basic foundation, i. e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

J.M. SHELAT & A.N. GROVER, JJ. - 499. These petitions which have been argued for a very long time raise momentous issues of great constitutional importance. Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom had taken an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take stock of the vast socio-economic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation.

503. Before the scheme of the Constitution is examined in some detail it is necessary to give the pattern which was followed in framing it. The Constituent Assembly was unfettered by any previous commitment in evolving a constitutional pattern "suitable to the genius and requirements of the Indian people as a whole". The Assembly had before it the experience of the working of the Government of India Act, 1935, several features of which could be accepted for the new Constitution. Our Constitution borrowed a great deal from the Constitutions of other countries, e. g. United Kingdom, Canada, Australia, Ireland, United States of America and Switzerland. The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other and each of them has to function within the four-corners of the constitutional provisions. The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence, i.e. a Sovereign Democratic Republic. Parts III and IV which embody the fundamental rights and directive principles of State policy have been described as the conscience of the Constitution. The legislative power distributed between the Union Parliament and the State Legislatures cannot be so exercised as to take away or abridge the fundamental rights contained in Part III. Powers of the Union and the States are further curtailed by conferring the right to enforce fundamental rights contained in Part III by moving the Supreme Court for a suitable relief, Article 32 itself has been constituted a fundamental right. Part IV containing the directive principles of State policy was inspired largely by similar provisions in the Constitution of the Eire Republic (1937). This part, according to B. N. Rao, is like an Instrument of Instructions from the ultimate sovereign,

namely, the people of India. The Constitution has all the essential elements of a federal structure as was the case in the Government of India Act, 1935, the essence of federalism being the distribution of powers between the federation or the Union and the States or the provinces. All the Legislatures have plenary powers but these are controlled by the basic concepts of the Constitution itself and they function within the limits laid down in it. All the functionaries, be they legislators, members of the executive or the judiciary take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions. The Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights. It is a written and controlled Constitution. It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. Although our Constitution is federal in its structure it provides a system modeled on the British parliamentary system. It is the executive that has the main responsibility for formulating the governmental policy by "transmitting it into law" whenever necessary. "The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State". With regard to the civil services and the position of the judiciary the British model has been adopted inasmuch as the appointment of judges both of the Supreme Court of India and of the High Courts of the States is kept free from political controversies. Their independence has been assured. But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections.

K.S. HEGDE & MUKHERJEA, JJ. – 667. We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals. There is no doubt as men of experience and sound political knowledge, they must have known that social, economic and political changes are bound to come with the passage of time and the Constitution must be capable of being so adjusted as to be able to respond to those new demands. Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. When we speak of the 'abrogation' or 'repeal' of the Constitution, we do not refer to any form but to substance. If one or more of the basic features of the Constitution are taken away to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other provisions inconsistent

with those features are incorporated, it cannot still remain the Constitution referred **to** in Article 368. The personality of the Constitution must remain unchanged.

PALEKAR, J.– 1229**.** Since fundamental questions with regard to the Constitution have been raised, it will be necessary to make a few prefatory remarks with regard to the Constitution. The Constitution is not an indigenous product. Those who framed it were thoroughly acquainted with the Constitutions and constitutional problems of the more important countries in the world, especially, the English-speaking countries. They knew the Unitary and Federal types of Constitutions and the Parliamentary and Presidential systems of Government. They knew what constitutions were regarded as "flexible" constitution and what constitutions were regarded as "rigid" constitutions. They further knew that in all modern written constitutions special provision is made for the amendment of the Constitution. Besides, after the Government of India Act, 1935, this country had become better acquainted at first hand, both with the Parliamentary system of Government and the frame of a Federal constitution with distribution of powers between the Centre and the States. All this knowledge and experience went into the making of our Constitution which is broadly speaking a quasi-Federal constitution which adopted the Parliamentary system of Government based on adult franchise both at the Centre and in the States.

1220. The two words mentioned above 'flexible' and 'rigid' were first coined by Lord Bryce to describe the English constitution and the American constitution respectively. The words were made popular by Dicey in his ***Law of the Constitution*** first published in 1885. Many generations of lawyers, thereafter, who looked upon Dicey as one of the greatest expositors of the law of the constitution became familiar with these words. A 'flexible' constitution is one under which every law of every description (including one relating to the constitution) can legally be *changed* with the same ease and in the same manner by one and the same body. A 'rigid' constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. It will be noted that the emphasis is on the word 'change' in denoting the distinction between the two types of constitutions. Lord Birkenhead in delivering the judgment of the Judicial Committee of the Privy Council in ***Mc Cawley*** **v.** ***The King*** [1920 AC 691], used the words 'uncontrolled' and 'controlled' for the words 'flexible' and 'rigid' respectively which were current then. He had to examine the type of constitution Queensland possessed, whether it was a 'flexible' constitution or a 'rigid' one in order to decide the point in controversy. He observed at page 703 'The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality and in some cases by a specially convened assembly'. He had to do that because the distinction between the two types of constitutions was vital to the decision of the controversy before the Privy Council. At page 704 he further said 'Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a 'controlled' and the other an 'uncontrolled' constitution as by any other nomenclature'. Perhaps this was an apology for not using the words 'rigid' and 'flexible'

which were current when he delivered the judgment. In fact, Sir John Simon in the course of his arguments in that case had used the words 'rigid' and 'flexible' and he had specifically referred to Dicey's, ***Law of the Constitution***. Strong in his text-book on ***Modern Political Constitutions,*** Seventh revised edition, 1966 says at p. 153 "The sole criterion of a rigid constitution is whether the Constituent Assembly which drew up the Constitution left any special directions as to how it was to be changed. If in the Constitution there are no such directions, or if the directions explicitly leave the Legislature a free hand, then the Constitution is 'flexible'."

H.R. KHANNA, J. – 1448. The approach while determining the validity of an amendment of the Constitution, in my opinion, has necessarily to be different from the approach to the question relating to the legality of amendment of pleadings. A Constitution is essentially different from pleadings filed in court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State, viz., the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. It had (*sic*) its roots in the past, its continuity is reflected in the present and it is intended for the unknown future. The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

> (T)he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

It is necessary to keep in view Marshall's great premises that "It is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

> Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the word. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society.

K.K. MATHEW, J. – 1563. Every well-drawn Constitution will therefore provide for its own amendment in such a way as to forestall as is humanly possible all revolutionary upheavals. That the Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which

must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forthwith an intensity that exacts more than reasonable satisfaction. As Wilson said, a living Constitution must be Darwinian in structure and practice. The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment". If the experiment fails, there must be provision for making another. Jefferson said that there is nothing sanctimonious about a Constitution and that nobody should regard it as the Ark of the Covenant, too sacred to be touched. Nor need we ascribe to men of preceding age, a wisdom more than human and suppose that what they did should be beyond amendment. A Constitution is not an end in itself, rather a means for ordering the life of a nation. The generation of yesterday might not know the needs of today, and, 'if yesterday is not to paralyse today', it seems best to permit each generation to take care of itself. The sentiment expressed by Jefferson in this behalf was echoed by Dr Ambedkar. If there is one sure conclusion which I can draw from this speech of Dr Ambedkar, it is this: He could not have conceived of any limitation upon the amending power. How could he have said that what Jefferson said is "not merely true but absolutely true", unless he subscribed to the view of Jefferson that "each generation is a distinct nation with a right, by the will of the majority to bind themselves but none 'to bind the succeeding generations more than the inhabitants of another country", and its corollary which follows as 'the night the day' that each generation should have the power to determine the structure of the Constitution under which they live. And how could this be done unless the power of amendment is plenary, for it would be absurd to think that Dr Ambedkar contemplated a resolution in every generation for changing the Constitution to suit its needs and aspirations. I should have thought that if there is any implied limitation upon any power, that limitation is that the amending body should not limit the power of amendment of the future generation by exercising its power to amend the amending power. Mr Palkhivala said that if the power of amendment of the amending power is plenary, one generation can, by exercising that power, take away the power of amendment of the Constitution from the future generations and foreclose them from ever exercising it. I think the argument is too speculative to be countenanced. It is just like the argument that if men and women are given the freedom to choose their vocations in life, they would all jump into a monastery or a nunnery, as the case may be, and prevent the birth of a new generation; or the argument of some political thinkers that if freedom of speech is allowed to those who do not believe in it, they would themselves deny it to others when they get power and, therefore, they should be denied that freedom today, in order that they might not deny it to others tomorrow.

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S. R. Bommai **v.** *Union of India*

AIR 1994 SC 1918

[*President's Rule in States under Article 356 – grounds and scope of judicial review*]

In this case, the court examined issues such as the nature of Indian Constitution, certain aspects of the centre-state relations, circumstances under which imposition of President's rule in the states could be justified, scope of judicial review of President's satisfaction in imposing President's rule in a State, dissolution of the State Assembly and the effect of dissolution on disapproval of the proclamation by Parliament, power of the Supreme Court to invalidate the proclamation and its effect on the dissolution of the Assembly.

FACTS IN S.R. BOMMAI'S APPEAL

On March 5, 1985 elections were held to the Karnataka State Legislative Assembly. The Janata Dal won 139 seats out of 225 seats and the Congress Party was the next largest party securing 66 seats. Shri R.K. Hegde was elected as the leader of Janata Dal and became the Chief Minister. Due to his resignation on August 12, 1988, Shri S.R. Bommai, was elected as leader of the party and became the Chief Minister. As on February 1, 1989, the strength of Janata Dal was 111; the Congress 65 and Janata Party 27, apart from others. On April 15, 1989, the expansion of the Ministry caused dissatisfaction to some of the aspirants. One Kalyan Molakery and others defected from Janata Dal and he wrote letters on April 17 and 18, 1989 to the Governor enclosing the letters of 19 others expressing want of confidence in Shri Bommai. On April 19, 1989, the Governor of Karnataka sent a report to the President. On April 20, 1989, 7 out of 19 MLAs that supported Kalyan Molakery, wrote to the Governor that their signatures were obtained by misrepresentation and reaffirmed their support to Shri Bommai. On the same day, the Cabinet also decided to convene the Assembly session on April 27, 1989 at 3.30 p.m. to obtain vote of confidence. Shri Bommai met the Governor and requested him to allow floor-test to prove his majority and he was prepared even to advance the date of the session. In this scenario, the Governor sent his second report to the President and exercising the power under Article 356, the President issued Proclamation, dismissed Bommai government and dissolved the Assembly on April 21, 1989 and assumed the administration of the State of Karnataka. When a writ petition was filed on April 26, 1989, a special bench of three Judges of the High Court of Karnataka dismissed the writ petition [***S.R. Bommai* v. *Union of India,*** AIR 1990 Kant. 5].

SRI RAM JANMABHOOMI-BABRI MASJID ISSUE

In the elections held in February, 1990, the Bhartiya Janata Party [BJP] emerged as majority party in the Legislative Assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the Governments in the respective States. One of the programmes of the BJP was to construct a temple for Lord Sri Rama at his birthplace Ayodhya. That was made an issue in its manifesto for the elections to the Legislative Assemblies. On December 6, 1992, Ram Janmabhoomi-Babri Masjid structure (there is a dispute that after destroying Lord Sri Rama temple Babur, the Moghul invader, built Babri Masjid at the birthplace of Lord Sri Rama. It is an acutely disputed question as to its correctness.) However, Ram Janmabhoomi-Babri Masjid structure was demolished by the *kar sevaks* gathered at Ayodhya, as a result of sustained momentum generated by BJP, Vishwa Hindu Parishad [VHP] Rashtriya Swayamsevak Sangh [RSS] Bajrang Dal [BD] Shiv Sena [SS] and other organisations. Preceding thereto when the dispute was brought to this Court, the Government of India was made to act on behalf of the Supreme Court and from time to

time directions were issued to the State Government which gave an assurance of full protection to Sri Ram Janmabhoomi-Babri Masjid structure. On its demolition, though the Government of Uttar Pradesh resigned, the President of India by Proclamation issued under Article 356 dissolved the State Legislature on December 6, 1992. The disastrous fall out of the demolition was in the nature of loss of precious lives of innocents, and property throughout the country and in the neighbouring countries. The President, therefore, exercised the power under Article 356 and by the Proclamations of December 15, 1992, dismissed the State Governments and dissolved the Legislative Assemblies of Rajasthan, Madhya Pradesh and Himachal Pradesh and assumed administration of the respective States.

A.M. AHMADI, J. - 13. India, as the Preamble proclaims, is a Sovereign, Socialist, Secular, Democratic Republic. It promises liberty of thought, expression, belief, faith and worship, besides equality of status and opportunity. What is paramount is the unity and integrity of the nation. In order to maintain the unity and integrity of the nation our Founding Fathers appear to have leaned in favour of a strong Centre while distributing the powers and functions between the Centre and the States. This becomes obvious from even a cursory examination of the provisions of the Constitution. There was considerable argument at the Bar on the question whether our Constitution could be said to be 'Federal' in character.

14. In order to understand whether our Constitution is truly federal, it is essential to know the true concept of federalism. Dicey calls it a political contrivance for a body of States which desire Union but not unity. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a federal compact.

15. The oldest federal model in the modern world can be said to be the Constitution of the United States of America. The American Federation can be described as the outcome of the process of evolution, in that, the separate States first formed into a Confederation (1781) and then into a Federation (1789). Although the States may have their own Constitutions, the Federal Constitution is the suprema lex and is made binding on the States. That is because under the American Constitution, amendments to the Constitution are required to be ratified by three-fourths of the States. Besides under that Constitution there is a single legislative list enumerating the powers of the Union and, therefore, automatically the other subjects are left to the States. This is evident from the Tenth Amendment. Of course, the responsibility to protect the States against invasion is of the Federal Government. The States are, therefore, prohibited from entering into any treaty, alliance, etc., with any foreign power. The principle of dual sovereignty is carried in the judicial set-up as well since disputes under federal laws are to be adjudicated by federal courts, while those under State laws are to be adjudicated by State courts, subject of course to an appeal to the Supreme Court of the United States. The interpretation of the Constitution is by the United States Supreme Court.

16. We may now read some of the provisions of our Constitution. Article 1 of the Constitution says : "India, that is Bharat, shall be a Union of States." Article 2 empowers

Parliament to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Under Article 3, Parliament can by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increasing the area of any State; diminishing the area of any State; altering the boundaries of any State; or altering the name of any State. The proviso to that article requires that the Bill for the purpose shall not be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. On a conjoint reading of these articles, it becomes clear that Parliament has the right to form new States, alter the areas of existing States, or the name of any existing State. Thus the Constitution permits changes in the territorial limits of the States and does not guarantee their territorial integrity. Even names can be changed. Under Article 2 it is left to Parliament to determine the terms and conditions on which it may admit any area into the Union or establish new States. In doing so, it has not to seek the concurrence of the State whose area, boundary or name is likely to be affected by the proposal. All that the proviso to Article 3 requires is that in such cases the President shall refer the Bill to the Legislatures of the States concerned likely to be affected "to express their views". Once the views of the States are known, it is left to Parliament to decide on the proposed changes. Parliament can, therefore, without the concurrence of the State or States concerned change the boundaries of the State or increase or diminish its area or change its name. These provisions show that in the matter of constitution of States, Parliament is paramount. This scheme substantially differs from the federal set-up established in the United States of America. The American States were independent sovereign States and the territorial boundaries of those independent States cannot be touched by the Federal Government. It is these independent sovereign units which together decided to form into a federation unlike in India where the States were not independent sovereign units but they were formed by Article 1 of the Constitution and their areas and boundaries could, therefore, be altered, without their concurrence, by Parliament. It is well-known that since independence, new States have been created, boundaries of existing States have been altered, States have been renamed and individual States have been extinguished by parliamentary legislation.

17. Our Founding Fathers did not deem it wise to shake the basic structure of Government and in distributing the legislative functions they, by and large, followed the pattern of the Government of India Act, 1935. Some of the subjects of common interest were, however, transferred to the Union List, thereby enlarging the powers of the Union to enable speedy and planned economic development of the nation. The scheme for the distribution of powers between the Union and the States was largely maintained except that some of the subjects of common interest were transferred from the Provincial List to the Union List thereby strengthening the administrative control of the Union. It is in this context that this Court in ***State of W.B.*** **v.** ***Union of India*** [AIR 1963 SC 1241] observed:

> The exercise of powers, legislative and executive, in the allotted fields is hedged in by the numerous restrictions, so that the powers of the States are not co-ordinate with the Union and are not in many respects independent.

18. In ***Union of India* v. *H.S. Dhillon*** [(1971) 2 SCC 779] another feature in regard to the distribution of legislative power was pointed out, in that, under the Government of India Act, 1935, the residuary power was not given either to the Union Legislature or to the provincial legislatures, but under our Constitution, by virtue of Article 248, read with Entry 97 in List I of the VII Schedule, the residuary power has been conferred on the Union. This arrangement substantially differs from the scheme of distribution of powers in the United States of America where the residual powers are with the States.

19. The Preamble of our Constitution shows that the people of India had resolved to constitute India into a Sovereign Secular Democratic Republic and promised to secure to all its citizens Justice, Liberty and Equality and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. In the people of India, therefore, vests the legal sovereignty while the political sovereignty is distributed between the Union and the States. Article 73 extends the executive power of the Union to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The executive power which is made co-extensive with Parliament's power to make laws shall not, save as expressly provided by the Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State also has power to make laws. Article 162 stipulates that the executive power of a State shall extend to matters with respect to which the Legislature of the State has power to make laws provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. It may also be noticed that the executive power of every State must be so exercised as not to impede or prejudice the exercise of the executive power by the Union. The executive power of the Union also extends to giving such directions to a State as may appear to the Government of India to be necessary for those purposes and as to the construction, maintenance of means of communication declared to be of national or military importance and for protection of railways. The States have to depend largely on financial assistance from the Union. Under the scheme of Articles 268 to 273, States are in certain cases allowed to collect and retain duties imposed by the Union; in other cases taxes levied and collected by the Union are assigned to the States and in yet other cases taxes levied and collected by the Union are shared with States. Article 275 also provides for the giving of grants by the Union to certain States. There is, therefore, no doubt that States depend for financial assistance upon the Union since their power to raise resources is limited. As economic planning is a concurrent subject, every major project must receive the sanction of the Central Government for its financial assistance since discretionary power under Article 282 to make grants for public purposes is vested in the Union or a State, notwithstanding that the purpose is one in respect to which Parliament or State Legislature can make laws. It is only after a project is finally sanctioned by the Central Government that the State Government can execute the same which demonstrates the control that the Union can exercise even in regard to a matter on which the State can legislate. In addition to these controls Article 368 confers powers on Parliament to amend the Constitution, *albeit* by a specified majority. The power extends to amending matters pertaining to the executive as well as legislative powers

of the States if the amendments are ratified by the legislatures of not less than one-half of the States. This provision empowers Parliament to so amend the Constitution as to curtail the powers of the States. A strong Central Government may not find it difficult to secure the requisite majority as well as ratification by one-half of the legislatures if one goes by past experience. These limitations taken together indicate that the Constitution of India cannot be said to be truly federal in character as understood by lawyers in the United States of America.

20. In ***State of Rajasthan* v. *Union of India*** [AIR 1977 SC 1361], Beg, C.J., observed in as under:

> A conspectus of the provisions of our Constitution will indicate that, whatever appearance of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal.

Further, the learned Chief Justice proceeded to add:

> In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government.

Pointing out that national planning involves disbursement of vast amount of money collected as taxes from citizens spread over all the States and placed at the disposal of the Central Government for the benefit of the States, the learned Chief Justice proceeds to observe:

> If then our Constitution creates a Central Government which is 'amphibian', in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case, the question which we are driven back to consider is whether an assessment of the 'situation' in which the Union Government should move either on the federal or unitary plane are matters for the Union Government itself or for this Court to consider and determine.

When the Union Government issued a notification dated May 23, 1977 constituting a Commission of Inquiry in exercise of its power under Section 3 of the Commissions of Inquiry Act, 1952, to inquire into certain allegations made against the Chief Minister of the State, the State of Karnataka instituted a suit under Article 131 of the Constitution challenging the legality and validity of the notification as unjustifiable trespass upon the domain of State powers. While dealing with the issues arising in that suit [***State of Karnataka* v. *Union of India,*** AIR 1978 SC 68], Beg, C.J., once again examined the relevant provisions of the Constitution and the Commissions of Inquiry Act, 1952, and observed in (AIR) paragraph 33 as under:

> In our country, there is, at the top, a Central or the Union Government responsible to Parliament, and there are, below it, State Governments, responsible to the State Legislatures, each functioning within the sphere of its own powers which are divided into two categories, the exclusive and the concurrent. Within the exclusive sphere of

> the powers of the State Legislature is local government. And, in all States there is a system of local government in both urban and rural areas, functioning under State enactments. Thus, we can speak of a three tier system of Government in our country in which the Central or the Union Government comes at the apex.....

It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Governments in emergency situations, vide Articles 352 to 360 of the Constitution.

21. It is common knowledge that shortly after we constituted ourselves into a Republic, the Princely States gradually disappeared leading to the unification of India into a single polity with duality of governmental agencies for effective and efficient administration of the country under central direction and, if I may say so, supervision. The duality of governmental organs on the Central and State levels reflect demarcation of functions in a manner as would ensure the sovereignty and integrity of our country. The experience of partition of the country and its aftermath had taught lessons which were too fresh to be forgotten by our Constitution-makers. It was perhaps for that reason that our Founding Fathers thought that a strong Centre was essential to ward off separatist tendencies and consolidate the unity and integrity of the country.

22. A Division Bench of the Madras High Court in ***M. Karunanidhi* v. *Union of India*** [AIR 1977 Mad. 192], while dealing with the contention that the Constitution is a federal one and that the States are autonomous having definite powers and independent rights to govern, and the Central Government has no right to interfere in the governance of the State, observed as under:

> [T]here may be a federation of independent States, as it is in the case of United States of America. As the name itself denotes, it is a Union of States, either by treaty or by legislation by the concerned States. In those cases, the federating units gave certain powers to the federal Government and retained some. To apply the meaning to the word 'federation' or 'autonomy' used in the context of the American Constitution, to our Constitution will be totally misleading.

After tracing the history of the governance of the country under the British rule till the framing of our Constitution, the Court proceeded to add as follows:

> The feature of the Indian Constitution is the establishment of a Government for governing the entire country. In doing so, the Constitution prescribes the powers of the Central Government and the powers of the State Governments and the relations between the two. In a sense, if the word 'federation' can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and governance of the country. The powers of the Centre and States are demarcated under the Constitution. It is futile to suggest that

the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such State ever existed or acceded to the Union.

23. Under our Constitution the State as such has no inherent sovereign power or autonomous power which cannot be encroached upon by the Centre. The very fact that under our Constitution, Article 3, Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, etc., militates against the view that the States are sovereign or autonomous bodies having definite independent rights of governance. In fact, as pointed out earlier in certain circumstances the Central Government can issue directions to States and in emergency conditions assume far-reaching powers affecting the States as well, and the fact that the President has powers to take over the administration of States demolishes the theory of an independent or autonomous existence of a State. It must also be realised that unlike the Constitution of the United States of America which recognises dual citizenship [Section 1(1), 14th Amendment], the Constitution of India, Article 5, does not recognise the concept of dual citizenship. Under the American Constitution all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside whereas under Article 5 of the Indian Constitution at its commencement, every person domiciled in the territory of India and (*a*) who was born in the territory of India; or (*b*) either of whose parents was born in the territory of India; or (*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India. Article 9 makes it clear that if any person voluntarily acquires the citizenship of any foreign country, he will cease to be a citizen of India. These provisions clearly negative the concept of dual citizenship, a concept expressly recognised under the American Constitution. The concept of citizenship assumes some importance in a federation because in a country which recognises dual citizenship, the individual would owe allegiance both to the Federal Government as well as the State Government but a country recognising a single citizenship does not face complications arising from dual citizenship and by necessary implication negatives the concept of State sovereignty.

24. Thus the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VIIth Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set-up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution.

Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is

important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions.

P.B. SAWANT, J. (*on behalf of Kuldip Singh, J. and himself)* — 97. We may in this connection, refer to the principles of federalism and democracy which are embedded in our Constitution. Article 1 of the Constitution states that India shall be a Union of States. Thus the States are constitutionally recognised units and not mere convenient administrative divisions. Both the Union and the States have sprung from the provisions of the Constitution. The learned author, H.M. Seervai, in his commentary ***Constitutional Law of India*** (p. 166, 3rd Edn.) has summed up the federal nature of our Constitution by observing that the federal principle is dominant in our Constitution and the principle of federalism has not been watered down for the following reasons:

(*a*) It is no objection to our Constitution being federal that the States were not independent States before they became parts of a Federation. A federal situation existed, first, when the British Parliament adopted a federal solution in the G.I. Act, 1935, and secondly, when the Constituent Assembly adopted a federal solution in our Constitution;

(*b*) Parliament's power to alter the boundaries of States without their consent is a breach of the federal principle, but in fact it is not Parliament which has, on its own, altered the boundaries of States. By extra-constitutional agitation, the States have forced Parliament to alter the boundaries of States. In practice, therefore, the federal principle has not been violated;

(*c*) The allocation of the residuary power of legislation to Parliament (i.e. the Federation) is irrelevant for determining the federal nature of a Constitution. The U.S. and the Australian Constitutions do not confer the residuary power on the Federation but on the States, yet those Constitutions are indisputably federal;

(*d*) External sovereignty is not relevant to the federal nature of a Constitution, for such sovereignty must belong to the country as a whole. But the division of internal sovereignty by a distribution of legislative powers is an essential feature of federalism, and our Constitution possesses that feature. With limited exceptions, the Australian Constitution confers overlapping legislative powers on the States and the Commonwealth, whereas List II, Schedule VII of our Constitution confers exclusive powers of legislation on the States, thus emphasising the federal nature of our Constitution;

(*e*) The enactment in Article 352 of the emergency power arising from war or external aggression which threatens the security of India merely recognises *de jure* what happens *de facto* in great federal countries like the U.S., Canada and Australia in times of war, or imminent threat of war, because in war, these federal countries act as though they were unitary. The presence in our Constitution of exclusive legislative powers conferred on the States makes it reasonable to provide that during the emergency created by war or external aggression, the Union should have power to

legislate on topics exclusively assigned to the States and to take corresponding executive action. The Emergency Provisions, therefore, do not dilute the principle of Federalism, although the abuse of those provisions by continuing the emergency when the occasion which caused it had ceased to exist does detract from the principle of Federal Government. The amendments introduced in Article 352 by the 44th Amendment have, to a considerable extent, reduced the chances of such abuse. And by deleting the clauses which made the declaration and the continuance of emergency by the President conclusive, the 44th Amendment has provided opportunity for judicial review which, it is submitted, the courts should not lightly decline when as a matter of common knowledge, the emergency has ceased to exist. This deletion of the conclusive satisfaction of the President has been prompted not only by the abuse of the Proclamation of emergency arising out of war or external aggression, but, even more, by the wholly unjustified Proclamation of emergency issued in 1975 to protect the personal position of the Prime Minister;

(*f*) The power to proclaim an emergency originally on the ground of internal disturbance, but now only on the ground of armed rebellion, does not detract from the principle of federalism because such a power, as we have seen exists in indisputably federal constitutions. ***Deb Sadhan Roy* v. *State of W.B.*** [AIR 1972 SC 1924] has established that internal violence would ordinarily interfere with the powers of the federal Government to enforce its own laws and to take necessary executive action. Consequently, such interference can be put down with the total force of the United States, and the same position obtains in Australia;

(*g*) The provisions of Article 355 imposing a duty on the Union to protect a State against external aggression and internal disorder are not inconsistent with the federal principle. The war power belongs to the Union in all Federal Governments, and therefore the defence of a State against external aggression is essential in any Federal Government. As to internal disturbance, the position reached in ***Deb*** case shows that the absence of an application by the State does not materially affect the federal principle. Such application has lost its importance in the United States and in Australia;

(*h*) Since it is of the essence of the federal principle that both federal and State laws operate on the same individual, it must follow that in case of conflict of a valid federal law and a valid State law, the federal law must prevail and our Constitution so provides in Article 254, with an exception noted earlier which does not affect the present discussion;

(*i*) It follows from what is stated in (*g*) above, that federal laws must be implemented in the States and that the federal executive must have power to take appropriate executive action under federal laws in the State, including the enforcement of those laws. Whether this is done by setting up in each State a parallel federal machinery of law enforcement, or by using the existing State machinery, is a matter governed by practical expediency which does not affect the federal principle. In the United States, a defiance of Federal law can be, and, as we have seen, has been put down by the use of Armed Forces of the U.S. and the National Militia of the

States. This is not inconsistent with the federal principle in the United States. Our Constitution has adopted the method of empowering the Union Government to give directions to the States to give effect to the Union law and to prevent obstruction in the working of the Union law. Such a power, though different in form, is in substance the same as the power of the Federal Government in the U.S. to enforce its laws, if necessary by force. Therefore, the power to give directions to the State Governments does not violate the federal principle;

(*j*) Article 356 (read with Article 355) which provides for the failure of constitutional machinery was based on Article 4, Section 4 of the U.S. Constitution and Article 356, like Article 4, Section 4, is not inconsistent with the federal principle. As stated earlier, these provisions were meant to be the last resort, but have been gravely abused and can therefore be said to affect the working of the Constitution as a Federal Government. But the recent amendment of Article 356 by the 44th Amendment, and the submission to be made hereafter that the doctrine of the political question does not apply in India, show that the courts can now take a more active part in preventing a mala fide or improper exercise of the power to impose a President's rule, unfettered by the American doctrine of the political question;

(*k*) The view that unimportant matters were assigned to the States cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the States, which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent source of revenue of their own. The legislative entries relating to taxes in List II show that the sources of revenue available to the States are substantial and would increasingly become more substantial. In addition to the exclusive taxing powers of the States, the States become entitled either to appropriate taxes collected by the Union or to a share in the taxes collected by the Union.

98. In this connection, we may also refer to what Dr. Ambedkar had to say while answering the debate in the Constituent Assembly in the context of the very Articles 355, 356 and 357. The relevant portion of his speech has already been reproduced above. He has emphasised there that notwithstanding the fact that there are many provisions in the Constitution whereunder the Centre has been given powers to override the States, our Constitution is a federal Constitution. It means that the States are sovereign in the field which is left to them. They have a plenary authority to make any law for the peace, order and good Government of the State.

99. The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not destructive of the essential federal nature of our Constitution. The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule.

100. For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi-federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question that arises in the present context, viz., whether the powers under Article 356(1) can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the State concerned. So long as the States are not mere administrative units but in their own right constitutional potentates with the same paraphernalia as the Union, and with independent Legislature and the Executive constituted by the same process as the Union, whatever the bias in favour of the Centre, it cannot be argued that merely because (and assuming it is correct) the Constitution is labelled unitary or quasi-federal or a mixture of federal and unitary structure, the President has unrestricted power of issuing Proclamation under Article 356(1). If the Presidential powers under the said provision are subject to judicial review within the limits discussed above, those limitations will have to be applied strictly while scrutinising the concerned material.

K. RAMASWAMI, J. – 165**.** Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the Centre and the States which are the structural units operating on balancing wheel of concurrence and promises to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the people. Article 1 is a recognition of the history that Union of India's territorial limits are unalterable and the States are creatures of the Constitution and they are territorially alterable constituents with single citizenship of all the people by birth or residence with no right to cessation. Under Articles 2 and 4 the significant feature is that while the territorial integrity of India is fully ensured and maintained, there is a significant absence of the territorial integrity of the constituent States under Article 3. Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or part of States or uniting any territory to a part of any State or by increasing the area of any State or diminishing the area of any State, or alter the boundary of any State.

166. In ***Berubari Union and Exchange of Enclaves Reference under Article 143(1) of the Constitution of India, in re*** [AIR 1960 SC 845], Gajendragadkar, J. speaking for eight-judge Bench held that:

> Unlike other federations, the Federation embodied in the said Act was not the result of a pact or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty. The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the Indian Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the Indian States. In fact it is well-known that as a result of the

> States Reorganisation Act, 1956 (Act XXXVII of 1956), in the place of the original 27 States and one Area which were mentioned in Part D in the First Schedule to the Constitution, there are now only 14 States and 6 other Areas which constitute the Union Territory mentioned in the First Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution.

167. ***Union and States Relations under the Constitution*** (Tagore Law Lectures) by M.C. Setalvad at p. 10 stated that :

> (O)ne notable departure from the accepted ideas underlying a federation when the power in the Central Government to redraw the boundaries of States or even to destroy them.

168. The Constitution decentralises the governance of the States by a four tier administration i.e. Central Government, State Government, Union Territories, Municipalities and Panchayats. *See* the Constitution for Municipalities and Panchayats: Part IX (Panchayats) and Part IX-A (Municipalities) introduced through the Constitution 73rd Amendment Act, making the peoples' participation in the democratic process from grass-root level a reality. Participation of the people in governance of the State is *sine qua non* of functional democracy. Their surrender of rights to be governed is to have direct encounter in electoral process to choose their representatives for resolution of common problems and social welfare. Needless interference in self-governance is betrayal of their faith to fulfill self-governance and their democratic aspirations. The constitutional culture and political morality based on healthy conventions are the fruitful soil to nurture and for sustained growth of the federal institutions set down by the Constitution. In the context of the Indian Constitution federalism is not based on any agreement between federating units but one of integrated whole as pleaded with vision by Dr. B.R. Ambedkar on the floor of the Constituent Assembly at the very inception of the deliberations and the Constituent Assembly unanimously approved the resolution of federal structure. He poignantly projected the pitfalls flowing from the word "federation".

169. The federal State is a political convenience intended to reconcile national unity and integrity and power with maintenance of the State's right. The end aim of the essential character of the Indian federalism is to place the nation as a whole under control of a national Government, while the States are allowed to exercise their sovereign power within their legislative and coextensive executive and administrative sphere. The common interest is shared by the Centre and the local interests are controlled by the States. The distribution of the legislative and executive power within limits and coordinate authority of different organs are delineated in the organic law of the land, namely the Constitution itself. The essence of federalism, therefore, is distribution of the power of the State among its coordinate bodies. Each is organised and controlled by the Constitution. The division of power between the Union and the States is made in such a way that whatever has been the power distributed, legislative and executive, be exercised by the respective units making each a sovereign in its sphere and the rule of law requires that there should be a responsible Government. Thus the State is a federal status. The State qua the Centre has quasi-federal unit. In the language of Prof. K.C. Wheare in his ***Federal Government***, 1963 Edn. at page 12 to ascertain the federal character, the important point is, "whether the powers of the Government are divided between

coordinate independent authorities or not", and at page 33 he stated that "the systems of Government embody predominantly on division of powers between Centre and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Government federal?"

170. Salmond in his ***Jurisprudence*****,** 9th Edn. brought out the distinction between unitary type of Government and federal form of Government. According to him a unitary or a simple State is one which is not made up of territorial divisions which are States themselves. A composite State on the other hand is one which is itself an aggregate or group of constituent States. Such composite States can be called as imperial, federal or confederate. The Constitution of India itself provided the amendments to territorial limits from which we discern that the federal structure is not obliterated but regrouped with distribution of legislative powers and their scope as well as the coextensive executive and administrative powers of the Union and the States. Articles 245 to 255 of the Constitution deal with relative power of the Union and the State Legislature read with Schedule VII of the Constitution and the entries in List I preserved exclusively to Parliament to make law and List II confines solely to the State Legislature and List III Concurrent List in which both Parliament as well the State Legislature have concurrent jurisdiction to make law in the occupied field, with predominance to the law made by Parliament, by operation of proviso to clause (2) of Article 254. Article 248, gives residuary legislative powers exclusively to Parliament to make any law with respect to any matters not enumerated in the Concurrent List or the State List including making any law imposing a tax not mentioned in either of those lists. The relative importance of entries in the respective lists to the VIIth Schedule assigned to Parliament or a State Legislature are neither relevant nor decisive though contended by Shri K. Parasaran. Indian federalism is in contradistinction to the federalism prevalent in USA, Australia and Canada.

171. In regard to distribution of executive powers the Constitution itself made demarcation between the Union and the States. Article 73(1) read with proviso and Article 162 read with proviso bring out this demarcation. The executive power of the Union and the State are coextensive with their legislative powers. However, during the period of emergency Articles 352 and 250 envisage certain contingencies in which the executive power of the State concerned would be divested and taken over by the Union of India which would last up to a period of 6 months, after that emergency in that area is so lifted or ceased.

172. The administrative relations are regulated by Articles 256 and 258-A for effective working of the Union Executive without in any way impeding or impairing the exclusive and permissible jurisdiction of the State within the territory. Articles 268 and 269 enjoin the Union to render financial assistance to the States. The Constitution also made the Union to depend on the States to enforce the Union law within States concerned. The composition of Rajya Sabha as laid down by Article 80 makes the Legislature of the State to play its part including the one for ratifying the constitutional amendments made by Article 368. The election of the President through the elected representatives of the State Legislatures under Article 54 makes the legislatures of federal units an electoral college. The legislature of the State has exclusive power to make laws for such State or any part thereto with respect to any

of the matters enumerated in List II of the VIIth Schedule by operation of Article 246(3) of the Constitution.

173. The Union of India by operation of Articles 240 and 245, subject to the provisions of the Constitution, has power to make laws for the whole or any part of the territory of India and the said law does not eclipse, nor become invalid on the ground of extraterritorial operation. In the national interest it has power to make law in respect of entries mentioned in List II, State List, in the penal field, as indicated in Article 249. With the consent of the State, it has power to make law under Article 252. The Union Judiciary, the Supreme Court of India, has power to interpret the Constitution and decide the disputes between Union and the States and the States inter se. The law laid down by the Supreme Court is the law of the land under Article 141. The High Court has judicial power over territorial jurisdiction over the area over which it exercises power including control over lower judiciary. Article 261 provides full faith and credit to the proceedings or public acts or judicial proceedings of the Union and of the States throughout the territory of India as its fulcrum. Indian Judiciary is unitary in structure and operation. Articles 339, 344, 346, 347, 353, 358, 360, 365 and 371-C(2) give power to the Union to issue directions to the States. Under Article 339(2) the Union has power to issue directions relating to tribal welfare and the State is enjoined to implement the same. In an emergency arising out of war or aggression or armed rebellion, contemplated under Article 352 or emergency due to failure of the constitutional machinery in a State envisaged under Article 356, or emergency in the event of threat to the financial stability or credit of India, Article 360 gives dominant power to the Union. During the operation of emergency Article 19 of the Constitution would become inoperative and the Centre assumes the legislative power of a State unit. Existence of All India Services under Article 312 and establishment of inter-State councils under Article 263 and existence of financial relations in Part XII of the Constitution also indicates the scheme of distribution of the revenue and the primacy to the Union to play its role. Establishment of Finance Commission for recommendations to the President under Article 280 for the distribution of revenue between the Union and the States and allocation of the respective shares of such inter-State trade and commerce envisaged in Part XIII of the Constitution and primacy to the law made therein bring out, though strongly in favour of unitary character, but suggestively for balancing operational federal character between the Union and the States make the Constitution a quasi-federal.

174. As earlier stated, the organic federalism designed by the Founding Fathers is to suit the parliamentary form of Government to suit the Indian conditions with the objective of promoting mutuality and common purpose rendering social, economic and political justice, equality of status and opportunity; dignity of person to all its citizens transcending regional, religious, sectional or linguistic barriers as complimentary units in working the Constitution without confrontation. Institutional mechanism aimed to avoid friction to promote harmony, to set constitutional culture on firm foothold for successful functioning of the democratic institutions, to bring about matching political culture adjustment and distribution of the roles in the operational mechanism are necessary for national integration and transformation of stagnant social order into vibrant egalitarian social order with change and continuity economically, socially and culturally. In the ***State of W.B.* v. *Union of India***, this Court laid

emphasis that the basis of distribution of powers between Union and the States is that only those powers and authorities which are concerned with the regulation of local problems are vested in the State and those which tend to maintain the economic nature and commerce, unity of the nation are left with the Union. In ***Shamsher Singh* v. *Union of India*** [(1974) 2 SCC 831] this Court held that parliamentary system of quasi-federalism was accepted rejecting the substance of Presidential style of Executive. Dr. Ambedkar stated on the floor of the Constituent Assembly that the Constitution is, "both unitary as well as federal according to the requirement of time and circumstances". He also further stated that the Centre would work for common good and for general interest of the country as a whole while the States work for local interest. He also refuted the plea for exclusive autonomy of the States. It would thus appear that the overwhelming opinion of the Founding Fathers and the law of the land is to preserve the unity and territorial integrity of the nation and entrusted the common wheel (*sic* weal) to the Union insulating from future divisive forces or local zealots with disintegrating India. It neither leaned heavily in favour of wider powers in favour of the Union while maintaining to preserve the federal character of the States which are an integral part of the Union. The Constitution being permanent and not self-destructive, the Union of India is indestructible. The democratic form of Government should nurture and work within the constitutional parameters provided by the system of law and balancing wheel has been entrusted in the hands of the Union Judiciary to harmonise the conflicts and adopt constitutional construction to subserve the purpose envisioned by the Constitution.

B.P. JEEVAN REDDY, J. - 274. The expression "federation" or "federal form of Government" has no fixed meaning. It broadly indicates a division of powers between a Central (federal) Government and the units (States) comprised therein. No two federal constitutions are alike. Each of them, be it of USA, Canada, Australia or of any other country, has its own distinct character. Each of them is the culmination of certain historical process. So is our Constitution. It is, therefore, futile to try to ascertain and fit our Constitution into any particular mould. It must be understood in the light of our own historical process and the constitutional evolution. One thing is clear — it was not a case of independent States coming together to form a Federation as in the case of USA.

275. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the Founding Fathers wished to establish a strong Centre. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. In a land as varied as India is, a strong Centre is perhaps a necessity. This bias towards Centre is reflected in the distribution of legislative heads between the Centre and States. All the more important heads of legislation are placed in List I. Even among the legislative heads mentioned in List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain entries in List I to some or the other extent. Even in the Concurrent List (List III), the parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the Centre. By the 42nd Amendment, quite a few of the entries in List II were omitted and/or transferred to other lists. Above all, Article 3 empowers Parliament to form new States out of existing States either by

merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Re-organisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty-seven States and one area. Even the names of the States can be changed by Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the legislatures of the affected States. There is single citizenship, unlike USA. The judicial organ, one of the three organs of the State, is one and single for the entire country - again unlike USA, where you have the federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a Proclamation of emergency, Parliament can make laws with respect to any matter in List II (Article 250). Similarly, Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the States and the proponents of the States' autonomy. Several taxes are collected by the Centre and made over, either partly or fully, to the States. Suffice it to say that Centre has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the Centre including the one in Article 355 - the duty to protect every State against external aggression and internal disturbance. Indeed, this very article confers greater power upon the Centre in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power.

276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-a-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments - be it the result of advances in technological/scientific fields or otherwise, and that even in USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures "***Union and State Relations under the Indian Constitution***" (1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible - nor is it necessary - for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-a-vis the States

State of West Bengal v. *Union of India*

AIR 1963 SC 1241

[*Nature of the Indian Constitution – (a) Federal [(i) Compact or agreement between independent and sovereign Units to surrender partially their authority in favour of the Union; (ii) Supremacy of the Constitution; (iii) Distribution of Powers between the Union and the Units; and (iv) Supreme authority of the courts to interpret the Constitution], (b) Unitary, (c) Quasi-federal; Power of Union to acquire the property of States.*]

The State of West Bengal filed a suit under Article 131 of the Constitution against the Union of India for a declaration that Parliament was not competent to make law authorizing the Union of India to acquire any land or any right in or over land belonging to a state and therefore the Coal Bearing Areas (Acquisition and Development) Act, 1957 (the Act) enacted by the Parliament for the acquisition of coal bearing areas in the whole of the country was unconstitutional. Consequently, two notifications dated September 21, 1959 and January 8, 1960 issued by the Central Government taking over coal bearing areas lying within the State of West Bengal were also unconstitutional. The suit raised the question as to whether the states enjoyed sovereign authority under the Constitution.

On the basis of the pleadings, the following issues were decided in the suit:

(1) Whether Parliament had legislative competence to enact a law for compulsory acquisition by the Union of land and other properties vested in or owned by the State?

(2) Whether the State of West Bengal was a sovereign authority?

(3) Whether assuming that the State of West Bengal was a sovereign authority, Parliament was entiled to enact a law for compulsory acquisition of its lands and properties?

(4) Whether the Act or any of its provisions were ultra vires the legislative competence of Parliament?

(5) Whether the plaintiff was entitled to any relief and, if so, what relief?.

B.P. SINHA, C.J. - 8. The issues joined between the parties are mainly two, (*1*) whether on a true construction of the provisions of the Act; they apply to lands vested in or owned by the Plaintiff; and (*2*) If this is answered in the affirmative, whether there was legislative competence in Parliament to enact the impugned statute. The scope and effect of the Act is the most important question for determination, in the first instance, because the determination of that question will affect the ambit of the discussion on the second question. As already indicated, when the case was opened for the first time by the learned Advocate-General of Bengal, he proceeded on the basis that the Act purported to acquire the interests of the State, and made his further submission to the effect that Parliament had no competence to pass an Act which had the effect of affecting or acquiring the interests of the State. But later he also took up the alternative position that the Act, on its true construction, did not affect the interests or property of the State. The other States which have entered appearance, through their respective counsel, have supported this stand of the plaintiff and have laid particular emphasis on those provisions of the Act which, they contend support their contention that the Act did not intend to acquire or in any way affect the interests of the States.

10. With the acquisition of zamindari rights by the State Governments, the rights in minerals are now vested in all areas in the State Governments, and it is not appropriate to use

the Land Acquisition Act, 1894, for the acquisition of mineral rights particularly because the Central Government does not intend to acquire the proprietary rights vested in the States. There is no other existing Central or State Legislation under which the Government has powers to acquire immediately the lessee's rights over the coal bearing areas required by Government for the additional coal production. It is accordingly considered necessary to take powers by fresh legislation to acquire the lessees' rights over unworked coal-bearing areas on payment of reasonable compensation to the lessees, and without affecting the State Governments' rights as owner of the minerals or the royalty payable to the State Government on minerals.

12. The Bill provides for payment of reasonable compensation for the acquisition of the rights of prospecting licensees and mining lessees.

13. Besides setting out the policy of the State in the matter of coal mining industry and the actual state of affairs in relation thereto, the Statement of Objects and Reasons contains the crucial words on which particular reliance was placed on behalf of the States, "because the Central Government does not intend to acquire the proprietary rights vested in the States...." and, "without effecting the State Governments' rights as owners". It is however well-settled that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, cannot be used to determine the true meaning and effect of the substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. But we cannot use this statement as an aid to the construction of the enactment or to show that the legislature did not intend to acquire the proprietary rights vested in the State or in any way to affect the State Governments' rights as owners of minerals. A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute.

14. It was then contended that the preamble of the Act was the key to the understanding of the scope and provisions of the statute. The preamble is in these words:

> An act to establish in the economic interest of India greater public control over the coal mining industry and its development by providing for the acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land, for the extinguishment or modification of such rights accruing by virtue of any agreement, lease, licence or otherwise, and for matter connected therewith.

Particular stress was laid on the last two lines of the preamble, showing that only rights "accruing by virtue of any agreement, lease, licence or otherwise" were being sought to be extinguished or modified by the provisions of the Act. But this argument omits to take note of the words of the previous clause in the preamble which has reference to the fact that the Act also was meant for "acquisition by the State of unworked lands containing or likely to contain coal deposits." Before proceeding to deal with the main arguments, it is necessary to advert to a submission of the learned Advocate-General of Bengal that the reference to the "State" in the words acquisition by the State occurring in the preamble was a reference to the "States" as distinguished from the Union. This contention has only to be mentioned to be rejected as entire object and purpose of the impugned Act was to vest powers in the Union Government

to work coal mines and in that context the word "State" could obviously refer only to Union Government.

20. Starting with the position that on a true construction of the relevant provisions of the Act, the rights and interests of a State Government in coal bearing land had not been excluded from the operation of the Act, either in express terms or by necessary implication, the next question that arises for consideration is the first issue which covers Issues 3 and 4 also. The competence of Parliament to enact the Act has to be determined with reference to specific provisions of the Constitution, with particular reference to the entries in the Seventh Schedule - List I and List III.

21. By Entry 42 in List III of the Seventh Schedule to the Constitution read with Article 246(2) power to legislate in respect of acquisition and requisition of property is conferred upon the Parliament as well as the State legislatures. Prima facie, this power may be exercised by the Parliament in respect of all property, privately owned or State owned. But on behalf of the State of West Bengal and some of the intervening States it was submitted that the very nature of the right in property vested in the State for governmental purposes imposed a limitation upon the exercise of the power of the Union Parliament, affecting state owned property. On behalf of the State of Punjab - one of the intervening States - it was urged that if acquisition of property was necessarily incidental to the effective exercise of power by Parliament in respect of any of the entries in Lists I and III, the Parliament may legislate so as to affect title of the State to property vested in it provided it does not interfere with the legislative power of the State.

22. Diverse reasons were suggested at the Bar in support of the plea that the State property was not subject to the exercise of legislative powers of the Parliament. They may be grouped under the following heads:

(*1*) The Constitution having adopted the federal principle of government the States share the sovereignty of the nation with the Union; and therefore power of the Parliament does not extend to enacting legislation for depriving the States of property vested in them as sovereign authorities. Entrustment of power to legislate must therefore be so read as to imply a restriction upon the Parliament under Entry 42 of List III when it is sought to be exercised in respect of the property owned by a State.

(*2*) Property vested in the States by virtue of Article 294(1) cannot be diverted to Union purposes by compulsion of Parliamentary legislation.

(*3*) The Government of India Act, 1935 provided special machinery for acquisition of property of the State by negotiations, and not by compulsion in exercise of legislative power. That provision recognised that the Central legislature of the Government of India had no power to acquire property of the State by exercise of legislative power, and even though no provision similar to Section 127 of the Government of India Act, 1935 has been enacted in the Constitution, the recognition implicit in that provision of the immunity of the property of the units must also be deemed to be superimposed upon the exercise of legislative power vested in the Parliament under the Constitution.

(*4*) Absence of power expressly conferred such as is to be found in the Australian Constitution, to legislate for acquisition of the property of the States

indicates that it was not the intention of the Constitution makers to confer that power upon the Union Parliament, under the general legislative heads.

(5) If power be exercised by the Union to acquire State property under Entry 42 of the Concurrent List, similar power may also be exercised by the States in respect of Union property and even to re-acquire the property from the Union by exercise of the State's legislative power. The power under Entry 42 can therefore never be effectively exercised by the Parliament.

(*6*) It could not have been the intention of the Constitution makers to confer authority upon the Parliament to legislate for acquiring property of the States and thereby to make the right of the State to property owned by it even more precarious than the right which individuals or Corporations have under the Constitution to their property. Individuals and Corporations have the guarantee under Article 31(2) of the Constitution that acquisition of their property will be for public purposes and compensation will be awarded for acquiring property. Entry 42 must be read subject to Article 31, and inasmuch as Fundamental rights are conferred upon individuals and Corporations against executive or legislative actions, and States are not invested with any fundamental rights exercisable against the Union or other States, the right to legislate for compulsory acquisition of State property cannot be exercised.

(*7*) Unless a law expressly or by necessary implication so provides, a State is not bound thereby. This well recognised rule applies to the interpretation of the Constitution. Therefore in the absence of any provision express or necessarily implying that the property of the State could be acquired by the Union, the rights claimed by the Union to legislate for acquisition of State property must be negatived.

23. All these arguments, except the purely interpretational, are ultimately founded upon the plea that the States have within their allotted field full attributes of sovereignty and exercise of authority by the Union agencies, legislative or executive, which trenches upon that sovereignty is void.

24. ***Re.*** **(1):** Ever since the assumption of authority by the British Crown under Statute 21 & 22, Vict. (1858) Chapter 106, the administration of British India was unitary and highly centralized. The Governor-General was invested with autocratic powers to administer the entire territory. Even though the territory was divided into administrative units, the authority of the respective Governors of the provinces was derived from the Governor-General and the Governor-General was responsible to the British Parliament. There was, therefore, a chain of responsibility; the Provincial Governments were subject to the control of the Central Government and the Central Government to the Secretary of State. Some process of devolution took place under the Government of India Act, 1919, but that was only for the purpose of decentralization of the Governmental power; but on that account the Government did not cease to be unitary. The aim of the Government of India Act, 1935 was to unite the Provinces and Indian States into a federation, but that could be achieved only if a substantial number of the Indian States agreed to join the Provinces in the federation. For diverse reasons the Indian States never joined the proposed federation and the part dealing with federation, never became effective. The Central Government as it was originally constituted under the Government of India Act, 1919 with some modification continued to function. But in the

Provinces certain alterations were made: Certain departments were administered with the aid of Ministers, who were popularly elected, and who were in a sense responsible to the electorate. The Governor was still authorised to act in his discretion without consulting his Ministers in respect of certain matters. He derived his authority from the British Crown, and was subject to the directions which the Central Government gave to carry into execution Acts of the Central legislature in the Concurrent List and for the maintenance of means of communication, and in respect of all matters for preventing grave menace to the peace or tranquility of India or part thereof. The administration continued to function as an agent of the British Parliament.

25. By the Indian Independence Act, 1947 a separate dominion of India was carved out and by Section 6 thereof the legislature was for the first time authorised to make laws for the dominion. Such laws were not to be void or inoperative on the ground that they were repugnant to the laws of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the legislature of the dominion included the power to repeal or amend any such Act, order, rule or regulation. The British Parliament ceased to have responsibility as respects governance of the territories which were immediately before that date included in British India, and suzerainty of the Crown over the Indian States lapsed and with it all treaties and agreements in force on the date of the passing of the Act between the Crown and the rulers of Indian States. The bond of agency which bound the administration in India to function as agent of the British Parliament was dissolved, and the Indian Dominion to that extent became sovereign. Then came the Constitution. The territory was evidently too large for a democratic set-up with wholly centralised form of Government. Imposition of a centralised form might also have meant a reversal of political trends which had led to decentralisation of the administration and to distribution of power. The Constitution had, therefore, to be in a form in which authority was decentralised. In the era immediately prior to the enactment of the Indian Independence Act, there were partially autonomous units such as the Provinces. There were Indian States which were in a sense sovereign but their sovereignty was extinguished by the various merger agreements which the rulers of those States entered into with the Government of India before the Constitution. By virtue of the process of integration of the various States there emerged a Centralised form of administration in which the Governor-General was the fountain head of executive authority. The Constitution of India was erected on the foundations of the Government of India Act, 1935: the basic structure was not altered in many important matters, and a large number of provisions were incorporated verbatim from the earlier Constitution.

26. In some respects a greater degree of economic unity was sought to be secured by transferring subjects having impact on matters of common interest into the Union List. A comparison of the Lists in Schedule 7 to the Constitution with the Schedule 7 to the Government of India Act, 1935 discloses that the powers of the Union have been enlarged particularly in the field of economic unity, and this was done as it was felt that there should be centralised control and administration in certain fields if rapid economic and industrial progress had to be achieved by the nation. To illustrate this it is sufficient to refer to National Highways (Entry 24), inter-State Trade and Commerce (Entry 42) - to mention only a few

being transferred from list II of the Government of India Act to List I in the Constitution, to the new entry regarding inter-State rivers (Entry 56), to the new Entry 33 in the Concurrent List to which it is transferred from List II, and to the comprehensive provisions of Part XIII - which seek to make India a single economic unit for purposes of trade and commerce under the overall control of the Union Parliament and the Union executive. The result was a Constitution which was not true to any traditional pattern of federation. There is no warrant for the assumption that the Provinces were sovereign, autonomous units which had parted with such power as they considered reasonable or proper for enabling the Central Government to function for the common good. The legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country and the distribution of these powers - save those withheld from both the Union and the States by reason of the provisions of Part III - between the Union and the States.

> (*a*) A truly federal form of Government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of, the Union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement: Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union,
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> (*b*) Supremacy of the Constitution which cannot be altered except by the component units. Our Constitution is undoubtedly supreme, but it is liable to be altered by the Union Parliament alone and the units have no power to alter it.
>
> (*c*) Distribution of powers between the Union and the regional units each in its sphere coordinate and independent of the other. The basis of such distribution of power is that in matters of national importance in which a uniform policy is desirable in the interest of the units authority is entrusted to the Union, and matters of local concern remain with the States.
>
> (*d*) Supreme authority of the courts to interpret the Constitution and to invalidate action violative of the Constitution. A federal Constitution, by its very nature, consists of checks and balances and must contain provisions for resolving conflicts between the executive and legislative authority of the Union and the regional units.

In our Constitution characteristic (*d*) is to be found in full force (*a*) and (*b*) are absent. There is undoubtedly distribution of powers between the Union and the States in matters legislative and executive, but distribution of powers is not always an index of political sovereignty. The exercise of powers legislative and executive in the allotted fields is hedged in by numerous restrictions so that the powers of the States are not coordinate with the Union and are in many respects independent.

27. Legal sovereignty of the Indian nation is vested in the people of India who as stated by the preamble have solemnly resolved to constitute India into a Sovereign Democratic Republic for the objects specified therein. The Political sovereignty is distributed between the Union of India and the States with greater weightage in favour of the Union. Article 300

invests the Government of India and the States with the character of quasi-Corporations entitled to sue and liable to be sued in relation to their respective affairs by Article 299 contracts may be entered into by the Union and the States in exercise of their respective executive powers, and Article 298 authorises in exercise of their respective executive powers the Union and the States to carry on trade or business and to acquire, hold and dispose of property and to make contracts. These provisions and the entrustment of powers to legislate on certain matters exclusive, and concurrently in certain other matters, and entrustment of executive authority co-extensive with the legislative power form the foundation of the division of authority.

28. In India judicial power is exercised by a single set of courts, civil, criminal and Revenue whether they deal with disputes in respect of legislation which is either State legislation or Union legislation. The exercise of executive authority by the Union or by the State and rights and obligations arising out of the executive authority are subject to the jurisdiction of the courts which have territorial jurisdiction in respect of the cause of action. The High Courts have been invested with certain powers under Article 226 to issue writs addressed to any person or authority, including in appropriate cases any Government, for the enforcement of any of the rights conferred by Part II and for any other purpose and under Article 227 the High Court has superintendence over all courts in relation to which it exercises jurisdiction. The Supreme Court is at the apex of the hierarchy of courts, Civil, Criminal, Revenue, and of quasi-judicial Tribunals. There are in India not two sets of courts, Federal and State, as are found functioning under the Constitution of the United States of America. By Article 247 power is reserved to the Parliament by law to provide for establishment of courts for better administration of laws made by the Parliament or of any existing laws with regard to the matters enumerated in the Union List, but no such courts have been constituted.

29. Sovereignty in executive matters of the Union is declared by Article 73 which enacts that subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament may make laws, and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. But this executive power may not save as expressly provided in the Constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also power to make laws. By Article 77 all executive actions of the Government of India have to be expressed to be taken in the name of the President. Executive power of the State is vested by Article 154 in the Governor and is exercisable by him directly or through officers subordinate to him in accordance with the Constitution. The appointment of the Governor is made by the President and it is open to the President to make such provision as he thinks fit for the discharge of the function of a Governor of the State in any contingency not provided for in Chapter II of Part 6 By Article 162 subject to the provisions of the Constitution, executive power of the State extends to matters with respect to which the legislature of the State has power to make laws, subject to the restriction that in matters in the Concurrent List of the Seventh Schedule, exercise of executive power of the State is also subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities

thereof. Exercise of executive authority of the States is largely restricted by diverse Constitutional provisions. The executive power of every State has to be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and not to impede or prejudice the executive power of the Union. The executive power of the Union extends to the giving of such directions to a State as may appear to the Government of India to be necessary for those purposes and as to the construction and maintenance of means of communication declared to be of national or military importance and for protection of railways. The Parliament has power to declare highways or waterways to be of national importance, and the Union may execute those powers, and also construct and maintain means of communication as part of its function with respect to naval, military and air force works. The President may also, with the consent of the Government of a State, entrust to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends; Article 258(1). Again the Union Parliament may by law made in exercise of authority in respect of matters exclusively within its competence confer powers and duties or authorise the conferment of powers and imposition of duties upon the State, or officers or authorities thereof: Article 258(2). Article 365 authorises the President to hold that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution, if the State fails to comply with or give effect to any directions given in exercise of the executive power of the Union.

30. These are the restrictions on the exercise of the executive power by the States, in normal times; in times of emergency power to override the exercise of executive power of the state is entrusted to the Union. Again the field of exercise of legislative power being co-extensive with the exercise of the legislative power of the States, the restrictions imposed upon the legislative power also apply to the exercise of executive power.

31. Distribution of legislative powers is effected by Article 246. In respect of matters set out in List I of the Seventh Schedule Parliament has exclusive power to make laws: in respect of matters set out in List II the State has exclusive power to legislate and in respect of matters set out in List III Parliament and the State legislature have concurrent power to legislate. The residuary power, including the power to tax, by Article 248 and Item 97 of List I is vested in the Parliament. The basis of distribution of powers between the Union and States is that only those powers and authorities which are concerned with the regulation of local problems are vested in the States, and the residue especially those, which tend to maintain the economic, industrial and commercial unity of the nation are left with the Union. By Article 123 the President is invested with the power to promulgate Ordinances on matters on which the Parliament is competent to legislate, during recess of Parliament. Similarly under Article 213 power is conferred upon the Governor of a state, to promulgate Ordinances on matters on which the State legislature is competent to legislate during recess of the legislature. But upon the distribution of legislative powers thus made and entrustment of power to the State legislature, restrictions are imposed even in normal times, Article 249 authorises the Parliament to legislate with respect to any matter in the State List if the Council of States has declared by resolution supported by not less then two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution. By

Article 252 power is conferred upon Parliament to legislate for two or more States by consent even though the Parliament may have no power under Article 246 to make laws for the State except as provided in Articles 249 and 250. Such a law may be adopted by a legislature of any other State, By Article 253 Parliament has the power notwithstanding anything contained in Article 246 to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international, conference, association or other body. In case of inconsistency between the laws made by Parliament and laws made by the legislatures of the States, the laws made by the Parliament whether passed before or after the State law in matters enumerated in the Concurrent List to the extent of repugnancy prevail over the State laws. It is only a law made by the legislature of a State which had been reserved for the consideration of the President and has received his assent, on a matter relating to a Concurrent List containing any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, prevails in the State.

36. The normal corporate existence of States entitles them to enter into contracts and invests them with power to carry on trade or business and the States have the right to hold property. But having regard to certain basic features of the Constitution, the restrictions on the exercise of their powers executive and legislative and on the powers of taxation, and dependence for finances upon the Union Government it would not be correct to maintain that absolute sovereignty remains vested in the States. This is illustrated by certain striking features of our constitutional set-up. There is no dual citizenship in India: all citizens are citizens of India and not of the various States in which they are domiciled. There are no independent Constitutions of the States, apart from the national Constitution of the Union of India: Chapter II, Part VI from Articles 152 to 237 deals with the States, the powers of the legislatures of the States, the powers of the executive and judiciary. What appears to militate against the theory regarding the sovereignty of the States is the wide power with which the Parliament is invested to alter the boundaries of States, and even to extinguish the existence of a State. There is no constitutional guarantee against alteration of the boundaries of the States. By Article 2 of the Constitution the Parliament may admit into the Union or establish new States on such terms and conditions as it thinks fit, and by Article 3 the Parliament is by law authorised to form a new State by redistribution of the territory of a State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, increase the area of any State, diminish the area of any State, alter the boundaries of any State, and alter the name of any State. Legislation which so vitally affects the very existence of the States may be moved on the recommendation of the President which in practice means the recommendation of the Union Ministry, and if the proposal in the Bill affects the area, boundaries or name of any of the States, the President has to refer the Bill to the legislature of that State for merely *expressing its views thereon.* Parliament is therefore by law invested with authority to alter the boundaries of any State and to diminish its area so as even to destroy a state with all its powers and authority. That being the extent of the power of the Parliament it would be difficult to hold that the Parliament which is competent to destroy a State is on account of some assumption as to absolute sovereignty of the State incompetent effectively to acquire by legislation designed for that purpose the property owned by the State for governmental purpose.

37. The Parliamentary power of legislation to acquire property is, subject to the express provisions of the Constitution, unrestricted. To imply limitations on that power on the assumption of that degree of political sovereignty which makes the States coordinate with and independent of the union, is to envisage a Constitutional scheme which does not exist in law or in practice. On a review of the diverse provisions of the Constitution the inference is inevitable that the distribution of powers - both legislative and executive does not support the theory of full sovereignty in the States so as to render it immune from the exercise of legislative power of the Union Parliament particularly in relation to acquisition of property of the States. That the Parliament may in the ordinary course not seek to obstruct the normal exercise of the powers which the States have, both legislative and executive in the field allotted to them will not be a ground for holding that the Parliament has no such power if it desires, in exercise of the powers which we have summarised to do so. It was urged that to hold that property vested in the State could be acquired by the Union, would mean, as was picturesquely expressed by the learned Advocate-General of Bengal, that the Union could acquire and take possession of writer's buildings where the Secretariat of the State Government is functioning and thus stop all State Governmental activity. There could be no doubt that if the "Union did so, it would not be using but abusing its power of acquisition, but the fact that a power is capable of being abused has never been in law a reason for denying its existence for its existence has to be determined on very different considerations.

39. It is pertinent also to note that under several entries of List I it is open to the Union Parliament to legislate directly upon properties which are situate in the States including properties which are vested in the States, for instance, Railways (Entry 22), Highways declared by or under law made by Parliament to be national highways (Entry 23), Shipping and Navigation on inland waterways, declared by Parliament by law to be national waterways (Entry 24), Lighthouses including lightships etc. (Entry 26), Ports declared by or under law made by Parliament or existing law to be major ports (Entry 27), Airways, aircraft and air navigation, provision of aerodromes etc. (Entry 29), Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels (Entry 30), property of the Union and the revenue therefrom, but as regards property situated in a State subject to legislation by the State, save insofar as Parliament by law otherwise provides (Entry 32), Industries, the control which by the Union is declared by Parliament by law to be expedient in the public interest (Entry 52), Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products other liquids and substances declared by Parliament by law to be dangerously inflammable (Entry 53), Regulation of mines and, in mineral development (Entry 54). Regulation and development of inter-State rivers and river-valleys (Entry 56), Ancient and historical monuments and records and archaeological sites and remains declared to be of national importance (Entry 67). These are some of the matters in legislating upon which the Parliament may directly legislate in respect of property in the States. To deny to the Parliament while granting these extensive powers of legislative authority to legislate in respect of property situate in the State, and even of the State, would be to render the Constitutional machinery practically unworkable. It may be noticed that in the United States of America the authority of Congress to legislate on a majority of these matters was derived from the "Commerce clause". The commerce clause is not regarded as so exclusive as to preclude the exercise of State legislative authority in matters which are local,

in their nature or operation, or are mere aids to commerce …. Our Constitution recognises no such distinction between the operation of a State law in matters which are local, and which are inter State, If an enactment falls within the Union List, whether its operation is local or otherwise State legislation inconsistent therewith, will subject to Article 254(2) be struck down.

40. The question may be approached from another angle. Even under Constitutions which are truly federal and full sovereignty of the States is recognised in the residuary field both executive and legislative, power to utilise or as it is said "Condemn" property of the State for Union purposes is not denied.

41. The power to acquire land sought to be exercised by the Union, which is challenged by the State of West Bengal, is power to acquire in exercise of authority conferred by Sections 6, 7 and 9 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, The Act was enacted for establishing in the economic interest of India greater public control over the coal mining in industry and its development by providing for the acquisition by the State of land containing or likely to contain coal deposits or of rights in or over such land for the extinguishment or modification of such rights accruing by virtue of any agreement, lease, licence or otherwise, and for matters connected therewith. By Entries 52 and 54 of List I the Parliament is given power to legislate in respect of:

> (*52*) Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
> (*54*) Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

In exercise of powers under Entry 36 of the Government of India Act, 1935 which corresponds with Entry 52 of the Constitution the Central legislature enacted the Minerals & Mining (Regulation & Development) Act, 53 of 1948. By Section 2 of the Act it was declared that it was expedient in the public interest that the Central Government should take under its control the regulation of mines and oil fields and development of minerals in the extent specified in the Act. 'Mine' was defined under the Act as meaning any excavation for the purpose of searching for or obtaining minerals and includes an oil well. No mining lease could be given after the commencement of the Act, otherwise than is accordance with the rules made under the Act. By Section 13 the provisions of the Act were to be binding on the Government, whether in the right of the dominion or of State. By the declaration by Section 2 the minerals became immobilized. The Act is on the Statute Book, and the declaration, in the future application of the Act since the Constitution must also remain in force, as if it were made under entry 52 of the Constitution.

42. After the Constitution, the Industries (Development & Regulation) Act, 65 of 1951 was enacted by the Parliament. By Section 2 it was declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. In the Schedule item (3) "Coal, including Coke; and other 'derivatives' was included as one of such industries. The legislature then enacted the Mines & Minerals (Regulation & Development) Act 67 of l957. By Section 2 a declaration in terms similar to

the declaration in Act 53 of 1948 was made. The Act deals with all minerals except oil, and enacts certain amendments in Act 53 of 1948. There being a declaration in terms of Item 52 the Parliament acquired exclusive authority to legislate in respect of Coal industry set out in the schedule to Act 65 of 1951 and the State Government had no authority in that behalf.

46. Therefore the power of the Union to legislate in respect of property situate in the States even if the States are regarded *qua* the Union as Sovereign, remains unrestricted, and the State property is not immune from its operation. Exercising powers under the diverse entries which have been referred to earlier, the Union Parliament could legislate so as to trench upon the rights of the States in the property vested in them. If exclusion of a State property from the purview of Union legislation is regarded as implicit in those entries in List I, it would be difficult if not impossible for the Union Government to carry out its obligations in respect of matters of national importance. If the entries which we have referred to earlier are not subject to any such restriction as suggested, there would be no reason to suppose that Entry 42 of List III is subject to the limitation that the property which is referred to in that item is of individuals or corporations and not of the State. In its ultimate analysis the question is one of legislative competence. Is the power conferred by Entry 42 List III as accessory to the effectuation of the power under Entries 52 & 54 incapable of being exercised in respect of property of the States? No positive interdict against its exercise is perceptible in the Constitution: and the implication of such an interdict assumes a degree of sovereignty in the States of such plenitude as transcends the express legislative power of the Union. The Constitution which makes a division of legislative and executive powers between the Union and the States is not founded on such a postulate, and the concept of superiority of the Union over the States in the manifold aspects already examined negatives it.

47. ***Re.* (*2*).** By Article 294(*a*) all property and assets which immediately before the commencement of the Constitution were vested in the British Crown for the Dominion of India, became vested in the Union, and property vested for the purposes of the Government of the Provinces, became vested in the corresponding States. Under the Government of India Act all property for governmental purposes was vested in the British Crown, and by virtue of the Constitution that property became vested in the Union and the Provinces. By virtue of clause (*b*) the rights, liabilities and obligations of the Government of India and the Provinces, devolved upon the Union and the corresponding Provinces.

48. A considerable point was made of the fact that Article 294 had vested certain property in the State and it was submitted that subject to the right of the State by agreement to convey that property under Article 298, the Constitution intended that the State should continue to be the owner of that property and that this vesting must be held to negative the Union's right to acquire any property vested in the State without its consent. It was pointed out by the learned Attorney-General that so far as the plaintiff - the State of West Bengal was concerned it did not own the coal-bearing lands on the date of the Constitution and that it got title there to only after they vested in the State by virtue of the provisions of the Bengal Acquisition of Estates Act of 1954(Act 1 of 1954) and that the property thus acquired subsequently was not within the scope of Article 294. We have no doubt that this would be an answer to the claim of the plaintiff in this suit and particularly in the context of the challenge to the validity of the

notification now impugned but we do not desire to rest our decision on any such narrow ground.

49. The argument was that the Constitution intended and enacted that property allotted to or vested in a State under the provisions of Article 294 or 296 shall continue to belong to that State unless and until by virtue of the power conferred on the State by Article 298 it chose to part with it, and that without a Constitutional amendment of these Articles such property cannot be divested from the State. We consider that this submission proceeds on a misconception of the function of Articles 294 and 298 in the scheme of the Constitution. To start with, it has to be pointed out that when Article 298 confers on States the power to acquire or dispose of property, the reference is to the executive power of the State to acquire or dispose of property which would apply without distinction to property vested under Article 294 or under 296 by escheat or lapse or as *bona vacantia,* or property acquired otherwise. Besides, Article 298 is merely an enabling Article conferring on the State as owner of the property, the power of disposal. That cannot on any reasonable interpretation be construed as negativing the possibility of the State's title to property being lost by the operation of other provisions of the Constitution. Article 298 has therefore no relevance on the proper construction of Article 294.

50. Article 294 was modeled on Section 172 of the Government of India Act, 1935. Section 172 which effected this distribution ran:

> 172. (1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the Government of India shall as from that date (*a*) in the case of lands and buildings which are situate in a Province, vest in His Majesty for the purposes of the government of that Province unless they were then used, otherwise than under a tenancy agreement between the Governor-General in Council and the Government of that Province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used and are certified by the Governor-General in Council or, as the case may be. His Majesty's Representative to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of more advantageous disposal by sale or otherwise;...

Just like Section 172 being the forerunner of Article 294, Sections 174 and 175 are phrased in terms similar and correspond to Articles 296 and 298.

51. The right of the States to property which devolved upon them by Article 294(*a*) was therefore no different from the right they had in the after acquired property: the Constitution does not warrant a distinction between the property acquired at the inception of the Constitution, and in exercise of executive authority. Article 294 does not contain any prohibition against transfer of property of the State and if the property is capable of being transferred by the State it is capable of being compulsorily acquired.

58. ***Re.*** **(3)** Power to acquire land was vested under the Government of India Act, 1935 by Entry 9 in List II of the Seventh Schedule, exclusively in the Provinces. For any purpose connected with a matter in respect of which the Central legislature was competent to enact laws, the Central Executive could require the Province to acquire land, on behalf of and at the

expense of the Union. This however did not mean that incidental to the exercise of the right to legislate in respect of Railways, Ports, Lighthouses, power to affect the right of the citizens and corporations and of Provinces in land was not exercisable. As already observed, even under Constitutions where a larger slice of sovereignty remains effectively vested in the competent units such as the United States of America power to legislate vested in the Central or national subjects includes the power to legislate so as to extinguish rights in State property.

Under the Government of India Act, 1935 the Central Government could *require* the Province to *acquire* land on behalf of the Union if it was private land, and to *transfer* it to the Union if it was the State land. The Provincial Government had manifestly no option to refuse to comply with the direction. Provision for fixation of compensation did not affect the nature of the right which the Central Government could exercise.

59. In broad outline the governmental structure under the Constitution vis-a-vis the Union and the States is based on the relationship which existed between the Central Government and the Provinces under the Government of India Act, 1935, and that in this respect the Constitution has borrowed largely from the earlier constitutional document. But even with the Provinces being autonomous within the spheres allotted to them and these being a distribution of property and assets between the Central Government and the Provinces under Part III of Chapter VII in almost the same terms as is found in the corresponding Articles 294 and 298, it was not considered an infraction of the autonomy of the Provinces to vest such a power in the Central Government, for Section 127 of the Government of India. Act enacted:

> 127. The Federation may, if it deems it necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which the Federal legislature has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed to, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.

and thus property vested in a Province under Section 172 could be required to be transferred to the Central Government if it was needed for a central purpose.

60. It would therefore be manifest that the right of the centre to require the Province to part with property for the effective performance of central functions was not considered as detracting from provincial autonomy.

61. What however is of relevance is the presence of Section 127 in that enactment which empowered the Central Government to require the Provinces to part with property owned by them if the same was needed for the purposes of the Government of India. It was however suggested that the compulsory acquisition of provincial property by the Central Government was there specifically provided for, and that the absence of such a provision made all the difference. But this, in our opinion, proceeds on merely a superficial view of the matter. A closer examination of the scheme of distribution of legislative power in regard to compulsory acquisition of property under the Government of India Act discloses that though the power to compulsorily acquire property was exclusively vested in the Provinces, the Central Government could satisfy its requirements of property for Central purposes by utilising provincial machinery, and that it was in that context that a specific provision referring to the

Provinces having at the direction of the Central Government to transfer provincial property was needed. It is therefore difficult to appreciate the ground on which the existence of a provision in the Government of India Act for assessment of compensation for land which the Provinces were bound to transfer on being so required by the Central Government and the deletion of that provision in enacting the Constitution may affect the exercise of the power vested in the Union Parliament.

62. ***Re.(4):*** The Australian Constitution contains an express power authorising legislation by the Parliament of Australia for acquisition of State property. But the Constitutions of the United States of America and Canada contain no such express provision. The power of the Union Parliament to enact legislation affecting title of the constituent States to property vested in them, is on that account not excluded. If the other provisions of our Constitution in terms of sufficient amplitude confer power for enacting legislation for acquiring State property, authority to exercise that power cannot be defeated because the express power to acquire property, generally does not specifically and in terms refer to State property.

63. ***Re.(5):*** In the Constitution of India as originally enacted there was an elaborate division of powers by providing three entries relating to acquisition and requisition of property, List I Entry 33 "Acquisition or requisitioning property for purposes of the Union"; List II Entry 36 "Acquisition or requisitioning of property, except for the purpose of the Union, subject to the provisions of Entry 42 of List III"; List III Entry 42 "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given". By the Constitution (Seventh Amendment) Act, 1956 the three Entries were repealed, and a single Entry 42 in the Concurrent List "Acquisition and Requisition of property" was substituted.

69. The following findings will accordingly be recorded on the issues:

Issue 1 . . . in the affirmative.
2 . . . not such as to disentitle the Union Parliament to exercise its legislative power under Entry 42 List III.
3 . . . answer covered by answer on Issue 2.
4 . . . in the negative.
5 . . . in the negative.

Finding on additional issue, in the affirmative. The suit will therefore stand dismissed.

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Ram Jawaya Kapur v. *State of Punjab*

AIR 1955 SC 549

[*Theory of Separation of Power; Articles 73 and 162 of the Constitution of India; in the absence of law, the state cannot monopolise any trade or business to the total or partial exclusion of citizens under Article 19(6) of the Constitution.*]

Writ petition under Article 32 of the Constitution was filed by six persons who carried on the business of preparing, printing, publishing and selling text books for different classes in the schools of Punjab, particularly for the primary and middle classes, under the name and style "Uttar Chand Kapur & Sons". It was alleged that the Education Department of the Punjab Government pursuant to their "so-called policy of nationalisation of text books", issued a series of notifications since 1950 regarding the printing, publication and sale of these books which not only placed unwarranted restrictions upon the rights of the petitioners to carry on their business but also practically ousted them and other traders from the business altogether and this was a violation of their fundamental right under Article 19(1)(g). It was contended that the restrictions were being imposed without the authority of law and therefore not saved by clause (6) of Article 19.

B.K. MUKHERJEA, C.J. - 5. The contentions raised by Mr Pathak, who appeared in support of the petitioners, are of a three-fold character. It is contended in the first place that the executive Government of a State is wholly incompetent, without any legislative sanction, to engage in any trade or business activity and that the acts of the Government in carrying out their policy of establishing monopoly in the business of printing and publishing text books for school students is wholly without jurisdiction and illegal.

His second contention is, that assuming that the State could create a monopoly in its favour in respect of a particular trade or business, that could be done not by any executive act but by means of a proper legislation which should conform to the requirements of Article 19(6) of the Constitution. Lastly, it is argued that it was not open to the Government to deprive the petitioners of their interest in any business or undertaking which amounts to property without authority of law and without payment of compensation as is required under Article 31 of the Constitution.

6. The first point raised by Mr Pathak, in substance, amounts to this, that the Government has no power in law to carry on the business of printing or selling text books for the use of school students in competition with private agencies without the sanction of the legislature. It is not argued that the functions of a modern State like the police States of old are confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. What Mr Pathak says, however, is, that as our Constitution clearly recognises a division of governmental functions into three categories viz. the legislative, the judicial and the executive, the function of the executive cannot but be to execute the laws passed by the legislature or to supervise the enforcement of the same. The legislature must first enact a measure which the executive can then carry out. The learned counsel has, in support of this contention, placed considerable

reliance upon Articles 73 and 162 of our Constitution and also upon certain decided authorities of the Australian High Court to which we shall presently refer.

7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of Sections 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following, the same analogy as is provided in regard to the distribution of legislative powers between them.

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and he States on the other. They do not mean, as Mr Pathak seems to suggest, that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr Pathak's contention.

8. The Australian cases upon which reliance has been placed by the learned counsel do not, in our opinion, appear to be of much help either. In the first [***Commonwealth and the Central Wool Committee* v. *Colonial Combing, Spinning and Weaving Co Ltd.***, 31 CLR 421] of these cases, the executive Government of the Commonwealth, during the continuance of the war, entered into a number of agreements with a company which was engaged in the manufacture and sale of wool-tops. The agreements were of different types.

By one class of agreements, the Commonwealth Government gave consent to the sale of wool-tops by the company in return for a share of the profits of the transactions (called by the parties "a licence fee"). Another class provided that the business of manufacturing wool-tops should be carried on by the company as agents for the Commonwealth in consideration of the company receiving an annual sum from the Commonwealth. The rest of the agreements were a combination of these two varieties.

It was held by a Full Bench of the High Court that apart from any authority conferred by an Act of Parliament or by regulations thereunder, the executive Government of the Commonwealth had no power to make or ratify any of these agreements. The decision, it may be noticed, was based substantially upon the provision of Section 61 of the Australian Constitution which is worded as follows:

> The executive power of the Commonwealth is vested in the Queen and is exercised by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth.

In addition to this, the King could assign other functions and powers to the Governor-General under Section 2 but in this particular case no assignment of any additional powers was alleged or proved. The court held that the agreements were not directly authorised by Parliament or under the provisions of any statute and as they were not for the execution and maintenance of the Constitution they must be held to be void.

Isacs, J., in his judgment, dealt elaborately with the two types of agreements and held that the agreements, so far as they purported to bind the company to pay to the government money, as the price of consents, amounted to the imposition of a tax and were void without the authority of Parliament. The other kind of agreements which purported to bind the Government to pay to the company a remuneration for manufacturing wool-tops was held to be an appropriation of public revenue and being without legislative authority was also void.

9. It will be apparent that none of the principles indicated above could have any application to the circumstances of the present case. There is no provision in our Constitution corresponding to Section 61 of the Australian Act. The Government has not imposed anything like taxation or licence fee in the present case nor have we been told that the appropriation of public revenue involved in the so-called business in text books carried on by the Government has not been sanctioned by the legislature by proper Appropriation Acts.

10. The other case [***Attorney-General for Victoria* v. *Commonwealth,*** 52 CLR 533] is of an altogether different character and arose in the following way. The Commonwealth Government had established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and postal employees. In times of peace the operations of the factory included the supply of uniforms for other departments of the Commonwealth and for employees in various public utility services. The Governor-General deemed such peace time operations of the factory necessary for the efficient defence of the Commonwealth inasmuch as the maintenance intact of the trained complement of the factory would assist in meeting wartime demands.

A question arose as to whether operations of the factory for such purposes in peace-time were authorised by the Defence Act. The majority of the court answered the question in the affirmative. Starke, J. delivered a dissenting opinion upon which Mr Pathak mainly relied. The learned Judge laid stress on Section 61 of the Constitution Act according to which the executive power of the Commonwealth extended to the maintenance of the Constitution and of the laws of the Commonwealth and held that there was nothing in the Constitution or any law of the Commonwealth which enabled the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes.

The opinion, whether right or wrong, turns upon the particular facts of the case and upon the provision of Section 61 of the Australian Act and it cannot and does not throw any light on the question that requires decision in the present case.

11. A question very similar to that in the present case did arise for consideration before a Full Bench of the Allahabad High Court in ***Motilal* v. *Government of the State of Uttar Pradesh*** [AIR 1951 All. 257]. The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorising the State Government to do so. Different views were expressed by different Judges on this question.

Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the Chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law. The running of a transport business therefore was not per se outside the ambit of the executive authority of the State.

Sapru, J. held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly conferred by Article 298 of the Constitution. Mootham and Wanchoo, JJ., who delivered a common judgment, were also of the opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public.

Agarwala, J. dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwala, J. undoubtedly supports the contention of Mr Pathak but it appears to us to be too narrow and unsupportable.

12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have

already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws.

13. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modeled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.

The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

14. In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.

The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part".

The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

15. Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start a trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute.

What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the house or houses of legislature in respect of every financial year under Article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on

the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (Article 203).

After the grant is sanctioned, an appropriation bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the assembly (Article 204). As soon as the appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under Article 266(3) of the Constitution.

16. It may be, as Mr Pathak contends, that the appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under Article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

The expression "law" here obviously includes the appropriation Acts. It is true that the appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised.

Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the appropriation Acts would afford a complete answer.

17. Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.

18. In the present case it is not disputed that the entire expenses necessary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due appropriation Acts were passed.

For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under Article 298 of the Constitution. In these circumstances, we are unable to agree with Mr Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course.

19. These discussions however are to some extent academic and are not sufficient by themselves to dispose of the petitioners' case. As we have said already, the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution.

On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under Article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed. The material question for consideration therefore is: What fundamental rights of the petitioners, if any, have been violated by the notifications and acts of the executive Government of Punjab undertaken by them in furtherance of their policy of nationalisation of the text books for the school students?

20. The petitioners claim fundamental right under Article 19(1)(*g*) of the Constitution which guarantees, inter alia, to all persons the right to carry on any trade or business. The business which the petitioners have been carrying on is that of printing and publishing books for sale including text books used in the primary and middle classes of the schools in Punjab. Ordinarily it is for the school authorities to prescribe the text books that are to be used by the students and if these text books are available in the market the pupils can purchase them from any book-seller they like.

There is no fundamental right in the publishers that any of the books printed and published by them should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. With regard to the schools which are recognised by the Government the position of the publishers is still worse. The recognised schools receive aids of various kinds from the Government including grants for the maintenance of the institutions, for equipment, furniture, scholarships and other things and the pupils of the recognised schools are admitted to the school final examinations at lower rates of fees than those demanded from the students of non-recognised schools.

Under the school code, one of the main conditions upon which recognition is granted by Government is that the school authorities must use as text books only those which are prescribed or authorised by the Government.

So far therefore as the recognised schools are concerned - and we are concerned only with these schools in the present case the choice of text books rests entirely with the Government and it is for the Government to decide in which way the selection of these text books is to be made. The procedure hitherto followed was that the Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and after selection was made by the Government, the size, contents as well as the prices of the books were fixed and it was left to the publishers or authors to print and publish them and offer them for sale to the pupils. So long as this system was in vogue the only right which

publishers, like the petitioners had, was to offer their books for inspection and approval by the Government. They had no right to insist on any of their books being accepted as text books.

So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever.

On the one hand, therefore, there was nothing but a chance or prospect which the publishers had of having their books approved by the Government, on the other hand the Government had the undisputed right to adopt any method of selection they liked and if they ultimately decided that after approving the text books they would purchase the copyright in them from the authors and others provided the latter were willing to transfer the same to the Government on certain terms, we fail to see what right of the publishers to carry on their trade or business is affected by it.

Nobody is taking away the publishers' right to print and publish any books they like and to offer them for sale but if they have no right that their books should be approved as text books by the Government it is immaterial so far as they are concerned whether the Government approves of text books submitted by other persons who are willing to sell their copyrights in the books to them, or choose to engage authors for the purpose of preparing the text books which they take up on themselves to print and publish.

We are unable to appreciate the argument of Mr Pathak that the Government while exercising their undoubted right of approval cannot attach to it a condition which has no bearing on the purpose for which the approval is made. We fail to see how the petitioners' position is in any way improved thereby. The action of the Government may be good or bad. It may be criticised and condemned in the houses of the legislature or outside but this does not amount to an infraction of the fundamental right guaranteed by Article 19(1)(*g*) of the Constitution.

21. As in our view the petitioners have no fundamental right in the present case which can be said to have been infringed by the action of the Government, the petition is bound to fail on that ground. This being the position, the other two points raised by Mr Pathak do not require consideration at all. As the petitioners have no fundamental right under Article 19(1)(*g*) of the Constitution, the question whether the Government could establish a monopoly without any legislation under Article 19(6) of the Constitution is altogether immaterial.

Again a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of Article 31(2) of the Constitution and no question of payment of compensation can arise because the petitioners have been deprived of the same. The result is that the petition is dismissed.

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THE UNION AND ITS TERRITORY

In Re Berubari Union and Exchange of Enclaves

AIR 1960 SC 845

[*Power to cede away Indian territory in favour of a foreign country – whether permissible; Procedure*]

With a view to removing causes of tension between India and Pakistan on account of boundary dispute, the Prime Ministers of both the countries entered into an agreement (known as the Indo-Pakistan agreement) settling the boundary dispute. Subsequently, a doubt arose as to 'whether the implementation of the Agreement relating to Berubari Union required any legislative action either by way of a suitable law of Parliament relatable to Article 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of Article 368 of the Constitution or both and that a similar doubt has arisen about the implementation of the Agreement relating to the exchange of Enclaves'. The President of India, in exercise of the powers under Article 143(1) of the Constitution, referred three questions to the Supreme Court for its advice:

(*1*) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union?

(*2*) If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative?

(*3*) Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?

The Court was concerned with two items of the agreement; Item 3 in para 2 of the agreement:

"(*3*) Berubari Union 12:

This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The Division of Berubari Union 12 will be horizontal, starting from the north east corner of Debiganj Thana. The division should be made in such a manner that the Cooch-Behar Enclaves between Pachagar Thana of East Pakistan and Berubari Union 12 of Jalpaiguri Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch-Behar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan."

and Item 10 of the Agreement:

"(*10*) Exchange of old Cooch-Behar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to".

P.B. GAJENDRAGADKAR, J. – 4. On February 20, 947, the British Government announced its intention to transfer power in British India to Indian hands by June 1948. On 3-6-1947, the said Government issued a statement as to the method by which the transfer of power would be effected. On July 18, 1947, the British Parliament passed the Indian Independence Act, 1947. This Act was to come into force from August 15,1947, which was

the appointed day. As from the appointed day two independent Dominions, it was declared, would be set up in India to be known respectively as India and Pakistan. Section 2 of the Act provided that subject to the provisions of sub-sections (3) and (4) of Section 2 the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India except the territories which under sub-section (2) of Section 2 were to be the territories of Pakistan. Section 3, sub-section (1), provided, inter alia, that as from the appointed day the Province of Bengal as constituted under the Government of India Act, 1935, shall cease to exist and there shall be constituted in lieu thereof two new Provinces to be known respectively as East Bengal and West Bengal. Sub-section (3) of Section 3 provided, inter alia, that the boundaries of the new Provinces aforesaid shall be such as may be determined whether before or after the appointed day by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until boundaries are so determined, (*a*) the Bengal District specified in the First Schedule of this Act ... shall be treated as the territories which are to be comprised as the new Province of East Bengal; (*b*) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall be treated as the territories which are to be comprised in the new Province of West Bengal. Section 3, sub-s. (4), provided that the expression "award" means, in relation to a boundary commission, the decision of the Chairman of the commission contained in his report to the Governor-General at the conclusion of the commission's proceedings. The Province of West Bengal is now known as the State of West Bengal and is a part of India, whereas the Province of East Bengal has become a part of Pakistan and is now known as East Pakistan.

5. Berubari Union 12, with which we are concerned, has an area of 8.75 sq. miles and a population of ten to twelve thousand residents. It is situated in the Police Station Jalpaiguri in the District of Jalpaiguri, which was at the relevant time a part of Rajashahi Division. It has, however, not been specified in the First Schedule of the Independence Act, and if the matter had to be considered in the light of the said Schedule, it would be a part of West Bengal. But, as we shall presently point out, the First Schedule to the Independence Act did not really come into operation at all.

6. On June 30, 947, the Governor-General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a boundary commission was appointed, inter alia, for Bengal consisting of four judges of High Courts and a Chairman to be appointed later. Sir Cyril Radcliffe was subsequently appointed as Chairman. So far as Bengal was concerned the material terms of reference provided that the boundary commission should demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of muslims and non-muslims; in doing so it had also to take into account other factors. The Commission then held its enquiry and made an award on 12-8-1947, which is known as the Radcliffe Award (hereinafter called "the award"). It would be noticed that this award was made three days before the appointed day under the Independence Act. The report shows that the Chairman framed seven basic questions on the decision of which the demarcation of a boundary line between East-West Bengal depended. Question 6 is relevant for our purpose; it was framed in this way:

> 6. Which State's claim ought to prevail in respect of the districts of Darjeeling and Jalpaiguri in which the muslim population amounted to 2.42% of the whole in the case of Darjeeling and 23.08% of the whole in the case of Jalpaiguri but which constituted an area not in any natural sense contiguous to another non-muslim area of Bengal?

It appears that the members of the Commission were unable to arrive at an agreed view on any of the major issues, and the Chairman had no alternative but to proceed to give his own decision. Accordingly the Chairman gave his decision on the relevant issues in these words:

> The demarcation of the boundary line is described in detail in the Schedule which forms annexure A to the award and in the map attached thereto, annexure B. The map is annexed for the purposes of illustration, and if there should be any divergence between the boundary as described in annexure A and as delineated on the map in annexure B the description in annexure A is to prevail.

Para 1 in annexure A is material. It provided that "a line shall be drawn along the boundary between the Thana of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the Province of Bihar and then along the boundary between the Thanas of Tetulia and Rajganj, the Thanas of Pachagar and Rajganj and the Thanas of Pachagar and Jalpaiguri, and shall then continue along with northern corner of Thana of Debiganj to the boundary of the State of Cooch-Behar. The district of Darjeeling and so much of the district of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall belong to East Bengal". Since the award came into operation three days before the day appointed under the Independence Act the territorial extent of the Province of West Bengal never came to be determined under Schedule I to the said Independence Act but was determined by the award. There is no dispute that since the date of the award Berubari Union 12 has in fact formed part of the State of West Bengal and has been governed as such.

7. Meanwhile the Constituent Assembly which began its deliberations on 9-12-1946, reassembled as the Sovereign Constituent Assembly for India after midnight of 14-8-1947, and it began its historic task of drafting the Constitution for India. A Drafting Committee was appointed by the Constituent Assembly and the draft prepared by it was presented to the Assembly on 4-11-1948. After due deliberations the draft passed through three readings and as finalised it was signed by the President of the Assembly and declared as passed on 26-11-1949. On that date it became the Constitution of India; but, as provided by Article 394, only specified articles came into force as from that date and the remaining provisions as from January 26,1950, which day is referred to in the Constitution as the commencement of the Constitution…. West Bengal was shown as one of the States in Part A; and it was provided that the territory of the State of West Bengal shall comprise the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. In the light of the award Berubari Union 12 was treated as a part of the Province of West Bengal and as such has been treated governed on that basis.

8. Subsequently, certain boundary disputes arose between India and Pakistan and it was agreed between them at the Inter-Dominion Conference held in New Delhi on 14-12-1948, that a tribunal should be set up without delay and in any case not later than 31-1-1949, for the

adjudication and final decision of the said disputes. This Tribunal is known as Indo-Pakistan Boundaries Disputes Tribunal, and it was presided over by the Hon'ble Lord Justice Algot Bagge. This Tribunal had to consider two categories of disputes in regard to East-West Bengal but on this occasion no issue was raised about the Berubari Union. In fact no reference was made to the District of Jalpaiguri at all in the proceedings before the Tribunal. The Bagge Award was made on 26-1-1950.

9. It was two years later that the question of Berubari Union was raised by the Government of Pakistan for the first time in 1952. During the whole of this period the Berubari Union continued to be in the possession of the Indian Union and was governed as a part of West Bengal. In 1952 Pakistan alleged that under the award Berubari Union should really have formed part of East Bengal and it had been wrongly treated as a part of West Bengal. Apparently correspondence took place between the Prime Ministers of India and Pakistan on this subject from time to time and the dispute remained alive until 1958. It was under these circumstances that the present Agreement was reached between the two Prime Ministers on 10-9-1958. That is the background of the present dispute in regard to Berubari Union 12.

10. At this stage we may also refer briefly to the background of events which ultimately led to the proposed exchange of Cooch-Behar Enclaves between India and Pakistan. Section 290 of the Government of India Act, 1935 had provided that His Majesty may by Order-in-Council increase or diminish the area of any Province or alter the boundary of any Province provided the procedure prescribed was observed. It is common ground that the Government of India was authorised by the Extra-Provincial Jurisdiction Act of 1947 to exercise necessary powers in that behalf. Subsequently on 12-1-1949, the Government of India Act, 1935 was amended and Section 290-A and Section 290-B were added to it. Section 290-A reads thus:

> 290-A. ***Administration of certain Acceding States as a Chief Commissioner's Province or as part of a Governor's or Chief Commissioner's Province***. — (1) Where full and exclusive authority, jurisdiction and powers for and in relation to governance of any Indian State or any group of such States are for the time being exercisable by the Dominion Government, the Governor-General may by order direct—
>
> (*a*) that the State or the group of States shall be administered in all respects as if the State or the group of States were a Chief Commissioner's Province; or
>
> (*b*) that the State or the group of States shall be administered in all respects as if the State or the group of States formed part of a Governor's or a Chief Commissioner's Province specified in the Order;

11. Section 290-B(1) provides that the Governor-General may by order direct for the administration of areas included within the Governor's Province or a Chief Commissioner's Province by an Acceding State, and it prescribes that the acceding area shall be administered in all respects by a neighbouring acceding State as if such area formed part of such State, and thereupon the provisions of the Government of India Act shall apply accordingly.

12. After these two sections were thus added several steps were taken by the Government of India for the merger of Indian States with the Union of India. With that object the States Merger (Governors' Provinces) Order, 1949, was passed on 27-7-1949. The effect of this order was that the States which had merged with the Provinces were to be administered in

Enclaves in all respects as if they formed part of the absorbing Provinces. This order was amended from time to time. On 28-8-1949, an agreement of merger was entered into between the Government of India and the Ruler of the State of Cooch-Behar and in pursuance of this agreement the Government of India took over the administration of Cooch-Behar on 12-9-1949; Cooch-Behar thus became apart of the territory of India and was accordingly included in the list of Part C States as Serial No. 4 in the First Schedule to the Constitution. Thereafter, on December 31, 1949, the States Merger (West Bengal) Order, 1949 was passed. It provided that whereas full and exclusive authority, jurisdiction and power for and in relation to the governance of the Indian State of Cooch-Behar were exercisable by the Dominion Government, it was expedient to provide by the order made under Section 290-A for the administration of the said State in all respects as if it formed part of the Province of West Bengal. In consequence, on 1-1-1950 the erstwhile State of Cooch-Behar was merged with West Bengal and began to be governed as if it was part of West Bengal. As a result of this merger Cooch-Behar was taken out of the list of Part C States in the First Schedule to the Constitution and added to West Bengal in the same Schedule, and the territorial description of West Bengal as prescribed in the First Schedule was amended by the addition of the clause which referred to the territories which were being administered as if they formed part of that Province. In other words, after the merger of Cooch-Behar the territories of West Bengal included those which immediately before the commencement of the Constitution were comprised in the Province of West Bengal as well as those which were being administered as if they formed part of that Province. Subsequently a further addition has been made to the territories of West Bengal by the inclusion of Chandernagore but it is not necessary to refer to the said addition at this stage.

13. It appears that certain areas which formed part of the territories of the former Indian State of Cooch-Behar and which had subsequently become a part of the territories of India and then of West Bengal became after the partition enclaves in Pakistan. Similarly certain Pakistan enclaves were found in India. The problem arising from the existence of these enclaves in Pakistan and in India along with other border problems was being considered by the Governments of India and of Pakistan for a long time. The existence of these enclaves of India in Pakistan and of Pakistan in India worked as a constant source of tension and conflict between the two countries. With a view to removing these causes of tension and conflict the two Prime Ministers decided to solve the problem of the said enclaves and establish peaceful conditions along the said areas. It is with this object that the exchange of enclaves was agreed upon by them and the said adjustment is described in Item 10 of para 3 of the Agreement. That in brief is the historical and constitutional background of the exchange of enclaves.

14. On behalf of the Union of India the learned Attorney-General has contended that no legislative action is necessary for the implementation of the Agreement relating to Berubari Union as well as the exchange of enclaves. In regard to the Berubari Union he argues that what the Agreement has purported to do is to ascertain or to delineate the exact boundary about which a dispute existed between the two countries by reason of different interpretations put by them on the relevant description contained in the award; the said Agreement is merely the recognition or ascertainment of the boundary which had already been fixed and in no sense is it a substitution of a new boundary or the alteration of the boundary implying any

alteration of the territorial limits of India. He emphasises that the ascertainment or the settlement of the boundary in the light of the award by which both Governments were bound, is not an alienation or cession of the territory of India, and according to him, if, as a result of the ascertainment of the true boundary in the light of the award, possession of some land has had to be yielded to Pakistan it does not amount to cession of territory; it is merely a mode of settling the boundary. The award had already settled the boundary; but since a dispute arose between the two Governments in respect of the location of the said boundary the dispute was resolved in the light of the directions given by the award and in the light of the maps attached to it. Where a dispute about a boundary thus arises between two States and it is resolved in the light of an award binding on them the agreement which embodies the settlement of such a dispute must be treated as no more than the ascertainment of the real boundary between them and it cannot be treated as cession or alienation of territory by one in favour of the other. According to this argument there was neither real alteration of the boundary nor real diminution of territory, and there would be no occasion to make any alteration or change in the description of the territories of West Bengal in the First Schedule to the Constitution.

15. It is also faintly suggested by the learned Attorney-General that the exchange of Cooch-Behar Enclaves is a part of the general and broader agreement about the Berubari Union and in fact it is incidental to it. Therefore, viewed in the said context, even this exchange cannot be said to involve cession of any territory.

16. On this assumption the learned Attorney-General has further contended that the settlement and recognition of the true boundary can be effected by executive action alone, and so the Agreement which has been reached between the two Prime Ministers can be implemented without any legislative action. In support of this argument the learned Attorney-General has relied upon certain provisions of the Constitution and we may at this stage briefly refer to them.

17. Entry 14 in List 1 of the Seventh Schedule reads thus: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." Article 253 occurs in Part XI which deals with relations between the Union and the States. It provides that "notwithstanding anything in the foregoing provisions of the said Chapter Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body". This power is conferred on Parliament by reference to Entry 14. Besides there are three other articles in the same part which are relevant. Article 245(1) empowers Parliament to make laws for the whole or any part of the territory of India; Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation; Article 246 prescribes the subject-matter of laws which Parliament can make; and Article 248 provides for the residuary powers of legislation in Parliament. Article 248 lays down that Parliament has power to make any law with respect to any matter not enumerated in the Concurrent List or State List. There is thus no doubt about the legislative competence of Parliament to legislate about any treaty, agreement or convention with any other country and to give effect to such agreement or convention.

18. It is, however, urged that in regard to the making of treaties and implementing them the executive powers of the Central Government are co-extensive and co-incidental with the powers of Parliament itself. This argument is sought to be based on the provisions of certain articles to which reference may be made. Article 53(1) provides that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 73 on which strong reliance is placed prescribes the extent of the executive power of the Union. Article 73(1) says "that subject to the provisions of this Constitution the executive power of the Union shall extend (*a*) to the matters with respect to which Parliament has power to make laws; and (*b*) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement provided that the executive power referred to in sub-clause (*a*) shall not save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also the power to make laws"; and Article 74 provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions; and Article 74(2) lays down that the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired into in any court. According to the learned Attorney-General the powers conferred on the Union executive under Article 73(l)(*a*) have reference to the powers exercisable by reference to Entry 14, List I, in the Seventh Schedule, whereas the powers conferred by Article 73(l)(*b*) are analogous to the powers conferred on the Parliament by Article 253 of the Constitution. Indeed the learned Attorney-General contended that this position is concluded by a decision of this Court in ***Rai Sahib Ram Jawaya Kapur* v. *State of Punjab*** [AIR 1955 SC549]. Dealing with the question about the limits within which the executive Government can function under the Indian Constitution Chief Justice Mukherjea, who delivered the unanimous decision of the Court, has observed that "the said limits can be ascertained without much difficulty by reference to the form of executive which our Constitution has set up", and has added, "that the executive function comprised both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State". It is on this observation that the learned Attorney-General has founded his argument.

19. Let us then first consider what the agreement in fact has done. Has it really purported to determine the boundaries in the light of the award, or has it sought to settle the dispute amicably on an ad hoc basis by dividing the disputed territory half and half? Reading the relevant portion of the agreement it is difficult to escape the conclusion that the parties to it came to the conclusion that the most expedient and reasonable way to resolve the dispute would be to divide the area in question half and half. There is no trace in the Agreement of any attempt to interpret the award or to determine what the award really meant. The agreement begins with the statement the decision that the area in dispute will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. In other words, the agreement says that, though the whole of the area of Berubari Union 12 was within India, India was prepared to give half of it to Pakistan in a spirit of give and take in order to ensure friendly relations between the parties and remove causes of tension between

them. Having come to this decision the Agreement describes how the decision has to be carried out. It provides that the division of the area will be horizontal starting from the north-east corner of Debiganj Thana. It also provides that the division should be made in such manner that the Cooch-Behar Enclaves between Pachagar Thana of East Pakistan and Berubari Union 12 of Jalpaiguri Thana of West Bengal will remain with India. This again is a provision for carrying out the decision of dividing the area half and half. Yet, another provision is made as to the division of Cooch-Behar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union 12 and it is provided that they shall be exchanged along with the general exchange of enclaves and will go to Pakistan. In our opinion, every one of the clauses in this Agreement clearly and unambiguously shows that, apart from, and independently of, the award, it was agreed to divide the area half and half and the method of effecting this division was specifically indicated by making four material provisions in that behalf. If that be so, it is difficult to accept the argument that this part of the Agreement amounts to no more than ascertainment and delineation of the boundaries in the light of the award.

20. It is no doubt suggested by the learned Attorney-General that an examination of the description in Annexure A in the Schedule to the award in relation to police station boundaries revealed a lacuna in it, inasmuch as there was no mention in it of the boundary between Police Station Boda and Police Station Jalpaiguri; and the argument is that the result of this description was that the two points were specified, one western boundary of the Berubari Union (the extremity of the boundary between the Thanas of Pachagar and Jalpaiguri) and the other on its eastern boundary (the northern corner of the Thana of Debiganj where it meets Cooch-Behar State) without giving an indication as to how these boundaries were to be connected. It is also pointed out that the line as drawn in the map, Annexure B, in the Schedule to the award would, if followed independently of the description given in Schedule A in the annexure to the said award, mean that almost the whole of the Berubari Union would have fallen in the territory of East Bengal and that was the claim made by the Government of Pakistan, and it is that claim which was settled in the light of the award.

21. In this connection it is relevant to remember the direction specifically given by the Chairman in his award that the map is annexed for the purpose of illustration and that in case of any divergence between the map, Annexure B, and the boundary as described in Annexure A, the description in Annexure A has to prevail, and so no claim could reasonably or validly be made for the inclusion of almost the whole of Berubari Union in East Bengal on the strength of the line drawn in the map. Besides, the lacuna to which the learned Attorney-General refers could have been cured by taking into account the general method adopted by the award in fixing the boundaries. Para 3 in Annexure A shows that the line which was fixed by the award generally proceeded along the boundaries between the Thanas, and this general outline of the award would have assisted the decision of the dispute if it was intended to resolve the dispute in the light of the award. The line which was directed to be drawn in para 1 of Annexure A has "to continue" along the northern corner of Thana Debiganj to the boundary of the State of Cooch-Behar, and this in the context may suggest that it had to continue by reference to the boundaries of the respective Thanas. It is principally because of

these considerations that the territory in question was in the possession of India for some years after the date of the award and no dispute was raised until 1952.

22. We have referred to these facts in order to emphasize that the agreement does not appear to have been reached after taking into account these facts and is not based on any conclusions based on the interpretation of the award and its effect. In fact the second clause of the agreement which directs that the division of Berubari Union 12 will be horizontal starting from the north-east corner of Debiganj Thana is not very happily worded. The use of the word "horizontal" appears to be slightly inappropriate; but, apart from it, the direction as to this horizontal method of division as well as the other directions contained in the agreement flow from the conclusion with which the Agreement begins that it had been decided that India should give half the area to Pakistan. We have carefully considered all the clauses in the Agreement and we are satisfied that it does not purport to be, and has not been, reached as a result of any interpretation of the award and its terms; it has been reached independently of the award and for reasons and considerations which appeared to the parties to be wise and expedient. Therefore, we cannot accede to the argument urged by the learned Attorney-General that it does no more than ascertain and determine the boundaries in the light of the award. It is an Agreement by which a part of the territory of India has been ceded to Pakistan and the question referred to us in respect of this Agreement must, therefore, be considered on the basis that it involves cession or alienation of a part of India's territory.

23. What is true about the Agreement in respect of Berubari Union 12 is still more emphatically true about the exchange of Cooch-Behar Enclaves. Indeed the learned Attorney-General's argument that no legislation is necessary to give effect to the Agreement in respect of this exchange was based on the assumption that this exchange is a part of a larger and broader settlement and so it partakes of its character. Since we have held that the agreement in respect of Berubari Union 12 itself involves the cession of Enclaves the territory of India *a fortiori* the Agreement in respect of exchange of Cooch-Behar Enclaves does involve the cession of Indian territory. That is why the question about this exchange must also be considered on the footing that a part of the territory of India has been ceded to Pakistan; besides it is clear that unlike Questions 1 and 2 the third question which has reference to this exchange postulates the necessity of legislation.

24. In this connection we may also deal with another argument urged by the learned Attorney-General. He contended that the implementation of the Agreement in respect of Berubari Union would not necessitate any change in the First Schedule to the Constitution because, according to him, Berubari Union was never legally included in the territorial description of West Bengal contained in the said Schedule. We are not impressed by this argument either. As we have already indicated, since the award was announced Berubari Union has remained in possession of India and has been always treated as a part of West Bengal and governed as such. In view of this factual position there should be no difficulty in holding that it falls within the territories which immediately before the commencement of the Constitution were comprised in the Province of West Bengal. Therefore, as a result of the implementation of this Agreement the boundaries of West Bengal would be altered and the content of Entry 13 in the First Schedule to the Constitution would be affected.

26. In view of our conclusion that the agreement amounts to cession or alienation of a part of Indian territory and is not a mere ascertainment or determination of the boundary in the light of, and by reference to, the award, it is not necessary to consider the other contention raised by the learned Attorney-General that it was within the competence of the Union executive to enter into such an Agreement, and that the Agreement can be implemented without any legislation. It has been fairly conceded by him that this argument proceeds on the assumption that the Agreement is in substance and fact no more than the ascertainment or the determination of the disputed boundary already fixed by the award. We need not, therefore, consider the merits of the argument about the character and extent of the executive functions and powers nor need we examine the question whether the observations made by Mukherjea, C.J., in the case of ***Rai Sahib Ram Jawaya Kapur*** [AIR 1955 SC 549] in fact lend support to the said argument, and if they do, whether the question should not be reconsidered.

27. At this stage it is necessary to consider the merits of the rival contention raised by Mr Chatterjee before us. He urges that even Parliament has no power to cede any part of the territory of India in favour of a foreign State either by ordinary legislation or even by the amendment of the Constitution; and so, according to him, the only opinion we can give on the Reference is that the Agreement is void and cannot be made effective even by any legislative process. This extreme contention is based on two grounds. It is suggested that the preamble to the Constitution clearly postulates that like the democratic republican form of government the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by constitutional amendment. The makers of the Constitution were painfully conscious of the tragic partition of the country into two parts, and so when they framed the Constitution they were determined to keep the entire territory of India as inviolable and sacred. The very first sentence in the preamble, which declares that "We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic", says Mr Chatterjee, irrevocably postulates that India geographically and territorially must always continue to be democratic and republican. The other ground on which this contention is raised is founded on Article 1(3) (*c*) of the Constitution which contemplates that "the territory of India shall comprise such other territories as may be acquired", and it is argued that whereas the Constitution has expressly given to the country the power to acquire other territories it has made no provision for ceding any part of its territory; and in such a case the rule of construction viz. *expressio unius est exclusio alterius* must apply. In our opinion, there is no substance in these contentions.

28. There is no doubt that the declaration made by the people of India in exercise of their sovereign will in the preamble to the Constitution is, in the words of Story, "a key to open the mind of the makers" which may show the general purposes for which they made the several provisions in the Constitution; but nevertheless the preamble is not a part of the Constitution, and, as Willoughby has observed about the preamble to the American Constitution, "it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted".

29. What is true about the powers is equally true about the prohibitions and limitations. Besides, it is not easy to accept the assumption that the first part of the preamble postulates a

very serious limitation on one of the very important attributes of sovereignty itself. As we will point out later, it is universally recognised that one of the attributes of sovereignty is the power to cede parts of national territory if necessary. At the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the preamble. Therefore, Mr Chatterjee is not right in contending that the preamble imports any limitation on the exercise of what is generally regarded as a necessary and essential attribute of sovereignty.

30. Then, as regards the argument that the inclusion of the power to acquire must necessarily exclude the power to cede or alienate, there are two obvious answers. Article 1(3)(*c*) does not confer power or authority on India to acquire territories as Mr Chatterjee assumes. There can be no doubt that under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour of a foreign State. What Article 1(3) (*c*) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so. It may be that this provision has found a place in the Constitution not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of Indian territories which, at the date of the Constitution, continued to be under the dominion of foreign States; but that is not the whole scope of Article 1(3)(c). It refers broadly to all foreign territories which may be acquired by India and provides that as soon as they are acquired they would form part of the territory of India. Thus, on a true construction of Article 1(3) (*c*) it is erroneous to assume that it confers specific powers to acquire foreign territories. The other answer to the contention is provided by Article 368 of the Constitution. That article provides for the procedure for the amendment of the Constitution and expressly confers power on Parliament in that behalf. The power to amend Constitution must inevitably include the power to amend Article 1, and that logically would include the power to cede national territory in favour of a foreign State; and if that is so, it would be unreasonable to contend that there is no power in the sovereign State of India to cede its territory and that the power to cede national territory which is an essential attribute of sovereignty is lacking in the case of India. We must, therefore, reject Mr Chatterjee's contention that no legislative process can validate the agreement in question.

31. What then is the nature of the treaty-making power of a sovereign State? That is the next problem which we must consider before addressing ourselves to the questions referred to us for our opinion. As we have already pointed out it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a foreign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner State in favour of another State. There can be no doubt that such cession is possible and indeed history presents several examples of such transfer of sovereignty. It is true as Oppenheim has observed that "hardship is involved in the fact that in all cases of cession the inhabitants of the territory, who remain, lose their old citizenship and are handed over to a new sovereign whether they like it or not" [**Oppenheim's *International Law*** by Lauterpacht, Vol I, p. 551 8th Edn.] ; and he has pointed out that "it may be possible

to mitigate this hardship by stipulating an option to emigrate within a certain period in favour of the inhabitants of ceded territory as means of averting the charge that the inhabitants are handed over to a new sovereign against their will" [p. 553]. But though from the human point of view great hardship is inevitably involved in cession of territory by one country to the other there can be no doubt that a sovereign State can exercise its right to cede a part of its territory to a foreign State. This power, it may be added, is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf; in other words, the question as to how treaties can be made by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself. We must, therefore, now turn to that aspect of the problem and consider the position under our Constitution.

32. In dealing with this aspect we are proceeding on the assumption that some legislation is necessary to implement the Agreement in question. It is urged on behalf of the Union of India that if any legislative action is held to be necessary for the implementation of the Agreement a law of Parliament relatable to Article 3 of the Constitution would be sufficient for the purpose; and if that be so, there would be no occasion to take any action under Article 368 of the Constitution. The decision of this question will inevitably depend upon the construction of Article 3 itself. The learned Attorney-General has asked us to bear in mind the special features of the basic structure of the Constitution in construing the relevant provisions of Article 3. He contends that the basic structure of the Constitution is the same as that of the Government of India Act, 1935, which had for the first time introduced a federal polity in India. Unlike other federations, the Federation embodied in the said Act was not the result of a pact or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty. The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the Indian Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the Indian States. In fact it is well known that as a result of the States Reorganization Act, 1966 (Act 37 of 1956), in the place of the original 27 States and one Area which were mentioned in Part D in the First Schedule to the Constitution, there are now only 14 States and 6 other areas which constitute the Union Territory mentioned in the First Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution. There may be some force in this contention. It may, therefore, be assumed that in construing Article 3 we should take into account the fact that the Constitution contemplated changes of the territorial limits of the constituent States and there was no guarantee about their territorial integrity.

33. Part I of the Constitution deals with the Union and its territories, and in a sense its provisions set out a self-contained code in respect of the said topic. Just as Part II deals with the topic of citizenship, Part I deals with the territory of India. Article 1 deals with the name and territory of India. Article 1 as it now stands is the result of amendments made by the Constitution (Seventh Amendment) Act, 1956. Before its amendment Article 1 referred to the territory of India as comprising the territories of the States specified in Parts A, B and C as well as the territories specified in Part D of the Schedule and such of the territories as might be acquired. Then a separate provision had been made by Article 243 in Part IX for the administration of the territories specified in Part D and other territories such as newly acquired territories which were not comprised in the First Schedule. The Constitution Amendments of 1956 made some important changes in Article 1. The distinction between Parts A, B and C and territories specified in Part D was abolished and in its place came the distinction between the territories of States and the Union territories specified in the First Schedule. In consequence Article 243 in Part IX was deleted. That is how under the present article the territory of India consists of the territories of the States, the Union territories and such other territories as may be acquired. We have already referred to Article 1(3) (*c*) and we have observed that it does not purport to confer power on India to acquire territories; it merely provides for and recognises automatic absorption or assimilation into the territory of India of territories which may be acquired by India by virtue of its inherent right as a sovereign State to acquire foreign territory. Thus Article 1 describes India as a Union of States and specifies its territories.

34. Article 2 provides that Parliament may by law admit into the Union or establish, new States on such terms and conditions as it thinks fit. This Article shows that foreign territories which after acquisition would become a part of the territory of India under Article 1(3) (*c*) can by law be admitted into the Union under Article 2. Such territories may be admitted into the Union or may be constituted into new States on such terms and conditions as Parliament may think fit; and as we shall presently point out such territories can also be dealt with by law under Article 3(*a*) or (*b*). The expression "by law "used in Articles 2 and 3 in this connection is significant. The acquisition of foreign territory by India in exercise of its inherent right as a sovereign State automatically makes the said territory a part of the territory of India. After such territory is thus acquired and factually made a part of the territory of India the process of law may assimilate it either under Article 2 or under Article 3(*a*) or (*b*).

35. As an illustration of the procedure which can be adopted by Parliament in making a law for absorbing newly acquired territory we may refer to the Chandernagore Merger Act, 1954 (Act 37 of 1954) which was passed on 29-9-1954, and came into force as from October 2,1954. Chandernagore, which was a French possession, was declared a free city, and in June 1946 the French Government, in agreement with the Government of India, stated that it intended to leave the people of the French establishments in India a right to pronounce on their future fate and future status. In pursuance of this declaration a referendum was held in Chandernagore in 1949, and in this referendum the citizens of Chandernagore voted in favour of the merger of the territory with India. Consequently, on 2-5-1950, the President of the French Republic effected a de facto transfer of the administration of Chandernagore to India, and as from that date the Government of India assumed control and jurisdiction over

Chandernagore under Section 4 of the Foreign Jurisdiction Act, 1947 (Act 47 of 1947). Relevant notification was issued by the Government of India under the said section as a result of which certain Indian laws were made applicable to it. The said notification also provided that the corresponding french laws would cease to apply with effect from 2-5-1960. This was followed by the treaty of cession signed at Paris and in due course on 9-6-1952, Chandernagore was transferred *de jure* to the Government of India on the ratification of the said treaty. The result was Chandernagore ceased to be a French territory and became a part of the territory of India; and the Foreign Jurisdiction Act was no longer applicable to it. Article 243(1) which was then in operation applied to Chandernagore as from 9-6-1952, and in exercise of the powers conferred under Article 243(2) the President promulgated a regulation for the administration of Chandernagore which came into force from 30-6-1952. The Government of India then ascertained the wishes of the citizens of Chandernagore by appointing a Commission of enquiry, and on receiving the Commission's report that the people of Chandernagore were almost unanimously in favour of merging with West Bengal, the Government introduced in Parliament the Chandernagore Merger Act in question. After this Act was passed Chandernagore merged with the State of West Bengal as from October 2,1954. This Act was passed by Parliament under Article 3 of the Constitution. As a result of this Act the boundaries of West Bengal were altered under Article 3(*d*) and by Section 4 the First Schedule to the Constitution was modified. We have thus briefly referred to the history of the acquisition and absorption of Chandernagore and its merger with West Bengal because it significantly illustrates the operation of Article 1(3)(*c*) as well as Article 3(*b*) and (*d*) of the Constitution.

36. That takes us to Article 3 which deals with the topic of formation of new States and alteration of areas, boundaries or names of existing States. The effect of Article 4 is that the laws relatable to Article 2 or Article 3 are not to be treated as constitutional amendments for the purpose of Article 368, which means that if legislation is competent under Article 3 in respect of the agreement, it would be unnecessary to invoke Article 368. On the other hand, it is equally clear that if legislation in respect of the relevant topic is not competent under Article 3, Article 368 would inevitably apply. The crux of the problem, therefore, is: Can Parliament legislate in regard to the agreement under Article 3?

38. Prima facie Article 3 may appear to deal with the problems which would arise on the reorganisation of the constituent States of India on linguistic or any other basis; but that is not the entire scope of Article 3. Broadly stated it deals with the internal adjustment inter se of the territories of the constituent States of India. Article 3(*a*) enables Parliament to form a new State and this can be done either by the separation of the territory from any State, or by uniting two or more States or parts of States, or by uniting any territory to a part of any State. There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under Article 1(3) (*c*) is included in the last clause of Article 3(*a*) and that such territory may, after its acquisition, be absorbed in the new State which may be formed under Article 3(*a*). Thus Article 3(*a*) deals with the problem of the formation of a new State and indicates the modes by which a new State can be formed.

39. Article 3(*b*) provides that a law may be passed to increase the area of any State. This increase may be incidental to the reorganisation of States in which case what is added to one

State under Article 3(*b*) may have been taken out from the area of another State. The increase in the area of any State contemplated by Article 3(*b*) may also be the result of adding to any State any part of the territory specified in Article 1(3)(*c*). Article 3(*d*) refers to the alteration of the boundaries of any State and such alteration would be the consequence of any of the adjustments specified in Article 3(*a*), (*b*) or (*c*). Article 3(*e*) which refers to the alteration of the name of any State presents no difficulty, and in fact has no material bearing on the questions with which we are concerned. We have yet to consider Article 3(*c*) the construction of which will provide the answers to the questions under reference; but before we interpret Article 3(*c*) we would like to refer to one aspect relating to the said article considered as a whole.

40. It is significant that Article 3 in terms does not refer to the Union territories and so, whether or not they are included in the last clause of Article 3(*a*) there is no doubt that they are outside the purview of Article 3(*b*), (*c*), (*d*) and (*e*). In other words, if an increase or diminution in the areas of the Union territories is contemplated or the alteration of their boundaries or names is proposed, it cannot be effected by law relatable to Article 3. This position would be of considerable assistance in interpreting Article 3(*c*).

41. Article 3(*c*) deals with the problem of the diminution of the area of any State. Such diminution may occur, where the part of the area of a State is taken out and added to another State, and in that sense Articles 3(b) and 3(c) may in some cases be said to be correlated; but does Article 3(*c*) refer to a case where a part of the area of a State is taken out of that State and is not added to any other State but is handed over to a foreign State? The learned Attorney-General contends that the words used in Article 3(*c*) are wide enough to include the case of the cession of national territory in favour of a foreign country which causes the diminution of the area of the State in question. We are not impressed by this argument. Prima facie it appears unreasonable to suggest that the makers of the Constitution wanted to provide for the cession of national territory under Article 3(*c*). If the power to acquire foreign territory which is an essential attribute of sovereignty is not expressly conferred by the Constitution there is no reason why the power to cede a part of the national territory which is also an essential attribute of sovereignty should have been provided for by the Constitution. Both of these essential attributes of sovereignty are outside the Constitution and can be exercised by India as a sovereign State. Therefore, even if Article 3(*c*) receives the widest interpretation it would be difficult to accept the argument that it covers a case of cession of a part of national territory in favour of a foreign State. The diminution of the area of any State to which it refers postulates that the area diminished from the State in question should and must continue to be a part of the territory of India; it may increase the area of any other State or may be dealt with in any other manner authorised either by Article 3 or other relevant provisions of the Constitution, but it would not cease to be a part of the territory of India. It would be unduly straining the language of Article 3(*c*) to hold that by implication it provides for cases of cession of a part of national territory. Therefore, we feel no hesitation in holding that the power to cede national territory cannot be read in Article 3(*c*) by implication.

42. There is another consideration which is of considerable importance in construing Article 3(*c*). As we have indicated Article 3 does not in terms refer to the Union territories, and there can be no doubt that Article 3(*c*) does not cover them; and so, if a part of the Union

territories has to be ceded to a foreign State no law relatable to Article 3 would be competent in respect of such cession. If that be the true position cession of a part of the Union territories would inevitably have to be implemented by legislation relatable to Article 368; and that, in our opinion, strongly supports the construction which we are inclined to place on Article 3(*c*) even in respect of cession of the area of any State in favour of a foreign State. It would be unreasonable, illogical and anomalous to suggest that, whereas the cession of a part of the Union territories has to be implemented by legislation relatable to Article 368, cession of a part of the State territories can be implemented by legislation under Article 3. We cannot, therefore, accept the argument of the learned Attorney-General that an agreement which involves a cession of a part of the territory of India in favour of a foreign State can be implemented by Parliament by passing a law under Art 3 of the Constitution. We think that this conclusion follows on a fair and reasonable construction of Article 3 and its validity cannot be impaired by what the learned Attorney-General has described as the special features of the federal Constitution of India.

43. In this connection the learned Attorney-General has drawn our attention to the provisions of Act 47 of 1951 by which the boundaries of the State of Assam were altered consequent on the cession of a strip of territory comprised in that State to the Government of Bhutan. Section 2 of this Act provides that on and from the commencement of the Act the territories of the State of Assam shall cease to comprise the strip of territory specified in the Schedule which shall be ceded to the Government of Bhutan, and the boundaries of the State of Assam shall be deemed to have been altered accordingly. Section 3 provides for the consequential amendment of the first paragraph in Part A of the First Schedule to the Constitution relating to the territory of Assam. The argument is that when Parliament was dealing with the cession of a strip of territory which was a part of the State of Assam in favour of the Government of Bhutan it has purported to pass this Act under Article 3 of the Constitution. It appears that the strip of territory which was thus ceded consisted of about 32 sq. miles of the territory in the Dewangiri Hill Block being a part of Dewangiri on the extreme northern boundary of Kamrup District. This strip of territory was largely covered by forests and only sparsely inhabited by Bhotias. The learned Attorney-General has not relied on this single statute as showing legislative practice. He has only cited this as an instance where Parliament has given effect to the cession of a part of the territory of Assam in favour of the Government of Bhutan by enacting a law relating to Article 3 of the Constitution. We do not think that this instance can be of any assistance in construing the scope and effect of the provisions of Article 3.

44. Therefore our conclusion is that it would not be competent to Parliament to make a law relatable to Article 3 of the Constitution for the purpose of implementing the Agreement. It is conceded by the learned Attorney-General that this conclusion must inevitably mean that the law necessary to implement the Agreement has to be passed under Article 368.

46. We have already held that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made

under Article 368. This position is not in dispute and has not been challenged before us; so it follows that acting under Article 368 Parliament may make a law to give effect to, and implement, the agreement in question covering the cession of a part of Berubari Union 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the agreement.

47. It would not be out of place to mention one more point before we formulate our opinion on the questions referred to us. We have already noticed that under the proviso to Article 3 of the Constitution it is prescribed that where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has to be referred by the President to the legislature of that State for its views thereon within such period as is therein prescribed. It has been urged before us by the learned Attorney-General that if it is held that Parliament must act under Article 368 and not under Article 3 to implement the Agreement, it would in effect deprive the legislature of West Bengal of an opportunity to express its views on the cession of the territory in question. That no doubt is true; but, if on its fair and reasonable construction Article 3 is inapplicable this incidental consequence cannot be avoided. On the other hand, it is clear that if the law in regard to the implementation of the Agreement is to be passed under Article 368 it has to satisfy the requirements prescribed by the said article; the Bill has to be passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds of the House present and voting; that is to say, it should obtain the concurrence of a substantial section of the House which may normally mean the consent of the major parties of the House, and that is a safeguard provided by the Article in matters of this kind.

48. In this connection it may incidentally be pointed out that the amendment of Article 1 of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State does not attract the safeguard prescribed by the proviso to Article 368 because neither Article 1 nor Article 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso. It is not for us to enquire or consider whether it would not be appropriate to include the said two articles under the proviso. That is a matter for the Parliament to consider and decide.

49. We would accordingly answer the three questions referred to us as follows:

Q. 1. Yes

Q. 2. *(a)* A law of Parliament relatable to Art. 3 of the Constitution would be incompetent;

(b) A law of Parliament relatable to Art. 368 of the Constitution is competent and necessary;

(c) A law of Parliament relatable to both Art. 368 and Art. 3 would be necessary only if Parliament chooses first to pass a law amending Arti. 3 as indicated above; in that case Parliament may have to pass a law on those

lines under Art. 368 and then follow it up with a law relatable to the amended Art. 3 to implement the agreement.

Q. 3. Same as answers (a), (b) and (c) to Question 2.

Additional Readings:

After receipt of the Advisory Opinion of the Supreme Court in ***Re The Berubari Union and Exchange of Enclaves*** [AIR 1960 SC 845, the Parliament passed the Constitution (Ninth Amendment) Act, 1960 to give effect to the Indo-Pak Agreement. The validity of the amendment was challenged alleging that the language of the Amendment Act in question insofar as it related to Berubari Union No. 12 was confusing and incapable of implementation. It was also contended that the transfer of Berubari Union would result in deprivation of citizenship and property without compensation. P.B. Gejendragadkar, C.J., speaking for the court, dismissed the appeal holding that its advisory opinion in the above case was binding: ***Ram Kishore Sen* v. *Union of India,*** AIR 1966 SC 644.

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Transfer of *Tin Bigha* area to Bangla Desh on the basis of a perpetual lease deed did not require a constitutional amendment since the impugned action did not involve cessation of Indian territory: ***Union of India* v. *Sukumar Sengupta***, AIR 1990 SC 1692.

* * * * *

Under *Article 2*, Parliament has power to admit into the Union or establish new States on such terms and conditions as it thinks fit. The terms and conditions must be consistent with the basic structure of the Constitution. The admission of Sikkim by Constitution (Thirtry-sixth Amenment) Act, 1975 was unsuccessfully challenged in ***R. C. Poudyal* v. *Union of India,*** AIR 1993 SC 1804.

* * * * *

A Bill referred by the President for expression of opinion by the State Legislature under the proviso to Article 3 of the Constitution need not be referred again to the concerned Legislature if changes are made by Parliament in the original Bill: ***Babulal Parate* v. *State of Bombay,*** AIR 1960 SC 51.

* * * * *

THE UNION AND STATE EXECUTIVE

The President and Union Council of Ministers

U.N.R. Rao **v.** *Indira Gandhi*

AIR 1971 SC 1002

[It is essential to have a Council of Ministers under Article 74(1) even at a time when the House of the People has been dissolved or its term has expired.]

A writ of *quo warranto* was prayed in this appeal against the continuation of Smt. Indira Gandhi as the Prime Minister since the House of the People had been dissolved.

The appellant contended that under the Constitution, as soon as the House of the People was dissolved under Article 85(2), the Council of Ministers, i.e. the Prime Minister and other Ministers, ceased to hold office. This argument was based on the wording of Article 75(3), which prescribes that "the Council of Ministers shall be collectively responsible to the House of the People". How can the Council of Ministers be collectively responsible to the House of the People when it has been dissolved under Article 85(2)? It was contended that no void in the carrying out of function will be created because the President can exercise the executive power of the Union either directly or through officers subordinate to him in accordance with Article 53(1) of the Constitution.

S.M. SIKRI, C.J. - 3. It seems to us that a very narrow point arises on the facts of the present case. The House of the People was dissolved by the President on December 27, 1970. The respondent was the Prime Minister before the dissolution. Is there anything in the Constitution, and in particular in Article 75(3), which renders her carrying on as Prime Minister contrary to the Constitution? It was said that we must interpret Article 75(3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an Article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.

[*The court quoted paras. 13 and 14 of* ***Ram Jawaya Kapur*** **v.** ***State of Punjab,*** AIR 1955 SC 549.]

In ***A. Sanjeevi Naidu*** **v.** ***State of Madras*** [AIR 1970 SC 1102], it was urged on behalf of the appellants in that case that "the Parliament has conferred power under Section 68(C) of the Motor Vehicles Act, 1939 to a designated authority. That power can be exercised only by that authority and by no one else. The authority concerned in the present case is the State Government. The Government could not have delegated its statutory functions to any one else. The Government means the Governor aided and advised by his Ministers. Therefore the

required opinion should have been formed by the Minister to whom the business had been allocated by 'the Rules'. It was further urged that if the functions of the Government can be discharged by any one else then the doctrine of ministerial responsibility which is the very essence of the cabinet form of Government disappears; such a situation is impermissible under our Constitution."

5. Speaking on behalf of the Court, Hegde, J., repelled the contentions in the following words:

> We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.
>
> The Cabinet is responsible to the Legislature for every action taken in any of the ministries. That is the essence of joint responsibility.

6. Let us now look at the relevant Articles of the Constitution in the context of which we must interpret Article 75(3) of the Constitution. Chapter I of Part V of the Constitution deals with the Executive. Article 52 provides that there shall be a President of India and Article 53(1) vests the executive power of the Union in the President and provides that it shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. The last five words are important inasmuch as they control the President's action under Article 53(1). Any exercise of the executive power not in accordance with the Constitution will be liable to be set aside. There is no doubt that the President of India is a person who has to be elected in accordance with the relevant provisions of the Constitution but even so he is bound by the provisions of the Constitution. Article 60 prescribes the oath or affirmation which the President has to take. It reads:

> I, A. B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law' and that I will devote myself to the service and well-being of the people of India.

7. It will be noticed that Article 74(1) is mandatory in form. We are unable to agree with the appellant that in the context the word 'shall' should be read as 'may'. Article 52 is

mandatory. In other words "there shall be a President of India'. So is Article 74(1). The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no 'Council of Ministers, nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61.

8. It seems to us that we must read the word 'shall' "as meaning 'shall' and not 'may'. If Article 74(1) is read in this manner the rest of the provisions dealing with the Executive must be read in harmony with. Indeed they fall into place. Under Article 75(1), the President appoints the Prime Minister and appoints the other Ministers on the advice of the Prime Minister, and under Article 75(2) they hold office during the pleasure of the President. The President has not said that it is his pleasure that the respondent shall not hold office.

9. Now comes the crucial clause three of Article 75. The appellant urges that the House of People having been dissolved this clause cannot be complied with. According to him it follows from the provisions of this clause that it is was contemplated that on the dissolution of the House of People the Prime Minister and the other ministers must resign or be dismissed by the President and the President must carry on the Government as best as he can with the aid of the Services. As we have shown above, Article 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonise the provisions of Article 75(3) with Article 74(1) and Article 75(2). Article 75(3) brings into existence what is usually called "Responsible Government". In other words the Council of Ministers must enjoy the confidence of the House of People. While the House of People is not dissolved under Article 85(2)(*a*), Article 75(3) has full operation. But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of People when it is prorogued. In the context, therefore, this clause *must* be read as meaning that Article 75(3) only applies when the House of People does not stand dissolved or prorogued. We are not concerned with the case where dissolution of the House of People takes place under Article 83(2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency in Section 14 of the Representation of Peoples Act, 1951.

10. On our interpretation other articles of the Constitution also have full play; *e. g.*. Article 77(3) which contemplates allocation of business among Ministers, and Article 78 which prescribes certain duties of Prime Minister.

12. In the result the appeal fails and is dismissed.

* * * * *

S.P. Anand v. *H.D. Deve Gowda*

AIR 1997 SC 272

[A *person who is not a member of either House of Parliament can be appointed as the Prime Minister of India.*]

H.D. Deve Gowda, not being a member of either House of Parliament, was appointed as the Prime Minister of India. The petitioner contended that he was not eligible to be appointed as the Prime Minister of India and the President of India had committed a grave and serious constitutional error in swearing him in as the Prime Minister. This action of the President, according to the petitioner, was violative of Articles 14, 21 and 75 of the Constitution and, therefore, void *ab initio* and deserved to be quashed by an appropriate writ, which may be issued under Article 32 of the Constitution.

A.M. AHMADI, C.J. - 2. A Constitution Bench of this Court had occasion to consider whether a person who is not a member of either House of the State Legislature could be appointed a Minister of State and this question was answered in the affirmative on a true interpretation of Articles 163 and 164 of the Constitution which, in material particulars, correspond to Articles 74 and 75 bearing on the question of appointment of the Prime Minister. In that case, Shri T.N. Singh was appointed the Chief Minister of Uttar Pradesh even though he was not a member of either House of the State Legislature on the date of his appointment. His appointment was challenged in the High Court by way of a writ petition filed under Article 226 of the Constitution. The High Court dismissed the writ petition but granted a certificate under Article 132 of the Constitution. That is how the matter reached this Court.

3. Now, Article 164(4) provides that a Minister who for any period of six consecutive months is not a member of the legislature of the State shall at the expiration of that period, cease to be a Minister. It was, however, urged that on the plain language of the said provision, it is obvious that it speaks of appointment of a Minister who is a member of the State Legislature but who loses his seat at a later date in which case he can continue as a Minister for a period of six months during which he must be re-elected or otherwise, must vacate office. Interpreting the said clause in the context of Article 163 and other clauses of Article 164, this Court held that clause 4 of Article 164 had an ancient lineage and there was no reason to whittle down the plain thrust of the said provision by confining it to cases where a person being a member of the legislature and a Minister, for some reason, loses his seat in the State. Accordingly, the decision of the High Court was affirmed. [See ***Har Sharan Verma* v. *Tribhuvan Narain Singh, Chief Minister, U.P.*** [(1971) 1 SCC 616].

4. The same petitioner again raised the issue when Shri K.P. Tiwari was appointed in November 1984 as a Minister of the U.P. Government even though he was not a member of either House of the State Legislature. He contended that the decision rendered by this Court in the case of ***T.N. Singh*** was not good law since the Court had overlooked the amendment of Article 173(*a*) effected by the Constitution (Sixteenth) Amendment Act, 1963. [The corresponding provision in regard to Parliament is Article 84(*a*).] Dealing with this contention this Court pointed out that the object of introducing the amendment in clause (*a*) of Article

173 of the Constitution was to provide that not only before taking his seat shall a member of legislature take the oath prescribed by the Third Schedule as required by Article 188 of the Constitution but that even before standing for election a candidate must take the same oath. This was to ensure that only a person having allegiance to India shall be eligible for membership of the legislature. The Court further pointed out that clause (4) of Article 164 of the Constitution provides that a Minister (which includes a Chief Minister also) who, for any period of six consecutive months, is not a member of the legislature of a State shall, at the expiration of that period cease to be a Minister. In other words, the Court held that a person who was not a member of either House of the State Legislature could also be appointed by the Governor as the Minister (which includes the Chief Minister) for a period not exceeding six consecutive months. The Court, therefore, did not see any material change brought about in the legal position by reason of the amendment of Article 173(*a*) of the Constitution from that as explained in the earlier decision in ***T.N. Singh*** case. This decision is reported as ***Har Sharan Verma* v. *State of U.P.*** [(1985) 2 SCC 48].

5. Not content with these two decisions rendered by this Court, the very same petitioner once again questioned the appointment of Shri Sita Ram Kesri as a Minister of State of the Central Cabinet since he was not a member of either House of Parliament at the date of the appointment. Spurning the challenge, this Court held that to appoint a non-member of Parliament as a Minister did not militate against the constitutional mechanism nor did it militate against the democratic principles embodied in the Constitution. The Court, therefore, upheld the appointment under Article 75(5) of the Constitution read with Article 88 thereof, which article, inter alia, conferred on every Minister the right to speak in, and otherwise to take part in the proceedings of, either House, in joint sitting of the Houses, and in a Committee of Parliament of which he may be named a member, though not entitled to vote. The Court, therefore, on a combined reading of the aforesaid two provisions held that a person not being a member of either House of Parliament can be appointed a Minister up to a period of six months. This case came to be reported as ***Harsharan Verma* v. *Union of India***, [1987 Supp. SCC 310].

6. We may now refer to two decisions rendered by the High Courts of Delhi and Calcutta in which the appointment of the present Prime Minister Shri H.D. Deve Gowda was challenged on more or less the same ground. One Dr Janak Raj Jai filed a Writ Petition No. 2408 of 1996 in which he questioned the appointment since the present Prime Minister was not a member of either House of Parliament on the date he was sworn in by the President of India as the Prime Minister of India. He contended that while under Article 75(5) a person can be appointed a Minister, he cannot be and should not be appointed a Prime Minister. Dealing with this submission the High Court, after referring to Articles 74 and 75 of the Constitution, held that "when Article 75(5) speaks of a 'Minister' it takes within its embrace that Minister also who is described in the Constitution as Prime Minister". In other words that High Court found that the Constitution did not make any distinction between the Prime Minister and other Ministers. The High Court dismissed the petition.

7. In the Calcutta High Court CO No. 1336(*w*) of 1996 was filed by one Ashok Sen Gupta, a Senior Advocate, challenging the appointment of Shri H.D. Deve Gowda as the Prime Minister of India on the ground that he was not eligible for appointment as he was not a

member of either House of Parliament. The learned Single Judge of the High Court in a well-considered judgment held that Article 75(5) of the Constitution permits the President of India to appoint a person who is not a member of either House of Parliament as a Minister, including a Prime Minister subject to the possibility of his commanding the support of the majority of members of the Lok Sabha. On this line of reasoning the petition was dismissed in limine.

8. From the aforesaid three decisions of this Court and the High Courts it becomes clear that a person who is not a member of either House of Parliament or of either House of a State Legislature can be appointed a Minister in the Central Cabinet (which would include a Prime Minister) or a Minister in the State Cabinet (which would include a Chief Minister), as the case may be. But the petitioner herein remains not satisfied.

9. The petitioner who argued the case in person with great passion, zeal and emotion, claiming to be concerned about the survival of the democratic process and the pristine glory of our constitutional scheme, submitted that if a person who is not the elected representative of the people of the country and in whom the people have not placed confidence, is allowed to occupy the high office of the Prime Minister on whom would rest the responsibility of governing the nation during peace and war (God forbid), it would be taking a great risk which the country can ill afford to take and, therefore, we should so construe the relevant provisions of the Constitution as would relieve the country of such a risk. When his attention was drawn to the case-law aforementioned he stated that those decisions were old and needed to be reconsidered in the changed circumstances. He submitted his submissions in writing which are by and large a repetition of the averments in the petition.

11. In order to appreciate the contention raised in this petition, and to determine if the aforesaid decision on which the learned Attorney General relied has any bearing on the point at issue in the present petition, it would be advantageous to read Articles 74 and 75 in juxtaposition with Articles 163 and 164 of the Constitution:

74. ***Council of Ministers to aid and advise President*** - (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:	163. ***Council of Ministers to aid and advise Governor*** - (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except insofar as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
[Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]	(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
(2) The question whether any, and if so what, advice was tendered by Ministers to the	(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor

President shall not be inquired into in any court.	shall not be inquired into in any court.
75. *Other provisions as to Ministers* - (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.	**164. *Other provisions as to Ministers*** - (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor: Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.
(2) The Ministers shall hold office during the pleasure of the President.	(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.
(3) The Council of Ministers shall be collectively responsible to the House of the people.	(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.
(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.	(4) A Minister who for any period of six consecutive months is not a member of the legislature of the State shall at the expiration of that period cease to be a Minister.
(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.	(5) The salaries and allowances of Ministers shall be such as the legislature of the State may from time to time by law determine and, until the legislature of the State so determines, shall be as specified in the Second Schedule.
(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.	

12. When we compare Articles 74 and 75 with Articles 163 and 164, the first point of difference is that while the former deal with the President and the Prime Minister, the latter deal with the Governor and the Chief Minister. Article 74(1) and Article 163(1) are substantially the same except that the sentence beginning with 'except' and ending with 'discretion', special to the Governor's function, is not to be found in Article 74(1). The proviso to Article 74(1) which grants a special privilege to the President is not to be found in Article 163(1) whereas clause (2) of Article 163 is not to be found in Article 74. Clause (2) to

Article 163 is a corollary to the exception clause in Article 163(1) and has no relevance to the issue on hand. Article 74(2) and Article 163(3) are verbatim.

13. Articles 75(1) and 75(2) are identical to Article 164(1) except that in the case of the latter, the two clauses have been combined into one. The proviso to Article 164(1) which is special to States, is not to be found in Article 75. The rest of the clauses of the two articles are identical except for consequential changes.

14. On a plain reading of Article 75(5) it is obvious that the Constitution-makers desired to permit a person who was not a member of either House of Parliament to be appointed a Minister for a period of six consecutive months and if during the said period he was not elected to either House of Parliament, he would cease to be a Minister. This becomes clear if one were to read the debates of the Constituent Assembly (the draft Articles were 62 and 144 for the present Articles 75 and 164). Precisely on the ground that permitting such persons to be appointed Ministers at the Union or State levels would "cut at the very root of democracy", an amendment was moved to provide: "No person should be appointed a Minister unless at the time of his appointment, he is elected member of the House:" which amendment was spurned by Dr Ambedkar.

15. The petitioner then invited our attention to *Halsbury's Laws of England* (3rd Edn.) p 347 wherein at para 745 it is stated: "By conventional usage the Prime Minister is invariably a member of either House of Commons or House of Lords"; footnote (*i*) proceeds to add that the person selected is preferably to be a member of the House of Commons. The petitioner further urged that even if the Constitution is construed to permit a person who is not a member of either House of Parliament to be appointed a Minister for six months, there is nothing in Article 75(5) to suggest that he can be appointed the Prime Minister of the country. He urged that the status of the Prime Minister is distinct from that of a Minister and, therefore, it is essential that a person who occupies the high position of a Prime Minister should be an elected representative of the people. This submission overlooks the fact that the person who is appointed the Prime Minister is chosen by the elected representatives of the people and can occupy the position only if he enjoys the confidence of the majority of the elected representatives in the Lok Sabha. Secondly, we must bear in mind the scheme of our Constitution and if our Constitution permits such appointment, that should put an end to the controversy.

16. Now Article 75(1) envisages a Council of Ministers with the Prime Minister at the head to aid and advise the President, and the latter is expected to act in accordance with such advice but if he has any reservations he may require the Council of Ministers to reconsider such advice. Thus, the President has to act in accordance with the advice of the Council of Ministers as a body and not go by the advice of any single individual. Only a person who, the President thinks, commands the confidence of the Lok Sabha would be appointed the Prime Minister who in turn would choose the other Ministers. The Council of Ministers is made collectively responsible to the House of the People. The form of the oath prescribed in the Third Schedule under Article 75(4) is the same for the Prime Minister as well as a Minister. In other words, the Constitution does not draw any distinction between the Prime Minister and any other Minister in this behalf. This is not to say that the Prime Minister does not enjoy a special status; he does as the head of the Council of Ministers but the responsibility of the

Council of Ministers to the House of the People is collective. Besides, the caption of Article 75 as a whole is "Other provisions as to Ministers". No separate provision is to be found dealing with the appointment of the Prime Minister as such. Therefore, even though the Prime Minister is appointed by the President after he is chosen by such number of members of the House of the People as would ensure that he has the confidence of the House and would be able to command the support of the majority, and the Ministers are appointed on the advice of the Prime Minister, the entire Council of Ministers is made collectively responsible to the House and that ensures the smooth functioning of the democratic machinery. If any Minister does not agree with the majority decision of the Council of Ministers, his option is to resign or accept the majority decision. If he does not, the Prime Minister would drop him from his Cabinet and thus ensure collective responsibility. Therefore, even though a Prime Minister is not a member of either House of Parliament, once he is appointed he becomes answerable to the House and so also his Ministers and the principle of collective responsibility governs the democratic process. Even if a person is not a member of the House, if he has the support and confidence of the House, he can be chosen to head the Council of Ministers without violating the norms of democracy and the requirement of being accountable to the House would ensure the smooth functioning of the democratic process. We, therefore, find it difficult to subscribe to the petitioner's contention that if a person who is not a member of the House is chosen as Prime Minister, national interest would be jeopardised or that we would be running a great risk. The English convention that the Prime Minister should be a member of either House, preferably House of Commons, is not our constitutional scheme since our Constitution clearly permits a non-member to be appointed a Chief Minister or a Prime Minister for a short duration of six months. That is why in such cases when there is any doubt in the mind of the President, he normally asks the person appointed to seek a vote of confidence of the House of the People within a few days of his appointment. By parity of reasoning if a person who is not a member of the State Legislature can be appointed a Chief Minister of a State under Article 164(4) for six months, a person who is not a member of either House of Parliament can be appointed Prime Minister for the same duration. We must also bear in mind the fact that conventions grow from long standing accepted practices or by agreement in areas where the law is silent and such a convention would not breach the law but fill the gap. If we go by that principle, the practice in India has been just the opposite. In the past, persons who were not elected to State Legislatures have become Chief Ministers and those not elected to either House of Parliament have been appointed Prime Ministers. We are, therefore, of the view that the British convention to which the petitioner has referred is neither in tune with our constitutional scheme nor has it been a recognised practice in our country.

19. With these observations we dismiss the petition. The interim order staying proceedings pending elsewhere shall stand vacated with a direction that they shall be disposed of in the light hereof.

* * * * *

Samsher Singh v. *State of Punjab*

AIR 1974 SC 2192

[The appellants had joined the Punjab Civil Service (Judicial Branch). Both of them were on probation. By an order dated April 27, 1967, the services of the appellant Samsher Singh were terminated by the following order:

> "The Governor of Punjab is pleased to terminate the services of Shri Samsher Singh, Subordinate Judge, on probation under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 with immediate effect. It is requested that these orders may please be conveyed to the officer concerned under intimation to the Government."

By an order dated December 15, 1969 the services of the appellant Ishwar Chand Agarwal were terminated by the following order:

> "On the recommendation of the High Court of Punjab and Haryana, the Governor of Punjab is pleased to dispense with the services of Shri Ishwar Chand Agarwal, P.C.S. (Judicial Branch), with immediate effect, under Rule 7(3) in Part 'D' of the Punjab Civil Services (Judicial Branch) Rules, 1951, as amended from time to time."

A.N. RAY, C.J. (*for himself, Palekar, Mathew, Chandrachud and Alagiriswami, JJ.*) - 5. The appellants contend that the Governor as the constitutional or the formal head of the State can exercise powers and functions of appointment and removal of members of the Subordinate Judicial Service only personally. The State contends that the Governor exercises powers of appointment and removal conferred on him by or under the Constitution like executive powers of the State Government only on the aid and advice of his Council of Ministers and not personally.

6. The appellants rely on the decision of this Court in ***Sardari Lal* v. *Union of India*** [(1971) 3 SCR 461] where it has been held that where the President or the Governor, as the case may be, if satisfied, makes an order under Article 311(2) proviso (*c*) that in the interest of the security of the State it is not expedient to hold an enquiry for dismissal or removal or reduction in rank of an officer, the satisfaction of the President or the Governor is his personal satisfaction. The appellants on the authority of this ruling contend that under Article 234 of the Constitution the appointment as well as the termination of services of Subordinate Judges is to be made by the Governor personally.

7. These two appeals were placed before a larger Bench to consider whether the decision in ***Sardari Lal*** case correctly lays down the law that where the President or the Governor is to be satisfied it is his personal satisfaction.

8. The appellants contend that the power of the Governor under Article 234 of the Constitution is to be exercised by him personally for these reasons.

9. First, there are several constitutional functions, powers and duties of the Governor. These are conferred on him *eo nomine* the Governor. The Governor, is, by and under the Constitution, required to act in his discretion in several matters. These constitutional functions and powers of the Governor *eo nomine* as well as these in the discretion of the Governor are not executive powers of the State within the meaning of Article 154 read with Article 162.

10. Second, the Governor under Article 163 of the Constitution can take aid and advice of his Council of Ministers when he is exercising executive power of the State. The Governor can exercise powers and functions without the aid and advice of his Council of Ministers when he is required by or under the Constitution to act in his discretion, where he is required to exercise his constitutional functions conferred on him *eo nomine* as the Governor.

11. Third, the aid and advice of the Council of Ministers under Article 163 is different from the allocation of business of the government of the State by the Governor to the Council of Ministers under Article 166(3) of the Constitution. The allocation of business of government under Article 166(3) is an instance of exercise of executive power by the Governor through his Council by allocating or delegating his functions. The aid and advice is a constitutional restriction on the exercise of executive powers of the State by the Governor. The Governor will not be constitutionally competent to exercise these executive powers of the State without the aid and advice of the Council of Ministers.

12. Fourth, the executive powers of the State are vested in the Governor under Article 154(1). The powers of appointment and removal of Subordinate Judges under Article 234 have not been allocated to the Ministers under the Rules of Business of the State of Punjab. Rule 18 of the Rules of Business states that except as otherwise provided by any other rule cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may, by means of Standing Orders, give such directions as he thinks fit for the disposal of cases in his department. Rule 7(2) in Part D of the Punjab Civil Service Rules which states that the Governor of Punjab may on the recommendation of the High Court remove from service without assigning any cause any Subordinate Judge or revert him to his substantive post during the period of probation is incapable of allocation to a Minister. Rule 18 of the Rules of Business is subject to exceptions and Rule 7(2) of the Service Rules is such an exception. Therefore, the appellants contend that the power of the Governor to remove Subordinate Judges under Article 234 read with the aforesaid Rule 7(2) of the Service Rules cannot be allocated to a Minister.

13. The Attorney General for the Union, the Additional Solicitor General for the State of Punjab and counsel for the State of Haryana contended that the President is the constitutional head of the Union and the Governor is the constitutional head of the State and the President as well as the Governor exercises all powers and functions conferred on them by or under the Constitution on the aid and advice of the Council of Ministers.

14. In all the articles which speak of powers and functions of the President, the expressions used in relation thereto are 'is satisfied', 'is of opinion', 'as he thinks fit' and 'if it appears to'. In the case of Governor, the expressions used in respect of his powers and functions are 'is satisfied', 'if of opinion' and 'as he thinks fit'.

15. Article 163(1) states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his discretion. Article 163 (2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of

anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Extracting the words "in his discretion" in relation to exercise of functions, the appellants contend that the Council of Ministers may aid and advise the Governor in executive functions but the Governor individually and personally in his discretion will exercise the constitutional functions of appointment and removal of officers in State Judicial Service and other State Services.

16. It is noticeable that though in Article 74 it is stated that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion.

17. It is necessary to find out as to why the words 'in his discretion' are used in relation to some powers of the Governor and not in the case of the President.

20. Articles where the expression "acts in his discretion" is used in relation to the powers and functions of the Governor are those which speak of special responsibilities of the Governor. These articles are 371A(1)(*b*), 371A(l)(*d*), 371A(2)(*b*) and 371A(2)(*f*). There are two paragraphs in the Sixth Schedule, namely 9(2) and 18(3) where the words "in his discretion" are used in relation to certain powers of the Governor. Paragraph 9(2) is in relation to determination of amount of royalties payable by licensees or lessees prospecting for, or extracting minerals, to the District Council. Paragraph 18(3) has been omitted with effect from January 21, 1972.

25. The executive power of the Union is vested in the President under Article 53(1). The executive power of the State is vested in the Governor under Article 154(1). The expressions "Union" and "State" occur in Articles 53(1) and 154(1) respectively to bring about the federal principles embodied in the Constitution. Any action taken in the exercise of the executive power of the Union vested in the President under Article 53(1) is taken by the Government of India in the name of the President as will appear in Article 77(1). Similarly, any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1) is taken by the Government of the State in the name of the Governor as will appear in Article 166(1).

26. There are two significant features in regard to the executive action taken in the name of the President or in the name of the Governor. Neither the President nor the Governor may sue or be sued for any executive action of the State. First, Article 300 states that the Government of India may sue or be sued in the name of the Union and the Governor may sue or be sued in the name of the State. Second, Article 361 states that proceedings may be brought against the Government of India and the Government of the State but not against the President or the Governor. Articles 300 and 361 indicate that neither the President nor the Governor can be sued for executive actions of the Government. The reason is that neither the President nor the Governor exercises the executive functions individually or personally. Executive action taken in the name of the President is the action of the Union. Executive action taken in the name of the Governor is the executive action of the State.

27. Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102.

28. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

29. The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the* State vested in the Governor under Article 154(1) in the other case. Clause (2) or clause f3) of Article 77 is not limited in its operation to the executive action of the Government of India under clause (1) of Article 77. Similarly, clause (2) or clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under clause (1) of Article 166. The expression "Business of the Government of India" in clause (3) of Article 77, and the expression "Business of the Government of the State" in clause (3) of Article 166 includes all executive business.

30. In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of the State respectively or by allocation among his Ministers of the said business, in accordance with Articles 77(3) and 166(3) respectively. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (*c*), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transaction of the business of the Government and the allocation of business among the Ministers of the said business. The

Rules of Business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the Rules of Business made under these two articles viz. Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively.

31. Further the Rules of Business and allocation of business among the Ministers are relatable to the provisions contained in Article 53 in the case of the President and Article 154 in the case of the Governor, that the executive power shall be exercised by the President or the Governor directly or through the officers subordinate. The provisions contained in Article 74 in the case of the President and Article 163 in the case of the Governor that there shall be a Council of Ministers to aid and advise the President or the Governor, as the case may be, are sources of the Rules of Business. These provisions are for the discharge of the executive powers and functions of the Government in the name of the President or the Governor. Where functions entrusted to a Minister are performed by an official employed in the Minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister.

32. It is a fundamental principle of English Constitutional law that Ministers must accept responsibility for every executive act. In England the Sovereign never acts on his own responsibility. The power of the Sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English Constitutional law is incorporated in our Constitution. The Indian Constitution envisages a Parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the constitutional head are not different.

33. This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system.

42. This Court in ***Jayantilal Amritlal Shodhan*** case [AIR 1964 SC 648] held that Article 258 enables the President to do by notification what the Legislature could do by legislation, namely, to entrust functions relating to matters to which executive power of the Union extends, to officers named in the notification. The notification issued by the President was held to have the force of law. This Court held that Article 258(1) empowers the President to entrust to the State the functions which are vested in the Union, and which are exercisable by the President on behalf of the Union and further went on to say that Article 258 does not authorise the President to entrust such powers as are expressly vested in the President by the Constitution and do not fall within the ambit of Article 258(1). This Court illustrated that observation by stating that the power of the President to promulgate ordinances under Articles 268 to 279 during an emergency, to declare failure of constitutional machinery in States under Article 356, to declare a financial emergency under Article 360, to make rules regulating the recruitment and conditions of service of persons appointed to posts and services, in connection with the affairs of the Union under Article 309, are not powers of the Union Government but are vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1).

43. The ratio in ***Jayantilal Amritlal Shodhan*** case is confined to the powers of the President which can be conferred on States under Article 258. The effect of Article 258 is to make a blanket provision enabling the President to exercise the power which the Legislature could exercise by legislation, to entrust functions to the officers to be specified in that behalf by the President and subject to the conditions prescribed thereby. The result of the notification by the President under Article 258 is that wherever the expression "appropriate Government" occurs in the Act in relation to provisions for acquisition of land for the purposes of the Union, the words "Appropriate Government or the Commissioner of the Division having territorial jurisdiction over the area in which the land is situate" were deemed to be substituted.

44. The distinction made by this Court between the executive functions of the Union and the executive functions of the President does not lead to any conclusion that the President is not the constitutional head of Government. Article 74(1) provides for the Council of Ministers to aid and advise the President in the exercise of his functions. Article 163(1) makes similar provision for a Council of Ministers to aid and advise the Governor. Therefore, whether the functions exercised by the President are functions of the Union or the functions of the President they have equally to be exercised with the aid and advice of the Council of Ministers, and the same is true of the functions of the Governor except those which he has to exercise in his discretion.

45. In ***Sardari Lal*** case an order was made by the President under sub-clause (*c*) to clause (2) of Article 311 of the Constitution. The order was:

The President is satisfied that you are unfit to be retained in the public service and ought to be dismissed from service. The President is further satisfied under sub-clause (c) of proviso to clause (2) of Article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry.

The order was challenged on the ground that the order was signed by the Joint Secretary and was an order in the name, of the President of India and that the Joint Secretary could not exercise the authority on behalf of the President.

46. This Court in ***Sardari Lal*** case relied on two decisions of this Court. One is ***Moti Ram Deka* v. *General Manager, N. E. F. Railway, Maligaon, Pandu*** [AIR 1964 SC 600] and the other is ***Jayantilal Amritlal Shodhan*** case. ***Moti Ram Deka*** case was relied on in support of the proposition that the power to dismiss a Government servant at pleasure is outside the scope of Articles 53 and 154 of the Constitution and cannot be delegated by the President or the Governor to a subordinate officer and can be exercised only by the President or the Governor in the manner prescribed by the Constitution. Clause (c) of the proviso to Article 311(2) was held by this Court in ***Sardari Lal*** case to mean that the functions of the President under that provision cannot be delegated to anyone else in the case of a civil servant of the Union and the President has to be satisfied personally that in the interest of the security of the State it is not expedient to hold an inquiry prescribed by Article 311(2). In support of this view this Court relied on the observation in ***Jayantilal Amritlal Shodhan*** case that the powers of the President under Article 311(2) cannot be delegated. This Court also stated in ***Sardari Lal*** case that the general consensus of the decisions is that the executive functions of the

nature entrusted by certain articles in which the President has to be satisfied himself about the existence of certain facts or state of affairs cannot be delegated by him to anyone else.

47. The decision in ***Sardari Lal*** case that the President has to be satisfied personally in exercise of executive power or function and that the functions of the President cannot be delegated is with respect not the correct statement of law and is against the established and uniform view of this Court as embodied in several decisions to which reference has already been made. These decisions are from the year 1955 up to the year 1971. These decisions are ***Rai Saheb Ram Jawaya Kapur* v. *State of Punjab***, ***A. Sanjeevi Naidu* v. *State of Madras*** and ***U.N.R. Rao* v. *Smt Indira Gandhi***. These decisions were neither referred to nor considered in ***Sardari Lal*** case.

48. The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor.

49. In ***Moti Rain Deka*** case, the question for decision was whether Rules 148(3) and 149(3) which provided for termination of the service of a permanent Government servant by a stipulated notice violated Article 311. The majority opinion in ***Moti Ram Deka*** case was that Rules 148(3) and 149(3) were invalid inasmuch as they are inconsistent with the provisions of Article 311(2). The decision in ***Moti Ram Deka*** case is not an authority for the proposition that the power to dismiss a servant at pleasure is outside the scope of Article 154 and cannot be delegated by the Governor to a subordinate officer.

50. This Court in ***State of U.P.* v. *Babu Ram Upadhya*** [AIR 1961 SC 751] held that the power of the Governor to dismiss at pleasure, subject to the provisions of Article 311, is not an executive power under Article 154 but a constitutional power and is not capable of being delegated to officers subordinate to him. The effect of the judgment in ***Babu Ram Upadhya*** case was that the Governor could not delegate his pleasure to any officer nor could any law provide for the exercise of that pleasure by an officer with the result that statutory rules governing dismissal were binding on every officer though they were subject to the overriding pleasure of the Governor. This would mean that the officer was bound by the rules but the Governor was not.

51. In ***Babu Ram Upadhya*** case, the majority view stated v seven propositions at p. 701 of the report. Proposition No. 2 is that the power to dismiss a public servant at pleasure is

outside the scope of Article 154 and therefore cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. Propositions Nos. 3 and 4 are these. The tenure of a public servant is subject to the limitations or qualifications mentioned in Article 311 of the Constitution. The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310 as qualified by Article 311. Proposition No. 5 is that the Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311. Proposition No. 6 is that the Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Article 311, but the said law would be subject to judicial review.

52. All these propositions were reviewed by the majority opinion of this Court in ***Moti Ram Deka*** case and this Court restated that proposition No. 2 must be read along with the subsequent propositions specified as propositions Nos. 3, 4, 5 and 6. The ruling in ***Moti Ram Deka*** case is that a law can be framed prescribing the procedure by which and the authority by whom the said pleasure can be exercised. The pleasure of the President or the Governor to dismiss can therefore not only be delegated but is also subject to Article 311. The true position as laid down in ***Moti Ram Deka*** case *is* that Articles 310 and 311 must no doubt be read together but once the true scope and effect of Article 311 is determined the scope of Article 310(1) must be limited in the sense that in regard to cases falling under Article 311(2) the pleasure mentioned in Article 310(2) must be exercised in accordance with the requirements of Article 311.

53. The majority view in ***Babu Ram Upadhya*** case is no longer good law after the decision in ***Moti Ram Deka*** case. The theory that only the President or the Governor is personally to exercise the pleasure or dismissing or removing a public servant is repelled by express words in Article 311 that no person who is a member of the civil service or holds a civil post under the Union or a State shall be dismissed or removed by authority subordinate to that by which he was appointed. The words "dismissed or removed by an authority subordinate to that by which he was appointed" indicate that the pleasure of the President or the Governor is exercised by such officers on whom the President or the Governor confers or delegates power.

54. The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in articles to which reference has been made. To illustrate. Article 239(2) states that where a Governor is appointed an administrator of an adjoining Union territory he shall exercise his functions as such administrator independently of his Council of Ministers. The other articles which speak of the discretion of the Governor are paragraphs 9(2) and 18(3) of the Sixth Schedule and Articles 371A(1)(*b*), 37lA(1)(*d*) and 371A(2)(*b*) and 371A(2)(*f*). The discretion conferred on the Governor means that as the constitutional or formal head of the State the power is vested in him. In this connection, reference may be made to Article^'356 which states that the Governor can send a report to the President that a situation has arisen in which the government of the State cannot be carried on

in accordance with the provisions of this Constitution. Again Article 200 requires the Governor to reserve for consideration any Bill which in his opinion if it became law, would so derogate from the powers of the High Court as to endanger the position which the High Court is designed to ml under the Constitution.

55. In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the constitutional machinery may be because of the conduct of the Council of Ministers. This discretionary power is given to the Governor to enable him to report to the President who, however, must act on the advice of his Council of Ministers in all matters. In this context Article 163(2) is explicable that the decision of the Governor in his discretion shall be final and the validity shall not be called in question. The action taken by the President on such a report is a different matter. The President acts on the advice of his Council of Ministers. In all other matters where the Governor acts in his discretion he will act in harmony with his Council of Ministers. The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers.

56. Similarly Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to pursue such courses which arc not detrimental to the State.

57. For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Services of the State which is to be made by the Governor as contemplated in Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution.

58. In the present appeals the two rules which deal with termination of services of probationers in the Punjab Civil Service (Judicial Branch) are Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules, 1952 and Rule 7(3) in Part D of the Punjab Civil Service (Judicial Branch) Rules, 1951 hereinafter referred to as Rule 9 and Rule 7. The services of the appellant Samsher Singh were terminated under Rule 9. The services of Ishwar Chand Agarwal were terminated under Rule 7(3).

59. Rule 9 provides that where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service, the probationer shall be apprised of the grounds of such proposal, and given an

opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment.

60**.** Rule 7(3) aforesaid provides that on the completion of the period of probation of any member of the service, the Governor may, on the recommendation of the High Court, confirm him in his appointment if he is working against a permanent vacancy or, if his work or conduct is reported by the High Court to be unsatisfactory, dispense with his services or revert him to his former substantive post, if any, or extend his period of probation and thereafter pass such orders as he could have passed on the expiry of the first period of probation.

61. Rule 9 of the Punishment and Appeal Rules contemplates an inquiry into grounds of proposal of termination of the employment of the probationer. Rule 7 on the other hand confers power on the Governor on the recommendation of the High Court to confirm or to dispense with the services or to revert him or to extend his period of probation.

62. The position of a probationer was considered by this Court in ***Purshottam Lal Dhingra* v. *Union of India*** [AIR 1958 SC 36]. Das, C.J. speaking for the Court said that where a person is appointed to a permanent post in Government service on probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the Government servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to do so. Such a termination does not operate as a forfeiture of any right of a servant to hold the post, for he has no such right. Obviously such a termination cannot be a dismissal, removal or reduction in rank by way of punishment. There are, however, two important observations of Das, C.J. in ***Dhingra*** case. One is that if a right exists under a contract or Service Rules to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The other is that if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and violates Article 311 of the Constitution. The reasoning why motive is said to be irrelevant is that it inheres in the state of mind which is not discernible. On the other hand, if termination is founded on misconduct it is objective and is manifest.

66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive ***K.H. Phadnis* v. *State of Maharashtra*** [(1971) 1 SCC 790].

67. An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with, Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct ***State of Bihar* v. *Shiva Bhikshuk Mishra*** [(1970) 2 SCC 871].

68. The appellant Ishwar Chand Agarwal contended that he completed his initial period of two years' probation on November 11, 1967 and the maximum period of three years' probation on November 11, 1968 and by reason of the fact that he continued in service after

the expiry of the maximum period of probation he became confirmed. The appellant also contended that he had a right to be confirmed and there was a permanent vacancy in the cadre of the service on September 17, 1969 and the same should have been allotted to him.

69. Rule 7(1) states that every Subordinate Judge, in the first instance, be appointed on probation for two years but this period may be extended from time to time expressly or impliedly so that the total period of probation including extension, if any, does not exceed three years. The explanation to Rule 7(1) is that the period of probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on the expiry of his period of probation.

72. In this context reference may be made to the proviso to Rule 7(3). The proviso to the rule states that the completion of the maximum period of three years' probation would not confer on him the right to be confirmed till there is a permanent vacancy in the cadre. Rule 7(3) states that an express order of confirmation is necessary. The proviso to Rule 7(3) is in the negative form that the completion of the maximum period of three years would not confer a right of confirmation till there is a permanent vacancy in the cadre. The period of probation is therefore extended by implication until the proceedings commenced against a probationer like the appellant are concluded to enable the Government to decide whether a probationer should be confirmed or his services should be terminated. No confirmation by implication can arise in the present case in the facts and circumstances as also by the meaning and operation of Rules 7(1) and 7(3) as aforesaid.

73. It is necessary at this stage to refer to the second proviso to Rule 7(3) which came into existence on November 19, 1970. That proviso of course does not apply to the facts of the present case. That proviso states that if the report of the High Court regarding the unsatisfactory work or conduct of the probationer is made to the Governor before the expiry of the maximum period of probation, further proceedings in the matter may be taken and orders passed by the Governor of Punjab dispensing with his services or reverting him to his substantive post even after the expiry of the maximum period of probation. The second proviso makes explicit which is implicit in Rule 7(1) and Rule 7(3) that the period of probation gets extended till the proceedings commenced by the notice come to an end either by confirmation or discharge of the probationer.

74. In the present case, no confirmation by implication can arise by reason of the notice to show cause given on October 4, 1968 the enquiry by the Director of Vigilance to enquire into allegations and the operation of Rule 7 of the Service Rules that the probation shall be extended impliedly if a Subordinate Judge is not confirmed before the expiry of the period of probation. Inasmuch as Ishwar Chand Agarwal was not confirmed at the end of the period of probation confirmation by implication is nullified.

75. The second contention on behalf of Ishwar Chand Agarwal was that the termination is by way of punishment. It was said to be an order removing the appellant from service on the basis of charges of gross misconduct by ex-parte enquiry conducted by the Vigilance Department. The enquiry was said to be in breach of Article 311 as also in violation of rules of natural justice. The appellant relied on Rule 9 to show that he was not only entitled to know the grounds but also to an opportunity to represent as a condition precedent to any such

termination. The appellant put in the forefront that the termination of his services was based on the findings of the Vigilance Department which went into 15 allegations of misconduct contained in about 8 complaints and these were never communicated to him.

76. The High Court under Article 235 is vested with the control of subordinate judiciary. The High Court according to the appellant failed to act in terms of the provisions of the Constitution and abdicated the control by not having an inquiry through Judicial Officers subordinate to the control of the High Court but asking the Government to enquire through the Vigilance Department.

78. The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse. The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Article 235 by asking the Government to enquire through the Director of Vigilance.

79. The Enquiry Officer nominated by the Director of Vigilance recorded the statements of the witnesses behind the back of the appellant. The enquiry was to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the Enquiry Officer reached the appellant. The Enquiry Officer gave his findings on allegations of misconduct. The High Court accepted the report of the Enquiry Officer and wrote to the Government on June 25, 1969 that in the light of the report the appellant was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report.

80. The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside.

81. The appellant Samsher Singh was appointed on May 1, 1964 as Subordinate Judge. He was on probation. On March 22, 1967 the Chief Secretary issued a notice to him substantially repeating the same charges which had been communicated by the Registrar on

December 15, 1966 and asked the appellant to show cause as to why his services should not be terminated as he was found unsuitable for the job. The appellant gave an answer. On April 29, 1967 the services of the appellant were terminated.

82. The appellant Samsher Singh in the context of the Rules of Business contended that the removal of a Subordinate Judge from service is a personal power of the Governor and is incapable of being delegated or dealt with under the Rules of Business. We have already held that the Governor can allocate the business of the Government to the Ministers and such allocation is no delegation and it is an exercise of executive power by the Governor through the Council or officers under the Rules of Business. The contention of the appellant that the order was passed by the Chief Minister without the formal approval of the Governor is, therefore, untenable. The order is the order of the Governor.

83. The appellant was asked to show cause as to why his services should not be terminated. There were four grounds. One was that the appellant's behaviour towards the Bar and the litigant public was highly objectionable, derogatory, non-cooperative and unbecoming of a judicial officer. The second was that the appellant would leave his office early. The third was the complaint of Om Prakash, Agriculture Inspector that the appellant abused his position by proclaiming that he would get Om Prakash involved in a case if he did not co-operate with Mangal Singh, a friend of the appellant and Block Development Officer, Sultanpur. The fourth was the complaint of Prem Sagar that the appellant did not give full opportunity to Prem Sagar to lead evidence. Prem Sagar also complained that the decree-holder made an application for execution of the decree against Prem Sagar and the appellant without obtaining office report incorporated some additions in the original judgment and warrant of possession.

84. The appellant showed cause. The appellant said that he was not provided with an opportunity to work under the same superior officer for at least six months so that independent opinion could be formed about his knowledge, work and conduct. On April 29, 1967 the appellant received a letter from the Deputy Secretary to the Government addressed to the Registrar, Punjab and Haryana High Court that the services of the appellant had been terminated.

85. It appears that a mountain has been made out of a mole hill. The allegation against the appellant is that he helped the opponent of Prem Sagar. The case against Prem Sagar was heard on April 17, 1965. Judgment was pronounced the same day. The application for execution of the decree was entertained on the same day by the appellant. In the warrant the appellant wrote with his own hands the words "Trees, well, crops and other rights attached to the land". This correction was made by the appellant in order that the warrant might be in conformity with the plaint and the decree. There is nothing wrong in correcting the warrant to make it consistent with the decree. It appears that with regard to the complaint of leaving office early and the complaint of Om Prakash, Agriculture Inspector the appellant was in fact punished and a punishment of warning was inflicted on him.

86. The appellant claimed protection of Rule 9. Rule 9 makes it incumbent on the authority that the services of a probationer can be terminated on specific fault or on account of unsatisfactory record implying unsuitability. In the facts and circumstances of this case it is

clear that the order of termination of the appellant Samsher Singh was one of punishment. The authorities were to find out the suitability of the appellant. They however concerned themselves with matters which were really trifle. The appellant rightly corrected the records in the case of Prem Sagar. The appellant did so with his own hand. The order of termination is in infraction of Rule 9. The order of termination is therefore set aside.

87. The appellant Samsher Singh is now employed in the Ministry of Law. No useful purpose will be served by asking for reconsideration as to the suitability of the appellant Samsher Singh for confirmation.

88. For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointments and removals of persons are made by the President and the Governor as the constitutional head of the Executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the State in regard to appointment or dismissal is brought against the Union or the State and not against the President or the Governor.

89. The orders of termination of the services of the appellants are set aside. The appellant Ishwar Chand Agarwal is declared to be a member of the Punjab Civil Service (Judicial Branch). The appellant Samsher Singh succeeds in so far as the order of termination is set aside. In view of the fact that Samsher Singh is already employed in the Ministry of Law no relief excepting salary or other monetary benefits which accrued to him upto the time he obtained employment in the Ministry of Law is given.

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M.P. Special Police Establishment v. *state of M.P.*

(2004) 8 SCC 788

S.N. VARIAVA, J. - 3. Respondents 4 (in both these appeals) i.e. Rajendra Kumar Singh and Bisahu Ram Yadav, were Ministers in the Government of M.P. A complaint was made to the Lokayukta against them for having released 7.5 acres of land illegally to its earlier owners even though the same had been acquired by the Indore Development Authority. After investigation the Lokayukta submitted a report holding that there were sufficient grounds for prosecuting the two Ministers under Section 13(1)(*d*) read with Section 13(2) of the Prevention of Corruption Act, 1988 and also for the offences of criminal conspiracy punishable under Section 120-B of the Penal Code. It must be mentioned that by the time the report was given the two Ministers had already resigned.

4. Sanction was applied for from the Council of Ministers for prosecuting the two Ministers. The Council of Ministers held that there was not an iota of material available against both the Ministers from which it could be inferred that they had entered into a criminal conspiracy with anyone. The Council of Ministers thus refused sanction on the ground that no prima facie case had been made out against them.

5. The Governor then considered grant of sanction keeping in view the decision of the Council of Ministers. The Governor opined that the available documents and the evidence were enough to show that a prima facie case for prosecution had been made out. The Governor accordingly granted sanction for prosecution under Section 197 of the Criminal Procedure Code.

6. Both the Ministers filed separate writ petitions under Articles 226 and 227 of the Constitution assailing the order of the Governor. A Single Judge of the High Court held that granting sanction for prosecuting the Ministers was not a function which could be exercised by the Governor "in his discretion" within the meaning of these words as used in Article 163 of the Constitution. It was held that the Governor could not act contrary to the "aid and advice" of the Council of Ministers. It was further held that the doctrine of bias could not be applied against the entire Council of Ministers and that the doctrine of necessity could not be invoked on the facts of the case to enable the Governor to act in his discretion.

7. The appellants filed two letters patent appeals which have been disposed of by the impugned judgment. The Division Bench dismissed the letters patent appeals upholding the reasoning and judgment of the Single Judge. It must be mentioned that the authority of this Court in the case of ***State of Maharashtra* v. *Ramdas Shrinivas Nayak*** [(1982) 2 SCC 463] was placed before the Division Bench. The Division Bench, however, held that the observations made therein may apply to the case of a Chief Minister but they could not be stretched to include cases of Ministers.

8. The question for consideration is whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code.

9. As this question is important, by order dated 12-9-2003 it has been directed that these appeals be placed before a Bench of five Judges. Accordingly, these appeals are before this Bench.

[The court quoted Article 163 of the Constitution.]

11. Mr Sorabjee submits that even though normally the Governor acts on the aid and advice of the Council of Ministers, but there can be cases where the Governor is, by or under the Constitution, required to exercise his function or any of them in his discretion. The Constitution of India expressly provides for contingencies/cases where the Governor is to act in his discretion. Articles 239(2), 371-A(1)(*b*), 371-A(2)(*b*), 371-A(2)(*f*) and paras 9(2) and 18(3) of the Sixth Schedule are some of the provisions. However, merely because the Constitution of India expressly provides, in some cases, for the Governor to act in his discretion, can it be inferred that the Governor can so act only where the Constitution expressly so provides? If that were so then sub-clause (2) of Article 163 would be redundant. A question whether a matter is or is not a matter in which the Governor is required to act in his discretion can only arise in cases where the Constitution has not expressly provided that the Governor can act in his discretion. Such a question cannot arise in respect of a matter where the Constitution expressly provides that the Governor is to act in his discretion. Article 163(2), therefore, postulates that there can be matters where the Governor can act in his discretion even though the Constitution has not expressly so provided.

12. Mr Sorabjee relies on the case of ***Samsher Singh* v. *State of Punjab*** [(1974) 2 SCC 831]. A seven-Judge Bench of this Court, *inter alia*, considered whether the Governor could act by personally applying his mind and/or whether, under all circumstances, he must act only on the aid and advice of the Council of Ministers. [The court quoted paras. 54-56 of the judgment and proceeded].The law, however, was declared in the following terms:

> "*154*. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (*a*) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (*b*) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (*c*) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement (***Constitutional and Administrative Law*** - by S.A. de Smith - Penguin Books on Foundations of Law) regarding royal assent holds good for the President and Governor in India:

> 'Refusal of the royal assent on the ground that the Monarch strongly disapproved of a Bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course - a highly improbable contingency - or possibly if it was notorious that a Bill had been passed in disregard to mandatory procedural requirements; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent.' "

Thus, as rightly pointed out by Mr Sorabjee, a seven-Judge Bench of this Court has already held that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out hereinabove. It is, however, clarified that the exceptions mentioned in the judgment are not exhaustive. It is also recognised that the concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. It is recognised that there may be situations where by reason of peril to democracy or democratic principles, an action may be compelled which from its nature is not amenable to Ministerial advice. Such a situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers.

13. Mr Sorabjee also points out that this Court in the case of *Ramdas Shrinivas Nayak*[1] has carved out a further exception. In this case, an MLA filed a complaint against the then Chief Minister of Maharashtra in the Court of Metropolitan Magistrate, 28th Court, Esplanade, Bombay, charging the Chief Minister with commission of offences punishable under Sections 161 and 185 of the Indian Penal Code and Section 5 of the Prevention of Corruption Act. The Metropolitan Magistrate refused to entertain the complaint without requisite sanction of the Government under Section 6 of the Prevention of Corruption Act. Against the order of the Metropolitan Magistrate, R.S. Nayak filed a criminal revision application in the High Court of Bombay wherein the State of Maharashtra and Shri Antulay were impleaded as respondents. During the pendency of this criminal revision application, Shri Antulay resigned as the Chief Minister of the State of Maharashtra. A Division Bench of the Bombay High Court dismissed the revision application, but whilst dismissing the application it was recorded by Gadgil, J. as follows:

> "However, I may observe at this juncture itself that at one stage it was expressly submitted by the learned counsel on behalf of the respondents that in case if it is felt that bias is well apparently inherent in the proposed action of the Ministry concerned, then in such a case situation notwithstanding the other Ministers not being joined in the arena of the prospective accused, it would be a justified ground for the Governor to act on his own, independently and without any reference to any Ministry, to decide that question."

Kotwal, J. in his concurring judgment observed:

> "At one stage it was unequivocally submitted by the learned counsel on behalf of the respondents in no uncertain terms that even in this case notwithstanding there

being no accusation against the Law Minister as such if the court feels that in the nature of things a bias in favour of the respondents and against a complainant would be manifestly inherent, apparent and implied in the mind of the Law Minister, then in that event, he would not be entitled to consider complainant's application and on the equal footing even the other Ministers may not be qualified to do so and the learned counsel further expressly submitted that in such an event, it would only be the Governor, who on his own, independently, will be entitled to consider that question."

The State of Maharashtra sought special leave to appeal to this Court, under Article 136 of the Constitution, against that portion of the judgment which directed the Governor of Maharashtra to exercise his individual discretion. Before this Court it was argued that the High Court could not have decided that the Governor should act in his individual discretion and without the aid and advice of the Council of Ministers. It was submitted that under Article 163(2) if a question arose whether any matter was or was not one in which the Governor was required to act in his discretion, it was the decision of the Governor which was to be final. It was also submitted that under Article 163(3) any advice tendered by the Council of Ministers to the Governor could not be inquired into by the Court. This Court noticed that an express concession had been made in the High Court to the effect that in circumstances like this bias may be apparently inherent and thus it would be a justified ground for the Governor to decide on his own, independently and without any reference to any Ministry. Before this Court it was sought to be contended that no such concession had been made out. This Court held that public policy and judicial decorum required that this Court does not launch into an enquiry whether any such concession was made. It was held that matters of judicial record are unquestionable and not open to doubt. It was held that this Court was bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. This Court then went on to hold as follows:

"*10*. We may add, there is nothing before us to think that any such mistake occurred, nor is there any ground taken in the petition for grant of special leave that the learned Judges proceeded on a mistaken view that the learned counsel had made a concession that there might arise circumstances, under which the Governor in granting sanction to prosecute a Minister must act in his own discretion and not on the advice of the Council of Ministers. The statement in the judgment that such a concession was made is conclusive and, if we may say so, the concession was rightly made. *In the facts and circumstances of the present case, we have no doubt in our mind that when there is to be a prosecution of the Chief Minister, the Governor would, while determining whether sanction for such prosecution should be granted or not under Section 6 of the Prevention of Corruption Act, as a matter of propriety, necessarily act in his own discretion and not on the advice of the Council of Ministers*.

11. The question then is whether we should permit the State of Maharashtra to resile from the concession made before the High Court and raise before us the contention now advanced by the learned Attorney General. We have not the slightest doubt that the cause of justice would in no way be advanced by permitting the State of Maharashtra to now resile from the concession and agitate the question posed by

the learned Attorney General. On the other hand we are satisfied that the concession was made to advance the cause of justice as it was rightly thought that in deciding to sanction or not to sanction the prosecution of a Chief Minister, the Governor would act in the exercise of his discretion and not with the aid and advice of the Council of Ministers. The application for grant of special leave is, therefore, dismissed."
(emphasis supplied)

14. As has been mentioned above, the Division Bench had noted this case. The Division Bench, however, held that even though this principle may apply to the case of a Chief Minister, it cannot apply to a case where Ministers are sought to be prosecuted. We are unable to appreciate the subtle distinction sought to be made by the Division Bench. The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of apparent bias. Actual bias only would lead to automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to "real danger of bias" and "suspicion of bias". [See ***Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant*** [(2001) 1 SCC 182] and ***Judicial Review of Administrative Action***, by de Smith, Woolf and Jowell (5th Edn. at p. 527) where two different spectrums of the doctrine have been considered.]

15. Another exception to the aforementioned general rule was noticed in ***Bhuri Nath* v. *State of J& K*** [(1997) 2 SCC 745] where the Governor was to chair the Board in terms of the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 on the premise that in terms of the statute he is required to exercise his ex officio power as Governor to oversee personally the administration, management and governance of the shrine. It was observed that the decision taken by him would be his own on his personal satisfaction and not on the aid and advice of the Council of Ministers opining:

The exercise of powers and functions under the Act is distinct and different from those exercised formally in his name for which responsibility rests only with his Council of Ministers headed by the Chief Minister."

16. In the case of ***A.K. Kraipak* v. *Union of India*** [(1969) 2 SCC 262] the question was whether a selection made by the Selection Board could be upheld. It was noticed that one of the candidates for selection had become a member of the Selection Board. A Constitution Bench of this Court considered the question of bias in such situations. This Court held as follows:

"*15*. It is unfortunate that Naqishbund was appointed as one of the members of the Selection Board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the Selection Board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the all-India service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the Selection Board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the

deliberations of the committee when his name was considered. But then the very fact that he was a member of the Selection Board must have had its own impact on the decision of the Selection Board. Further admittedly he participated in the deliberations of the Selection Board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the Selection Board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.

16. The members of the Selection Board other than Naqishbund, each one of them separately, have filed affidavits in this Court swearing that Naqishbund in no manner influenced their decision in making the selections. In a group deliberation each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the Selection Board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates the members of the Board did not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to believe that the members of Selection Board functioned like computers. At this stage it may also be noted that at the time the selections were made, the members of the Selection Board other than Naqishbund were not likely to have known that Basu had appealed against his supersession and that his appeal was pending before the State Government. Therefore there was no occasion for them to distrust the opinion expressed by Naqishbund. Hence the Board in making the selections must necessarily have given weight to the opinion expressed by Naqishbund."

17. On the basis of the ratio in this case Mr Sorabjee rightly contends that bias is likely to operate in a subtle manner. Sometimes members may not even be aware of the extent to which their opinion gets influenced.

18. Again in the case of ***Kirti Deshmankar (Dr.)* v. *Union of India*** [(1991) 1 SCC 104] the mother-in-law of the selected candidate had participated in the Selection Committee. This Court held that the mother-in-law was vitally interested in the admission of her daughter-in-law and her presence must be held to have vitiated the selection for the admission. It was held that there was a conflict between interest and duty and taking into consideration human

probabilities and the ordinary course of human conduct, there was reasonable ground to believe that she was likely to have been biased.

19. Article 163 has been extracted above. Undoubtedly, in a matter of grant of sanction to prosecute, the Governor is normally required to act on aid and advice of the Council of Ministers and not in his discretion. However, an exception may arise whilst considering grant of sanction to prosecute a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion. Similar would be the situation if the Council of Ministers disables itself or disentitles itself.

20. Mr Tankha, on behalf of the Ministers, submitted that a case of Chief Minister would be completely different from that of Ministers. He submitted that in this case the Council of Ministers had considered all the materials and had applied their minds and come to the conclusion that sufficient material to grant sanction was not there. He submitted that the Governor was not an appellate body and he could not sit in appeal over the decision of the Council of Ministers. He submitted that the decision of the Council of Ministers could only have been challenged in a court of law.

21. Mr Tankha submitted that the theory of bias cannot be applied to the facts of this case. In support of his submission, he relied upon the case of *V.C. Shukla* v. *State (Delhi Admn.)* [1980 Supp SCC 249] wherein the vires of the Special Courts Act, 1979 had been challenged. Under Section 5 of the Special Courts Act, sanction had to be granted by the Central Government. Sub-section (2) of Section 5 provided that the sanction could not be called in question by any court. It had been submitted that this would enable an element of bias or malice to operate by which the Central Government could prosecute persons who are political opponents. This Court negatived this contention on the ground that the power was vested in a very high authority and therefore, it could not be assumed that it was likely to be abused. This Court held that as the power was conferred on a high authority the presumption would be that the power would be exercised in a bona fide manner and according to law. Mr Tankha also relied upon the case of ***State of Punjab* v. *V.K. Khanna*** [(2001) 2 SCC 330]. In this case, two senior IAS officers in the State of Punjab were sought to be prosecuted after obtaining approval from the then Chief Minister of Punjab. Thereafter, there was a change in the Government. The new Government cancelled the sanction granted earlier. The question before the Court was whether the action in withdrawing the sanction was fair and correct. This Court held that fairness was synonymous with reasonableness and bias stood included within the attributes and broader purview of the word "malice". This Court held that mere general statements were not sufficient but that there must be cogent evidence available to come to the conclusion that there existed a bias which resulted in a miscarriage of justice. Mr Tankha also relied upon the case of ***Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant.*** In this case, the question was whether the Managing Director had a bias against the respondent therein. This Court held that mere apprehension of bias was not sufficient but that there must be real danger of bias. It was held that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. It was held that if on facts the conclusion was otherwise inescapable that there existed a real danger of bias, the administrative action could not be sustained. It was held that if, on the other hand, the

allegations pertaining to bias are rather fanciful, then the question of declaring them to be unsustainable would not arise.

22. There can be no dispute with the propositions of law. However, in our view, the above authorities indicate that if the facts and circumstances indicate bias, then the conclusion becomes inescapable.

23. Mr Tankha is not right when he submits that the Governor would be sitting in appeal over the decision of the Council of Ministers. However, as stated above, unless a situation arises as a result whereof the Council of Ministers disables or disentitles itself, the Governor in such matters may not have any role to play. Taking a cue from ***Antulay*** [Ed.: See ***R.S. Nayak* v. *A.R. Antulay*** (1984) 2 SCC 183. Other connected ***Antulay*** cases are reported at (1984) 2 SCC 500; (1984) 3 SCC 86; (1986) 2 SCC 716; 1986 Supp SCC 510; (1988) 2 SCC 602]. it is possible to contend that a Council of Ministers may not take a fair and impartial decision when their Chief Minister or other members of the Council face prosecution. But the doctrine of "apparent bias", however, may not be applicable in a case where a collective decision is required to be taken under a statute in relation to former Ministers. In a meeting of the Council of Ministers, each member has his own say. There may be different views or opinions. But in a democracy the opinion of the majority would prevail.

24. Mr Soli J. Sorabjee has not placed any material to show as to how the Council of Ministers collectively or the members of the Council individually were in any manner whatsoever biased. There is also no authority for the proposition that a bias can be presumed in such a situation. The real doctrine of likelihood of bias would also not be applicable in such a case. The decision was taken collectively by a responsible body in terms of its constitutional functions. To repeat, only in a case of "apparent bias", the exception to the general rule would apply.

25. On the same analogy in the absence of any material brought on record, it may not be possible to hold that the action on the part of the Council of Ministers was actuated by any malice. So far as plea of malice is concerned, the same must be attributed personally against the person concerned and not collectively. Even in such a case the persons against whom malice on fact is alleged must be impleaded as parties.

26. However, here arises another question. There are two competing orders; one of the Council of Ministers, another by the Governor, one refusing to grant sanction, another granting the same. The Council of Ministers had refused to grant sanction on the premise that there existed no material to show that Respondents 4 in each appeal had committed an offence of conspiracy, whereas the Governor in his order dated 24-9-1998 was clearly of the view that the materials did disclose their complicity.

27. An FIR was lodged in relation to the commission of offence on 31-3-1998.

28. The Lokayukta for the State of Madhya Pradesh admittedly made a detailed inquiry in the matter on a complaint received by him. The inquiry covered a large area, namely, the statutory provisions, the history of the case, orders dated 11-8-1995, 24-2-1997 and 5-3-1997 which were said to have been passed in the teeth of the statutory provisions, the clandestine manner in which the matter was pursued, the notings in the files as also how the accused persons deliberately and knowingly closed their minds and eyes from the realities of the case.

The report of the Lokayukta is itself replete with the materials which led him to arrive at the conclusion which is as under:

> "Having gone through the record of the IDA and the State Government and the statements recorded by Shri P.P. Tiwari and the replies of the two Ministers Shri B.R. Yadav and Shri Rajendra Kumar Singh and Shri R.D. Ahirwar, the then Additional Secretary, Department of Environment, I have come to the conclusion that this is a fit case in which an offence should be registered. Therefore, in exercise of the powers vested in me under Section 4(1) of the M.P. Special Police Establishment Act, I direct the DG (SPE) to register and investigate an offence against Shri B.R. Yadav, Minster, Shri Rajendra Kumar Singh, Minister and Shri R.D. Ahirwar, the then Additional Secretary under relevant provisions of the PC Act, 1988 and IPC. It is also directed that investigation in this case will be done by an officer not below the rank of SP. The entire record be transferred to the SPE wing."

29. The office of the Lokayukta was held by a former Judge of this Court. It is difficult to assume that the said high authority would give a report without any material whatsoever. We, however, do not intend to lay down any law in this behalf. Each case may be judged on its own merits. In this case, however, we are satisfied that the Lokayukta made a report upon taking into consideration the materials which were placed or received by him. When the Council of Ministers takes a decision in exercise of its jurisdiction it must act fairly and reasonably. It must not only act within the four corners of the statute but also for effectuating the purpose and object for which the statute has been enacted. Respondents 4 in each appeal are to be prosecuted under the Prevention of Corruption Act wherefor no order of sanction is required to be obtained. A sanction was asked for and granted only in relation to an offence under Section 120-B of the Penal Code. It is now trite that it may not be possible in a given case even to prove conspiracy by direct evidence. It was for the court to arrive at the conclusion as regards commission of the offence of conspiracy upon the material placed on record of the case during trial which would include the oral testimonies of the witnesses. Such a relevant consideration apparently was absent in the mind of the Council of Ministers when it passed an order refusing to grant sanction. It is now well settled that refusal to take into consideration a relevant fact or acting on the basis of irrelevant and extraneous factors not germane to the purpose of arriving at the conclusion would vitiate an administrative order. In this case, on the material disclosed by the report of the Lokayukta it could not have been concluded, at the prima facie stage, that no case was made out.

30. It is well settled that the exercise of administrative power will stand vitiated if there is a manifest error of record or the exercise of power is arbitrary. Similarly, if the power has been exercised on the non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous.

31. We have, on the premises aforementioned, no hesitation to hold that the decision of the Council of Ministers was ex facie irrational whereas the decision of the Governor was not. In a situation of this nature, the writ court while exercising its jurisdiction under Article 226 of the Constitution as also this Court under Articles 136 and 142 of the Constitution can pass an appropriate order which would do complete justice to the parties. The High Court unfortunately failed to consider this aspect of the matter.

32. If, on these facts and circumstances, the Governor cannot act in his own discretion there would be a complete breakdown of the rule of law inasmuch as it would then be open for Governments to refuse sanction in spite of overwhelming material showing that a prima facie case is made out. If, in cases where a prima facie case is clearly made out, sanction to prosecute high functionaries is refused or withheld, democracy itself will be at stake. It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted.

33. Mr Tankha also pressed into play the doctrine of necessity to show that in such cases of necessity it is the Council of Ministers which has to take the decision. In support of this submission he relied upon the cases of ***J. Mohapatra and Co.* v. *State of Orissa*** [(1984) 4 SCC 103], ***Institute of Chartered Accountants* v. *L.K. Ratna*** [(1986) 4 SCC 537], ***Charan Lal Sahu* v. *Union of India*** [(1990) 1 SCC 613], ***Badrinath* v. *Govt. of T.N***.[(2000) 8 SCC 395], ***Election Commission of India* v. *Dr. Subramaniam Swamy*** (1996) 4 SCC 104], ***Ramdas Shrinivas Nayak*** and ***State of M.P.* v. *Dr. Yashwant Trimbak***.[(1996) 2 SCC 305]. In our view, the doctrine of necessity has no application to the facts of this case. Certainly, the Council of Ministers has to first consider grant of sanction. We also presume that a high authority like the Council of Ministers will normally act in a bona fide manner, fairly, honestly and in accordance with law. However, on those rare occasions where on facts the bias becomes apparent and/or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction.

34. In this view of the matter, the appeals are allowed. The decisions of the Single Judge and the Division Bench cannot be upheld and are, accordingly, set aside. The writ petitions filed by the two Ministers will stand dismissed. For the reasons aforementioned we direct that the order of the Governor sanctioning prosecution should be given effect to and that of the Council of Ministers refusing to do so may be set aside. The Court shall now proceed with the prosecution. As the case is very old, we request the Court to dispose of the case as expeditiously as possible.

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PARLIAMENT AND STATE LEGISLATURES

B. R. Kapur v. *State of Tamil Nadu*

AIR 2001 SC 3435

[*Conviction of a person for an offence - disqualified to be a member of the state legislature. Can such a person be appointed as Chief Minister?*]

Ms. Jayalilatha was the Chief Minister of Tamil Nadu between 1991 and 1996. She was convicted in two criminal cases in respect of offences she had committed during her tenure as Chief Minister. She was sentenced to undergo three years' rigorous imprisonment and imposed fine of Rs. 10,000 in one case and two years' rigorous imprisonment and fine of Rs. 5,000 in the other. The fine that was imposed in both cases was paid. Her appeals were pending at the time of filing of the petition. At her instance the High Court had suspended the sentences of imprisonment and directed her release on bail. However, her applications for stay of the operation of the judgments in both the criminal cases were rejected. In April, 2001, she filed nomination papers for four constituencies in respect of the general elections to the Tamil Nadu Legislative Assembly. Three of the said nominations were rejected on account of her disqualification under Section 8(3) of the Representation of People Act, 1951, by reason of her conviction. The fourth nomination was rejected because she had filed her nomination for more than two seats. Ms. Jayalalitha did not challenge those rejection orders. However, in the election, her party (AIADMK) secured 132 out of the 234 seats in the Legislative Assembly and the party elected her as its leader. Consequently, she was sworn in as the Chief Minister of the State. This was challenged before the Supreme Court.

Submissions of the petitioner : Constitution did not envisage that a person disqualified from being (or is not qualified to be) a member of the Legislature can be appointed as a Minister under Article 164(4):

(*a*) The purpose of Article 164(4) is to enable those persons who are otherwise competent, but who are not members of the Legislature, to work as a Minister for a limited period. It is basically a good governance provision, which should not be so read as to allow those persons who are ineligible at the time of appointment to become Ministers.

(*b*) The provisions of Article 164(4) itself postulate that a person who has been appointed a Minister ceases to be one if such person does not become a member of the Legislature within the short prescribed time. This necessarily means that such a person is eligible to be a member at the time of appointment as a Minister but is in fact not such a member.

(*c*) Article 164(4) has to be read in conjunction with Articles 163, 173 and 191 of the Constitution of India, as well as the Representation of the People Act, 1951 ("the RoP Act").

(*d*) An appointment of any person as a Minister while such person is not a member of the Legislature is an exception to the normal rule that a Minister must be a member of the Legislature at the time of appointment.

(*e*) The appointment of a Minister under Article 164(4) should be read subject to the provisions of Article 164(2) which speak of the collective responsibility of the Council of Ministers. This means that each Minister is individually and collectively responsible to the House.

S.P. BHARUCHA, J. - 15. Central to the controversy herein is Article 164, with special reference to sub-article (4) thereof. This Court has considered its import in a number of decisions. In ***Har Sharan Verma* v. *Tribhuvan Narain Singh, Chief Minister, U.P.*** [(1971) 1 SCC 616], a Constitution Bench rendered the decision in connection with the appointment of the first respondent therein as the Chief Minister of Uttar Pradesh at a time when he was not a member of either House of the Legislature of that State. The Court said:

> *3*. It seems to us that clause (4) of Article 164 must be interpreted in the context of Articles 163 and 164 of the Constitution. Article 163(1) provides that 'there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except insofar as he is by or under this Constitution required to exercise his functions or any of them in his discretion'. Under clause (1) of Article 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They all hold office during the pleasure of the Governor. Clause (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Minister, but clause (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf.
>
> *6*. It seems to us that in the context of the other provisions of the Constitution referred to above there is no reason why the plain words of clause (4) of Article 164 should be cut down in any manner and confined to a case where a Minister loses for some reason his seat in the Legislature of the State. We are assured that the meaning we have given to clause (4) of Article 164 is the correct one from the proceedings of the Constituent Assembly and the position as it obtains in England, Australia and South Africa.

The Court set out the position as it obtained in England, Australia and South Africa and observed that this showed that Article 164(4) had "an ancient lineage".

19. In ***S.R. Chaudhuri* v. *State of Punjab*** [(2001) 7 SCC 126], one Tej Parkash Singh was appointed a Minister of the State of Punjab on the advice of the Chief Minister, Sardar Harcharan Singh Brar. At the time of his appointment as a Minister, Tej Parkash Singh was not a member of the Punjab Legislative Assembly. He was not elected as a member of that Assembly within a period of six months and he submitted his resignation. During the same legislative term Sardar Harcharan Singh Brar was replaced as Chief Minister by Smt Rajinder Kaur Bhattal. On her advice, Tej Parkash Singh was appointed a Minister yet again. The appointment was challenged by a writ petition in the High Court seeking a writ of quo

warranto. The writ petition was dismissed in limine and an appeal was filed by the writ petitioner in this Court. The judgments aforementioned were referred to by this Court and it was said:

> *17*. The absence of the expression 'from amongst members of the Legislature' in Article 164(1) is indicative of the position that whereas under that provision a non-legislator can be appointed as a Chief Minister or a Minister but that appointment would be governed by Article 164(4), which places a restriction on such a non-member to continue as a Minister or the Chief Minister, as the case may be, unless he can get himself elected to the Legislature within the period of six consecutive months from the date of his appointment. Article 164(4) is, therefore, not a source of power or an enabling provision for appointment of a non-legislator as a Minister even for a short duration. It is actually in the nature of a disqualification or restriction for a non-member who has been appointed as a Chief Minister or a Minister, as the case may be, to continue in office without getting himself elected within a period of six consecutive months.

The Court said that in England the position was this:

> In the Westminster system, it is an established convention that Parliament maintains its position as controller of the executive. By a well-settled convention, it is the person who can rely on support of a majority in the House of Commons, who forms a Government and is appointed as the Prime Minister. Generally speaking, he and his Ministers must invariably all be members of Parliament (House of Lords or House of Commons) and they are answerable to it for their actions and policies. Appointment of a non-member as a Minister is a rare exception and if it happens it is for a short duration. Either the individual concerned gets elected or is conferred life peerage.

The Court noted the constitutional scheme that provided for a democratic parliamentary form of government, which envisaged the representation of the people, responsible government and the accountability of the Council of Ministers to the Legislature. Thus was drawn a direct line of authority from the people through the Legislature to the executive. The position in England, Australia and Canada showed that the essentials of a system of representative government, like the one in India, were that, invariably, all Ministers were chosen out of the members of the Legislature and only in rare cases was a non-member appointed a Minister and he had to get himself returned to the Legislature by direct or indirect election within a short period. The framers of the Constitution had not visualised that a non-legislator could be repeatedly appointed a Minister, for a term of six months each, without getting elected because such a course struck at the very root of parliamentary democracy. It was accordingly held that the appointment of Tej Parkash Singh as a Minister for a second time was invalid and unconstitutional.

21. To answer the question before us, three sub-articles of Article 164 need, in our view, to be read together, namely, sub-articles (1), (2) and (4). By reason of sub-article (1), the Governor is empowered to appoint the Chief Minister, the Governor is also empowered to appoint the other Ministers, but, in this regard, he must act on the advice of the Chief Minister. Sub-article (2) provides, as is imperative in a representative democracy, that the

Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. The political executive, namely, the Council of Ministers, is thus, through the Legislative Assembly, made representative of and accountable to the people of the State who have elected the Legislative Assembly. There is necessarily implicit in these provisions the requirement that a Minister must be a member of the Legislative Assembly and thus representative of and accountable to the people of the State. It is sub-arti. (4) which makes the appointment of a person other than a member of the Legislature of the State as a Minister permissible, but it stipulates that a Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister. Necessarily implicit in sub-article (4) read with sub-articles (1) and (2) is the requirement that a Minister who is not a member of the Legislature must seek election to the Legislature and, in the event of his failing to secure a seat in the Legislature within six months, he must cease to be a Minister. The requirement of sub-article (4) being such, it follows as the night the day that a person who is appointed a Minister though he is not a member of the Legislature shall be one who can stand for election to the Legislature and satisfy the requirement of sub-article (4). In other words, he must be one who satisfies the qualifications for membership of the Legislature contained in the Constitution (Article 173) and is not disqualified from seeking that membership by reason of any of the provisions therein (Article 191) on the date of his appointment.

22. The provision of sub-article (4) of Article 164 is meant to provide for a situation where, due to political exigencies or to avail of the services of an expert in some field, it is requisite to induct into the Council of Ministers a person who is not then in the Legislature. That he is not in the Legislature is not made an impassable barrier. To that extent we agree with Mr Venugopal, but we cannot accept his submission that sub-article (4) must be so read as to permit the induction into the Council of Ministers of short-term Ministers whose term would not extend beyond six months and who, therefore, were not required to have the qualifications and be free of the disqualifications contained in Articles 173 and 191 respectively. What sub-article (4) does is to give a non-legislator appointed Minister for six months to become a member of the Legislature. Necessarily, therefore, that non-legislator must be one who, when he is appointed, is not debarred from obtaining membership of the Legislature: he must be one who is qualified to stand for the Legislature and is not disqualified to do so. Sub-article (4) is not intended for the induction into the Council of Ministers of someone for six months or less so that it is of no consequence that he is ineligible to stand for the Legislature.

23. It would be unreasonable and anomalous to conclude that a Minister who is a member of the Legislature is required to meet the constitutional standards of qualification and disqualification but that a Minister who is not a member of the Legislature need not. Logically, the standards expected of a Minister who is not a member should be the same as, if not greater than, those required of a member.

24. The ***Constituent Assembly Debates*** (Vol. VII) notes that when the corresponding article relating to members of Parliament was being discussed by the Constituent Assembly, Dr B.R. Ambedkar said: (Vol. 8, p. 521)

> The first amendment is by Mr Mohd. Tahir. His suggestion is that no person should be appointed a Minister unless at the time of his appointment he is an elected member of the House. He does not admit the possibility of the cases covered in the proviso, namely, that although a person is not at the time of his appointment a member of the House, he may nonetheless be appointed as a Minister in the Cabinet subject to the condition that within six months he shall get himself elected to the House. The second qualification is by Prof. K.T. Shah. He said that a Minister should belong to a majority party and his third qualification is that he must have a certain educational status. Now, with regard to the first point, namely, that no person shall be entitled to be appointed a Minister unless he is at the time of his appointment an elected member of the House. I think it forgets to take into consideration certain important matters which cannot be overlooked. First is this, it is perfectly possible to imagine *that a person who is otherwise competent to hold the post of a Minister* has been defeated in a constituency or for some reason which, although it may be perfectly good, might have annoyed the constituency and he might have incurred the displeasure of that particular constituency. It is not a reason why a member so competent as that should be not permitted to be appointed a member of the Cabinet on the assumption that he shall be able to get himself elected either from the same constituency or from another constituency. After all the privilege that is permitted - is a privilege that extends only for six months. *It does not confer a right to that individual to sit in the House without being elected at all*…. (emphasis supplied)

25. What was said by Dr B.R. Ambedkar is self-explanatory. It shows clearly that the Constituent Assembly envisaged that non-legislator Ministers would have to be elected to the Legislature within six months and it proceeded on the basis that the article as it read required this. The manner in which we have interpreted Article 164 is, thus, borne out.

27. What we have done is to interpret Article 164 on its own language and to read sub-article (4) thereof in the context of sub-articles (1) and (2). In any event, it is permissible to read into sub-article (4) limitations based on the language of sub-articles (1) and (2). The majority judgment in ***Kesavananda Bharati*** conceded to Parliament the right to make alterations in the Constitution so long as they were within the basic framework. The preamble assured the people of India of a polity whose basic structure was described therein as a sovereign democratic republic; Parliament could make any amendments to the Constitution as it deemed expedient so long as they did not damage or destroy India's sovereignty and its democratic, republican character. Democracy was a meaningful concept whose essential attributes were recited in the preamble itself: justice, social, economic and political: liberty of thought, expression, belief, faith and worship; and equality of status and opportunity. Its aim, again as set out in the preamble, was to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation." The newly introduced clause (5) demolished the very pillars on which the preamble rested by empowering Parliament to exercise its constituent power without any "limitation whatever". No constituent power could conceivably go higher than the power conferred by clause (5) for it empowered Parliament even to "repeal the provisions of this Constitution", that is to say, to abrogate democracy and substitute for it a totally antithetical form of government. That could

most effectively be achieved, without calling democracy by any other name, by denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy was not a power to amendment. Since the Constitution had conferred a limited amending power on Parliament, Parliament could not under the exercise of that limited power enlarge that very power into an absolute power. A limited amending power was one of the basic features of the Constitution and, therefore, the limitations on that power could not be destroyed. In other words, Parliament could not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power could not by the exercise of that power convert the limited power into an unlimited one.

30. We hold, therefore, that a non-legislator can be made a Chief Minister or Minister under Article 164 only if he has the qualifications for membership of the Legislature prescribed by Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191.

31. The next question is: was the second respondent qualified for membership of the Legislature and not disqualified therefore when she was appointed Chief Minister on 14-5-2001?

32. It was submitted by learned counsel for the respondents that the suspension of the sentences passed against the second respondent by the High Court at Madras was tantamount to the suspension of the convictions against her. Our attention was then drawn to Section 8(3) of the Representation of the People Act, which says that "a person convicted of any offence and sentenced to imprisonment for not less than two years shall be disqualified …." In learned counsel's submission, for the purposes of S. 8(3), it was the sentence alone which was relevant and if there were a suspension of the sentence, there was a suspension of the disqualification. The sentences awarded to the second respondent having been suspended, the disqualification under Section 8(3), insofar as it applied to her, was also suspended.

33. Section 389 of the Code of Criminal Procedure on the basis of which the second respondent was released on bail by the Madras High Court reads, so far as is relevant, as follows:

> 389. ***Suspension of sentence pending the appeal; release of appellant on bail***.—(1) Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that *the execution of the sentence or order appealed against be suspended* and, also, if he is in confinement, that he be released on bail, or on his own bond. (emphasis supplied)

34. It is true that the order of the High Court at Madras on the application of the second respondent states: "Pending criminal appeals the sentence of imprisonment alone is suspended and the petitioners shall be released on bail….", but this has to be read in the context of Section 389 under which the power was exercised. Under Section 389 an appellate court may order that "the execution of the sentence or order appealed against be suspended …". It is not within the power of the appellate court to suspend the sentence; it can only suspend the

execution of the sentence pending the disposal of appeal. The suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of a grave offence and has attracted the sentence of imprisonment of not less than two years. The suspension of the execution of the sentences, therefore, does not remove the disqualification against the second respondent. The suspension of the sentence, as the Madras High Court erroneously called it, was in fact only the suspension of the execution of the sentences pending the disposal of the appeals filed by the second respondent. The fact that she secured the suspension of the execution of the sentences against her did not alter or affect the convictions and the sentences imposed on her and she remained disqualified from seeking legislative office under Section 8(3).

37. It was pointed out by learned counsel for the respondents that under Section 8(3) of the Representation of the People Act the disqualification was attracted on the date on which a person was convicted of any offence and sentenced to imprisonment for not less than two years. It was pointed out, rightly, that the law contemplated that the conviction and the sentence could be on different dates. It was submitted that it was unworkable that the disqualification should operate from the date of conviction which could precede the date of sentence; therefore, the conviction referred to in Section 8(3) should be taken to be that confirmed by the appellate court because it was only in the appellate court that conviction and sentence would be on the same day. We find the argument unacceptable. In those cases where the sentence is imposed on a day later than the date of conviction (which, incidentally, is not the case here) the disqualification would be attracted on the date on which the sentence was imposed because only then would a person be both convicted of the offence and sentenced to imprisonment for not less than two years which is cumulatively requisite to attract the disqualification under Section 8(3).

38. The focus was then turned upon Section 8(4) of the Representation of the People Act and it was submitted that all the disqualifications set down in Section 8 would not apply until a final court had affirmed the conviction and sentence. This was for the reason that the principle underlying Section 8(4) had to be extended to a non-legislator as, otherwise, Article 14 would stand violated for the presumption of innocence would apply to a sitting member till the conviction was finally affirmed but in the case of a non-legislator the disqualification would operate on conviction by the court of first instance. It was submitted that Section 8(4) had to be "read down" so that its provisions were not restricted to sitting members and in all cases the disqualification applied only when the conviction and sentence were finally upheld.

39. Section 8(4) opens with the words "notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3)", and it applies only to sitting members of Legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be "reading up" the provision, not "reading down", and that is not known to the law.

40. In much the same vein, it was submitted that the presumption of innocence continued until the final judgment affirming the conviction and sentence was passed and, therefore, no disqualification operated as of now against the second respondent. Before we advert to the four judgments relied upon in support of this submission, let us clear the air. When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates and the accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. In many cases, the accused is released on bail so that the appeal is not rendered infructuous, at least in part, because the accused has already undergone imprisonment. If the appeal of the accused succeeds the conviction is wiped out as cleanly as if it had never existed and the sentence is set aside. A successful appeal means that the stigma of the offence is altogether erased. But that is not to say that the presumption of innocence continues after the conviction by the trial court. That conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well.

45. Our conclusion, therefore, is that on the date on which the second respondent was sworn in as Chief Minister she was disqualified, by reason of her convictions under the Prevention of Corruption Act and the sentences of imprisonment of not less than two years, for becoming a member of the Legislature under Section 8(3) of the Representation of the People Act.

46. It was submitted by learned counsel for the respondents that, even so, the court could do nothing about it. It was submitted that in the case of a Chief Minister or a Minister appointed under Article 164(1) read with (4) the people, who were the ultimate sovereign, had expressed their will through their elected representatives. For the period of six months the locus penitentiae operated as an exception, as a result of which, for that period, the people's will prevailed in a true parliamentary democracy, especially as no provision was made for adjudicating alleged disqualifications, like the holding of an office of profit or a subsisting contract for the supply of goods or execution of works. In this area of constitutional governance, for the limited period of six months, it was not open to the court to import qualifications and disqualifications for a Minister qua Minister when none existed in Article 164(4). The Governor, not being armed with the machinery for adjudicating qualifications or disqualifications, for example, on the existence of subsisting contracts or the holding of offices of profit, and having no power to summon witnesses or to administer an oath or to summon documents or to deliver a reasoned judgment, the appointment made by him on the basis of the conventions of the Constitution could not be challenged in quo warranto proceedings so that an appointment that had been made under Article 164 could not be rendered one without the authority of law. If it did so, the court would be entering the political thicket. When qualifications and disqualifications were prescribed for a candidate or a member of the Legislature and a machinery was provided for the adjudication thereof, the absence of the prescription of any qualification for a Minister or a Chief Minister appointed under Article 164(1) read with (4) and for adjudication thereof meant that the Governor had to accept the will of the people in selecting the Chief Minister or the Minister, the only consideration being whether the political party and its leader commanded a majority in the

Legislature and could provide a stable Government. Once the electorate had given its mandate to a political party and its leader to run the Government of a State for a term of five years, in the absence of any express provision in the Constitution to the contrary, the Governor was bound to call the leader of that legislature party to form the Government. There was no express, unambiguous provision in the Constitution or in the Representation of the People Act or any decision of this Court or a High Court declaring that a person convicted of an offence and sentenced to imprisonment for a period of not less than two years by the trial court shall not be appointed Chief Minister during the pendency of his first appeal. In such a situation, the Governor could not be expected to take a position of confrontation with the people of the State who had voted the ruling party to power and plunge the State into turmoil. In the present case, the Governor was entitled to proceed on the basis that the appeals of the second respondent having been directed, in October 2000, to be heard within two months, it would be open to the second respondent to have the appeals disposed of within the time-limit of six months and, in the case of an acquittal, no question of ineligibility to contest an election within the period of six months would arise. If the Governor invited the leader of the party which had a majority in the Legislature to form a Government, it would, if the leader was a non-legislator, thereafter not be open to the court in quo warranto proceedings to decide that the Chief Minister was disqualified. Otherwise, this would mean that when the Governor had invited, in accordance with conventions, the leader to be the Chief Minister, in the next second the leader would have to vacate his office by reason of the quo warranto. The court would then be placing itself in a position of prominence among the three organs of the State, as a result of which, instead of the House deciding whether or not to remove such a person through a motion of no-confidence, the court would take over the function, contrary to the will of the Legislature which would mean the will of the people represented by the majority in the Legislature. In then deciding that the Chief Minister should demit office, the court would be entering the political thicket, arrogating to itself a power never intended by the Constitution, the exercise of which would result in instability in the governance of the State.

48. But submissions were made by learned counsel for the respondents in respect of the Governor's powers under Article 164 which call for comment. The submissions were that the Governor, exercising powers under Article 164(1) read with (4), was obliged to appoint as Chief Minister whosoever the majority party in the Legislature nominated, regardless of whether or not the person nominated was qualified to be a member of the Legislature under Article 173 or was disqualified in that behalf under Article 191, and the only manner in which a Chief Minister who was not qualified or who was disqualified could be removed was by a vote of no-confidence in the Legislature or by the electorate at the next elections. To a specific query, learned counsel for the respondents submitted that the Governor was so obliged even when the person recommended was, to the Governor's knowledge, a non-citizen, under age, a lunatic or an undischarged insolvent, and the only way in which a non-citizen or an under age or a lunatic or an insolvent Chief Minister could be removed was by a vote of no-confidence in the Legislature or at the next election.

49. The nomination to appoint a person who is a non-citizen or under age or a lunatic or an insolvent as Chief Minister having been made by the majority party in the Legislature, it is hardly realistic to expect the Legislature to pass a no-confidence motion against the Chief

Minister; and the election would ordinarily come after the Chief Minister had finished his term.

50. To accept learned counsel's submission is to invite disaster. As an example, the majority party in the Legislature could recommend the appointment of a citizen of a foreign country, who would not be a member of the Legislature and who would not be qualified to be a member thereof under Article 173, as Chief Minister under Article 164(1) read with (4) to the Governor; and the Governor would be obliged to comply; the Legislature would be unable to pass a no-confidence motion against the foreigner Chief Minister because the majority party would oppose it; and the foreigner Chief Minister would be ensconced in office until the next election. Such a dangerous — such an absurd interpretation of Article 164 has to be rejected out of hand. The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution. The Governor is a functionary under the Constitution and is sworn to "preserve, protect and defend the Constitution and the law" (Article 159). The Governor cannot, in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and the laws. It is another thing that by reason of the protection the Governor enjoys under Article 361, the exercise of the Governor's discretion cannot be questioned. We are in no doubt at all that if the Governor is asked by the majority party in the Legislature to appoint as the Chief Minister a person who is not qualified to be a member of the Legislature or who is disqualified to be such, the Governor must, having due regard to the Constitution and the laws, to which he is subject, decline, and the exercise of discretion by him in this regard cannot be called in question.

51. If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a member of the Legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down. The submission to the contrary - unsupported by any authority - must be rejected.

52. The judgment of this Court in ***Kumar Padma Prasad* v. *Union of India*** [(1992) 2 SCC 428] is a case in point. One K.N. Srivastava was appointed a Judge of the Gauhati High Court by a warrant of appointment signed by the President of India. Before the oath of office could be administered to him, quo warranto proceedings were taken against him in that High Court. An interim order was passed directing that the warrant of appointment should not be given effect to until further orders. A transfer petition was then filed in this Court and was allowed. This Court, on examination of the record and the material that it allowed to be placed before it, held that Srivastava was not qualified to be appointed a High Court Judge and his appointment was quashed. This case goes to show that even when the President, or the Governor, has appointed a person to a constitutional office, the qualification of that person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed.

53. It was submitted that we should not enter a political thicket by answering the question before us. The question before us relates to the interpretation of the Constitution. It is the duty of this Court to interpret the Constitution. It must perform that duty regardless of the fact that the answer to the question would have a political effect. In ***State of Rajasthan* v. *Union of India*** [(1977) 3 SCC 592], it was said by Bhagwati, J.:

> But merely because a question has a political complexion, that by itself is no ground why the court should shirk from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. ... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest possible terms, particularly in the context of recent history, that the Constitution is suprema lex, the paramount law of the land, and there is no department or branch of Government above or beyond it.

54. We are satisfied that in the appointment of the second respondent as the Chief Minister there has been a clear infringement of a constitutional provision and that a writ of quo warranto must issue.

56. We are not impressed by the submission that we should not exercise our discretion to issue a writ of quo warranto because the period of six months allowed by Article 164(4) to the second respondent would expire in about two months from now and it was possible that the second respondent might succeed in the criminal appeals which she has filed. We take the view that the appointment of a person to the office of Chief Minister who is not qualified to hold it should be struck down at the earliest.

58. We are of the view that a person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed the Chief Minister of a State under Article 164(1) read with (4) and cannot continue to function as such.

59. We, accordingly, order and declare that the appointment of the second respondent as the Chief Minister of the State of Tamil Nadu on 14-5-2001 was not legal and valid and that she cannot continue to function as such. The appointment of the second respondent as the Chief Minister of the State of Tamil Nadu is quashed and set aside.

60. All acts, otherwise legal and valid, performed between 14-5-2001 and today by the second respondent acting as the Chief Minister of the State of Tamil Nadu, by the members of the Council of Ministers of that State and by the Government of that State shall not be adversely affected by reason only of this order.

62. In the light of this order, the other writ petitions, the appeal and the transferred writ petition stand disposed of.

* * * * *

LEGISLATIVE POWERS OF THE EXECUTIVE (ORDINANCES)

R.K. Garg v. *Union of India*

(1981) 4 SCC 675

[*An Ordinance is 'Law' within Article 13(3) of the Constitution and the fundamental rights can be abridged by an Ordinance to the same extent as an Act of the Legislature.*]

On January 12, 1981, both Houses of Parliament not being in session, the President promulgated the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 [later replaced by the Special Bearer Bonds (Immunities and Exemptions) Act, 1981] in exercise of the power conferred upon him under Article 123 of the Constitution. The long title of the Act described it as an Act "to provide for certain immunities to holders of Special Bearer Bonds, 1991 and for certain exemptions from direct taxes in relation to such Bonds and for matters connected therewith". Its Preamble read as follows:

> "Whereas for effective economic and social planning it is necessary to canalise for productive purposes black money which has become a serious threat to the national economy;
>
> And whereas with a view to such canalisation the Central Government has decided to issue at par certain bearer bonds to be known as the Special Bearer Bonds, 1991, of the face value of ten thousand rupees and redemption value, after ten years, of twelve thousand rupees;
>
> And whereas it is expedient to provide for certain immunities and exemptions to render it possible for persons in possession of black money to invest the same in the said Bonds;"

Sections 3 and 4 of the Act, which were challenged as violative of Article 14, read as follows:

> "3. (1) Notwithstanding anything contained in any other law for the time being in force,—
>
> (*a*) no person who has subscribed to or has otherwise acquired Special Bearer Bonds shall be required to disclose, for any purpose whatsoever, the nature and source of acquisition of such Bonds;
>
> (*b*) no inquiry or investigation shall be commenced against any person under any such law on the ground that such person has subscribed to or has otherwise acquired Special Bearer Bonds; and
>
> (*c*) the fact that a person has subscribed to or has otherwise acquired Special Bearer Bonds shall not be taken into account and shall be inadmissible as evidence in any proceedings relating to any offence or the imposition of any penalty under any such law.
>
> (2) Nothing in sub-section (1) shall apply in relation to prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code, the Prevention of Corruption Act, 1947 or any offence which is punishable under any other law and which is similar to an offence punishable under either of those Chapters or under that Act or for the purpose of enforcement of any civil liability.
>
> *Explanation.* - For the purposes of this sub-section, "civil liability" does not include liability by way of tax under any law for the time being in force.
>
> 4. Without prejudice to the generality of the provisions of Section 3, the subscription to, or acquisition of, Special Bearer Bonds by any person shall not be taken into account for the purpose of any proceedings under the Income Tax Act, 1961 (the Income Tax Act), the Wealth Tax Act, 1957 (the Wealth Tax Act), or the Gift Tax Act, 1958 (the Gift Tax Act) and,

in particular, no person who has subscribed to, or has otherwise acquired, the said Bonds shall be entitled -

(*a*) to claim any set-off or relief in any assessment, re-assessment, appeal, reference or other proceeding under the Income Tax Act or to reopen any assessment or re-assessment made under that Act on the ground that he has subscribed to or has otherwise acquired the said Bonds;

(*b*) to claim, in relation to any period before the date of maturity of the said Bonds, that any asset which is includible in his net wealth for any assessment year under the Wealth Tax Act has been converted into the said Bonds; or

(*c*) to claim, in relation to any period before the date of maturity of the said Bonds, that any asset held by him or any sum credited in his books of account or otherwise held by him represents the consideration received by him for the transfer of the said Bonds."

P.N. BHAGWATI, J. - These writ petitions raise a common question of law relating to the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 ('the Ordinance') and the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 ('the Act'). The principal ground on which the constitutional validity of the Ordinance and the Act is challenged is that they are violative of the equality clause contained in Article 14 of the Constitution. There is also one other ground on which the Ordinance is assailed as constitutionally invalid and it is that the President had no power under Article 123 of the Constitution to issue the Ordinance and the Ordinance is therefore ultra vires and void. We shall first deal with the latter ground since it can be disposed off briefly.

3. [W]e may now proceed to consider the challenge against the constitutional validity of the Ordinance on the ground that the President had no power to issue the Ordinance under Article 123 of the Constitution. There were two limbs of the argument under this head of challenge; one was that since the Ordinance had the effect of amending the tax laws, it was outside the competence of the President under Article 123 and the other was that the subject-matter of the Ordinance was in the nature of a Money Bill which could be introduced only in the House of the People and passed according to the procedure provided in Articles 109 and 110 and the President had therefore no power under Article 123 to issue the Ordinance bypassing the special procedure provided in Articles 109 and 110 for the passing of a Money Bill. There is, as we shall presently point out, no force in either of these two contentions, but we may point out straightway that both these contentions are academic, since the Act has been brought into force with effect from the date of promulgation of the Ordinance and sub-section (2) of Section 9 provides that anything done or any action taken under the Ordinance shall be deemed to have been done or taken under the corresponding provisions of the Act and the validity of anything done or any action taken under the Ordinance is therefore required to be judged not with reference to the Ordinance under which it was done or taken, but with reference to the Act which was, by reason of its retrospective enactment, in force right from the date of promulgation of the Ordinance and under which the thing or action was deemed to have been done or taken. It is in the circumstances wholly unnecessary to consider the constitutional validity of the Ordinance, because even if the Ordinance be unconstitutional, the validity of anything done or any action taken under the Ordinance could still be justified with reference to the provisions of the Act. This would seem to be clear on first principle as a matter of pure construction and no authority is needed in support of it, but if any were needed,

it may be found in the decision of this Court in ***Gujarat Pottery Works* v. *B.P. Sood*, *Controller of Mining Leases for India*** [AIR 1967 SC 964]. There the question was whether the Mining Leases (Modification of Terms) Rules, 1956 (the '1956 Rules') made under Mines and Minerals (Regulation and Development) Act, 1948 (the '1948 Act') were void as being inconsistent with the provisions of the 1948 Act and if they were void, they could be said to be continued by reason of Section 29 of the Mines and Minerals (Regulation and Development) Act, 1957 (the '1957 Act'). This Court sitting in a Constitution Bench held that the 1956 Rules were not inconsistent with the provisions of the 1948 Act and were therefore valid, but proceeded to observe that even if the 1956 Rules were void as being inconsistent with the provisions of the 1948 Act, they must by reason of Section 29 of the 1957 Act be deemed to have been made under that Act and their validity and continuity must therefore be determined with reference to the provisions of the 1957 Act and not the provisions of the 1948 Act and since there was no inconsistency between the 1956 Rules and the provisions of the 1957 Act, the 1956 Rules could not be faulted as being outside the power of the Central Government.

4. The Ordinance was issued by the President under Article 123 which is the solitary Article in Chapter III headed "Legislative Powers of the President". It will be noticed that under this Article legislative power is conferred on the President exercisable when both Houses of Parliament are not in session. It is possible that when neither House of Parliament is in session, a situation may arise which needs to be dealt with immediately and for which there is no adequate provision in the existing law and emergent legislation may be necessary to enable the executive to cope with the situation. What is to be done and how is the problem to be solved in such a case? Both Houses of Parliament being in recess, no legislation can be immediately undertaken and if the legislation is postponed until the House of Parliament meet damage may be caused to public wealth. Article 123, therefore, confers powers on the President to promulgate a law by issuing an Ordinance to enable the executive to deal with the emergent situation which might well include a situation created by a law being declared void by a court of law. "Grave public inconvenience would be caused", points out Mr. Seervai in his famous book on ***Constitutional Law***, if on a statute like the Sales Tax Act being declared void, "no machinery existed whereby a valid law could be promulgated to take the place of the law declared void". The President is thus given legislative power to issue an Ordinance and since under our constitutional scheme as authoritatively expounded by this Court in ***Shamsher Singh* v. *State of Punjab*** [AIR 1974 SC 2192], the President cannot act except in accordance with the aid and advice of his Council of Ministers, it is really the executive which is invested with this legislative power. Now at first blush it might appear rather unusual and that was the main thrust of the criticism of Mr. R.K. Garg on this point - that the power to make laws should have been entrusted by the founding fathers of the Constitution to the executive, because according to the traditional outfit of a democratic political structure, the legislative power must belong exclusively to the elected representatives of the people and vesting it in the executive, though responsible to the legislature, would be undemocratic, as it might enable the executive to abuse this power by securing the passage of an ordinary bill without risking a debate in the legislature. But if we closely analyse this provision and consider it in all its aspects, it does not appear to

be so startling, though we may point out even if it were, the Court would have to accept it as the expression of the collective will of the founding fathers. It may be noted, and this was pointed out forcibly by Dr. Ambedkar while replying to the criticism against the introduction of Article 123 in the Constituent Assembly, - that the legislative power conferred on the President under this Article is not a parallel power of legislation. It is a power exercisable only when both Houses of Parliament are not in session and it has been conferred *ex necessitate rie* in order to enable the executive to meet an emergent situation. Moreover, the law made by the President by issuing an Ordinance is of strictly limited duration. It ceases to operate at the expiration of six weeks from the reassembly of Parliament or if before the expiration of this period, resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions. This also affords the clearest indication that the President is invested with this legislative power only in order to enable the executive to tide over an emergent situation which may arise whilst the Houses of Parliament are not in session. Furthermore, this power to promulgate an Ordinance conferred on the President is coextensive with the power of Parliament to make laws and the President cannot issue an Ordinance which Parliament cannot enact into a law. It will therefore be seen that legislative power has been conferred on the executive by the constitution makers for a necessary purpose and it is hedged in by limitations and conditions. The conferment of such power may appear to be undemocratic but it is not so, because the executive is clearly answerable to the legislature and if the President, on the aid and advice of the executive, promulgates an Ordinance in misuse or abuse of this power, the legislature can not only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional law complete control of the legislature over the executive, because if the executive misbehaves or forfeits the confidence of the legislature, it can be thrown out by the legislature. Of course this safeguard against misuse or abuse of power by the executive would dwindle in efficacy and value according (*sic*) as if the legislative control over the executive diminishes and the executive begins to dominate the legislature. But nonetheless it is a safeguard which protects the vesting of the legislative power in the President from the charge of being an undemocratic provision.

5. Now once it is accepted that the President has legislative power under Article 123 to promulgate an Ordinance and this legislative power is coextensive with the power of the Parliament to make laws, it is difficult to see how any limitation can be read into this legislative power of the President so as to make it ineffective to alter or amend tax laws. If Parliament can by enacting legislation alter or amend tax laws, equally can the President do so by issuing an Ordinance under Article 123. There have been, in fact, numerous instances where the President has issued an Ordinance replacing with retrospective effect a tax law declared void by the High Court or this Court. Even offences have been created by Ordinance issued by the President under Article 123 and such offences committed during the life of the Ordinance have been held to be punishable despite the expiry of the Ordinance [***State of Punjab* v. *Mohar Singh,*** AIR 1955 SC 84]. It may also be noted that clause (2) of Article 123 provides in terms clear and explicit that an Ordinance promulgated under that Article shall have the same force and effect as an Act of Parliament. That there is no qualitative difference between an Ordinance issued by the President and an Act passed by Parliament is also

emphasized by clause (2) of Article 367 which provides that any reference in the Constitution to Acts or laws made by Parliament shall be construed as including a reference to an Ordinance made by the President. We do not therefore think there is any substance in the contention of the petitioner that the President has no power under Article 123 to issue an Ordinance amending or altering the tax laws and that the Ordinance was therefore outside the legislative power of the President under that Article.

6. That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject-matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the judgment of one of us (Chandrachud, J., as he then was) in ***In re The Special Courts Bill, 1978*** [AIR 1979 SC 478]. It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that:

> 1. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.
>
> 2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protection clause in Article 14.

7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

9. With these prefatory observations, we may now proceed to examine the constitutional validity of the Act. The Preamble of the Act which "affords useful light as to what the statute intends to reach" or in other words "affords a clue to the scope of the statute" makes it clear that the Act is intended to canalise for productive purposes black money which has become a serious threat to the national economy. It is an undisputed fact that there is considerable amount of black money in circulation which is unaccounted or concealed and therefore outside the disclosed trading channels. It is largely the product of black market transactions and evasion of tax. Indeed, as pointed out by the Direct Taxes Enquiry Committee headed by Mr. Wanchoo, retired Chief Justice of India "tax evasion and black money are closely and inextricably interlinked". The abundance of black money has in fact given rise to a parallel economy operating simultaneously and competing with the official economy. This parallel economy has over the years grown in size and dimension and even on a conservative estimate, the amount of black money in circulation runs into some thousand crores. The menace of black money has now reached such staggering proportions that it is causing havoc to the economy of the country and poses a serious challenge to the fulfillment of our objectives of distributive justice and setting up of an egalitarian society. There are several causes responsible for the generation of black money and they have been analysed in the Report of the Wanchoo Committee. Some of the principal causes may be summarised as follows: (1) high rates of taxation under the direct tax laws: they breed tax evasion and generate black money; (2) economy of shortages and consequent controls and licences leading to corruption for issuing licences and permits and turning blind eye to the violation of controls; (3) donations of black money encouraged by political parties to meet election expenses and for augmenting party funds and also for personal purposes; (4) corrupt business practices such as payments of secret commission, bribes, on money, pugree etc. which need keeping on hand money in black; (5) ineffective administration and enforcement of tax laws by the authorities and (6) deterioration in moral standards so that tax evasion is no longer regarded as immoral and unethical and does not carry any social stigma. These causes need to be eliminated if we want to eradicate the evil of black money. But whether any steps are taken or not for removing these causes with a view to preventing future generation of black money, the fact remains that today there is considerable amount of black money, unaccounted and concealed,

in the hands of a few persons and it is causing incalculable damage to the economy of the country.

12. It was to combat this menacing problem of black money and to unearth black money lying secreted and outside the ordinary trade channels that the Act was enacted by Parliament. It was realised that all efforts to detect black money and to uncover it had failed and the problem of black money was an obstinate economic issue which was defying solution and the impugned legislation proving for issue of Special Bearer Bonds was therefore enacted with a view to mopping up black money and bringing it out in the open, so that, instead of remaining concealed and idle, such money may become available for augmenting the resources of the State and being utilised for productive purposes so as to promote effective social and economic planning. This was the object for which the Act was enacted and it is with reference to this object that we have to determine whether any impermissible differentiation is made by the Act so as to involve violation of Article 14.

13. We may now turn to examine the provisions of the Act. Section 3, sub-section (1) provides certain immunities to a person who has subscribed to or otherwise acquired Special Bearer Bonds. Clause (*a*) protects such a person from being required to disclose, for any purpose whatsoever, the nature and source of acquisition of the Special Bearer Bonds. Clause (*b*) prohibits the commencement of any inquiry or investigation against a person on the ground of his having subscribed to or otherwise acquired the Special Bearer Bonds. And clause (*c*) provides that the fact of subscription to or acquisition of Special Bearer Bonds shall not be taken into account and shall be inadmissible in evidence in any proceedings relating to any offence or the imposition of any penalty. It will be seen that the immunities granted under Section 3, sub-section (1) are very limited in scope. They do not protect the holder of Special Bearer Bonds from any inquiry or investigation into concealed income which could have been made if he had not subscribed to or acquired Special Bearer Bonds. There is no immunity from taxation given to the black money which may be invested in Special Bearer Bonds. That money remains subject to tax with all consequential penalties, if it can be discovered independently of the fact of subscription to or acquisition of Special Bearer Bonds. The only protection given by Section 3, sub-section (1) is that the fact of subscription to or acquisition of Special Bearer Bonds shall be ignored altogether and shall not be relied upon as evidence showing possession of undisclosed money. This provision relegates the Revenue to the position as if Special Bearer Bonds had not been purchased at all. If without taking into account the fact of subscription to or acquisition of Special Bearer Bonds and totally ignoring it as if it were non-existent, any inquiry or investigation into concealed income could be carried out and such income detected and unearthed, it would be open to the Revenue to do so and it would be no answer for the assessee to say that this money has been invested by him in Special Bearer Bonds and it is therefore exempt from tax or that he is on that account not liable to prosecution and penalty for concealment of such income. This is the main difference between the impugned Act and the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1965. Under the latter Act, where gold is acquired by a person out of his undisclosed income, which is the same thing as black money, and such gold is tendered by him as subscription for the National Defence Gold Bonds, 1980, the income invested in such gold is exempted from tax, but where Special Bearer Bonds are purchased out of undisclosed

income under the impugned Act, the income invested in the Special Bearer Bonds is not exempt from tax and if independently of the fact of purchase of the Special Bearer Bonds and ignoring them altogether, such income can be detected, it would be subject to tax. The entire machinery of the taxation laws for inquiry and investigation into concealed income is thus left untouched and no protection is granted to a person in respect of his concealed income merely because he has invested such income in Special Bearer Bonds. It is therefore incorrect to say that as soon as any person purchases Special Bearer Bonds, he is immunised against the processes of taxation laws. Here there is no amnesty granted in respect of any part of the concealed income even though it be invested in Special Bearer Bonds. The whole object of the impugned Act is to induce those having black money to convert it into white money by making it available to the State for productive purposes, without granting in return any immunity in respect of such black money, if it could be detected through the ordinary processes of taxation laws without taking into account the fact of purchase of Special Bearer Bonds. Now it is true - and this was one of the arguments advanced on behalf of the petitioner - that if black money were not invested in Special Bearer Bonds but were lying in cash, it could be seized by the tax authorities by carrying out search and seizure in accordance with the provisions of the tax laws and this opportunity to detect and unearth black money would be lost, if such black money were invested in Special Bearer Bonds, because even if Special Bearer Bonds were seized, they cannot be relied upon as evidence of possession of black money. But this argument of the petitioner that the detection and discovery of black money would thus be thwarted by the conversion of black money into Special Bearer Bonds is highly theoretical and does not take into account the practical realities of the situation. If it had been possible to detect and discover a substantial part of the black money in circulation by carrying out searches and seizures, there would have been no need to enact the impugned Act. It is precisely because, in spite of considerable efforts made by the tax authorities including carrying out of searches and seizures, the bulk of black money remained secreted and could not be unearthed, that the impugned Act had to be enacted. Moreover, actual seizure of black money by carrying out searches is not the only method available to tax administration for detecting and discovering black money. There are other methods also by which concealment of income can be detected and these are commonly employed by the tax authorities in making assessment of income or wealth. Close and searching scrutiny of the books of account may reveal that accounts are not properly maintained, unexplained cash credits may provide evidence of concealment and so too unaccounted for investments or lavish expenditure; information derived from external sources may indicate that income has been concealed by resorting to stratagems like suppression of sales or under-statement of consideration; and existence of assets in the names of near relatives may give a lead showing investment of undisclosed income. All these methods and many others would still remain available to the tax authorities for detecting undisclosed income and bringing it to tax despite investment in Special Bearer Bonds. The taxable income of the holder of Special Bearer Bonds would not stand reduced by the amount invested in the purchase of Special Bearer Bonds and it would be open to the Revenue to assess such taxable income in the same manner in which it would do in any other case, employing the same methods and techniques of inquiry and investigation for determining the true taxable income. The only inhibition on the Revenue would be that it would not be entitled to call upon the assessee to disclose for the purpose of assessment, the

nature and source of acquisition of the Special Bearer Bonds and in making the assessment, the investment in the Special Bearer Bonds would have to be left wholly out of account and the Revenue would not be entitled to rely upon it as evidence of possession of undisclosed money. This is the only limited immunity granted under Section 3, sub-section (1) and even this limited immunity is cut down by the provision enacted in sub-section (2) of Section 3. This sub-section says that the immunity granted under sub-section (1) shall not be available in relation to prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code or the Prevention of Corruption Act, 1947 or any other similar law. If therefore an inquiry or investigation is sought to be made against a public servant in respect of an offence under Chapter IX of the Indian Penal Code or the Prevention of Corruption Act, 1947 alleged to have been committed by him, the acquisition or possession of Special Bearer Bonds could be a ground for instituting such inquiry or investigation and it could also be an admissible piece of evidence in a prosecution in respect of such offence. The same would be the position in relation to an inquiry, investigation or prosecution in respect of an offence under Chapter XVII of the Indian Penal Code. The acquisition or possession of Special Bearer Bonds would not therefore afford any protection to a public servant against a charge of corruption or to a person committing any offence against property. Equally this immunity would not be available where what is sought to be enforced is a civil liability other than liability by way of tax. It will thus be seen that the immunity granted in respect of subscription to or acquisition of Special Bearer Bonds is a severely restricted immunity and this is the bare minimum immunity necessary in order to induce holders of black money to bring it out in the open and invest it in Special Bearer Bonds.

14. It is also necessary to note the further restrictions provided in Section 4 which are calculated to pre-empt any possible abuse of the immunity granted in respect of subscription to or acquisition of Special Bearer Bonds. This Section in its opening part affirms in unmistakable terms that subscription to or acquisition of Special Bearer Bonds shall not be taken into account in any proceeding under the Income Tax Act, 1961 or the Wealth Tax Act, 1957 or the Gift Tax Act, 1958. If any investment in Special Bearer Bonds has been made by the assessee, it is to be ignored in making assessment on him under any of the above-mentioned three tax laws; the assessment is to be made as if no Special Bearer Bonds had been purchased at all. The process of computation of taxable income and assessment of tax on it remains unaffected and is not in any way deflected or thwarted by the investment in Special Bearer Bonds. The position remains the same as it would have been if there were no investment in Special Bearer Bonds. We have already discussed the full implications of this proposition in the preceding paragraph while dealing with Section 3 and it is not necessary to say anything more about it. Then, proceeding further, after enacting this provision in the opening part, Section 4 branches off into three different clauses: clause (*a*) provides that no person who has subscribed to or otherwise acquired Special Bearer Bonds shall be entitled to claim any set off or relief in any proceeding under the Income Tax Act, 1961 or to reopen any assessment or reassessment made under that Act on the ground that he has subscribed to or otherwise acquired such Bonds. The holder of Special Bearer Bonds is thus precluded from claiming any advantage by way of set off or relief or reopening of assessment on the ground of having invested undisclosed money in purchase of Special Bearer Bonds. Clause (*b*) enacts another prohibition with a view to preventing abuse of the immunity granted in respect of

Special Bearer Bonds and says that no person who has subscribed to or otherwise acquired Special Bearer Bonds shall be entitled to claim, in relation to any period before the date of maturity of such Bonds, that any asset which is includible in his net wealth for any assessment year under the Wealth Tax Act has been converted into such Bonds. The object of this provision is to preclude an assessee who is sought to be taxed on his net wealth under the Wealth Tax Act from escaping assessment to tax on any asset forming part of his net wealth by claiming that he has invested it in purchase of Special Bearer Bonds. The investment in Special Bearer Bonds would not grant immunity from assessment to wealth tax to any asset which is found by the taxing authorities, otherwise than by relying on the fact of acquisition of Special Bearer Bonds, to belong to the assessee and hence forming part of his net wealth. The asset would be subjected to wealth tax despite the investment in Special Bearer Bonds. Then follows clause (*c*) which is extremely important and which effectively counters the possibility of serious abuse to which the issue of Special Bearer Bonds might otherwise have lent itself. It provides that no person who has subscribed to or otherwise acquired Special Bearer Bonds shall be entitled to claim, in relation to any period before the date of maturity of such Bonds, that any asset held by him or any sum credited in his books of account or otherwise held by him represents the consideration received by him for the transfer of such Bonds. This provision precludes a person from explaining away the existence of any asset held by him or any sum credited in his books of account or otherwise held by him by claiming that it represents the sale proceeds of Special Bearer Bonds held by him. If at any time before the date of maturity of the Special Bearer Bonds held by an assessee, it is found that any asset is held by him or any sum is credited in his books of account or is otherwise held by him and he is required to explain the nature and source of acquisition of such asset or sums of money, he cannot be heard to say by way of explanation that such asset or sums of money represents the consideration received by him for transfer of the Special Bearer Bonds, even if that be factually correct. This explanation, though true being statutorily excluded, it would be impossible for the assessee to offer any other explanation for the acquisition of such asset or sum of money, because any such explanation which might be given by him would be untrue and in the absence of any satisfactory explanation in regard to the nature and source of acquisition of such asset or sum of money, the Revenue would be entitled to infer that such asset has been acquired out of undisclosed income or that such sum of money represents concealed income and hence the value of such asset or such sum of money, as the case may be, should be treated as undisclosed income liable to be included in the taxable income of the assessee (vide Sections 69, 69-A and 69-B of the Income Tax Act, 1961). It is obvious that this provision is calculated to act as a strong deterrent against negotiability of Special Bearer Bonds for disclosed or "white" money. No holder of Special Bearer Bonds would dare to transfer his Bonds to another person against receipt of disclosed or "white" money, because he will not be able to account for the consideration received by him, the true explanation being statutorily unavailable to him, and such consideration would inevitably be liable to be regarded as his concealed income and would be subjected to tax and penalties. Moreover, it is difficult to see why anyone should want to invest disclosed or "white" money in the acquisition of Special Bearer Bonds. Ordinarily a person would go in for Special Bearer Bonds only for the purpose of converting his undisclosed money into "white" money and it would be quite unusual bordering almost on freakishness for anyone to acquire Special Bearer

Bonds with disclosed or "white" money, when he can get only 2 per cent simple interest on the investment in Special Bearer Bonds, while outside he can easily get anything between 15 per cent to 40 per cent yield by openly dealing with his disclosed or "white" money. The transferability of Special Bearer Bonds against disclosed or "white" money is thus, from a practical point of view, completely excluded. The question may still arise whether Special Bearer Bonds would not pass from hand to hand against undisclosed or black money. Would they not be freely negotiable against payment of undisclosed or black money? Now it may be conceded that a purchaser of Special Bearer Bonds would undoubtedly be interested in acquiring such Bonds by making payment of "black" money, because he would thereby convert his undisclosed or "black" money into "white" money. But it is difficult to understand why a holder of Special Bearer Bonds should ever be interested in selling such Bonds against receipt of "black" money. Obviously he would have acquired such Bonds for the purpose of converting his "black" money into "white" in order to avoid the risk of being found in possession of "black" money and if that be so, it is inexplicable as to why he should again want to convert his "white" money into "black" by selling such Bonds against receipt of "black" money. The immunity granted under the provisions of the Act, limited as it is, extends only to the person who is for the time being the holder of Special Bearer Bonds and the person who has transferred the Special Bearer Bonds for black money has no immunity at all and all the provisions of tax laws are available against him for determining his true income or wealth and therefore no one who has purchased Special Bearer Bonds with a view to earning security against discovery of unaccounted money in his hands would ordinarily barter away that security by again receiving black money for the Special Bearer Bonds. Furthermore, even if Special Bearer Bonds are transferred against receipt of black money, it will not have the effect of legalising more black money into white, because the black money of the seller which had become white on his subscribing to or acquiring Special Bearer Bonds would again be converted into black money and the black money paid by the purchaser by way of consideration would become white by reason of being converted into Special Bearer Bonds. The petitioners however expressed an apprehension that Special Bearer Bonds would fetch a much higher value in the black market than that originally subscribed and this would enable a larger amount of black money to be legalised into white than what was originally invested in subscription to Special Bearer Bonds. We do not think this apprehension is well founded. It is true that once the date for original subscription to Special Bearer Bonds has expired, the only way in which Special Bearer Bonds could thereafter be acquired would be by going in the open market and the number of Special Bearer Bonds in the market being necessarily limited, they may fetch a higher value in black money from a person who is anxious to convert his black money into white. If the demand outreaches the limited supply, the price of Special Bearer Bonds in the black market may exceed the amount originally invested in subscription to Special Bearer Bonds. But even so, the black money paid by the purchaser for acquisition of Special Bearer Bonds would not in its entirety be converted into white; it would change its colour from black to white only to the extent of the amount originally subscribed for the Special Bearer Bonds or at the most, if we also take into account interest on such amount, to the extent of the face value of the Special Bearer Bonds, because whatever be the amount he might have paid in black money for acquisition of the Special Bearer Bonds, the holder of the Special Bearer Bonds will get only the amount representing

the face value on maturity of the Special Bearer Bonds. It will thus be seen that howsoever Special Bearer Bonds may be transferred and for whatever consideration, only *a limited amount of black money*, namely, the amount originally subscribed for the Special Bearer Bonds or at the most the amount representing the face value of the Special Bearer Bonds would be legalised into white money and the supposedly free negotiability of Special Bearer Bonds would not have the effect of legalising more black money into white or encouraging further generation of black money.

17. We may now proceed to consider the constitutional validity of the Act in the light of the above discussion as regards the scope and effect of its various provisions. It is obvious that the Act makes a classification between holders of black money and the rest and provides for issue of Special Bearer Bonds with a view to inducing persons belonging to the former class to invest their unaccounted money in purchase of Special Bearer Bonds, so that such money which is today lying idle outside the regular economy of the country is canalised into productive purposes. The object of the Act being to unearth black money for being utilised for productive purposes with a view to effective social and economic planning, there has necessarily to be a classification between persons possessing black money and others and such classification cannot be regarded as arbitrary or irrational. It is of course true — and this must be pointed out here since it was faintly touched upon in the course of the arguments — that there is no legal bar enacted in the Act against investment of white money in subscription to or acquisition of Special Bearer Bonds. But the provisions of the Act properly construed are such that no one would even think of investing white money in Special Bearer Bonds and from a practical point of view, they do operate as a bar against acquisition, whether by original subscription or by purchase, of Special Bearer Bonds with white money. We do not see why anyone should want to invest his white money in subscribing to or acquiring Special Bearer Bonds which yield only 2 per cent simple interest per annum and which are not encashable for a period of not less than ten years. It is true that Special Bearer Bonds can be sold before the date of maturity but who would pay white money for them and even if in some rare and exceptional case, a purchaser could be found who would pay the consideration in white money, no one will dare to sell Special Bearer Bonds for white money, because of the disincentive provided in Section 4, clause (*c*). The investment of white money in Special Bearer Bonds is accordingly, as a practical measure, completely ruled out and the provisions of the Act are intended to operate only *qua* persons in possession of black money. There is a practical and real classification made between persons having black money and persons not having such money and this de facto classification is clearly based on intelligible differentia having rational relation with the object of the Act. The petitioners disputed the validity of this proposition and contended that the classification made by the Act is discriminatory in that it excludes persons with white money from taking advantage of the provisions of the Act by subscribing to or acquiring Special Bearer Bonds. But this contention is totally unfounded and we cannot accept the same. The validity of a classification has to be judged with reference to the object of the legislation and if that is done, there can be no doubt that the classification made by the Act is rational and intelligible and the operation of the provisions of the Act is rightly confined to persons in possession of black money.

18. It was then contended that the Act is unconstitutional as it offends against morality by according to dishonest assessees who have evaded payment of tax, immunities and exemptions which are denied to honest tax payers. Those who have broken the law and deprived the State of its legitimate dues are given benefits and concessions placing them at an advantage over those who have observed the law and paid the taxes due from them and this, according to the petitioners, is clearly immoral and unwarranted by the Constitution. We do not think this contention can be sustained. It is necessary to remember that we are concerned here only with the constitutional validity of the Act and not with its morality. Of course, when we say this we do not wish to suggest that morality can in no case have relevance to the constitutional validity of a legislation. There may be cases where the provisions of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational and hence violative of Article 14. But the test in every such case would be not whether the provisions of the statute offend against morality but whether they are arbitrary and irrational having regard to all the facts and circumstances of the case. Immorality by itself is not a ground of constitutional challenge and it obviously cannot be, because morality is essentially a subjective value, except insofar as it may be reflected in any provision of the Constitution or may have crystallised into some well-accepted norm of social behaviour. Now there can be no doubt that under the provisions of the Act certain immunities and exemptions are granted with a view to inducing tax evaders to invest their undisclosed money in Special Bearer Bonds and to that extent they are given benefits and concessions which are denied to those who honestly pay their taxes. Those who are honest and who observe the law are mulcted in paying the taxes legitimately due from them while those who have broken the law and evaded payment of taxes are allowed by the provisions of the Act to convert their black money into "white" without payment of any tax or penalty. The provisions of the Act may thus seem to be putting premium on dishonesty and they may, not, without some justification, be accused of being tinged with some immorality, but howsoever regrettable or unfortunate it may be, they had to be enacted by the legislature in order to bring out black money in the open and canalise it for productive purposes. Notwithstanding stringent laws imposing severe penalties and vigorous steps taken by the tax administration to detect black money and despite various voluntary disclosure schemes introduced by the Government from time to time, it had not been possible to unearth black money and the menace of black money had over the years assumed alarming proportions causing havoc to the economy of the country and the legislature was therefore constrained to enact the Act with a view to mopping up black money so that instead of remaining idle, such money could be utilised for productive purposes. The problem of black money was an obstinate economic problem which had been defying the Government for quite some time and it was in order to resolve this problem that, other efforts having failed, the legislature decided to enact the Act, even though the effect of its provisions might be to confer certain undeserved advantages on tax evaders in possession of black money. The legislature had obviously only two alternatives: either to allow the black money to remain idle and unproductive or to induce those in possession of it to bring it out in the open for being utilised for productive purposes. The first alternative would have left no choice to the Government but to resort to deficit financing or to impose a heavy dose of taxation. The former would have resulted in inflationary pressures affecting the vulnerable sections of the society while the latter would have increased the burden on the honest taxpayer and perhaps

led to greater tax evasion. The legislature therefore decided to adopt the second alternative of coaxing persons in possession of black money to disclose it and make it available to the Government for augmenting its resources for productive purposes and with that end in view, enacted the Act providing for issue of Special Bearer Bonds.

19. It is true that certain immunities and exemptions are granted to persons investing their unaccounted money in purchase of Special Bearer Bonds but that is an inducement which has to be offered for unearthing black money. Those who have successfully evaded taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the tax department are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions and it must necessarily be left to the legislature to decide what immunities and exemptions would be sufficient for the purpose. It would be outside the province of the Court to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in *Munn* v. *Illinois*, namely, "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies". The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary. It is true that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilised for tax evasion or avoidance not intended by the legislature, the Act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the Act is violative of Article 14 and its constitutional validity must be upheld.

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Also read ***A.K. Roy* v. *Union of India***, AIR 1982 SC 710 which had upheld the validity of the National Security Ordinance, 1980. It dealt with preventing detention.

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D.C. Wadhwa v. *State of Bihar*

(1987) 1 SCC 378

[*Repeated promulgation of the same Ordinance(s) was a fraud on the Constitution*]

The petitions under Article 32 of the Constitution raised the question relating to the power of the Governor under Article 213 of the Constitution to repromulgate ordinances from time to time without getting them replaced by Acts of the legislature. The question was: Can the Governor go on repromulgating Ordinances for an indefinite period of time and thus take over to himself the power of the legislature to legislate though that power was conferred on him under Article 213 only for the purpose of enabling him to take immediate action at a time when the legislative assembly of the State was not in session or when in a case where there was a Legislative Council in the State, both Houses of legislature were not in session.

The writ petitions were filed by four petitioners challenging the practice of the State of Bihar in promulgating and repromulgating Ordinances on a massive scale and in particular they challenged the constitutional validity of three different Ordinances issued by the Governor of Bihar, namely, (*i*) Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, (*ii*) The Bihar Intermediate Education Council Third Ordinance, 1983, and (*iii*) The Bihar Bricks Supply (Control) Third Ordinance, 1983.

P.N. BHAGWATI, C.J. - 2. It was contended on behalf of the respondents that the petitioners had no locus standi to maintain this writ petition since out of the three Ordinances challenged on behalf of the petitioners, two of them, namely, Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 and the Bihar Bricks Supply (Control) Third Ordinance, 1983 had already lapsed and their provisions were enacted into Acts of the legislature and so far as the third Ordinance, namely, the Bihar Intermediate Education Council Third Ordinance was concerned, a legislative proposal was already introduced for enacting its provisions into an Act. The respondents also contended that the petitioners are not entitled to challenge the practice prevalent in the State of Bihar of repromulgating ordinances from time to time since they were merely outsiders who had no legal interest to challenge the validity of this practice. We do not think this preliminary objection raised on behalf of the respondents is well founded. It is undoubtedly true that the provisions of two out of the three Ordinances challenged in these writ petitions were enacted into Acts of the legislature but that happened only during the pendency of these writ petitions and at the date when these writ petitions were filed, these two Ordinances were very much in operation and affected the interest of Petitioners 2 and 4 respectively. Moreover, the third Ordinance, namely, the Bihar Intermediate Education Council Third Ordinance is still in operation though a bill incorporating the provisions of this Ordinance is pending consideration before the State Legislature and it has been referred to a Select Committee and the right of Petitioner 3 to pursue a particular course of study is vitally affected by the provisions contained in that Ordinance. Besides Petitioner 1 is a Professor of Political Science and is deeply interested in ensuring proper implementation of the constitutional provisions. He has sufficient interest to maintain a petition under Article 32 even as a member of the public because it is a right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. Of course, if any particular ordinance was being challenged by Petitioner 1 he may not have

the locus standi to challenge it simply as a member of the public unless some legal right or interest of his is violated or threatened by such ordinance, but here what Petitioner 1 as a member of the public is complaining of is a practice which is being followed by the State of Bihar of repromulgating the ordinances from time to time without their provisions being enacted into Acts of the legislature. It is clearly for vindication of public interest that Petitioner 1 has filed these writ petitions and he must therefore be held to be entitled to maintain his writ petitions. The rule of law constitutes the core of our Constitution and it is the essence of the rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitations and if any practice is adopted by the executive which is in flagrant and systematic violation of its constitutional limitations, Petitioner 1 as a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the validity of such practice. We must therefore reject the preliminary contention raised on behalf of the respondents challenging the locus of the petitioners to maintain these writ petitions.

4. We shall now proceed to state how the Governor in the State of Bihar has been indulging in the practice of repromulgating the ordinances from time to time so as to keep them alive for an indefinite period of time. Petitioner 1 carried out a thorough and detailed research in the matter of repromulgation of ordinances by the Governor of Bihar from time to time and the result of this research was compiled by him and published in a book entitled ***Repromulgation of Ordinances : Fraud on the Constitution of India*****.** Some of the relevant extracts from this book have been annexed to the writ petition indicating the number of ordinances repromulgated repeatedly by the Governor of Bihar. It is clear on a perusal of these extracts that the Governor of Bihar promulgated 256 ordinances between 1967 and 1981 and all these ordinances were kept alive for periods ranging between one to 14 years by repromulgation from time to time. Out of these 256 ordinances 69 were repromulgated several times and kept alive with the prior permission of the President of India. The enormity of the situation would appear to be startling if we have a look at some of the ordinances which were allowed to continue in force by the methodology of repromulgation. It will thus be seen that the power to promulgate ordinances was used by the Government of Bihar on a large scale and after the session of the State Legislature was prorogued, the same ordinances which had ceased to operate were repromulgated containing substantially the same provisions almost in a routine manner. This would be clear from the fact that on August 26, 1973 the Governor of Bihar repromulgated 54 ordinances with the same provisions and on January 17, 1973, 49 ordinances were repromulgated by the Governor of Bihar containing substantially the same provisions and again on April 27, 1974, 7 ordinances were repromulgated and on April 29, 1974, 9 ordinances were repromulgated with substantially the same provisions. Then again on July 23, 1974, 51 ordinances were repromulgated which included the selfsame ordinances which had been repromulgated on April 27 and 29, 1974. On March 18, 1979, 52 ordinances were repromulgated while on August 18, 1979, 51 ordinances were repromulgated containing substantially the same provisions. 49 ordinances were repromulgated on April 28, 1979 and on August 18, 1979, 51 ordinances were repromulgated. This exercise of making mass repromulgation of ordinances on the prorogation of the session of the State legislature continued unabated and on August 11, 1980, 49 ordinances were repromulgated while on

January 19, 1981, the number of ordinances repromulgated was as high as 53. It may be pointed out that the three ordinances challenged in these writ petitions also suffered the same process of repromulgation from time to time. The Bihar Forest Produce (Regulation of Trade) Third Ordinance was first promulgated in 1977 and after its expiry, it was repromulgated several times without it being converted into an Act of the State Legislature and it continued to be in force until it was replaced by Bihar Act 12 of 1984 on May 17, 1984. So far as the Bihar Intermediate Education Council Third Ordinance is concerned it was initially promulgated in 1982 and after its expiry, it was again repromulgated by the Governor of Bihar four times with the same provisions and it was ultimately allowed to lapse on June 6, 1985, but then the Bihar Intermediate Education Council Ordinance, 1985 was promulgated which contained almost the same provisions as those contained in the Bihar Intermediate Education Council Third Ordinance. Similarly the Bihar Bricks Supply (Control) Third Ordinance was initially promulgated in 1979 and after its expiry it was repromulgated by the Governor of Bihar from time to time and continued to be in force until May 17, 1984 when it was replaced by Bihar Act 13 of 1984. Thus the Bihar Forest Produce (Regulation of Trade) Third Ordinance continued to be in force for a period of more than six years, the Bihar Intermediate Education Council Third Ordinance remained in force for a period of more than one year, while the Bihar Bricks Supply (Control) Third Ordinance was continued in force for a period of more than five years.

5. The Government of Bihar, it seems, made it a settled practice to go on repromulgating the ordinances from time to time and this was done methodologically and with a sense of deliberateness. Immediately at the conclusion of each session of the State legislature, a circular letter used to be sent by the Special Secretary in the Department of Parliamentary Affairs to all the Commissioners, Secretaries, Special Secretaries, Additional Secretaries and all Heads of Departments intimating to them that the session of the legislature had been got prorogued and that under Article 213 clause (2)(*a*) of the Constitution all the ordinances would cease to be in force after six weeks of the date of reassembly of the legislature and that they should therefore get in touch with the Law Department and immediate action should be initiated to get "all the concerned ordinances repromulgated", so that all those ordinances are positively repromulgated before the date of their expiry. This circular letter also used to advise the officers that if the old ordinances were repromulgated in their original form without any amendment, the approval of the Council of Ministers would not be necessary. The petitioners placed before the court a copy of one such circular letter dated July 29, 1981 and it described the subject of the communication as "regarding repromulgation of ordinances". It would be profitable to reproduce this circular letter dated July 29, 1981 as it indicates the routine manner in which the ordinances were repromulgated by the Governor of Bihar:

LETTER NO. PA/MISC. 1040/80-872 GOVERNMENT OF BIHAR
DEPARTMENT OF PARLIAMENTARY AFFAIRS

Dated July 29, 1981

Subject: Regarding repromulgation of ordinances

From: Basant Kumar Dubey, Special Secretary to the Govt.

To: All Commissioners and Secretaries; All Special Secretaries; All Additional Secretaries; All Heads of Departments.

I am directed to say that the budget session of the legislature (June-July 1981) has been got prorogued after the completion of the business of both the houses on July 28, 1981.

Under the provisions of Article 213(2)(*a*) of the Constitution all the ordinances cease to be in force after six weeks of the date of the reassembly of the legislature. This time the session of the Legislative Assembly has begun on June 29, 1981 and that of the Legislative Council on July 1, 1981. Therefore from July 1, 1981, six weeks, that is, 42 days would be completed on August 11, 1981 and if they are not repromulgated before the aforesaid date, then all the ordinances will cease to be in force after August 11, 1981.

It is, therefore, requested that the Law Department may be contacted and immediate action be initiated to get all the concerned ordinances repromulgated so that they are definitely repromulgated before August 11, 1981.

If the old ordinances are repromulgated in their original form without any amendment, then the approval of the Council of Ministers is not necessary.

This should be given the topmost priority and necessary action should be taken immediately".

This circular letter clearly shows beyond doubt that the repromulgation of the ordinances was done on a massive scale in a routine manner without even caring to get the ordinances replaced by Acts of the legislature or considering whether the circumstances existed which rendered it necessary for the Governor to take immediate action by way of repromulgation of the ordinances. The Government seemed to proceed on the basis that it was not necessary to introduce any legislation in the legislature but that the law could be continued to be made by the Government by having the ordinances repromulgated by the Governor from time to time. The question is whether this practice followed by the Government of Bihar could be justified as representing legitimate exercise of power of promulgating ordinances conferred on the Governor under Article 213 of the Constitution.

6. The determination of this question depends on the true interpretation of Article 213 which confers power on the Governor of a State to promulgate ordinances.

The power conferred on the Governor to issue ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the legislature is not in session. The primary law making authority under the Constitution is the legislature and not the executive but it is possible that when the legislature is not in session circumstances may arise which render it necessary, to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate ordinances. But every ordinance promulgated by the Governor must be placed before the legislature and it would cease to operate at the expiration of six weeks from the reassembly of the legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue ordinances is an emergent power exercisable when the legislature is not in session, an ordinance promulgated by the Governor to deal with a situation which requires immediate action and which cannot wait until the legislature

reassembles, must necessarily have a limited life. Since Article 174 enjoins that the legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session and an ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the legislature, it is obvious that the maximum life of an ordinance cannot exceed seven-and-a-half months unless it is replaced by an Act of the legislature or disapproved by the resolution of the legislature before the expiry of that period. The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends". It is contrary to all democratic norms that the executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the legislature.

The Constitution-makers expected that if the provisions of the ordinance are to be continued in force, this time should be sufficient for the legislature to pass the necessary Act. But if within this time the legislature does not pass such an Act, the ordinance must come to an end. The executive cannot continue the provisions of the ordinance in force without going to the legislature. The law-making function is entrusted by the Constitution to the legislature consisting of the representatives of the people and if the executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of repromulgation without submitting to the voice of the legislature, it would be nothing short of usurpation by the executive of the law-making function of the legislature. The executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the executive. The Government cannot bypass the legislature and without enacting the provisions of the ordinance into an Act of the legislature, repromulgate the ordinance as soon as the legislature is prorogued. Of course, there may be a situation where it may not be possible for the government to introduce and push through in the legislature a Bill containing the same provisions as in the ordinance, because the legislature may have too much legislative business in a particular session or the time at the disposal of the legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the ordinance. Where such is the case, re-promulgation of the ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the executive to continue an ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation. It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision.

7. Shri Lal Narain Sinha, appearing on behalf of the State of Bihar urged that the court is not entitled to examine whether the conditions precedent for the exercise of the power of the Governor under Article 213 existed or not, for the purpose of determining the validity of an ordinance. It is true that, according to the decisions of the Privy Council and this Court, the court cannot examine the question of satisfaction of the Governor in issuing an ordinance, but the question in the present case does not raise any controversy in regard to the satisfaction of the Governor. The only question is whether the Governor has power to repromulgate the same ordinance successively without bringing it before the legislature. That clearly the Governor cannot do. He cannot assume legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him. It is significant to note that so far as the President of India is concerned, though he has the same power of issuing an ordinance under Article 123 as the Governor has under Article 213, there is not a single instance in which the President has, since 1950 till today, repromulgated any ordinance after its expiry. The startling facts which we have narrated above clearly show that the executive in Bihar has almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid. We hope and trust that such practice shall not be continued in the future and that whenever an ordinance is made and the Government wishes to continue the provisions of the ordinance in force after the assembling of the legislature, a Bill will be brought before the legislature for enacting those provisions into an Act. There must not be ordinance-Raj in the country.

8. We must accordingly strike down the Bihar Intermediate Education Council Ordinance, 1985 which is still in operation as unconstitutional and void.

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UNION AND STATE JUDICIARY

S.P. Gupta **v.** *Union of India*

AIR 1982 SC 149

[*Independence of Judiciary; Public Interest Litigation, Locus standi, Privilege under Article 74(2)*]

The basic question raised in this case related to the independence of the judiciary which was alleged to be eroded on account of short term extensions given to three Additional Judges of Delhi High Court; transfer of Chief Justices of two High Courts and a circular issued by the Union Law Minister to Chief Justices of High Courts and State Chief Ministers requiring them to obtain written consent of the persons whom they recommended for appointment as judges in the High Courts.

Impugned Circular

No. D.O. No. 66/10/81Jus. Ministry of Law, Justice and Company Affairs, India

"It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to -

(*a*) obtain from all the Additional judges working in the High Court of your State their consent to be appointed as permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and

(*b*) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

sd/-

(P. Shiv Shankar)"

A copy of the Circular letter was sent by the Law Minister to the Chief Justice of each High Court and the Chief Minister of each State also forwarded a copy of the circular letter to the Chief Justice of the High Court of his State. Presumably, each Chief Justice sent a copy of the circular letter to the Additional Judges in his court with a request to do the needful in view of what was stated in the circular letter. The Chief Justice of Bombay High Court in any event

addressed such a communication to each of the Additional Judges in his Court. The record showed that out of the total number of Additional Judges in the country, quite a few Additional Judges gave their consent to be appointed outside their High Court. The petitioners and other advocates practising on the original as well as appellate side of the High Court of Bombay however took the view that the circular letter was a direct attack on the independence of the judiciary which is a basic feature of the Constitution and hence the Advocates Association of Western India which represents advocates practising on the appellate side, the Bombay Bar Association which represents advocates practising on the original side and the Managing Committee of the Bombay Incorporated Law Society which represents Solicitors practising in the High Court of Bombay, passed resolutions condemning the circular letter as subversive of judicial independence and asking the Government of India to withdraw the circular letter. Since the circular letter was not withdrawn by the Law Minister, the petitioners moved the High Court of Bombay challenging the constitutional validity of the circular letter and seeking a declaration that 'if consent has been given by any Additional Judge or by any person whose name has been or is to be submitted for appointment as a Judge, consequent on or arising from the circular letter, it should be held to be null and void'.

P.N. BHAGWATI, J. - ***Locus Standi***

13. When these writ petitions reached hearing before us, a preliminary objection was raised by Mr Mridul, appearing on behalf of the Law Minister, challenging the locus standi of the petitioners in Iqbal Chagla's writ petition. He urged that the petitioners in that writ petition had not suffered any legal injury as a result of the issuance of the circular by the Law Minister or the making of short-term appointments by the Central Government and they had therefore no locus standi to maintain the writ petition assailing the constitutional validity of the circular or the short-term appointments. The legal injury, if at all, was caused to the Additional Judges whose consent was sought to be obtained under the circular or who were appointed for short terms and they alone were therefore entitled to impugn the constitutionality of the circular and the short-term appointments and not the petitioners. The basic postulate of the argument was that it is only a person who has suffered legal injury who can maintain a writ petition for redress and no third party can be permitted to have access to the court for the purpose of seeking redress for the person injured. The same preliminary objection was urged by Mr Mridul against the writ petition of S. P. Gupta and the contention was that the petitioner in that writ petition not having suffered any legal injury had no locus standi to maintain the writ petition. So far as the writ petition of V. M. Tarkunde is concerned, Mr Mridul said that he would have had the same preliminary objection against the locus standi of the petitioner to maintain that writ petition because the petitioner had suffered no legal injury, but since S. N. Kumar had appeared, albeit as a respondent, and claimed relief against the decision of the Central Government not to appoint him for a further term and sought redress of the legal injury said to have been caused to him as a result of such decision, the lack of locus standi on the part of the petitioner was made good and the writ petition was maintainable. Mr Mridul asserted that if S.N. Kumar had not appeared and sought relief against the decision of the Central Government discontinuing him as an Additional Judge, the writ petition would have been liable to be rejected at the threshold on the ground that the petitioner had no locus standi to maintain the writ petition. This preliminary objection urged by Mr Mridul raised a very interesting question of law relating to locus standi, or as the

Americans call it 'standing', in the area of public law. This question is of immense importance in a country like India where access to justice being restricted by social and economic constraints, it is necessary to democratise judicial remedies, remove technical barriers against easy accessibility to justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes.

14. The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born.

15. In the first place a ratepayer of a local authority is accorded standing to challenge an illegal action of the local authority. Thus, a ratepayer can question the action of the municipality in granting a cinema licence to a person, vide: ***K. Ramadas Shenoy* v. *Chief Officers, Town Municipal Council, Udipi*** [AIR 1974 SC 2177]. Similarly, the right of a ratepayer to challenge misuse of funds by a municipality has also been recognised by the courts vide: ***Varadarajan* v. *Salem Municipal Council*** [AIR 1973 Mad 55].

The reason for this liberalisation of the rule in the case of a taxpayer of a municipality is that his interest in the application of the money of the municipality is direct and immediate and he has a close relationship with the municipality. The courts in India have, in taking this view, followed the decisions of the English courts. Secondly, if a person is entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision, he would have locus standi to maintain an action challenging the impugned decision, vide: ***Queen* v. *Bowman*** [1898 1 QB 663] where it was held that any member of the public had a right to be heard in opposition to an application for a licence and having such right, the applicant was entitled to ask for mandamus directing the licensing Justices to hear and determine the application for licence according to law. Thirdly, the statute itself may expressly recognise the locus standi of an applicant, even though no legal right or legally protected interest of the applicant has been violated resulting in legal injury to him. For example, in ***Jasbhai Motibhai Desai* v. *Roshan Kumar*** [AIR 1976 SC 578] this Court noticed that the Bombay Cinematograph Act, 1918 and the Bombay Cinema Rules, 1954 made under that Act, recognised a special interest of persons residing, or concerned with any institution such as a school, temple, mosque etc. located within a distance of 200 yards of the site on which the cinema house is proposed to be constructed and held that as the petitioner, a rival cinema owner, did not fall within the category of such persons having a special interest in the locality, he had no locus standi to maintain the petition for a writ of certiorari to quash

the no objection certificate granted by the District Magistrate, to Respondents 1 and 2. It is obvious from the observations made at page 72 of the Report that if the petitioner had been a person falling within this category of persons having a special interest in the locality, he would have been held entitled to maintain the petition.

16. There is also another exception which has been carved out of this strict rule of standing which requires that the applicant for judicial redress must have suffered a legal wrong or injury in order to entitle him to maintain an action for such redress. It is clear that, having regard to this rule, no one can ordinarily seek judicial redress for legal injury suffered by another person; it is only such other person who must bring action for judicial redress. But it must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him. Take for example, the case of a minor to whom a legal wrong has been done or a legal injury caused. He obviously cannot on his own approach the court because of his disability arising from minority. The law therefore provides that any other person acting as his next friend may bring an action in his name for judicial redress, *vide:* Order XXXII of the Code of Civil Procedure. So also where a person is detained and is therefore not in a position to move the court for securing his release, any other person may file an application for a writ of habeas corpus challenging the legality of his detention. Of course, this Court has ruled in a number of cases that a prisoner is entitled to address a communication directly to the court complaining against his detention and seeking release and if he addresses any such communication to the court, the Superintendent of the prison is bound to forward it to the court and, in fact, there have been numerous instances where this Court has acted on such communication received from a prisoner and treating it as an application for a writ of habeas corpus, called upon the detaining authority to justify the legality of such detention and on the failure of the detaining authority to do so, released the prisoner. But since a person detained would ordinarily be unable to communicate with the outside world, the law presumes that he will not be able to approach the court and hence permits any other person to move the court for judicial redress by filing an application for a writ of habeas corpus. Similarly, where a transaction is entered into by the Board of Directors of a company which is illegal or ultra vires the company, but the majority of the shareholders are in favour of it and hence it is not possible for the company to sue for setting aside the transaction, any shareholder may file an action impugning the transaction. Here it is the company which suffers a legal wrong or a legal injury by reason of the illegal or ultra vires transaction impugned in the action, but an individual shareholder is permitted to sue for redressing such legal wrong or injury to the company, because otherwise the company being under the control of the majority shareholders would be without judicial redress.

17. It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. Where the weaker sections of the community are concerned, such as under-trial prisoners languishing in jails without a trial, inmates of the Protective Home in Agra, or Harijan workers engaged in road construction in the district of Ajmer, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public-spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting pro bono public. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public-minded individual as a writ petition and act upon it. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. It is in this spirit that the court has been entertaining letters for judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach. But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court. We may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is

caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organisation which can take care of such cases.

18. The types of cases which we have dealt with so far for the purpose of considering the question of locus standi are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought, arising from violation of some constitutional or legal right or legally protected interest. What is complained of in these cases is a specific legal injury suffered by a person or a *determinate* class or group of persons. But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or is there no one who can complain and the public injury must go unredressed? To answer these questions it is first of all necessary to understand what is the true purpose of the judicial function.

We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy body or a meddlesome interloper but who has sufficient interest in the proceeding.

There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice.

19. There is also another reason why the rule of locus standi needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible, to all. The new social and economic rights which are sought to be created in pursuance of the Directive Principles of State Policy essentially require active intervention of the State and other public authorities. Amongst these social and economic rights are freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from financial, commercial, corporate or even governmental oppression. More and more frequently the conferment of these socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which a single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of effluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air; defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons: public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant

in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.

20. The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. We have undoubtedly an Attorney-General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code. But, even if we had a provision empowering the Attorney-General or the Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney-General or the Advocate General would be too dependent upon the political branches of government to act as an advocate against abuses which are frequently generated or at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though, they may not be directly injured in their own rights. It is for this reason that in public interest litigation – litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing.

What is sufficient interest to give standing to a member of the public would have to be determined by the court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable sections of the people by creating new social, collective 'diffuse' rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action.

24. But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that "political pressure groups who could not achieve their aims through the administrative process" and we might add, through the political process, "may try to use the courts to further their aims". These are some of the dangers in public

interest litigation which the court has to be careful to avoid. It is also necessary for the court to bear in mind that there is a vital distinction between locus standi and justiciability and it is not every default on the part of the State or a public authority that is justiciable. The court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution. It is a fascinating exercise for the court to deal with public interest litigation because it is a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public law are expanding far and wide and new concepts and doctrines which will change the complexion of the law and which were so far as embedded in the womb of the future, are beginning to be born.

25. Before we part with this general discussion in regard to locus standi, there is one point we would like to emphasise and it is, that cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want.

26. If we apply these principles to determine the question of locus standi in the writ petition of Iqbal Chagla in which alone this question has been sharply raised, it will be obvious that the petitioners had clearly and indisputably locus standi to maintain their writ petition. The petitioners are lawyers practising in the High Court of Bombay. The first petitioner is a member of the Bombay Bar Association, petitioners 2 and 3 are members of the Advocates Association of Western India and petitioner 4 is the President of the Incorporated Law Society. There can be no doubt that the petitioners have a vital interest in the independence of the judiciary and if any unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, the petitioners would certainly be interested in challenging the constitutionality or legality of such action. The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be wellnigh impossible for the Court to administer justice. They are really and truly officers of the Court in which they daily sit and practice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because they are equal partners with the Judges in the administration of justice. Iqbal Chagla and others cannot be regarded as mere bystanders or meddlesome interlopers in filing the writ petition. The complaint of the petitioners in the writ petition was that the circular letter issued by the Law Minister constituted a serious threat to the independence of the judiciary and it was unconstitutional and void and if this complaint

be true, and for the purpose of determining the standing of the petitioners to file the writ petition, we must assume this complaint to be correct, the petitioners already had locus standi to maintain the writ petition. The circular letter, on the averments made in the writ petition, did not cause any specific legal injury to an individual or to a determinate class or group of individuals, but it caused public injury by prejudicially affecting the independence of the judiciary.

The petitioners being lawyers had sufficient interest to challenge the constitutionality of the circular letter and they were, therefore entitled to file the writ petition as a public interest litigation. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates. We may point out that this was precisely the principle applied by this Court to uphold the standing of the Fertiliser Corporation Kamgar Union to challenge the sale of a part of the undertaking by the Fertiliser Corporation of India in ***Fertilizer Corporation Kamgar Union* v. *Union of India*** [AIR 1981 SC 344]. Justice Krishna Iyer pointed out that if a citizen "belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered". We must therefore, hold that Iqbal Chagla and others had locus standi to maintain their writ petition. What we have said in relation to the writ petition of Iqbal Chagla and others must apply equally in relation to the writ petitions of S. P. Gupta and J. C. Kaira and others. So far as the writ petition of V. M. Tarkunde is concerned, Mr Mridul, learned Advocate appearing on behalf of the Law Minister, did not contest the maintainability of that writ petition since S. N. Kumar to whom, according to the averments made in the writ petition, a specific legal injury was caused, appeared in the writ petition and claimed relief against the decision of the Central Government to discontinue him as an Additional Judge. We must, therefore, reject the preliminary objection raised by Mr Mridul challenging the locus standi of the petitioners in the first group of writ petitions.

Disclosure of documents*: *Privilege

56. We now come to a very important question which was agitated before us at great length and which exercised our minds considerably before we could reach a decision. The question related to the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the non-appointment of O.N. Vohra and S.N. Kumar as Additional Judges. The learned counsel for the petitioners and S.N. Kumar argued before us with great passion and vehemence that these documents were relevant to the inquiry before the court and they should be directed to be disclosed by the Union of India. This claim of the petitioners and S.N. Kumar for disclosure was resisted by the Solicitor-General of India on behalf of the Union of India and Mr Mridul on behalf of the Law Minister. They contended that so far as O.N. Vohra was concerned his case stood on an entirely different footing from that of S.N. Kumar since, unlike S.N. Kumar who allied himself with the petitioners and actively participated in the arguments almost as if he was petitioner, O.N. Vohra though made a party respondent to the writ petition of V.M. Tarkunde did not appear and participate in the proceedings or seek any relief from the court in regard to his continuance as an Additional Judge. Mr Mridul on behalf of the Law Minister informed us

that in fact O.N. Vohra had started practice in the Delhi High Court and his case could not be considered by us when he himself did not want any relief. So far as the case of S.N. Kumar was concerned the learned Solicitor-General on behalf of the Union of India conceded that the documents of which disclosure was sought on behalf of the petitioners and S.N. Kumar were undoubtedly relevant to the issues arising before the Court, but contended — and in this contention he was supported by Mr Mridul on behalf of the Law Minister — that they were privileged against disclosure for a two-fold reason. One was that they formed part of the advice tendered by the Council of Ministers to the President and hence by reason of Article 74, clause (2) of the Constitution, the Court was precluded from ordering their disclosure and looking into them and the other was that they were protected against disclosure under Section 123 of the Indian Evidence Act since their disclosure would injure public interest. We propose to consider these rival arguments in the order in which we have set them out, first in regard to O.N. Vohra and then in regard to S.N. Kumar.

58. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an Additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an Additional Judge, an issue is squarely joined between the petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar. Now, as we have already pointed out while discussing the scope and ambit of Article 217, there are only two grounds on which the decision of the Central Government not to continue an Additional Judge for a further term can be assailed and they are, firstly, that there has been no full and effective consultation between the Central Government and the constitutional authorities required to be consulted under that Article and, secondly, that the decision of the Central Government is based on irrelevant grounds. It was on both these grounds that the petitioners and S.N. Kumar impugned the decision of the Central Government not to appoint S.N. Kumar as an Additional Judge for a further term and there can be no doubt that the correspondence exchanged between the Law Minister, the Chief justice of Delhi and the Chief Justice of India would be relevant qua both these grounds. The learned Solicitor-General on behalf of the Union of India and Mr Mridul on behalf of the Law Minister, with the usual candour and frankness always shown by them; did not dispute the relevance of these documents to the issues arising in the writ petition in regard to S.N. Kumar, but contended that they were protected against disclosure under Article 74, clause (2) of the Constitution as also Section 123 of the Indian Evidence Act. This contention raised an extremely important question in the area of public law particularly in the context of the open society which we are trying to evolve as part of the democratic structure and it caused great concern to us, for it involved a clash between two competing aspects of public interest, but ultimately after inspecting these documents for ourselves and giving our most anxious thought to this highly debatable question, we decided to reject the claim for protection against disclosure and directed that these documents be disclosed by the Union of India. We now proceed to give our reasons for this decision taken by us by a majority of six against one.

59. The first ground on which protection against disclosure was claimed on behalf of the Union of India and the Law Minister was based on Article 74, clause (2) of the Constitution. It is clear from the constitutional scheme that under our Constitution the President is a constitutional Head and is bound to act on the aid and advice of the Council of Ministers. This was the position even before the amendment of clause (1) of Article 74 by the Constitution (42nd Amendment) Act, 1976, but the position has been made absolutely explicit by the amendment and Article 74, clause (1) as amended now reads as under:

> There shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

What was judicially interpreted even under the unamended Article 74, clause (1) has now been given Parliamentary recognition by the constitutional amendment. There can therefore be no doubt that the decision of the President under Article 224 read with Article 217 not to appoint an Additional Judge for a further term is really a decision of the Council of Ministers and the reasons which have weighed with the Council of Ministers in taking such decision would necessarily be part of the advice tendered by the Council of Ministers to the President. Now clause (2) of Article 74 provides:

> The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

The court cannot, having regard to this constitutional provision, embark upon an inquiry as to whether any and if so what advice was tendered by the Council of Ministers to the President and since the reasons which have prevailed with the Council of Ministers in taking a particular decision not to continue an Additional Judge for a further term would form part of the advice tendered to the President, they would be beyond the ken of judicial inquiry. But the Government may in a given case choose to disclose these reasons or it may be possible to gather them from other circumstances, in which event the Court would be entitled to examine whether they bear any reasonable nexus with the question of appointment of a High Court Judge or they are constitutionally or illegally prohibited or extraneous or irrelevant. But if these reasons are not disclosed by the Government and it is otherwise not possible to discover them, it would be impossible for the Court to decide whether the decision of the Central Government not to appoint an Additional Judge for a further term is based on irrelevant grounds. There would however not be much difficulty by and large in cases of this kind to gather what are the reasons which have prevailed with the Central Government in taking the decision not to continue an Additional Judge. Article 217 requires that there must be full and effective consultation between the President, that is, the Central Government on the one hand and the Chief Justice of the High Court, the Governor, that is, the State Government and the Chief Justice of India on the other and the "full and identical facts" on which the decision of the Central Government is based must be placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India. The reasons which the Central Government is inclined to take into account for reaching a particular decision have therefore necessarily to be communicated to the Chief Justice of the High Court, the State Government and the Chief Justice of India and in the circumstances, it should ordinarily be possible for the Court to gather from such communication, the reasons which have persuaded the Central

Government to take its decision. Of course there may be cases where there are several reasons discussed between the Central Government and the three constitutional authorities and some of these reasons may be relevant, while some others may be irrelevant and without inquiring into the advice given by the Council of Ministers to President, it may not be possible to determine as to what are the reasons, relevant or irrelevant, which have weighed with the Central Government in taking its decision and in such a case, the Court may not be able to pronounce whether the decision of the Central Government is based on irrelevant grounds. But ordinarily the correspondence exchanged between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India would throw light on the question as to what are the reasons which have impelled the Central Government to take any particular decision regarding the continuance of an Additional Judge. This correspondence would also show whether the "full and identical facts" on which the decision of the Central Government is based were placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India before they gave their opinion in the course of the consultative process. Of course if the communication between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India has not taken place by correspondence but has been the subject-matter of only oral talk or discussion, it would become impossible for the Court to discover the reasons which have weighed with the Central Government in taking the decision not be continue the Additional Judge for a further term, unless of course the Central Government chooses to disclose such reasons and it would also become extremely difficult for the Court to decide whether the "full and identical facts" on which the decision of the Central Government is based were placed before the other three constitutional authorities and there was full and effective consultation as required by Article 217. The court would then have to depend only on such affidavits as may be filed before it and the task of the court to ascertain the truth would be rendered extremely delicate and difficult, as it has been in the writ petitions challenging the transfer of Mr Justice K.B.N. Singh, Chief Justice of Patna High Court. It is not at all desirable that when the Chief Justice of the High Court or the Chief Justice of India has to communicate officially with the State Government or the Central Government in regard to a matter where he is discharging a constitutional function, such communication should be only by way of oral talk or discussion unrecorded in writing. We think it absolutely essential that such communication must, as far as possible, be in writing, whether by way of a note or by way of correspondence. The process of consultation, whether under Article 217 or under Article 222, must be evidenced in writing so that if at any point of time a dispute arises as to whether consultation had in fact taken place or what was the nature and content of such consultation, there must be documentary evidence to resolve such dispute and an ugly situation should not arise where the word of one constitutional authority should be pitted against the word of another and the Court should be called upon to decide which of them is telling the truth. Oral talk or discussion may certainly take place between the Central Government and any other constitutional authority required to be consulted but it must be recorded immediately either in a note or in correspondence. Besides eliminating future dispute or controversy, the practice of having written communication or record of oral discussion ensures greater care and deliberation in expression of views and considerably reduces the possibility of improper or unjustified recommendations or unholy confabulations

or conspiracies which might be hidden under the veil of secrecy if there were no written record. Moreover, such a practice would tend to promote openness in society which is the hallmark of a democratic polity. It would indeed be highly regrettable if, instead of following this healthy practice of having a written record of consultation, the Central Government or the State Government or the Chief Justice of the High Court or the Chief Justice of India were to carry on the consultation process either on the telephone or by personal discussion without recording it. But we find that fortunately .in the present case, unlike K.B.N. Singh's case which falls for determination in the second batch of writ petitions, there was correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the continuance of S.N. Kumar and the question is whether this correspondence forms part of the advice tendered by the Council of Ministers to the President so as to be protected against disclosure by reason of clause (2) of Article 74.

60. The argument of the learned Solicitor-General was that this correspondence formed part of the advice tendered by the Council of Ministers to the President and he sought to support this argument by adopting the following process of reasoning. He said that the Council of Ministers cannot advise the President to appoint or not to appoint an Additional Judge for a further term without consulting the Chief Justice of the High Court and the Chief Justice of India. It is only after consulting them that appropriate advice can be tendered by the Council of Ministers to the President. When advice is tendered by the Council of Ministers to the President, it is open to the President under the proviso to clause (1) of Article 74 not to immediately accept such advice but to require the Council of Ministers to reconsider the advice generally or otherwise. If in a given case the President finds that advice has been given by the Council of Ministers without consulting either the Chief Justice of the High Court or the Chief Justice of India or both or that there has been no full and effective consultation with them as required by the Constitution, he may, and indeed he must, send the case back to the Council of Ministers and require them to reconsider the advice after carrying out full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India. Now how can the President satisfy himself in regard to the fulfilment of the constitutional requirement of consultation with the Chief Justice of the High Court and the Chief Justice of India, unless the views expressed by the two Chief Justices are placed before him along with the advice tendered by the Council of Ministers. The exercise of the power of the President to appoint or not to appoint an Additional Judge is so integrally connected with the constitutional requirement of full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India that at no stage can it be delinked from the views expressed by them on consultation and it would not be possible for the President to exercise this executive power in accordance with the Constitution unless the views of the two Chief Justices are placed before him. On the basis of this reasoning and as a logical consequence of it, argued the learned Solicitor-General, the view of the Chief Justice of Delhi and the Chief Justice of India obtained on consultation must be regarded as forming part of the advice tendered by the Council of Ministers to the President. The learned Solicitor-General sought to draw support for his argument from the decision of a Constitution Bench of this Court in the ***State of Punjab*** **v.** ***Sodhi Sukhdev*** [AIR 1961 SC 493]. We shall presently refer to this

decision but before we do so, let us examine the argument of the learned Solicitor-General on principle.

61. There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny by reason of clause (2) of Article 74. But can it be said that the views expressed by the Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. The advice is given by the Council of Ministers *after* consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts" and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under clause (2) or Article 74 is only the advice tendered by the Council of Ministers. The reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice, as held by this Court in ***State of Rajasthan* v. *Union of India*** [AIR 1977 SC 1361]. *Vide* the observations of Beg, C.J. at page 46, Chandrachud, J. (as he then was) at page 61, Fazal Ali, J. at pages 120 and 121, where all the three learned Judges took the view that by reason of clause (2) of Article 74 the Court would be barred from inquiring into the grounds which might weigh with the Council of Ministers in advising the President to issue a proclamation under Article 356, because the grounds would form part of the advice tendered by the Council of Ministers. But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form part of the advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in clause (2) of Article 74.

62. We may now refer to the decision of the Constitution Bench of this Court in the ***State of Punjab* v. *Sodhi Sukhdev Singh*** on which the greatest reliance was placed by the learned Solicitor-General in support of his plea based on clause (2) of Article 74. The respondent who was the District and Sessions Judge in the erstwhile State of Pepsu was removed from service by an order dated April 7, 1953 passed by the President who was then incharge of the Administration of the State. The respondent made a representation against the order of removal which was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end and the Council of Ministers expressed its views in a

Resolution passed on September 28, 1955. But before taking any action it invited the Report of the Public Service Commission. On receipt of the Report of the Public Service Commission, the Council of Ministers considered the matter again and ultimately on August 11, 1956 it reached the final conclusion against the respondent and in accordance with the conclusion, the order was passed to the effect that the respondent must be re-employed on some suitable post. The respondent thereupon instituted a suit against the successor State of Punjab for a declaration that his removal from service was illegal and in that suit he filed an application for the production of certain documents which included inter alia the proceedings of the Council of Ministers dated September 28, 1955 and August 11, 1956 and the Report of the Public Service Commission. The State objected to the production of these documents and ultimately the matter came before this Court. Gajendragadkar, J. (as he then was) speaking on behalf of the majority of the Court upheld the claim of privilege put forward on behalf of the State and so far as the Report of the Public Service Commission was concerned, the learned Judge held that it was protected against disclosure both under clause (3) of Article 163, and Section 123 of the Indian Evidence Act. We are at present concerned only with the claim for protection under clause (3) of Article 163 because that is an Article which corresponds to clause (2) of Article 74 insofar as advice by the Council of Ministers to the Governor is concerned. The learned Judge speaking on behalf of the majority, accorded protection to the report of the Public Service Commission under clause (3) of Article 163 on the ground that it formed part of the advice tendered by the Council of Ministers to the Rajpramukh. This view taken by the majority does appear prima facie to support the contention of the learned Solicitor-General, but we do not think we can uphold the claim for protection put forward by the learned Solicitor-General by adopting a process of analogical reasoning from the majority view in this decision. In the first place, we do not know what were the circumstances in which the majority Judges came to regard the report of the Public Service Commission as forming part of the advice tendered to the Rajpramukh. There is no reasoning in the judgment of the learned Judge showing as to why the majority held that the report of the Public Service Commission fell within the terms of clause (3) of Article 163. The learned Judge has merely set out his ipse dixit, without any reasons at all, saying in just one sentence: "The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers." It is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion. Secondly, we may point out that we find it difficult to accept the view taken by the majority in this case. We are unable to appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers came to its decision as recorded in the proceedings dated August 11, 1956 could be said to form part of the advice tendered by the Council of Ministers to the Rajpramukh. We do not think the learned Solicitor-General can invoke the aid of this decision in support of his claim for protection under clause (2) of Article 74.

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Re Special Reference No. 1 of 1998

AIR 1999 SC 1

[Relevance of seniority of High Court judges in the appointment to Supreme Court; Consultation under Article 124(2) and 217(1) of the Constitution of India for appointment of judges in the Supreme Court and High Courts and transfer of judges of the High Courts under Article 222.]

S.P. BHARUCHA, J. - Article 143 of the Constitution of India confers upon the President of India the power to refer to this Court for its opinion questions of law or fact which have arisen or are likely to arise and which are of such a nature and of such public importance that it is expedient to obtain such opinion. In exercise of this power, the President of India has on 23-7-1998 made the present Reference:

"WHEREAS the Supreme Court of India has laid down principles and prescribed procedural norms in regard to the appointment of Judges of the Supreme Court [Article 124(2) of the Constitution of India], Chief Justices and Judges of the High Court [Article 217(1)], and transfer of Judges from one High Court to another [Article 222(1)], in the case of ***Supreme Court Advocates-on-Record Assn.*** **v.** ***Union of India*** [AIR 1994 SC 268];

AND WHEREAS doubts have arisen about the interpretation of the law laid down by the Supreme Court and it is in public interest that the said doubts relating to the appointment and transfer of Judges be resolved;

AND WHEREAS, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

NOW, THEREFORE, in exercise of the powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, K.R. Narayanan, President of India, hereby refer the following questions to the Supreme Court of India for consideration and to report its opinion thereon, namely:

(1) whether the expression 'consultation with the Chief Justice of India' in Articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles;

(2) whether the transfer of Judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that 'such transfer is not justiciable on any ground' and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review;

(3) whether Article 124(2) as interpreted in the said judgment requires the Chief Justice of India to consult only the two seniormost Judges or whether there should be wider consultation according to past practice;

(4) whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment;

(5) whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the High Court concerned refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other court;

(6) whether in the light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the 'strong cogent reason' required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her;

(7) whether the Government is not entitled to require that the opinions of the other consulted Judges be in writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views;

(8) whether the Chief Justice of India is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India;

(9) whether any recommendations made by the Chief Justice of India without complying with the norms and consultation process are binding upon the Government of India?

New Delhi — Narayanan, K.R.
Dated: 23-7-1998 — President of India"

2. The decision mentioned in the Reference, in ***Supreme Court Advocates-on-Record Assn.* v. *Union of India*** [AIR 1994 SC 268]("the ***Second Judges*** case") was rendered by a Bench of nine learned Judges. It examined these issues:

"(1) Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Court, and in regard to the transfers of High Court Judges/Chief Justices; and

(2) Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts."

The issues were required to be examined because a smaller Bench was of the opinion that the correctness of the majority view in the case of ***S.P. Gupta* v. *Union of India*** [AIR 1982 SC 149]("the Judges case") required reconsideration by a larger Bench.

3. Five judgments were delivered in the Second Judges case1. Verma, J. spoke for himself and four learned Judges. Pandian, J. and Kuldip Singh, J. wrote individual judgments supporting the majority view. Ahmadi, J. dissented, adopting, broadly, the reasoning that had found favour in the Judges case2. Punchhi, J. took the view that the Chief Justice of India had primacy and that he was entitled "to consult any number of Judges on the particular proposal. It is equally within his right not to consult anyone".

4. The questions in the Presidential Reference relate, broadly, to three aspects:

(1) consultation between the Chief Justice of India and his brother Judges in the matter of appointments of Supreme Court and High Court Judges and transfers of the latter: Questions 1, 3, 4, 5, 7, 8 and 9;

(2) judicial review of transfers of Judges: Question 2; and
(3) the relevance of seniority in making appointments to the Supreme Court: Question 6.

[*Refer to Articles 124, 216, 217 and 222 of the Constitution of India*].

6. The following are extracts of what was said in the majority judgment in the ***Second Judges*** case about the primacy of the Chief Justice of India in the matter of appointments of Judges to the Supreme Court and the High Courts and the need in this behalf of the desirability of consultation between the Chief Justice of India and his brother Judges:

> "A further check in that limited sphere is provided by the conferment of the discretionary authority not to one individual but to a body of men, requiring the final decision to be taken after full interaction and effective consultation between themselves, to ensure projection of all likely points of view and procuring the element of plurality in the final decision with the benefit of the collective wisdom of all those involved in the process. The conferment of this discretionary authority in the highest functionaries is a further check in the same direction. The constitutional scheme excludes the scope of absolute power in any one individual. Such a construction of the provisions also, therefore, matches the constitutional scheme and the constitutional purpose for which these provisions were enacted. * * * * *
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> Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector.
>
> The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate. * * * * *
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> It is obvious that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word

'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts.

The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion. * * * * *

The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable. * * * * *

On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever-vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India.

If that is the position in actual practice of the constitutional provisions relating to the appointments of the superior Judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it indicates the primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation. This reason given by the majority in S.P. Gupta2 for its view, that the executive has primacy, does not withstand scrutiny, and is also not in accord with the existing practice and the perception even of the executive.

However, it need hardly be stressed that *the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion.* (emphasis supplied) * * * * *

Providing for the role of the judiciary as well as the executive in the integrated process of appointment merely indicates that it is a participatory consultative process, and the purpose is best served if at the end of an effective consultative process between all the consultees the decision is reached by consensus, and no question arises of giving

primacy to any consultee. Primarily, it is this indication which is given by the constitutional provisions, and the constitutional purpose would be best served if the decision is made by consensus without the need of giving primacy to any one of the consultees on account of any difference remaining between them. The question of primacy of the opinion of any one of the constitutional functionaries qua the others would arise only if the resultant of the consultative process is not one opinion reached by consensus.

The constitutional purpose to be served by these provisions is to select the best from amongst those available for appointment as Judges of the superior judiciary, after consultation with those functionaries who are best suited to make the selection. * * * *

Even the personal traits of the members of the Bar and the Judges are quite often fully known to the Chief Justice of India and the Chief Justice of the High Court who get such information from various sources. There may, however, be some personal trait of an individual lawyer or Judge, which may be better known to the executive and may be unknown to the Chief Justice of India and the Chief Justice of the High Court, and which may be relevant for assessing his potentiality to become a good Judge. It is for this reason that the executive is also one of the consultees in the process of appointment. The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultees, before the appointment is made. * * * * *

It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all-pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogeneous mixture, which accords with the constitutional purpose and its ethos, indicates that *it is the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the Chief Justice of India does, and is expected to function, so that the final opinion expressed by him is not merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.*

In view of the primacy of judiciary in this process, the question next is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. *The opinion of the judiciary*

'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.

The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; *the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues*; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister.

The norms developed in actual practice, which have crystallised into conventions in this behalf, as visualised in the speech of the President of the Constituent Assembly, are mentioned later. (emphasis supplied) * * * * *

NORMS

The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned norms emerging from the actual practice and crystallised into conventions - not exhaustive - are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers.

Appointments

(1) What is the meaning of the opinion of the judiciary 'symbolised by the view of the Chief Justice of India'?

This opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the seniormost Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object

underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. *This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.*

In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. *The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two seniormost Judges of the High Court.*

The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge his duty objectively to select the best available persons as Judges of the Supreme Court and the High Courts. *The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity.* (emphasis supplied) * * * * *

(5) The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.

(6) The distinction between making an appointment in conformity with the opinion of the Chief Justice of India, and not making an appointment recommended by the Chief Justice of India has to be borne in mind. Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an exceptional case, where the facts justify, a recommendee of the Chief Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India, may not be appointed except in the situation indicated later. Primacy is in making an appointment; and, when the appointment is not made, the question of primacy does not arise. There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India, except in the situation indicated hereafter.

It is only to this limited extent of non-appointment of a recommendee of the Chief Justice of India, on the basis of positive material indicating his appointment to be otherwise unsuitable, that the Chief Justice of India does not have the primacy to persist for appointment of that recommendee except in the situation indicated later. This will ensure composition of the courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and intended to secure the independence of the judiciary and the appointment of the best men available with undoubted credentials. (emphasis supplied)

(7) *Non-appointment of anyone recommended, on the ground of unsuitability must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest.* If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment. *However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.*

(8) Some instances when non-appointment is permitted and justified may be given. *Suppose the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible.* (emphasis supplied) * * * * *

(9) In order to ensure effective consultation between all the constitutional functionaries involved in the process, the reasons for disagreement, if any, must be disclosed to all others, to enable reconsideration on that basis. *All consultations with everyone involved, including all the Judges consulted, must be in writing and the Chief Justice of the High Court, in the case of appointment to a High Court, and the Chief Justice of India, in all cases, must transmit with his opinion the opinions of all Judges consulted by him, as a part of the record.*

Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection. Exclusion of justiciability, as indicated hereafter, in this sphere should prevent any inhibition against the expression of a free and frank opinion. *The final opinion of the Chief Justice of India, given after such effective consultation between the constitutional functionaries, has primacy in the manner indicated.* (emphasis supplied)

7. On the aspect of transfers of Judges and the judicial review thereof, the majority judgment stated:

> ***"Transfers***
>
> *(1) In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India.* The personal factors relating to the Judge concerned, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice. (emphasis supplied)
>
> ***Justiciability***
>
> ***Appointments and Transfers***
>
> The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judicial review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. *Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias,* even subconsciously, of any individual. *The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.* The reduction of the area of discretion to the minimum, *the element of plurality of Judges in formation of the opinion of the Chief Justice of India,* effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.
>
> *These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground,* including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.
>
> This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. (emphasis supplied) * * * * *
>
> It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. *Except on the ground of want of*

consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making." (emphasis supplied)

8. On the aspect of the relevance of seniority in the matter of Supreme Court appointments, this was stated:

(3) Inter se seniority amongst Judges in their High Court and their combined seniority on all-India basis is of admitted significance in the matter of future prospects. Inter se seniority amongst Judges in the Supreme Court, based on the date of appointment, is of similar significance. *It is, therefore, reasonable that this aspect is kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.* Apart from recognising the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court according to their seniority, this would also lend greater credence to the process of appointment and would avoid any distortion in the seniority between the appointees drawn even from the same High Court. The likelihood of the Supreme Court being deprived of the benefit of the services of some who are considered suitable for appointment, but decline a belated offer, would also be prevented.

(4) *Due consideration of every legitimate expectation* in the decision-making process is a requirement of the rule of non-arbitrariness and, therefore, this also *is a norm to be observed by the Chief Justice of India in recommending appointments to the Supreme Court.* Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority.

This legitimate expectation has relevance on the ground of longer experience on the Bench, and is a factor material for determining the suitability of the appointee. *Along with other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the Apex Court.*(emphasis supplied)

9. The majority judgment ends with a summary of its conclusions. Conclusions 1, 2, 3, 4, 5, 7, 9, 10, 11 and 14 are relevant for our purposes. They read thus:

"(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most

suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal had to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.

(3) In the event of conflicting opinions by the constitutional functionaries*, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy*.

(4) *No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.*

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.

(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) *In making all appointments and transfers, the norms indicated must be followed*. However, the same do not confer any justiciable right in anyone.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

(14) The majority opinion in ***S.P. Gupta* v. *Union of India*** [(1982) 2 SCR 365] insofar as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us." (emphasis supplied)

10. We have heard the learned Attorney General, learned counsel for the interveners and some of the High Courts and the Advocates General of some States.

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case1 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

12. The majority view in the Second Judges case1 is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon.

13. Insofar as appointments to the Supreme Court of India are concerned, the majority view in the ***Second Judges*** case is that the opinion given by the Chief Justice of India in this behalf:

> "has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the seniormost Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite".

14. It was urged by the learned Attorney General as also by learned counsel that the Chief Justice of India needs to consult a larger number of Judges of the Supreme Court before he recommends an appointment to the Supreme Court. Attention was drawn to the fact that at the time of the latest selection of Judges appointed to the Supreme Court, the then Chief Justice of India had constituted a panel of himself and five of the then seniormost puisne Judges. It was submitted that this precedent should be treated as a convention and institutionalised.

15. We think it necessary to make clear at the outset the distinction that follows. The opinion of the Chief Justice of India which has primacy in the matter of recommendations for appointment to the Supreme Court has to be formed in consultation with a collegium of Judges. Presently, and for a long time now, that collegium consists of the two seniormost puisne Judges of the Supreme Court. In making a decision as to whom that collegium should recommend, it takes into account the views that are elicited by the Chief Justice of India from the seniormost Judge of the Supreme Court who comes from the same High Court as the person proposed to be recommended. It also takes into account the views of other Judges of the Supreme Court or the Chief Justice or Judges of the High Courts or, indeed, members of the Bar who may also have been asked by the Chief Justice of India or on his behalf. The principal objective of the collegium is to ensure that the best available talent is brought to the Supreme Court Bench. The Chief Justice of India and the seniormost puisne Judges, by reason of their long tenures on the Supreme Court, are best fitted to achieve this objective. They can assess the comparative worth of possible appointees by reason of the fact that their judgments would have been the subject-matter of petitions for special leave to appeal and appeals. Even where the person under consideration is a member of the Bar, he would have frequently appeared before them. In assessing comparative worth as aforestated, the

collegium would have the benefit of the inputs provided by those whose views have been sought. The distinction, therefore, is between the Judges of the Supreme Court who decide, along with the Chief Justice of India, who should be recommended for appointment to the Supreme Court and the Judges of the Supreme Court and others who are asked to express their views about the suitability of a possible nominee for such appointment.

16. With this in mind, what has to be considered is whether the size of the collegium that makes the recommendation should be increased. Having regard to the terms of Article 124(2) as analysed in the majority judgment in the Second Judges case1 as also the precedent set by the then Chief Justice of India as set out earlier and having regard to the objective aforestated, we think it is desirable that the collegium should consist of the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court.

17. Ordinarily, one of the four seniormost puisne Judges of the Supreme Court would succeed the Chief Justice of India, but if the situation should be such that the successor Chief Justice is not one of the four seniormost puisne Judges, he must invariably be made part of the collegium. The Judges to be appointed will function during his term and it is but right that he should have a hand in their selection.

18. It is not practicable to include in the collegium the seniormost Judge of the Supreme Court who comes from the same High Court as the person to be recommended, unless, of course, he is a part of the collegium by virtue of being one of the four seniormost puisne Judges, because, as experience shows, it is normally not one vacancy that has to be filled up but a number thereof. The prospective candidates to fill such multiple vacancies would come from a number of High Courts. It would, therefore, be necessary to consult the seniormost Judges from all those High Courts. All these Judges cannot conveniently be included in the collegium. Secondly, the composition of the collegium cannot vary depending upon where the prospective appointees hail from. To put it differently, for a particular set of vacancies, the seniormost Judges from the High Courts at, let us say, Allahabad and Bombay may have to be consulted. It would neither be proper nor desirable, if they have been part of the collegium for that particular selection, to leave them out of the next collegium although no prospective appointee at that time hails from the High Courts at Allahabad or Bombay. Thirdly, it would not be proper to exclude from the collegium such Judges of the Supreme Court, if any, as are senior to the Judges required to be consulted. Lastly, the seniormost Judge of the Supreme Court who comes from the same High Court as the person to be recommended may be in terms of overall seniority in the Supreme Court, very junior, with little experience of work in the Supreme Court, and, therefore, unable to assess the comparative merit of a number of possible appointees.

19. Necessarily, the opinion of all members of the collegium in respect of each recommendation should be in writing. The ascertainment of the views of the seniormost Supreme Court Judges who hail from the High Courts from where the persons to be recommended come must also be in writing. These must be conveyed by the Chief Justice of India to the Government of India along with the recommendation. The other views that the Chief Justice of India or the other members of the collegium may elicit, particularly if they are from non-Judges, need not be in writing, but it seems to us advisable that he who elicits

the opinion should make a memorandum thereof, and the substance thereof in general terms, should be conveyed to the Government of India.

20. The seniormost Judge in the Supreme Court from the High Court from which a prospective candidate comes would ordinarily know his merits and demerits, but if perchance he does not, the next seniormost Judge in the Supreme Court from that High Court should be consulted and his views obtained in writing.

21. We should add that the objective being to procure the best information that can be obtained about a prospective appointee, it is of no consequence that a Judge in the Supreme Court from the prospective appointee's High Court had been transferred to that High Court either as a puisne Judge or as its Chief Justice.

22. It is, we think, reasonable to expect that the collegium would make its recommendations based on a consensus. Should that not happen, it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India. The question that remains is: what is the position when the Chief Justice of India is in a minority and the majority of the collegium disfavour the appointment of a particular person? The majority judgment in the Second Judges case1 has said if

> "the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible".

This is delicately put, having regard to the high status of the President, and implies that if the majority of the collegium is against the appointment of a particular person, that person shall not be appointed, and we think that this is what must invariably happen. We hasten to add that we cannot easily visualise a contingency of this nature; we have little doubt that if even two of the Judges forming the collegium express strong views for good reasons that are adverse to the appointment of a particular person, the Chief Justice of India would not press for such appointment.

23. The majority judgment in the Second Judges case1 contemplates the non-appointment of a person recommended on the ground of unsuitability. It says that such non-appointment

> "must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest. ... However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made".

It may be that one or more members of the collegium that made a particular recommendation have retired or are otherwise unavailable when reasons are disclosed to the Chief Justice of India for the non-appointment of that person. In such a situation, the reasons must be placed before the remaining members of the original collegium plus another Judge or Judges who have reached the required seniority and become one of the first four puisne Judges. It is for this collegium, so reconstituted, to consider whether the recommendation should be withdrawn or reiterated. It is only if it is unanimously reiterated that the appointment must be made. Having regard to the objective of securing the best available men for the Supreme Court, it is imperative that the number of Judges of the Supreme Court who consider the reasons for non-appointment should be as large as the number that had made the particular recommendation.

24. The Chief Justice of India may, in his discretion, bring to the knowledge of the person recommended the reasons disclosed by the Government of India for his non-appointment and ask for his response thereto. The response, if asked for and made, should be considered by the collegium before it withdraws or reiterates the recommendation.

25. The majority judgment in the Second Judges case1 said that "inter se seniority amongst Judges in their High Court and their combined seniority on all-India basis" should be "kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court". It also said that "the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court, according to their seniority" must be duly considered. The statement made thereafter is very important; it is "Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India for appointment to the Supreme Court."

26. Merit, therefore, as we have already noted, is the predominant consideration for the purposes of appointment to the Supreme Court.

27. Where, therefore, there is outstanding merit, the possessor thereof deserves to be appointed regardless of the fact that he may not stand high in the all-India seniority list or in his own High Court. All that then needs to be recorded when recommending him for appointment is that he has outstanding merit. When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench. All that then needs to be recorded when making the recommendation for appointment is this factor. The "strong cogent reasons" that the majority judgment in the Second Judges case1 speaks of are good reasons for appointing to the Supreme Court a particular High Court Judge, not for not appointing other High Court Judges senior to him. It is not unusual that a Judge who has once been passed over for appointment to the Supreme Court might still find favour on the occasion of another selection and there is no reason to blot his copybook by recording what might be construed to be an adverse comment about him. It is only when, for very strong reasons, a collegium finds that whatever his seniority, some High Court Judge should never be appointed to the Supreme

Court that it should so record. This would then be justified and would afford guidance on subsequent occasions of considering who to recommend.

28. Mr Parasaran, learned counsel for the intervener, the Advocates-on-Record Association, submitted that the words "legitimate expectation" were not apposite when the reference was to High Court Judges. We make it clear that no disparagement of High Court Judges was meant; all that was intended to be conveyed was that it was very natural that senior High Court Judges should entertain hopes of elevation to the Supreme Court and that the Chief Justice of India and the collegium should bear this in mind.

29. The majority judgment in the Second Judges case1 requires the Chief Justice of a High Court to consult his two seniormost puisne Judges before recommending a name for appointment to the High Court. In forming his opinion in relation to such appointment, the Chief Justice of India is expected "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court...."

The Chief Justice of India should, therefore, form his opinion in regard to a person to be recommended for appointment to a High Court in the same manner as he forms it in regard to a recommendation for appointment to the Supreme Court, that is to say, in consultation with his seniormost puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court which "would be entitled to the greatest weight", the views of other Judges of the High Court who may have been consulted and the views of colleagues on the Supreme Court Bench "who are conversant with the affairs of the High Court concerned". Into that last category would fall Judges of the Supreme Court who were puisne Judges of the High Court or Chief Justices thereof, and it is of no consequence that the High Court is not their parent High Court and they were transferred there. The objective being to gain reliable information about the proposed appointee, such Supreme Court Judge as may be in a position to give it should be asked to do so. All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

30. Having regard to the fact that information about a proposed appointee to a High Court would best come from the Chief Justice and Judges of that High Court and from Supreme Court Judges conversant with it, we are not persuaded to alter the strength of the decision-making collegium's size; where appointments to the High Courts are concerned, it should remain as it is, constituted of the Chief Justice of India and the two seniormost puisne Judges of the Supreme Court.

31. In the context of the judicial review of appointments, the majority judgment in the Second Judges case1 said:

> "Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias.... The judicial element being predominant in the case of appointments ..., as indicated, the need for further judicial review, as in other executive actions, is eliminated."

The judgment added:

> "Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, ... these matters are not justiciable on any other ground...."

32. Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforestated, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility.

33. The majority judgment in the ***Second Judges*** case dealt with the question of the transfer of a puisne Judge of one High Court as a puisne Judge of another High Court. It said:

> "In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India."

In regard to the justiciability of such transfers, it said:

> "Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias.... The judicial element being ... decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated."

In the same context there was reference to "the element of plurality of Judges in formation of the opinion of the Chief Justice of India". It was then said that:

> "Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary."

Again, it was said:

> "Except on the ground ... of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

34. The same thoughts were expressed in the concurring judgment of Kuldip Singh, J., thus:

> "We are, therefore, of the view that the opinion of the Chief Justice of India in the process of consultation for appointments to the superior courts must be formed in consultation with two of his seniormost colleagues. Apart from that the Chief Justice of India must also consult the seniormost Judge who comes from the same State (the State from where the candidate is being considered). *This process of consultation shall also be followed while transferring any Judge/Chief Justice from one State to another*." (emphasis supplied)

35. The judgment in the case of ***K. Ashok Reddy* v. *Govt. of India*** [(1994) 2 SCC 303] dealt with the justiciability of transfers of High Court Judges from one High Court to another. The judgment, rendered by a Bench of three learned Judges, records that it was a "sequel to the decision" in the ***Second Judges*** case. It refers to the fact that after the ***Second Judges*** case the then Chief Justice of India had constituted a Peer Committee comprised of the then two seniormost puisne Judges of the Supreme Court and two Chief Justices of High Courts to make suggestions for transfers and the Chief Justice of India was to make his recommendations on that basis and in accordance with the broad guidelines indicated in the ***Second Judges*** case. There was, therefore, the judgment said, no room left for any apprehension of arbitrariness or bias in the transfer of any Judge or Chief Justice of a High Court. There was no doubt that the Chief Justice of India, acting on the institutional advice available to him, was the surest and safest bet for preservation of the independence of the judiciary. The ***Second Judges*** case did not exclude judicial review but limited the area of justiciability to the constitutional requirement of the recommendation of the Chief Justice of India for exercise of power under Article 222 by the President of India. The power of transfer was to be exercised by the highest constitutional functionaries in the country in the manner indicated, which provided several inbuilt checks against the likelihood of arbitrariness or bias. The need for restricting the standing to sue in such a matter to the affected Judge alone had been reiterated in the ***Second Judges*** case. The transfer of a High Court Judge was justiciable only on the ground indicated in the ***Second Judges*** case and only at the instance of the transferred Judge himself and no one else. This was necessary to prevent any transferred Judge from being exposed to any litigation involving him except when he chose to resort to it himself in the available limited area of justiciability. When it was said in the ***Second Judges*** case that the ground of bias was not available for challenging a transfer, it was to emphasise that the decision by the collective exercise of several Judges at the highest level on objective criteria, on which the recommendation of the Chief Justice of India was based, was an inbuilt check against arbitrariness and bias indicating the absence of need for judicial review on those grounds. If any court other than the Supreme Court was called upon to decide a matter relating to the transfer of a High Court Judge, it should promptly consider the option of requesting the Supreme Court to withdraw the case to itself for decision to avoid any embarrassment.

36. What emerges from the aforesaid is this: before recommending the transfer of a puisne Judge of one High Court to another High Court, also as a puisne Judge, the Chief Justice of India must consult a plurality of Judges. He must take into account the views of the

Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may have significance in the case and at least one other senior Chief Justice of a High Court or any other person whose views he considers relevant. The then Chief Justice of India had constituted, as was noted in ***Ashok Reddy*** case a Peer Committee of the two seniormost puisne Judges of the Supreme Court and two Chief Justices of High Courts to advise him in the matter of transfers of High Court Judges. That Committee is no longer in position.

37. It is to our mind imperative, given the gravity involved in transferring High Court Judges, that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also the Chief Justice of the High Court to which the transfer is to be effected. This is in accord with the majority judgment in the ***Second Judges*** case which postulates consultation with the Chief Justice of another High Court. The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court. These views and those of each of the four seniormost puisne Judges should be conveyed to the Government of India along with the proposal of transfer. Unless the decision to transfer has been taken in the manner aforestated, it is not decisive and does not bind the Government of India.

38. Wide-based decision-making such as this eliminates the possibility of bias or arbitrariness. By reason of such elimination, the remedy of judicial review can legitimately be confined to a case where the transfer has been made or recommended without obtaining views and reaching the decision in the manner aforestated.

39. What applies to the transfer of a puisne Judge of a High Court applies as well to the transfer of the Chief Justice of a High Court as Chief Justice of another High Court except that, in this case, only the views of one or more knowledgeable Supreme Court Judges need to be taken into account.

40. The majority judgment in the ***Second Judges*** case requires that:

> "(T)he personal factors relating to the Judge concerned, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice."

These factors, including the response of the High Court Chief Justice or puisne Judge proposed to be transferred to the proposal to transfer him, should now be placed before the collegium of the Chief Justice of India and his first four puisne Judges to be taken into account by them before reaching a final conclusion on the proposal.

41. We have heard with some dismay the dire apprehensions expressed by some of the counsel appearing before us. We do not share them. We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the ***Second Judges*** case and this opinion.

42. We have not dealt with any aspect placed before us at the Bar that falls outside the scope of the questions posed in the Reference.

44. The questions posed by the Reference are now answered, but we should emphasise that the answers should be read in conjunction with the body of this opinion:

1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the High Court concerned does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.

7. The views of the other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India.

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Shanti Bhushan **v.** *Union of India*

2008 (15) SCALE 647

ARIJIT PASAYAT, J. - Judges, like Caesar's wife, should be above suspicion is the focal point in this petition under Article 32 of the Constitution of India, 1950 (in short the `Constitution') filed by Mr. Shanti Bhushan, a senior lawyer of eminence and former Law Minister and Ms. Kamini Jaiswal, an Advocate. The writ petition is stated to have been filed in public interest litigation seeking appropriate declaration and issuance of a writ of quo warranto or any other writ or direction quashing the appointment of respondent No. 2 as a Judge of the Madras High Court. The prayers read as follows:

(a) restrain respondent No. 2 from functioning as a Judge of the Madras High Court.

(b) Direct respondent No. 1 to produce all the records regarding the appointment/re-appointment of respondent No. 2 as Additional Judge and also as the permanent Judge; and

(c) pass any other or further orders, as this Hon'ble Court may deem fit and proper.

2. The grievances center around the appointment of respondent No. 2 as a permanent Judge by the Union of India (Department of Justice, Ministry of Law and Justice). It is stated that required norms have not been followed while appointing him as a permanent Judge and such appointment is in violation of the law as declared by this Court in ***Supreme Court Advocates-on-Record Association*** **v.** ***Union of India*** and ***Special Reference No. 1 of 1998*** [1998 (7) SCC 739]. The primary ground urged is that the opinion of the Chief Justice of India has to be formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of opinion and no appointment can be made unless it is in conformity with the final opinion of the Chief Justice of India formed in the aforesaid manner. In the oral arguments and the written submissions, reference has been made to various paragraphs of the aforesaid judgments and the memorandum dated 30th June, 1999 issued by the Minister of Law, Justice and Company Affairs, Union of India, laying down procedure to be followed in connection with the appointment and transfer of Judges of High Courts. It is submitted that while forming the opinion, the Chief Justice of India has to consult two senior-most Judges and some other Judges of the Supreme Court who are conversant with the affairs of the High Court concerned. The latter category includes the serving Supreme Court Judges who were either puisne Judges or Chief Justice of the concerned High Court though the concerned High Court may not be their parent High Court and they may have been transferred to the said High Court. It is, therefore, submitted that the appointment of respondent No. 2 as a permanent Judge as notified on 2.2.2007 has no sanctity in law. He was sworn as a permanent Judge on 3.2.2007.

[The petitioner relied upon the following cases: ***Special Reference No. 1 of 1998,*** paras. 12, 29-30, 32, 41 and 44(8) and ***Supreme Court Advocates-on-Record Assn.*** **v.** ***Union of India,*** paras. 460, 466-67, 478(5), 482].

4. Learned Counsel for the Union of India on the other hand with reference to Office Memorandum and decisions referred to above submitted that a total number of more than 350 Additional Judges have been appointed as permanent Judges during the period from 1.1.1999 to 31.7.2007 by successive Chief Justice of India who had not consulted the Collegium while

considering the cases of appointment of Additional Judges as Permanent Judges of the High Courts although the collegium was consulted at the stage of initial appointment as Additional Judge. It is, therefore, submitted that in view of the practice followed while implementing the memorandum the Government being once satisfied that a suitable candidate was in fact appointed as an Additional Judge of the High Court, elaborate consultations as required for forming the opinion for appointment of an Additional Judge may not have considered necessary while considering the case for appointment as permanent Judge. Additionally, it is submitted that in ***Advocates-on-Records Association*** in paras 466, 467 and 468 this Court had observed that though some aspects in ***S.P. Gupta* v. *Union of India*** have the approval of the larger Bench, yet the Executive itself has understood the correct procedure notwithstanding S.P. Gupta's case and there is no reason to depart from it when it is in consonance with the concept of the independence of the judiciary. Consequent to the judgment in ***Advocates-on-Record Association*** the memorandum of procedure was revised vide D.O. No. K-11017/9/93-US. 11 dated 9.6.1994. Subsequently, on the basis of the opinion in Special Reference No. 1/1998 the revised procedure was prescribed by Reference No. K-110017/13/98-U.S II dated 30.6.1999. Paras 11, 12, 13, 14, 15, 16, 17, 18 and 19 pertain to appointment of permanent Judges. It is therefore submitted that there is no infirmity in the appointment of respondent No. 2 as a Permanent Judge.

[Reliance was also placed on paras. 39-40, 88, 102-103 of ***S.P. Gupta***].

6. It is the further stand of the Union of India that on true interpretation of Article 224(1) of the Constitution it can be said that Additional Judges are not intended to be re-appointed out of turn. Reliance is placed on the observations to that effect made by Bhagwati, J (as the Hon'ble Judge then was) in ***S.P. Gupta***. It is submitted that on expiry of the term as an Additional Judge, he or she is entitled to be considered for appointment as a Permanent Judge. But in either case the procedure under Article 217(1) of the Constitution has to be repeated. An additional Judge who had worked for a period of his tenure has a weightage in his favour compared to a fresh appointee and any process of appointment while filling in a vacancy must commence with an Additional Judge whose tenure has come to an end and has led to the vacancy. Pathak, J (as the Hon'ble Judge then was) had expressed similar opinion by observing that in following the procedure of Article 217(1) while appointing an Additional Judge as a Permanent Judge there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The position was succinctly stated by observing that there is a presumption that a person found suitable for appointment as an Additional Judge continues to be suitable for appointment as a Permanent Judge, except when circumstances or events arise which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. There must be relevant and pertinent material to sufficiently convince a reasonable mind that the person is no longer suitable to fill the high office of a Judge and has forfeited his right to be considered for appointment. Venkataramaiah, J (as the Hon'ble Judge then was) observed that a Judge appointed under Article 224(1) of the Constitution had a well founded expectation that he would be made permanent. The test which applied to the appointment of an Additional Judge

under Article 217(1) would apply when an Additional Judge is to be appointed as a permanent Judge.

7. Before dealing with the case of respondent No. 2, the memorandum of procedure needs to be extracted so far as relevant. Paragraphs 11 to 18 and 20 read as follows:

> 11. The Chief Justice and Judges of High Courts are to be appointed by the President under Clause (1) of the Article 217 of the Constitution. The Judges of the Jammu and Kashmir High Court are to be appointed by the President under Section 95 of the Constitution of Jammu and Kashmir. Appointments to the High Court should be made on a time bound schedule so that the appointments are made well in advance preferably a month before the occurrence of the anticipated vacancy.
>
> 12. When a permanent vacancy is expected to arise in any year in the office of a Judge, the Chief Justice will as early as possible but at least 6 months before the date of occurrence of the vacancy, communicate to the Chief Minister of the State his views as to the persons to be selected for appointment. Full details of the persons recommended, in the format given in Annexure-1 should invariably be sent. Before forwarding the recommendation, the Chief Justice must consult two of his senior most colleagues on the Bench regarding the suitability of the names proposed. All consultation must be in writing and these opinions must be sent to the Chief Minister along with the recommendations.
>
> 13. The Chief Justice while sending the recommendation for appointing an additional Judge as a permanent Judge must along with his recommendation furnish statistics of month wise disposal of cases and judgments rendered by the Judge concerned as well as the number of cases reported in the Law Journal duly certified by him. The information would also be furnished regarding the total number of working days, the number of days he actually attended the Court and the days of his absence from the Court during the period for which the disposal statistics are sent.
>
> 14. The proposal for appointment of a Judge of a High Court shall be initiated by the Chief Justice of the High Court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Since the Governor is bound by the advice of the Chief Minister heading the Council of Ministers, a copy of the Chief Justice's proposal, with full set of papers should simultaneously be sent to the Governor to avoid delay. Similarly, a copy thereof may also be endorsed to the Chief Justice of India and the Union Minister of Law, Justice and Company Affairs to expedite consideration. The Governor as advised by the Chief Minister should forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs as early as possible but not later than six weeks from the date of receipt of the proposal from the Chief Justice of the High Court. If the comments are not received within the said time frame, it should be presumed by the Union Minister of Law, Justice and Company Affairs that the Governor (i.e. Chief Minister) has nothing to add to the proposal and proceed accordingly.
>
> 15. The Union Minister of Law, Justice and Company Affairs would consider the recommendations in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be

forwarded to the Chief Justice of India for his advice. The Chief Justice of India would in consultation with the two senior most judges of the Supreme Court form his opinion in regard to a person to be recommended for appointment to the High Court. The Chief Justice of India and the collegium of two Judges of the Supreme Court would take into account the views of the Chief Justice of the High Court and of those Judges of the High Court who have been consulted by the Chief Justice as well as views of those Judges in the Supreme Court who are conversant with the affairs of that High Court. It is of no consequence whether that High Court is their parent High Court or they have functioned in that High Court on transfer.

15. After their consultation the Chief Justice of India will in course of 4 weeks send his recommendation to the Union Minister of Law, Justice and Company Affairs. Consultation by the Chief Justice of India with his colleagues should be in writing and all such exchange of correspondence with his colleagues would be sent by the Chief Justice of India to the Union Minister of Law, Justice and Company Affairs. Once the names have been considered and recommended by the Chief Justice of India they should not be referred back to the State constitutional authorities even if a change takes place in the incumbency of any post. However, where it is considered expedient to refer back the names, the opinion of Chief Justice of India should be obtained. The Union Minister of Law, Justice and Company Affairs would then put up as early as possible preferably within 3 weeks the recommendation of the Chief Justice of India to the Prime Minister who will advise the President in the matter of appointment.

16. The correspondence between the Chief Justice and the Chief Minister and the correspondence between the Chief Minister and the Governor, if any should be in writing and copies of the correspondence should invariably be forwarded along with the Chief Minister's recommendations.

17. As soon as the appointment is approved by the President the Secretary to the Government of India in the Department of Justice will inform the Chief Justice of the High Court who will obtain from the person selected (i) a certificate of physical fitness as in Annexure II signed by a Civil Surgeon or District Medical Officer and, (ii) a certificate of date of birth as in Annexure III. A copy of the communication will also be sent simultaneously to the Chief Minister of the State. The medical certificate should be obtained from all persons selected for appointment whether they are at the time of appointment in the service of the State or not. When these documents are obtained the Chief Justice will intimate the fact to the Secretary to the Government of India in the Department of Justice and also forward these documents to him.

18. As soon as the warrant of appointment is signed by the President the Secretary to the Government of India in the Department of Justice will inform the Chief Justice and a copy of such communication will be sent to the Chief Minister. He will also announce the appointment and issue necessary notification in the Gazette of India. x x x x x

20. Additional Judges can be appointed by the President under Clause (1) of Article 224 of the Constitution. When the need for this arises, the State Government should first obtain the sanction of the Central Government for the creation of such additional posts.

The correspondence relating to this should be in the normal official form. After the post is sanctioned the procedure to be followed for making the appointment will be the same as given in paragraph 12 to 18 for the appointment of a permanent Judge, except that a medical certificate will not be necessary from the person being appointed as an Additional Judge.

8. So far as the scope of judicial review in such matters is concerned, it is extremely limited and is permitted to the extent indicated in para 482 of the Supreme Court Advocates-on-Record case (supra).

9. Essentially the decision in this case would depend upon the combined reading of paras 12 and 13.

10. It is to be noted that an Additional Judge cannot be said to be on probation for the purpose of appointment as a Permanent Judge. This position is clear from the fact that when an Additional Judge is appointed there may not be vacancy for a Permanent Judge. The moment a vacancy arises, the Chief Justice of the concerned High Court is required to send a proposal for appointment of the Additional Judge as a Permanent Judge along with material as indicated in para 13. The rigor of the scrutiny and the process of selection initially as an Additional Judge and a Permanent Judge are not different. The yardsticks are the same. Whether a person is appointed as an Additional Judge or a Permanent Judge on the same date, he has to satisfy the high standards expected to be maintained as a Judge. Additionally, on being made permanent, the effect of such permanency relates back to the date of initial appointment as an Additional Judge. The parameters of paragraph 12 of the memorandum cannot be transported in its entirety to paragraph 13. To begin with, while making the recommendations for appointment of an Additional Judge as a permanent Judge, Chief Justice of the High Court is not required to consult the collegium of the High Court. Additionally, there is no requirement of enquiry by the Intelligence Bureau. The Chief Justice while sending his recommendation has to furnish statistics of month-wise disposal of cases and judgments rendered by a Judge concerned as well as the number of cases reported in the Law Journals duly certified by him. Further information required to be furnished regarding the total number of working days, the number of days the concerned Judge attended the Court and the days of his absence from Court during the period for which the disposal statistics are sent. It is also clear from para 15 that at the stage of appointment of either as an Additional Judge or a Permanent Judge, the Union Minister of Law, Justice and Company Affairs is required to consider the recommendation in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. This procedure is not required to be followed when an Additional Judge is appointed as a Permanent Judge. Further, the consultation with members of the Collegium and other Judges, as noted above, is not expressly provided in para 13. The details which are required to be given in the format in Annexure I in para 12 are not required to be given in a case relatable to para 13.

11. As rightly submitted by learned Counsel for the Union of India unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent Judge has to be considered in the background of what has

been stated in S.P. Gupta's case (supra). Though there is no right of automatic extension or appointment as a permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). The weightage required to be given cannot be lost sight of. As Justice Pathak J, had succinctly put it there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The concept of plurality and the limited scope of judicial review because a number of constitutional functionaries are involved, are certainly important factors. But where the constitutional functionaries have already expressed their opinion regarding the suitability of the person as an Additional Judge, according to us, the parameters as stated in para 13 have to be considered differently from the parameters of para 12. The primacy in the case of the Chief Justice of India was shifted because of the safeguards of plurality. But that is not the only factor. There are certain other factors which would render the exercise suggested by the petitioners impracticable. Having regard to the fact that there is already a full fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as Additional Judge or Permanent Judge, repetition of the same process does not appear to be the intention.

12. It is not in dispute that Union of India is the ultimate authority to approve the recommendation for appointment as a Judge. The Central Government, as noted above, has stated that in view of the practice followed in implementing the memorandum, once the Government on being satisfied that a suitable candidate who was earlier appointed as an Additional Judge is suitable for appointment as a permanent Judge, the elaborate consultation has not been considered necessary. It is of significance to note that some of the Hon'ble Judges who were parties to the judgments relied on by the petitioners while functioning as a Chief Justice of India have not thought it necessary to consult the Collegium as is evident from the fact that from 1.1.1999 to 31.7.2007 in more than 350 cases the Collegium was not consulted. It means that they were also of the view that the practice/procedure was being followed rightly. Therefore, the plea that without consultation with the Collegium, the opinion of the Chief Justice of India is not legal, cannot be sustained.

13. But at the same time we find considerable substance in the plea of the petitioners that a person who is not found suitable for being appointed as a permanent Judge, should not be given extension as an Additional Judge unless the same is occasioned because of non availability of the vacancy. If a person, as rightly contended by the petitioners, is unsuitable to be considered for appointment as a permanent Judge because of circumstances and events which bear adversely on the mental and physical capacity, character and integrity or other relevant matters rendering it unwise for appointing him as a permanent Judge, same yardstick has to be followed while considering whether any extension is to be given to him as an Additional Judge. A person who is functioning as an Additional Judge cannot be considered in such circumstances for re-appointment as an Additional Judge. If the factors which render him unsuitable for appointment as a permanent Judge exist, it would not only be improper but also undesirable to continue him as an Additional Judge.

14. Coming to the factual scenario it appears that eight Additional Judges including respondent No. 2 were appointed on 3.4.2003 and respondent No. 2 was second in the order

of seniority. On 1.4.2005 the term of the aforesaid Additional Judges was extended for a period of four months. On 27.7.2005, seven of the eight Additional Judges (except respondent No. 2) were appointed as permanent Judges and the term of respondent No. 2 was extended by one year w.e.f. 3.8.2005. Again on 3.8.2006 the term of respondent No. 2 was extended for a period of six months. The aforesaid scenario according to the petitioners shows that respondent No. 2 was found to be unsuitable to be appointed as a permanent Judge. It is emphasized that all the three members of the collegium including the then Chief Justice of India opposed the appointment of respondent No. 2 as a permanent Judge. A grievance is made that for the reasons best known, all the 8 Judges were appointed as Additional Judges, with a view to draw smokescreen over the factual scenario. After the expiry of the four months period, 7 Additional Judges were made permanent and not respondent No. 2. A plea is taken that when he was not found suitable to be made as a permanent Judge, why his tenure as an Additional Judge was extended, and that too, for a period of one year? Again, his term was extended for a period of 6 months. Such extensions for short periods obviously, according to the petitioners, were intended to continue him as a Judge notwithstanding his unsuitability to be appointed as a permanent Judge. But the belated challenge as has been done in the present writ petition to such extensions cannot put the clock back. The position is almost undisputed that on 17.3.2005 the then Chief Justice of India recommended for extension of term of 8 out of 9 persons named as additional Judges for a further period of four months w.e.f. 3rd April, 2005. On 29.4.2005 the collegium including the then Chief Justice of India was of the view that name of respondent No. 2 cannot be recommended alongwith another Judge for confirmation as permanent Judge. Since it is crystal clear that the Judges are not concerned with any political angle if there be any in the matter of appointment as Additional Judge or Permanent Judge; the then Chief Justice should have stuck to the view expressed by the colllegium and should not have been swayed by the views of the government to recommend extension of the term of respondent No. 2 for one year; as it amounts to surrender of primacy by jugglery of words.

15. Again on 3.8.2006, the then Chief Justice of India who was earlier of the view about unsuitability of respondent No. 2, alongwith his senior colleagues, extended the term for six months on the ground that the time was inadequate to obtain views of then Chief Justice of the Madras High Court. It is to be noted that at different points of time, starting from the point of initial appointment, the successive Chief Justices have recommended for respondent No. 2 to be made permanent. That situation continued till 3.2.2007 when the recommendation of the then Chief Justice of the Madras High Court for appointing respondent No. 2 as a permanent Judge was accepted. The grievance of the petitioners as noted above is that collegium was not consulted. We have dealt with the legal position so far as this plea is concerned in detail above. Before the Chief Justice of India, at the time of accepting the recommendation for respondent No. 2 being made permanent, the details required to be furnished in terms of para 13 of the memorandum were there. There was also the recommendation of the then Chief Justice of Madras High Court who re-iterated the view of his predecessor in this regard.

16. The matter can be looked at from another angle. Supposing instead of accepting the recommendation for appointment as a permanent Judge, the Chief Justice of India would have extended the period of Additional Judgeship for two years which is maximum time

permissible. There would not have been any requirement for taking the views of the collegium (as contended by the petitioners) and the result ultimately would have been the same i.e. respondent No. 2 would have continued as a Judge. It is to be noted that he is due to retire on 9.7.2009. As noted above, at various points of time, when the term of appointment as an Additional Judge of respondent No. 2 was extended, there was no challenge. The situation prevailed for more than two years. As noted above, the clock cannot be put back.

17. In the peculiar circumstances of the case, we are not inclined to accept the prayer of the petitioners. But as indicated above, we have no hesitation in saying that a person who is not suitable to be appointed as a permanent Judge on the ground of unsuitability due to adverse factors on account of mental and physical capacity, adverse materials relating to character and integrity and other relevant matters, which are so paramount and sacrosanct for the functioning as a Judge, should not be continued as an Additional Judge. Even when an additional Judge is appointed as a permanent Judge, he does not become immune from action, if circumstances so warrant. Whenever materials are brought to the notice of the Chief Justice of India about lack of mental and physical capacity, character and integrity, it is for him to adopt such modalities which according to him would be relevant for taking a decision in the matter.

18. So far as respondent No. 2 is concerned, it appears that he has been transferred to some other High Court in public interest. If, it comes to the notice of the Hon'ble Chief Justice of India that action needs to be taken in respect of him for any aberration while functioning as a Judge, it goes without saying appropriate action as deemed proper shall be taken.

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L. Chandra Kumar v. *Union of India*

AIR 1997 SC 1125

[*Ouster of power of Judicial Review and vesting the same in administrative tribunals to the total exclusion of the High Courts under Article 226 of the Constitution – not permissible.*]

The Constitution (Forty-second Amendment) Act, 1976 inserted Part XIVA in the Constitution which contains Articles 323A and 323B. These articles provide for the setting up of various tribunals as adjudicatory bodies. They, *inter alia*, contain provisions enabling the Parliament and state legislatures to exclude the jurisdiction of all courts except that of the Supreme Court under Article 136 with respect to matters falling within the jurisdiction of the tribunals concerned. The Administrative Tribunals Act, 1985 was enacted by Parliament by virtue of Article 323A. The validity of the Act was upheld in ***S.P. Sampath Kumar* v. *Union of India*** [(1987) 1 SCC 124].

While upholding the validity of Section 28 of the Act in ***Sampath Kumar*** case, the court had taken the view that the power of judicial review need not always be exercised by regular courts and the same could be exercised by an equally efficacious alternative mechanism. Apart from making suggestions relating to the eligibility, etc. of the persons who could be appointed as chairman, vice-chairman or members of the tribunal, the court stated that every Bench of the tribunal should consist of one Judicial Member and one Administrative Member.

The case required a fresh look at the issues involved in ***Sampath Kumar*** case because the tribunals were equated with the High Courts. A two-judge Bench of the Court in ***J.B. Chopra* v. *Union of India*** [AIR 1987 SC 357], relying upon ***Sampath Kumar,*** had held that the tribunals had the jurisdiction, power and authority to adjudicate upon questions pertaining to the constitutional validity of a rule framed by the President of India under the proviso to Article 309 of the Constitution. They could also adjudicate on the *vires* of the Acts of Parliament and state legislatures. Section 5(6) of the Act conferred this power, if the chairman of the tribunal so desired, even to a single administrative member.

The post-***Sampath Kumar*** cases required a fresh look by a larger Bench over all the issues adjudicated in ***Sampath Kumar*** including the question whether the tribunal could at all have an administrative member on its bench, if it were to have the power of deciding constitutional validity of a statute or Article 309 Rule.

A.M. AHMADI, C.J. - The special leave petitions, civil appeals and writ petitions which together constitute the present batch of matters before us owe their origin to separate decisions of different High Courts and several provisions in different enactments which have been made the subject of challenge. Between them, they raise several distinct questions of law; they have, however, been grouped together as all of them involve the consideration of the following broad issues:

(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (*d*) of clause (2) of Article 323A or by sub-clause (*d*) of clause (3) of Article 323B of the Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323A or with regard to all or any of the matters specified in clause (2) of Article 323B, runs counter to the power of judicial

review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

73. We may now analyse certain other authorities for the proposition that the jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. While expressing his views on the significance of draft Article 25, which corresponds to the present Article 32 of the Constitution, Dr B.R. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly stated as follows: (*CAD*, Vol. VII, p. 953)

> If I was asked to name any particular article in this Constitution as *the most important* - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. *It is the very soul of the Constitution and the very heart of it* and I am glad that the House has realised its importance. (emphasis added)

76. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in ***Kesavananda Bharati*** case [AIR 1973 SC 1461]. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. In ***Indira Gandhi*** case [AIR 1975 SC 2299], Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country.

77. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme.

78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they

were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental - as opposed to a substitutional - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3) of Article 32 of the Constitution.

81. If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created

under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

82. There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in ***Sampath Kumar*** case was rendered against such a backdrop.We are conscious of the fact that when a Constitution Bench of this Court in ***Sampath Kumar*** case adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

83. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in ***Sampath Kumar*** case. In his leading judgment, Ranganath Misra, J. refers to the fact that since Independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted.

84. The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to half a century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India ("the LCI") or similar high-level committees appointed by the Central Government, and are particularly noteworthy.

85. An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the Law Commission of India in its 124th Report which was released sometime after the judgment in ***Sampath Kumar*** case. The Report was delivered in 1988, nine years ago, and some changes have occurred since, but the broad perspective which emerges is still, by and large, true:

> The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various statutes as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary, matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being courts of record, have the power to punish for its contempt as well as contempt of its subordinate courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of *habeas corpus, mandamus,* prohibition*, quo warranto and certiorari*. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by Section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of the Gift Tax Act, 1958, and Section 18 of the Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as, Section 130 of the Customs Act, 1962, and Section 354 of the Central Excises and Salt Act, 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated by reference to those names, viz., (*a*) first appeals; (*b*) appeals under the letters patent; (*c*) second appeals; (*d*) revision petitions; (*e*) criminal appeals; (*f*) criminal revisions; (*g*) civil and criminal references; (*h*) writ petitions; (*i*) writ appeals; (*j*) references under direct and indirect tax laws; (*k*) matters arising under the Sales Tax Act; (*l*) election petitions under the Representation of the People Act; (*m*) petitions under the Companies Act, Banking Companies Act and other special Acts and (*n*) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction. This varied jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts.

88. In ***R.K. Jain*** case [(1993) 4 SCC 119] this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI [Law Commission of India] or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory. Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "*Alternative Modes and Forums for Dispute Resolution*", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up "Gram Nyayalayas", Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323-A and 323-B of the Constitution.

90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the

jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In ***R.K. Jain*** case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the

aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will

ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

98. Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the vires of the provision was not in question in ***Dr Mahabal Ram*** case [(1994) 2 SCC 401], we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a Single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a Single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality.

99. In view of the reasoning adopted by us, we hold that clause 2(*d*) of Article 323A and clause 3(*d*) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

Daryao v. *State of U.P.*

AIR 1961 SC 1457

[*Application of the principle of res judicata to writ petitions*]

Six writ petitions were filed under Article 32 after the petitioners had unsuccessfully moved the High Court for similar relief under Article 226. The petitions were opposed on the ground that the dismissal of the petitions under Article 226 seeking the same relief operated as res judicata for petitions filed under Article 32 of the Constitution.

The petitioners had alleged that they and their ancestors had been the tenants of certain land and respondents 3 to 5 were the proprietors of that land. Owing to communal disturbances in the Western District of Uttar Pradesh in 1947, the petitioners had to leave their village in July, 1947; in November, 1947, after returning they found that during their temporary absence Respondents 3 to 5 had taken unlawful possession of the land. Since they refused to deliver possession of the land, the petitioners filed suits in June, 1948 for ejectment under Section 180 of the U.P. Tenancy Act, 1939. In the trial court, the petitioners succeeded and a decree was passed in their favour. The said decree was confirmed in appeal. In pursuance of the appellate decree, the petitioners obtained possession of the land through Court. Respondents 3 to 5 then preferred a second appeal before the Board of Revenue under Section 267. The Board allowed the appeal and dismissed the petitioner's suit. Aggrieved by the decision, the petitioners moved the High Court of Allahabad under Article 226 of the Constitution for the issue of a writ of certiorari to quash the said judgment. Before the said petition was filed, the Allahabad High Court had already interpreted Section 20 of the U.P. Land Reforms Act as amended by Act 16 of 1953. The effect of the said decision was plainly against the petitioners' contentions and therefore their counsel had no alternative but not to press the petition before the High Court. The petition was consequently dismissed. Section 20 was again amended by Act 20 of 1954.

P.B. GAJENDRAGADKAR, J. - 7. The argument that Article 32 does not confer upon a citizen the right to move this Court by an original petition but merely gives him the right to move this Court by an appropriate proceeding according to the nature of the case seems to us to be unsound. It is urged that in a case where the petitioner has moved the High Court by a writ petition under Article 226 all that he is entitled to do under Article 32(1) is to move this Court by an application for special leave under Article 136; that, it is contended, is the effect of the expression "appropriate proceedings"used in Article 32(1). In our opinion, on a fair construction of Article 32(1) the expression "appropriate proceedings" has reference to proceedings which may be appropriate having regard to the nature of the order, direction or writ which the petitioner seeks to obtain from this Court. The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move this Court by appropriate proceedings. That is why we must proceed to deal with the question of res judicata on the basis that a fundamental right has been guaranteed to the citizen to move this Court by an original petition wherever his grievance is that his fundamental rights have been illegally contravened.

8. There can be no doubt that the fundamental right guaranteed by Article 32(1) is a very important safeguard for the protection of the fundamental rights of the citizens, and as a result of the said guarantee this Court has been entrusted with the solemn task of upholding the

fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself. It is because of this aspect of the matter that in ***Romesh Thappar* v. *State of Madras*** [(1950) SCR 594] in the very first year after the Constitution came into force, this Court rejected a preliminary objection raised against the competence of a petition filed under Article 32 on the ground that as a matter of orderly procedure the petitioner should first have resorted to the High Court under Article 226, and observed that "this Court is thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights". Thus the right given to the citizen to move this Court by a petition under Article 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the application of the rule of res judicata this aspect of the matter has no doubt to be borne in mind.

9. But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

10. In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William B. Hale in the leading ***Duchess of Kingston*** case [2 Smith Lead Case 13]. Said Sir William B. Hale "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose". As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records;' it is a fundamental doctrine of all courts that there must be an end of litigation." Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a Court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause" (p. 187, paragraph 362). "Res judicata", it is observed in *Corpus Juris*, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which

makes it to the interest of the State that there should be an end to litigation - *interest republicae ut sit finis litium;* the other, the hardship on the individual that he should be vexed twice for the same cause - *nemo debet bis vexari pro eadem causa*". In this sense the recognised basis of the rule of *res judicata* is different from that of technical estoppel. "Estoppel rests on equitable principles and res judicata rests on maxims which are taken from the Roman Law". Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted.

11. The same question can be considered from another point of view. If a judgment has been pronounced by a court of competent jurisdiction it is binding between the parties unless it is reversed or modified by appeal, revision or other procedure prescribed by law. Therefore, if a judgment has been pronounced by the High Court in a writ petition filed by a party rejecting his prayer for the issue of an appropriate writ on the ground either that he had no fundamental right as pleaded by him or there has been no contravention of the right proved or that the contravention is justified by the Constitution itself, it must remain binding between the parties unless it is attacked by adopting the procedure prescribed by the Constitution itself. The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. As Halsbury has observed: "subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences". Similar is the statement of the law in *Corpus Juris*: "the doctrine of estoppel by judgment does not rest on any superior authority of the court rendering the judgment, and a judgment of one court is a bar to an action between the same parties for the same cause in the same court or in another court, whether the latter has concurrent or other jurisdiction". This rule is subject to the limitation that the judgment in the former action must have been rendered by a court or tribunal of competent jurisdiction. "It is, however, essential that there should have been a judicial determination of rights in controversy with a final decision thereon". In other words, an original petition for a writ under Article 32 cannot take the place of an appeal against the order passed by the High Court in the petition filed before it under Article 226. There can be little doubt that the jurisdiction of this Court to entertain applications under Article 32 which are original cannot be confused or mistaken or used for the appellate jurisdiction of this Court which alone can be invoked for correcting errors in the decisions of High Courts pronounced in writ petitions under Article 226. Thus, on general considerations of public policy there seems to be no reason why the rule of res judicata should be treated as inadmissible or irrelevant in dealing with petitions filed under Article 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a decision pronounced be a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that the general rule of res Judicata should not be allowed to be invoked cannot be sustained.

12. This Court had occasion to consider the application of the rule of res judicata to a petition filed under Article 32 in ***M.S.M. Sharma* v. *Dr Shree Krishna Sinha*** [AIR 1960 SC 1186]. In that case the petitioner had moved this Court under Article 32 and claimed an appropriate writ against the Chairman and the Members of the Committee of Privileges of the State Legislative Assembly. The said petition was dismissed. Subsequently he filed another petition substantially for the same relief and substantially on the same allegations. One of the points which then arose for the decision of this Court was whether the second petition was competent, and this Court held that it was not because of the rule of res judicata. It is true that the earlier decision on which res judicata was pleaded was a decision of this Court in a petition filed under Article 32 and in that sense the background of the dispute was different, because the judgment on which the plea was based was a judgment of this Court and not of any High Court. Even so, this decision affords assistance in determining the point before us. In upholding the plea of res judicata this Court observed that the question determined by the previous decision of this Court cannot be reopened in the present case and must govern the rights and obligations of the parties which are substantially the same. In support of this decision Sinha, C.J., who spoke for the Court, referred to the earlier decision of this Court in ***Raj Lakshmi Dasi* v. *Banamali Sen*** [(1953) SCR 154] and observed that the principle underlying res judicata is applicable in respect of a question which has been raised and decided after full contest, even though the first Tribunal which decided the matter may have no jurisdiction to try the subsequent suit and even though the subject-matter of the dispute was not exactly the same in the two proceedings. We may add incidentally that the Court which tried the earlier proceedings in the case of ***Raj Lakshmi Dasi*** was a court of exclusive jurisdiction. Thus this decision establishes the principle that the rule of res judicata can be invoked even against a petition filed under Article 32.

15. The next question to consider is whether it makes any difference to the application of this rule that the decision on which the plea of res judicata is raised is a decision not of this Court but of a High Court exercising its jurisdiction under Article 226. The argument is that one of the essential requirements of Section 11 of the Code of Civil Procedure is that the Court which tries the first suit or proceeding should be competent to try the second suit or proceeding, and since the High Court cannot entertain an application under Article 32 its decision cannot be treated as res judicata for the purpose of such a petition. It is doubtful if the technical requirement prescribed by Section 11 as to the competence of the first Court to try the subsequent suit is an essential part of the general rule of res judicata; but assuming that it is, in substance even the said test is satisfied because the jurisdiction of the High Court in dealing with a writ petition filed under Article 226 is substantially the same as the jurisdiction of this Court in entertaining an application under Article 32. The scope of the writs, orders or directions which the High Court can issue in appropriate cases under Article 226 is concurrent with the scope of similar writs, orders or directions which may be issued by this Court under Article 32. The cause of action for the two applications would be the same. It is the assertion of the existence of a fundamental right and its illegal contravention in both cases and the relief claimed in both the cases is also of the same character. Article 226 confers jurisdiction on the High Court to entertain a suitable writ petition, whereas Article 32 provides for moving this Court for a similar writ petition for the same purpose. Therefore, the argument that a petition under Article 32 cannot be entertained by a High Court under Article 226 is without any substance; and so the plea that the judgment of the High Court cannot be treated as res judicata on the ground that it cannot entertain a petition under Article 32 must be rejected.

16. It is, however, necessary to add that in exercising its jurisdiction under Article 226 the High Court may sometimes refuse to issue an appropriate writ or order on the ground that the party applying for the writ is guilty of laches and in that sense the issue of a high prerogative writ may reasonably be treated as a matter of discretion. On the other hand, the right granted to a citizen to move this Court by appropriate proceedings under Article 32(1) being itself a fundamental right this Court ordinarily may have to issue an appropriate writ or order provided it is shown that the petitioner has a fundamental right which has been illegally or unconstitutionally contravened. It is not unlikely that if a petition is filed even under Article 32 after a long lapse of time considerations may arise whether rights in favour of third parties which may have arisen in the meanwhile could be allowed to be affected, and in such a case the effect of laches on the part of the petitioner or of his acquiescence may have to be considered; but, ordinarily if a petitioner makes out a case for the issue of an appropriate writ or order he would be entitled to have such a writ or order under Article 32 and that may be said to constitute a difference in the right conferred on a citizen to move the High Court under Article 226 as distinct from the right conferred on him to move this Court. This difference must inevitably mean that if the High Court has refused to exercise its discretion on the ground of laches or on the ground that the party has an efficacious alternative remedy available to him then of course the decision of the High Court cannot generally be pleaded in support of the bar of res judicata. If, however, the matter has been considered on the merits and the High Court has dismissed the petition for a writ on the ground that no fundamental right is proved or its breach is either not established or is shown to be constitutionally justified there is no reason why the said decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same facts and for the same reliefs under Article 32.

17. In this connection reliance has been placed on the fact that in England habeas corpus petitions can be filed one after the other and the dismissal of one habeas corpus petition is never held to preclude the making of a subsequent petition for the same reason. In our opinion, there is no analogy between the petition for habeas corpus and petitions filed either under Article 226 or under Article 32. For historical reasons the writ for habeas corpus is treated as standing in a category by itself; but, even with regard to a habeas corpus petition it has now been held in England in ***Re Hastings (No. 2)*** [(1958) 3 All ER QBD 625] that "an applicant for a writ of habeas corpus in a criminal matter who has once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard a second time by another Divisional Court in the same Division, since a decision of a Divisional Court of the Queen's Bench Division is equivalent to the decision of all the judges of the Division, just as the decision of one of the old common law courts sitting in banc was the equivalent of the decision of all the judges of that Court." Lord Parker, C.J., who delivered the judgment of the Court, has elaborately examined the historical genesis of the writ, several dicta pronounced by different Judges in dealing with successive writ petitions, and has concluded that "the authorities cannot be said to support the principle that except in vacation an applicant could go from Judge to Judge as opposed to going from court to court"(p. 633), so that even in regard to a habeas corpus petition it is now settled in England that an applicant cannot move one Divisional Court of the Queen's Bench Division after another. The said decision has been subsequently applied in ***Re Hastings* (*No. 3*)** [(1959) 1 All ER Ch D 698] to a writ petition filed for habeas corpus in a Divisional Court of the Chancery Division. In England, technically an order passed on a petition for habeas corpus is not regarded as a judgment and

that places the petitions for habeas corpus in a class by themselves. Therefore we do not think that the English analogy of several habeas corpus applications can assist the petitioners in the present case when they seek to resist the application of res judicata to petitions filed under Article 32. Before we part with the topic we would, however, like to add that we propose to express no opinion on the question as to whether repeated applications for habeas corpus would be competent under our Constitution. That is a matter with which we are not concerned in the present proceedings.

18. There is one more argument which still remains to be considered. It is urged that the remedies available to the petitioners to move the High Court under Article 226 and this Court under Article 32 are alternate remedies and so the adoption of one remedy cannot bar the adoption of the other. These remedies are not exclusive but are cumulative and so no bar of res judicata can be pleaded when a party who has filed a petition under Article 226 seeks to invoke the jurisdiction of this Court under Article 32.

19. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other.

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DISTRIBUTION OF LEGISLATIVE POWERS

[Doctrine of Territorial Nexus – Extra-territorial operation of a state legislation]

State of Bihar **v.** *Charusila Dasi*

AIR 1959 SC 1002

S.K. DAS, J. - This appeal relates to a trust known as the Srimati Charusila Trust and the properties appertaining thereto. By its judgment and order dated October 5, 1953 the High Court of Patna has held that the trust in question is a private trust created for the worship of a family idol in which the public are not interested and, therefore, the provisions of the Bihar Hindu Religious Trusts Act, 1950 (Bihar 1 of 1951), hereinafter referred to as the Act, do not apply to it. Accordingly, it allowed an application made to it under Article 226 of the Constitution and quashed the proceedings taken against the respondent herein under Sections 59 and 70 of the Act. The State of Bihar, the President of the Bihar State Board of Religious Trusts and the Superintendent of the said Board who were respondents to the petition under Article 226 are the appellants before us.

2. The trust in question was created by a trust deed executed on March 11, 1938. Srimati Charusila Dasi is the widow of one Akshaya Kumar Ghose of No. 3, Jorabagan Street in Calcutta. She resided at the relevant time in a house known as Charu Niwas at Deoghar in the district of Santhal Perganas in the State of Bihar. In the trust deed she described herself as the settlor who was entitled to and in possession of certain properties described in Schedules B, C and D. Schedule B property consisted of three bighas and odd of land situate in Mohalla Karanibad of Deoghar town together with buildings and structures thereon; Schedule C property was Charu Niwas, also situate in Karanibad of Deoghar; and Schedule D properties consisted of several houses and some land in Calcutta the aggregate value of which was in the neighbourhood of Rs 8,50,000. In a subsequent letter to the Superintendent, Bihar State Board of Religious Trusts, it was stated on behalf of Srimati Charusila Dasi that the total annual income from all the properties was about Rs 87,839. In the trust deed it was recited that the settlor had installed a deity named Iswar Srigopal in her house and had since been regularly worshipping and performing the "puja" of the said deity; that she had been erecting and constructing a twin temple (jugal mandir) and a Nat Mandir (entrance hall) to be named in memory of her deceased son Dwijendra Nath on the plot of land described in Schedule B and was further desirous of installing in one of the two temples the deity Srigopal and such other deity or deities as she might wish to establish during her lifetime and also of installing in the other temple a marble image of Sri Sri Balanand Brahmachari, who was her religious preceptor and who was regarded by his disciples as a divine person. It was further recited in the trust deed that the settlor was also desirous of establishing and founding a hospital at Karanibad for Hindu females to be called Akshaya Kumar Female Hospital in memory of her deceased husband.

By the trust deed the settlor transferred to the trustees the properties described in Schedules B, C and D and the trustees were five in number including Srimati Charusila Dasi and her deceased husband's adopted son Debi Prasanna Ghosh; the other three trustees were Amarendra Kumar Bose, Tara Shanker Chatterjee and Surendra Nath Burman, but they were

not members of the family of the settlor. Amarendra Kumar Bose resigned from the office of trusteeship and was later replaced by Dr Shailendra Nath Dutt. The trusts imposed under the trust deed were - (1) to complete the construction of the two temples and the Nat Mandir at a cost not exceeding three lakhs to be met out of the trust estate and donations, if any; (2) after the completion of the two temples, to instal or cause to be installed the deity Iswar Srigopal in one of the temples and the marble image of Sri Balanand Brahmachari in the other and to hold a consecration ceremony and a festival in connection therewith; (3) after the installation ceremonies and festivals mentioned above, to provide for the payment and expenditure of the daily "sheba puja" and periodical festivals each year of the deity Srigopal and such other deities as might be installed at an amount not exceeding the sum of Rs 13,600 per annum and also to provide for the daily "sheba" of the marble image of Sri Balanand Brahmachari and to celebrate each year in his memory festivals on the occasion of (a) the "Janma-tithi"(the anniversary of the installation of the marble image); (b) "Guru-purnima" (full moon in the Bengali month of Ashar); and (c) "Tirodhan" (anniversary of the day on which Sri Balanand Brahmachari gave up his body) at a cost not exceeding Rs 4500 per annum; and (4) to establish or cause to be established and run and manage in Deoghar a hospital for Hindu females only to be called Akshaya Kumar Female Hospital and an attached outdoor charitable dispensary for all outpatients of any religion or creed whatsoever and pay out of the income for the hospital and the outdoor dispensary an annual sum of Rs 12,000 or such other sum as might be available and sufficient after meeting the charges and expenditure of the two temples and after paying the allowance of the "shebait" and trustees and members of the temple committee. It was further stated that the work of the establishment of the hospital and the out-door charitable dispensary should not be taken in hand until the construction of the temples and the installation of the deities mentioned above.

3. It may be here stated that it is the case of both parties before us that the temples and the Nat Mandir have been constructed and the deity and the marble image installed therein; but neither the hospital nor the charitable dispensary has yet been constructed. The powers, functions and duties of the trustees were also mentioned in the deed and, in Schedule A, detailed rules were laid down for the holding of annual general meetings, special meetings, and ordinary meetings of the trustees. To these details we shall advert later.

4. On October 27, 1952 the Superintendent, Bihar State Board of Religious Trusts, Patna, sent a notice to Srimati Charusila Dasi under Section 59 of the Act asking her to furnish a return in respect of the trust in question. Srimati Charusila Dasi said in reply that the trust in question was a private endowment created for the worship of a family idol in which the public were not interested and therefore the Act did not apply to it. On January 5, 1953 the Superintendent wrote again to Srimati Charusila Dasi informing her that the Board did not consider that the trust was a private trust and so the Act applied to it. There was further correspondence between the solicitor of Srimati Charusila Dasi and the President of the Bihar State Board of Religious Trusts. The correspondence did not, however, carry the matter any further and on February 5, 1953 the President of the State Board of Religious Trusts said in a notice that he had been authorised to assess a fee under Section 70 of the Act in respect of the trust. Ultimately, on April 6, 1953, Srimati Charusila Dasi made an application to the High Court under Article 226 of the Constitution in which she prayed that a writ or order be issued

quashing the proceedings taken against her by the Bihar State Board of Religious Trusts on the grounds (a) that the trust in question was a private trust to which the Act did not apply and (b) that the Act was ultra vires the Constitution by reason of the circumstance that its several provisions interfered with her rights as a citizen guaranteed under Article 19 of the Constitution.

5. This application was contested by the State of Bihar and the Bihar State Board of Religious Trusts, though no affidavit was filed by either of them. On a construction of the trust deed the High Court came to the conclusion that the trust in question was wholly of a private character created for the worship of a family idol in which the public were not interested and in that view of the matter held that the Act and its provisions did not apply to it. Accordingly, the High Court allowed the application and issued a writ in the nature of a writ of certiorari quashing the proceedings under Sections 59 and 70 of the Act and a writ in the nature of a writ of prohibition restraining the Bihar State Board of Religious Trusts from taking further proceedings against Srimati Charusila Dasi in respect of the trust in question. The appellants then applied for and obtained a certificate from the High Court that the case fulfilled the requirements of Article 133 of the Constitution. The present appeal has been filed in pursuance of that certificate.

6. In connected Civil Appeals numbered 225, 226, 228, 229 and 248 of 1955 judgment has been pronounced today, and we have given therein a conspectus of the provisions of the Act and have further dealt with the question of the constitutional validity of those provisions in the context of fundamental rights guaranteed by Part III of the Constitution. We have held therein that the provisions of the Act do not take away or abridge any of the rights conferred by that Part. In Civil Appeal No. 343 of 1955 in which also judgment has been pronounced today, we have considered the definition clause in Section 2(1) of the Act and come to the conclusion that the Act does not apply to private endowments, and have further explained therein the essential distinction in Hindu law between private and public religious trusts. We do not wish to repeat what we have said in those two decisions; but in the light of the observations made therein, the two questions which fall for decision in this appeal are— (1) if on a true construction of the trust deed dated March 11, 1938 the Charusila Trust is a private endowment created for the worship of a family idol in which the public are not interested, as found by the High Court and (2) if the answer to the first question is in the negative, does the Act apply by reason of Section 3 thereof to trust properties which are situate outside the State of Bihar.

7. We now proceed to consider and decide these two questions in the order in which we have stated them. On behalf of the appellants it has been contended that on a true construction of the deed of trust, the Charusila Trust must be held to be a public religious trust. The learned Judges of the High Court emphasised that part of the preamble wherein it was stated that the settlor had installed a deity called Iswar Srigopal in her house and had been regularly worshipping the said deity, which circumstance (according to them) showed that in its origin the endowment was a private endowment created for the worship of a family idol in which the public were not interested, and the learned Judges were further of the view that the installation of the said deity in one of the two temples and of the marble image of Sri Balanand Brahmachari in the other temple did not alter the nature of the endowment which continued to

be a private endowment; they also expressed the opinion that the provision in the trust deed for the establishment of a hospital for Hindu females and a charitable dispensary for patients of any religion or creed was merely incidental to the other main objects of the endowment. These findings of the High Court have been seriously and strenuously challenged before us.

8. We say this with respect, but we consider that the learned Judges of the High Court have failed to give to several material clauses of the trust deed their due weight and these have an important bearing on the question in issue. It is true that the settlor said that she had installed the deity Iswar Srigopal in her house and she had been regularly worshipping the deity since such installation; if the trust had been created only for the purpose of continuing such family worship, the conclusion would no doubt be that the endowment was wholly of a private character in which the public had no interest. That was not, however, what was done. The settlor created the trust for the construction of two temples, in one of which was to be installed the deity Iswar Srigopal and in the other the marble image of her preceptor; the trustees consisted of persons three of whom were strangers to the family, though the settlor reserved to herself the power to remove in her absolute discretion any one or more of the trustees for misconduct by reason of change of religion etc. One of the relevant considerations is if by the trust deed any right of worship has been given to the public or any section of the public answering a particular description. One of the clauses of the trust deed reads:

> "The 'pronamis' and perquisites to be offered to the deities and image in the Jugal Mandir shall form part of the Srimati Charusila Trust Estate and neither the shebait nor any one else shall have interest or claim in or over same."

This clause to which the learned Judges of the High Court have made no reference shows that the right of worship was not confined to the family of the settlor or founder, but was given to other members of the Hindu public who could offer "pronamis" and perquisites to the deities, and those "pronamis" and perquisites were to form part of the trust estate. Schedule E of the deed gives details of the festivals and ceremonials to be performed for the deity and the image of Sri Balanand Brahmachari. One of the ceremonials is a "Jal Chhatra" (free distribution of water); another is "annakoot" (distribution of food) at the time of Diwali, the approximate expenditure being fixed at Rs 500. A third ceremony is a "bhandara", culminating in free distribution of food, of the Mataji of Sri Balanand Brahmachari. These are ceremonies which even if ancillary to "deva-sheba", appear prima facie to confer benefit on the general body of worshippers. Though not conclusive by themselves, they have to be considered in the light of the other main provisions of the trust deed. The other festivals which have to be performed as a rule for the deity are such well-known festivals as Rath Yatra, Jhulan, Janmastami, Rash and Dol (Holi) in which members of the Hindu community usually take part in large numbers, and the scale of expenses laid down shows that the festivals are to be performed on a large scale so as to enable a large number of persons to take part in them. Even with regard to the special festivals for Sri Balanand Brahmachari on the occasion of the Janmatithi, Gurupurnima, and Tirodhan, the provisions of the trust deed contemplate that they are to be performed on a large scale so that other disciples of Sri Balananda Brahmachari may also join in them.

9. Even the constitution of the committee of trustees is such as would show that the endowment is not a mere private endowment. The trust deed says—

> "In filling up a vacancy the trustees shall see that in the Board of Trustees there shall be, if available, one who is the seniormost lineal male descendant of Akshaya Kumar Ghose, the deceased husband of the settlor, who is eligible and willing and capable of acting as a trustee, another who is a trustee of the Sree Balanand Trust created at Deoghar by the said Sree Balanandji Brahmachari Maharaj of sacred memory, and a third who shall be disciple of Sree Sree Balanand order, that is to say, any one of the disciples of the said Sree Sree Balanand Brahmachari Maharaj of sacred memory and his disciples and the disciples of the latter and so on if such a disciple is willing, eligible and capable of acting as a trustee of the said Trust hereby created, provided always that the full number of trustees shall at all times be five in number and no one shall be eligible to be a trustee unless he be adult male, pious, Bengali Hindu and provided also that the shebait of Sree Gopal and the shebait of Sree Baleshwari Devi of the Ashram Deoghar shall under no circumstances be eligible to be a trustee under these presents save and except in the case of the settlor who shall so long as she lives to both a trustee and a shebait."

We may here draw attention to the formation of the temple committee as envisaged by the trust deed. It says that the temple committee shall consist of the Jugal Mandir shebait for the time being who shall be the ex officio member and president of the committee and the other members who will be appointed or nominated by the trustees shall consist of six pious Hindus who must be residents of Deoghar and of whom at least four shall be Bengalis. If the trust were created for the worship of a family idol, one would not expect provisions of this nature which vest the management of the temple and the "sheba puja" in members of the public outside the family of the settlor.

10. Besides the aforesaid provisions, there is in express terms the imposition of a trust in favour of the public so far as the hospital and the charitable dispensary are concerned. It h necessary to quote here clause 8 of the trust deed. That clause reads:

> "To establish or cause to be established and run and manage in Deoghar a hospital for Hindu females only to be called in memory of the husband of the settlor, since deceased, the 'Akshaya Kumar Female Hospital' and an attached out-door charitable dispensary for all outpatients of any religion or creed whatsoever and out of the said income to pay and/or spend for the objects of the said Hospital and out-door dispensary annually a sum of rupees twelve thousand or such sum as will be available and sufficient after meeting the aforesaid charges and expenditure and after paying the allowance of the shebait and trustees and members of the temple committee and the establishment charges of offices at Calcutta and Deoghar and of the temple establishment hereinafter mentioned provided however that the work of the establishment of the hospital and out-door charitable dispensary shall not be taken in hand by the trustees until the construction of the temple and installation of the deities hereinbefore mentioned."

The trust deed further states that the female hospital and charitable dispensary shall, so long as the settlor is alive, be located in a house to be rented in Deoghar and after her death shall be shifted to and located in Charu Niwas. Charu Niwas was, however, sold by an order of the Calcutta High Court and the sale proceeds, it is stated, were appropriated towards the satisfaction of the debts and liabilities of the trust estate. One clause of the trust deed relating to the hospital and the charitable dispensary says:

> "The object of the said Hospital shall be to provide Hindu females with gratuitous medical and surgical and maternity advice and aid and also to admit them as indoor patients in conformity with such rules and regulation as may be made by or with the sanction of the Board of Trustees. The outdoor Charitable Hospital shall be run as the trustees shall provide by rules. In furtherance of these objects, its funds may be expended in subscriptions or contributions to convalescent and other similar institutions and to other special hospitals and in sending patients to and maintaining them in such institution and hospitals provided that the sum so expended in any one year shall not exceed rupees one thousand or such sum as may be fixed by the trustees from time to time."

The learned Judges of the High Court have expressed the view that these provisions for the establishment of a hospital and charitable dispensary are merely incidental or ancillary to the other main objects of the trust. With great respect, we are unable to appreciate how the establishment of a hospital and charitable dispensary of the nature indicated in the trust deed can be said to be ancillary or incidental to the other objects of the trust viz. the construction of two temples and the installation of the deities therein. In clear and unequivocal terms the trust deed imposes a distinct and independent trust in favour of a considerable section of the public for whose benefit the hospital and the charitable dispensary are to be established. It is true that the establishment of the hospital and the charitable dispensary is to be taken in hand after the construction of the temples and the installation of the deities; that circumstance, however, does not make the trust in relation to the hospital and the dispensary any the less important or even merely incidental or ancillary to the other trusts. It merely determines the priority of time when the different trusts created by the deed are to be given effect to. The High Court has placed reliance on the decision in ***Prasaddas Pal* v. *Jagannath Pal*** [(1932) ILR 60 Cal 538]. That was a case in which by the deed of endowment were dedicated certain houses and premises to the "sheba" of a family idol established in one of the said houses and for feeding the poor and carrying out other charitable objects; the deity was installed inside one of the residential quarters, the "shebaitship" was confined to the members of the family of the founder, and the feeding of the poor and of students, in case the income of the debutter property increased, was found to be part and parcel of the "debasheba", and in those circumstances it was held that the feeding of the poor etc. was not an independent charity but incidental to the main purpose of the endowment viz. the "puja" of the deity. We are unable to hold that the same considerations apply to the trust before us.

11. In ***Deoki Nandan* v. *Murlidhar*** [(1956) SCR 756, 762], this Court considered the principles of law applicable to a determination of the question whether an endowment is public or private, and observed:

> "The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers."

One of the facts which was held in that case to indicate that the endowment was public was that the idol was installed not within the precincts of residential quarters but in a separate building constructed for that very purpose on a vacant site. We do not suggest that such a fact is by itself decisive of the question. The fact that the temple is outside the dwelling house is only a circumstance in favour of it being regarded a public temple, particularly in Madras (except Malabar); there are, however, private temples in Bengal which are built outside the residential houses of donors (see the *Hindu Law of Religious and Charitable Trust*, Tagore Law Lectures by the late Dr B.K. Mukherjea, 1952 Edn., p. 188). In the case before us, the two temples were constructed outside the residential quarters, but that is only one of the relevant circumstances. We must construe the deed of trust with reference to all its clauses and so construed, we have no doubt that the trusts imposed constitute a public endowment. There is one other point to be noticed in this connexion. The deed of trust in the present case is in the English form and the settlor has transferred the properties to trustees who are to hold them for certain specific purposes of religion and charity; that in our opinion is not decisive but is nevertheless a significant departure from the mode a private religious endowment is commonly made.

12. It is necessary now to refer to a decision of the Calcutta High Court, In ***re Charusila Dasi*** [(1946) 1 Cal 473] relating to this very trust. The question for consideration in that case was the assessment of income tax on the income of this trust estate for accounting year 1938-39. The trustees were assessed upon the whole income of the trust. The trustees appealed against the assessment and contended that the entire trust was for public, religious and charitable purposes and the whole income fell within clause (1) of sub-section (3) of Section 4 of the Income Tax Act. The contention of the Commissioner of Income Tax was that the trust was no more than a private religious trust and the income did not enure for the public benefit, save with respect to that part of the income which was to be devoted to the hospital and dispensary and to which the latter part of clause (1) applied. A reference was accordingly made to the High Court and the question framed was whether on a proper construction of the deed of trust, so much of the income of the trust as was not applied for the purpose of constructing and maintaining the female hospital was exempt from tax under the provisions of Section 4(3) of the Indian Income Tax Act. It was pointed out before the High Court that no part of the income of the trust during the accounting year was devoted to the hospital and dispensary and it was conceded that that part of the income which would be devoted to those institutions would fall within the exempting clause. It so happens that the learned counsel who argued the case on behalf of the trustees in the Calcutta High Court in the income tax reference is the same counsel who has argued the case before us on behalf of Srimati Charusila Dasi. The contention now is that the trust in its entirety is a private religious trust. Eleven circumstances were referred to by learned counsel in the income tax reference in support of his contention that the entire trust as ascertained from the trust deed was of a public nature. Gentle, J. with whom Ormond, J. agreed, held that on a proper construction of the deed of trust, so much of the income of the trust as was not applied for the purpose of constructing and maintaining the female hospital was not exempt from tax under the provisions of Section 4 (3) of the Indian Income Tax Act. This decision, it must be stated at once, does not wholly support the present respondent. So far as the hospital and the dispensary are concerned the trust was held to be a public trust. We are of the view that

having regard to the main clauses of the trust deed to which we have already made a reference, the trusts in favour of the deity Iswar Srigopal and the image of Sri Balanand Brahmachari are also of a public nature. One of the points which was emphasised before the Calcutta High Court was the provision with regard to "pronamis" and perquisites to be offered to the deity and the image. The High Court said:

> "This provision does not indicate the creation of a trust in favour of the public, but, on the contrary, it denies the right of any one, which must include any member of the public, having a right to the pronamis. In its terms, the deed negatives that benefit is conferred upon the public."

The aforesaid observations appear to us, with respect, to be based on a misconception. When a member of the public makes an offering to a deity, he does not retain any right to what he has offered. What he offers belongs to the deity. When we talk of the right of members of the public or a considerable section thereof, we refer to the right of worship or the right to make offerings in worship of the deity and not of the right to the offerings after they have been made. With regard to other clauses of the trust deed also we take a view different from that of the learned Judges who decided the income tax reference. We have already explained our view in the preceding paragraphs and it is unnecessary to reiterate it. The conclusions at which we have arrived on a construction of the deed of trust is that it creates a religious and charitable trust of a public nature.

13. Now, we proceed to a consideration of the second point. Section 3 of the Act says—

> "This Act shall apply to all religious trusts, whether created before or after the commencement of this Act, any part of the property of which is situated in the State of Bihar."

The argument before us on behalf of the respondent is this. Under Article 245 of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. clause (2) of the said Article further states that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Article 246 gives the distribution of legislative power; Parliament has exclusive power to make laws with respect to any of the matters enumerated in what has been called the Union List; Parliament as also the legislature of a State have power to make laws with respect to any of the matters enumerated in the Concurrent List; the legislature of a State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in the State List. Item 28 of the Concurrent List is - "Charities and charitable institutions, charitable and religious endowments and religious institutions." Learned counsel for the respondent contends that by reason of the provisions in Articles 245 and 246 of the Constitution read with Item 28 of the Concurrent List, the Bihar legislature which passed the Act had no power to make a law which has operation outside the State of Bihar; he further contends that under Section 3 the Act is made applicable to all religious trusts, whether created before or after the commencement of the Act, any part of the property of which is situated in the State of Bihar; therefore, the Act will apply to a religious institution which is outside Bihar even though a small part of its property may lie in that State. It is contended that such a provision is ultra vires the power of the Bihar Legislature, and Parliament alone can make a law which will

apply to religious institutions having properties in different States. Alternatively, it is contended that even if the Act applies to a religious institution in Bihar a small part of the property of which is in Bihar, the provisions of the Act can have no application to such property of the institution as is outside Bihar, such as the Calcutta properties in the present case.

14. It is necessary first to determine the extent of the application of the Act with reference to Sections 1(2) and 3 of the Act read with the preamble. The preamble states:

> "Whereas it is expedient to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts."

It is clear from the preamble that the Act is intended to provide for the better administration of Hindu religious trusts in the State of Bihar. Section 1(2) states that the Act extends to the whole of the State of Bihar, and Section 3 we have quoted earlier. If these two provisions are read in the context of the preamble, they can only mean that the Act applies in cases in which (a) the religious trust or institution is in Bihar and (b) any part of the property of which institution is situated in the State of Bihar. In other words, the aforesaid two conditions must be fulfilled for the application of the Act. It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as will make it operative and not inoperative; see the cases referred to In re the Hindu Women's Right to Property Act, 1937 and The Hindu Women's Rights to Property (Amendment) Act, 1936 and ***in re a Special Reference under Section 213 of the Government of India Act, 1935*** [(1941) FCR 12, 27-30, and the decision of this Court in ***R.M.D. Chamarbauguwala* v. *Union of India*** [(1957) SCR 930]. We accordingly hold that Section 3 makes the Act applicable to all public religious trusts, that is to say, all public religious and charitable institutions within the meaning of the definition clause in Section 2(1) of the Act, which are situate in the State of Bihar and any part of the property of which is in that State. In other words, both conditions must be fulfilled before the Act can apply. If this be the true meaning of Section 3 of the Act, we do not think that any of the provisions of the Act have extra-territorial application or are beyond the competence and power of the Bihar Legislature. Undoubtedly, the Bihar Legislature has power to legislate in respect of, to use the phraseology of Item 28 of the Concurrent List, "charities, charitable institutions, charitable and religious endowments and religious institutions" situate in the State of Bihar. The question, therefore, narrows down to this: in so legislating, has it power to affect trust property which may be outside Bihar but which appertains to the trust situate in Bihar? In our opinion, the answer to the question must be in the affirmative. It is to be remembered that with regard to an interest under a trust the beneficiaries' only right is to have the trust duly administered according to its terms and this right can normally be enforced only at the place where the trust or religious institution is situate or at the trustees' place of residence; see Dicey's ***Conflict of Laws***, 7th Edn., p. 506.

The Act purports to do nothing more. Its aim, as recited in the preamble, is to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection of properties appertaining thereto. This aim is sought to be achieved by exercising control

over the trustees in personam. The trust being situate in Bihar the State has legislative power over it and also over its trustees or their servants and agents who must be in Bihar to administer the trust. Therefore, there is really no question of the Act having extra-territorial operation. In any case, the circumstance that the temples where the deities are installed are situate in Bihar, that the hospital and charitable dispensary are to be established in Bihar for the benefit of the Hindu public in Bihar gives enough territorial connection to enable the legislature of Bihar to make a law with respect to such a trust. This Court has applied the doctrine of territorial connection or nexus to income tax legislation, sales tax legislation and also to legislation imposing a tax on gambling. In ***Tata Iron & Steel Co. Ltd.* v. *State of Bihar*** [AIR 1958 SC 452] the earlier cases were reviewed and it was pointed out that sufficiency of the territorial connection involved a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It cannot be disputed that if the religious endowment is itself situated in Bihar and the trustees function there, the connection between the religious institution and the property appertaining thereto is real and not illusory; indeed, the religious institution and the property appertaining thereto form one integrated whole and one cannot be dissociated from the other. If, therefore, any liability is imposed on the trustees, such liability must affect the trust property. It is true that in the ***Tata Iron & Steel Co.*** case this Court observed:

> "It is not necessary for us on this occasion to lay down any broad proposition as to whether the theory of nexus, as a principle of legislation is applicable to all kinds of legislation. It will be enough for disposing of the point now under consideration, to say that this Court has found no apparent reason to confine its application to income tax legislation but has extended it to sales tax and to tax on gambling."

We do not see any reason why the principles which were followed in ***State of Bombay* v. *R.M.D. Chamarbaugwala*** [(1957) SCR 874] should not be followed in the present case. In ***R.M.D. Calmarbaugwala*** case it was found that the respondent who was the organiser of a prize competition was outside the State of Bombay; the paper through which the prize competition was conducted was printed and published outside the State of Bombay, but it had a wide circulation in the State of Bombay and it was found that "all the activities which the gambler is ordinarily expected to undertake" took place mostly, if not entirely, in the State of Bombay. These circumstances, it was held, constituted a sufficient territorial nexus which entitled the State of Bombay to impose a tax on the gambling that took place within its boundaries and the law could not be struck down on the ground of extra-territoriality. We are of the opinion that the same principles apply in the present case and the religious endowment itself being in Bihar and the trustees functioning there, the Act applies and the provisions of the Act cannot be struck down on the ground of extra-territoriality.

16. There is a decision of this Court to which our attention has been drawn Petition No. 234 of 1953 decided on March 18, 1953). A similar problem arose in that case where the head of a math situate in Banaras made an application under Article 32 of the Constitution for a writ in the nature of mandamus against the State of Bombay and the Charity Commissioner of that State directing them to forbear from enforcing against the petitioner the provisions of the Bombay Public Trusts Act, 1950 on the ground inter alia that the Bombay Act could have no

application to the math situate in Banaras or to any of the properties or places of worship appurtenant to that math. In the course of the hearing of the petition the learned Attorney-General who appeared for the State of Bombay made it clear that there was no intention on the part of the Government of Bombay or the Charity Commissioner to apply the provisions of the Bombay Act to any math or religious institution situated outside the State territory. The learned Attorney-General submitted that the Bombay Act could be made applicable, if at all, to any place of religious instruction or worship which is appurtenant to the math and is actually within the State territory. In view of these submissions no decision was given on the point urged. The case cannot, therefore, be taken as final decision of the question in issue before us.

17. For the reasons which we have already given the Act applies to the Charusila Trust which is in Bihar and its provisions cannot be struck down on the ground of extra-territoriality.

18. The result is that the appeal succeeds and is allowed with costs, the judgment and order of the High Court dated October 5, 1953 are set aside and the petition of Srimati Charusila Dasi must stand dismissed with costs.

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In Re CP & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938

AIR 1939 F.C. 1

[*Doctrine of Harmonious Construction*]

This was the opinion rendered by the Federal Court in a Special Reference made by the Governor-General to the Court under S. 213 Government of India Act, 1935. The Reference was in the following terms:

> "Is the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars, or to what extent, ultra vires the Legislature of the Central Provinces and Berar"?

GWYER C.J. – Notwithstanding the very wide terms in which the Special Reference is framed, the question to be determined lies essentially in a small compass. It has arisen in the following way. S. 3 (1), Provincial Act, to which it will be convenient to refer hereafter as the impugned Act, is in these terms:

> There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent on the value of such sales.

"Retail dealer" is defined by S. 2 as any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased, and "retail sale" is given a corresponding meaning.

Both motor spirit and lubricants are manufactured or produced (though not to any great extent) in India. Motor spirit is subject to an excise duty imposed by the Motor Spirit (Duties) Act, 1917, an Act of the Central Legislature; no excise duty at present has been imposed on lubricants.

By Sec. 100 (1), Constitution Act the Federal Legislature (which up to the date of the Federation contemplated by the Act, means the present Indian Legislature) has, notwithstanding anything in sub-ss. (2) and (3) of the same Section, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in the Federal Legislative List, that of List I in Sch. 7 to the Act. Entry (45) in that List is as follows: "Duties of excise on tobacco and other goods manufactured or produced in India", with certain exceptions not here material and it is said on behalf of the Government of India that the tax imposed by S. 3 (1) of the impugned Act, in so far as it may fall on motor spirit and lubricants of Indian origin, is a duty of excise within Entry (45) and therefore an intrusion upon the field of taxation reserved by the Act exclusively for the Federal Legislature.

By Sec. 100 (3) of the Act, a Provincial Legislature has, subject to the two Preceding sub-sections of that Section, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List, that is List II of Sch. 7. Entry (48) in this List is as follows: II "Taxes on the sale of goods and on advertisements"; and it is said on behalf of the Provincial Government

that the tax imposed by the impugned Act is within the taxing power conferred by that entry, and therefore within the exclusive competence of the Provincial Legislature.

It will be observed that by Sec, 100 (1) the Federal Legislature are given the exclusive powers enumerated in the Federal Legislative List, "notwithstanding" anything in the two next succeeding sub sections" of that Section. Sub-sec. (2) is not relevant to the Present case but sub-s. (3) is as I have stated, the enactment which gives to the Provincial Legislature the exclusive powers enumerated in the Provincial Legislative List. Similarly Provincial Legislature are given by Sec. 100 (3) the exclusive powers in the Provincial Legislative List "subject to the two preceding sub-sections", that is sub-sections (1) and (2). Accordingly, the Government of India further contend that, even if the impugned Act were otherwise within the competence of the Provincial Legislature, it is nevertheless invalid, because the effect of the *non obstante* clauses in S. 100 (1), and a *fortiori* of that clause read with the opening words of Sec. 100 (3), is to make the federal power prevail if federal and provincial legislature powers overlap. The Provincial Government, on the other hand, deny that the two entries overlap and say that they are mutually exclusive. The Government of India raise a further point under S. 297, Constitution Act, but it will be more convenient to deal with this separately and at a later stage. I should add that it is common ground between the parties that if S. 3 (1) of the impugned Act is held to be invalid, the rest of the Act must be invalid also, since it only provides the machinery for giving practical effect to the charging Section.

The first case of importance that has come before the Federal Court; and it is desirable, more particularly in view of some of the arguments addressed to us during the hearing, to refer briefly to certain Principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself: but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it: nor, will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere.

The Judicial Committee have observed that a Constitution is not be construed in any narrow and pendantic sense: per Lord Wright in [***James* v. *Commonwealth of Australia***, (1936) A C 578, 614]. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:

> Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be: [**Attorney-General for *New South Wales*** v. ***Brewery Employees Union*** (1908) 6 Commonwealth LR 469], per Higgins J. at p. 611.

Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret; but I

do not imply but this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis-valeat quam pereat.*

Dispute with regard to central and provincial legislative spheres are inevitable under every federal Constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument. The decisions of the Canadian and Australian Courts are not bindings upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend on the words of the Constitution which the Court is interpreting; and since no two Constitution are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.

The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists. Whether this elaboration will be productive of more or less litigation than in Canada, where there is also a distribution, by enumeration time alone will show; at least this court will not be confronted with the additional problems created by the interlacing provisions of Ss. 91 and 92. British North America Act and the distribution of powers not only by the enumeration of specified subjects, but also by reference to the general or local nature of the subject matter of legislation. But the interpretation of the British North America Act has given rise to questions analogous to that which is now before this Court and there are two decisions of the Judicial Committee which lay down most clearly the principles which should be applied by Courts before which questions may come.

The question before the Court admits of three possible solutions: (1) that the provincial entry covers the tax now challenged and that the federal entry does not; (2) that the federal entry covers it, but that the provincial entry does not; and (3) that the tax falls within both entries, so that there is a real overlapping of jurisdiction between the two. In the first case, the validity of the tax could not be questioned; in the second, the tax would be invalid as the invasion of an exclusively federal sphere, in the third, it would, because falling within both spheres be invalid by reason of the *non obstante* clause. It is necessary therefore to scrutinize more closely the two entries, first separately and then in relation to each other and to the context and scheme of the Act.

The provincial legislative power extends to making laws with respect to taxes on the sale of goods. The words which this power is given, taken by themselves and in their ordinary and natural sense seem apt to cover such a tax as is imposed by the impugned Act; and it might indeed be difficult to had a more exact or appropriate formula for the purpose.

The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India. "Excise" is stated in the Oxford Dictionary to have been originally "accise", a word derived through the Dutch from the late Latin *accensare,* to tax; the modern form, which ousted "accise" at an early date, being apparently due to a mistaken derivation from the Latin *excidere,* to cut out. It was at first a general word for a toll or tax, but since the 17th century it has acquired in the United Kingdom particular, though not always precise, signification. The primary meaning of 'excise duty' or'duty of excise' has come to be that of a tax on certain articles of luxury (such as spirits, beer to tobacco) produced or manufactured in the United Kingdom, and it is used in contradistinction to customs duties on articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to licence fees imposed for revenue, administrative, or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise; and, generally speaking, the expression is used to cover all duties and taxes which together with customs duties are collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry (45).

It was then contended on behalf of the Government of India that an excise duty is a duty which may be imposed upon home produced goods at any stage from production to consumption and that therefore the federal legislative power extended to imposing excise duties at any stage. This is to confuse two things, the nature of excise duty and the extent of the federal legislative power to impose them. Authorities were cited to us, from Blackstone onwards, to prove that excise duties may be imposed at any stage; and if this means no more than that, instances are to be found where they have been so imposed, authority seems scarcely needed. It would perhaps not be easy without considerable research to ascertain how far Blackstone was justified at the time he wrote in saying that excise duties were an inland imposition, paid sometimes on the consumption of the commodity, and frequently on the retail sale. Blackstone's statement however is repeated, almost verbatim, in the latest edition of Stephen's commentaries, and as a description of excise duty now in force in the United Kingdom it is demonstrably wrong; for, a brief examination of those duties shows that in practically all cases it is the producer or manufacturer from whom the duty is collected. But there can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority; a duty on home-produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it

may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty; that is a duty on home-produced or home manufactured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose them: for a duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor for the reasons already given, is it possible to agree that in no circumstances could an excise duty be levied at a stage subsequent to production or manufacture.

If therefore a Legislature is given power to make laws "with respect to" duties of excise it is a matter to be determined in each case whether on the true construction of the enactment conferring the power, the power itself extends to imposing duties on home-produced or home manufactured goods at any stage up to consumption, or whether it is restricted to imposing duties, let us say, at the production or manufacture only. A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense, but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

The question must next be asked whether such a tax as is imposed by the impugned Act, though described as a tax on the sale of goods could in any circumstances be held to be a duty of excise, for it is common ground that the Courts are entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says in order to ascertain the true nature of the tax. Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities, and I will assume for the moment in favour of the Government of India that it is on that ground capable of being regarded as a duty of excise.

It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province.

But the question before the Court is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitution Act. This is a very different problem and one on which case decided under other Constitutions can never be conclusive. In the United Kingdom there are no competing jurisdictions at all:

and though in Canada, Australia and United States there is a division or distribution of powers between the Centre and the Provinces or States, there is nowhere to be found set in opposition to one another the power of levying duties of excise and an express power of levying a tax on the sale of goods. In Canada there is, it is true, a double enumeration of legislative powers; but so far as taxation is concerned, the conflict is between direct and indirect taxation, the first being the prerogative of the Provinces, the second of the Dominion; and though duties of excise (as well as those of customs) are mentioned in the British North America Act, it is nearly always as indirect taxes that constitutional questions arise with regard to them. In Australia all taxing powers belong to the States except those which are specifically reserved to the Commonwealth. Among the latter are duties of customs and excise; and the question in Australia always is whether a particular tax falls within the field of taxation reserved to the Commonwealth or not; there can be no overlapping of particular legislative spheres. In the United States the Central Legislature has power to levy "taxes, duties, imposts and excises", provided that they are uniform throughout the States. This is not an exclusive power, and the States can levy what taxes they like (other than imposts or duties on imports or exports), subject to the provisions of the Constitution, though certain of those provisions, such as the commerce clause, operate in practice as a very effective restriction upon State powers. Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and where necessary, modifying the language of the one by the that of the other. If indeed such a reconciliation should prove impossible then, and only then, will the *non obstante* clause operate and the federal power prevail: for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation it would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess. I mention, only to dismiss, the argument that the new autonomy of the provinces and the expenditure necessary to administer and maintain the vital services committed to their charge require that every intendment should be made in favour of the provincial taxing power. I should never deny the high importance of the provincial functions; but the Centre has also great responsibilities, though of another kind, and it is not for this Court to weigh one against the other. The issue must be decided on other grounds than these.

The provincial legislative power defined in Entry (48) may be first considered. The Advocate-General of India, when asked what was left to the legislative power of the Provinces under this entry if the view of the Government of India prevailed, said that it was clearly within their power to levy the taxes commonly known as turnover taxes, which under that name or under the name of sales taxes have since the War proved so successful a fiscal

expedient in many countries. Strictly, a turnover tax appears to be the correct description of a tax usually calculated in the form of a percentage, on the gross receipts of wholesalers or retailers or of both, and in some countries also on receipts in respect of services. It is however sometimes included under the more general name of sales tax, and it is evident from the various modern writers who have dealt with the subject and to whose works we were referred that the latter expression is often used a convenient name for a number of taxes ranging from turnover taxes to taxes on the retail sale of specified classes of goods; the so-called sales taxes which have been imposed by a large number of the State Legislatures in the United States seem to be often of the latter variety. Two citations from these writers will be sufficient to show that neither "turnover tax" nor "sales tax" has yet achieved a recognized and certain meaning:

> The scope of sales and turnover taxes has varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turnover taxes. Certain taxes include both goods and services, while others include only goods. The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services.

And again:

> The tax (i.e. the sales or turnover tax) may be general, as in France or Germany, or retail transactions may be excluded, as in Belgium. It may be as is common in the States of the American Union, confined to retail transactions. It may be imposed, as in Canada and Australia, as a producers' or manufactures' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempt unless carrying on manufacture as well as agriculture.

Thus the expression "sales tax" may comprehend a good deal more than would be understood by "tax on the sale of goods" in the ordinary and natural meaning of those words, and the expression "turnover tax" seems to be in some directions wider and in others narrower. "Tax on the sale of goods" at any rate seems to include some varieties of turnover tax but it seems also to include more than a turnover tax in the stricter sense could reasonably be held to cover. In these circumstances it may be thought hazardous to impute to Parliament any particular intentions with regard to turnover taxes. Parliament may have had them in mind. The Proposals for Indian Constitutional Reform, commonly known as the White Paper (Cmd. 4268, 1933) and the Report of the Joint Select Committee thereon (H. L. 6 and H. C. 5, 1934) are historical facts and their relation to the Constitution Act is matter of common knowledge to which this court is entitled to refer and it may be observed that "taxes on the sale of commodities and on turnover" appeared in the White Paper as a suggestion for possible sources of provincial revenue, and that the suggestion was approved without comment by the Joint Select Committee. I do not know, and it would be idle to speculate why a different formula was ultimately inserted in the Act, the Court is only concerned with what Parliament has in fact said, and if the Government of India are right and "taxes on the sale of goods" was intended to refer to taxes on turnover alone, I find it difficult to understand why Parliament used so inappropriate and indeed misleading a formula. "Taxes on turnover" may not be yet a term of art, but some of its meanings are tolerably plain. "Taxes on the sale of goods" appears to me to be plainer still, and though there may be general agreement that it

includes some forms of turnover the exclusion of everything else. Certainly that would not be its ordinary meaning, and I cannot persuade myself, even for the purpose of avoiding a conflict between the two entries, that Parliament deliberately used words which cloaked its real intention when it would have been so simple a matter to make that intention clear beyond any possibility of doubt. I therefore proceed to inquire if it is reasonably possible to avoid the conflict by construing the power to make laws "with respect to" duties of excise as not extending to the imposition of a tax or duty on the retail sale of goods. This is the crucial issue in the case.

In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacture or producer of the excisable articles, or at least at the stage of or in connection with, manufacture or production, and that it extends no further. I think that this is an interpretation reasonable in itself; more consonant than any other with the context and general scheme of the Act, and supported by other considerations to which I shall refer.

I have said that it seems to me impossible, without straining the language of the Act, to construe a power to impose taxes on the sale of goods as a power to impose only turnover taxes. To construe the power to impose duties of excise, as I think it ought to be construed, involves no straining of language at all. The expression "duties of excise", taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but, so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a competing legislative power, such as appears in entry (48).

Much stress was laid upon two cases which were cited to us. In [***Patoon* v. *Brady*** (1901) 184 US 608], a case before the United States Supreme Court, tobacco, which had already paid excise duty had been sold to the plaintiff. While it was still in his hands, an Act was passed doubling the current rate of duty and (no doubt lest persons in possession at the moment of duty paid tobacco should get an unearned increment on its sale) imposing a special duty on all tobacco which had paid the excise duty in force at the date of the Act and was at that date held and intended for sale. The Act was challenged as unconstitutional on the ground (inter alia) that the legislature having once excised an article could not excise it a second time. The Court; upholding the Act on this particular point, referred to the account of excise duties given in Blackstone and Story and to definitions in various standard dictionaries, and then said:

> Within the scope of the various definitions we have quoted, there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacture or any intermediate dealer, and until they reach the consumer. Our conclusion then is that it is within the power of Congress to increase an excise, as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer.

The case is thus a decision on the scope and extent of the power to impose excise duties given to the Central Legislature by the Constitution of the United States. No question was involved of a competing legislative power. It is to be observed however that the imposition of an excise duty at a stage later than production or manufacture was obviously regarded as an unusual thing and that the duty about which the litigation arose was not intended as a permanent duty but was imposed once for all. The other case was [***Commonwealth Oil Refineries Co.*** **v.** ***South Australia,*** 38 Commonwealth LR 408]. There a State law had (inter alia) purported to impose an additional income tax (for so the duty was described) at the rate of 3 for every gallon of motor spirit sold by any person who sold and delivered it within the State to persons within the State for the first time after its production or manufacture, but not including any purchaser who subsequently sold it. It was argued that this was in substance a duty of excise which under the Constitution only the Commonwealth had the right to impose, and that contention prevailed. It might at first sight appear that this decision supported the Government of India's case; for, as already pointed out, the taxing power of the Australian States is unlimited, save in so far as the Constitution reserves the right for imposing certain specified taxes to the Commonwealth and indirectly limits the power of the States by giving the Commonwealth power to regulate inter-State trade and commerce. But closer examination of the judgment delivered shows that the majority of the Judges took the view that the duty on first sale of the commodity in fact is a tax on the producer and for that a reason a duty of excise without doubt. The case is no authority at all for the proposition that a tax on retail sales must necessarily be a duty of excise.

It cannot be strongly emphasized that the question now before the Court is one of possible limitations on a legislative power, and not possible limitations on the meaning of the expression duties of excise"; for, "duties of excise" will bear the same meaning whether the power of the Central Legislature to impose them is restricted or extended. It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by language of the other. Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and would accord with sound principles of construction to take the more general power; that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for, the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect given to the latter in its ordinary and natural meaning. So in ***Bank of Toronto*** **v.** ***Lambe*** [(1887) 12 AC 575, 587], where a Provincial Legislature in Canada had imposed a tax upon banks carrying on business in the Province, varying in amount with the paid up capital and with the number of the offices of the bank, whether or not the bank's principal place of business was within the Province, it was argued that even if the tax imposed by the Act was direct taxation and therefore within the power of the Provincial Legislature under Sec. 92, British North America Act, it was nevertheless invalid because it was legislation relating to banking and the incorporation of banks, the making of laws on

which was by S. 91 of the Act vested solely in the Dominion Parliament. The Judicial Committee rejected this argument. They pointed out that in (1882) 7 A C 96, to which reference has already been made, it was found absolutely necessary that the literal meaning of the words defining the powers vested in the Dominion Parliament should sometimes be restricted, "in order to afford scope for powers which are given exclusively to the Provincial Legislatures"; and they summed up the matter thus:

The question they (the Committee) have to answer is whether the one body or the other has power to make a given law. If they find that on the due constitution of the Act the legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.

This is not to ignore the *non obstante* clause, still less to bring into existence, as it were a *non obstante* clause in favour of the Provinces; for if the two legislative powers are read together in the manner suggested above, there will be a separation into two mutually exclusive spheres, and there will be no overlapping between them. Thus, the Central Legislature will have the power to impose duties of excisable articles before they become part of the general stock of the Province that is not say, at the stage of manufacture or the production and the Provincial Legislature an exclusive power to impose a tax on sales thereafter.

In discussing the possible overlapping of the federal and provincial jurisdictions I assumed for the moment that a tax on retail sales might be a duty of excise. Whether it is so or not must depend upon circumstances: certainly I cannot agree that it must always be so regarded, even where the power to impose duties of excise extends to imposing them at stages subsequent to production or manufacture. There are some significant observations on this point in the judgment of Isaacs J. (afterwards Isaacs C.J.) in the ***Commonwealth Refineries*** case to which reference has already been made. After stating his conclusion that the words "excise duties" were not used in the constitution in the extended sense which had been suggested, the learned Judge proceeded as follows:

> I arrive at that conclusion notwithstanding the expression was in South Australia before Federation, as in Victoria, sometimes used in a sense large enough to include breweries' and wine licences. Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a license or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words "excise duties as used in the constitution... Therefore, if the taxation by the State Act under S. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter State operation of trade or commerce it would not be open to the challenge here made. [***Commonwealth Oil Refineries Co.*** case]

There appears to be a sound basis for the above distinction and the case which the Court is now considering is indeed stronger than the Australian one, for in the latter the power of the State to levy taxes on sale other than duties of excise was implied in its general powers of taxation and was not conferred expressly as in Entry (48). No doubt there will be border line cases in which it may be difficult to say on which side a particular tax or duty falls; but that is one of the inevitable consequences of a division of legislative powers. If however the facts in (1901) 184 U S 608 had been such as to make the decision turn upon the distinction between the two kinds of tax mentioned above, it seems probable that the special duty there imposed would still have been held to be a duty of excise, because it was an attempt, as it were, to relate duty back to the stage of production, even though the person may be liable for payment was not (and indeed could seldom have been) the original producer himself. In the present case it could not be suggested that the tax on retail sales has any connection with production; it is also imposed indifferently on all motor spirit and lubricants, whether produced or manufactured in India or not. I do not say that this is conclusive, but it is to be taken into consideration. And I think that the distinction drawn by the learned Judge corresponds in substance with the distinction which it seems to me ought to be drawn in the case of the federal and provincial spheres in India, that is, between the taxation of goods at the stage of manufacture or production and their taxation by the provincial taxing authority (as in Australia by the State) after they have become part of what I have called the common stock of the Province. The learned Judge's observations, it is true, were obiter, and in any case are not binding upon us; but I am strengthened in my own view by what he has said.

I am impressed also by another argument. The claim of the Government of India must be that any provincial Act imposing a tax on the sale of any goods (other than a turnover tax) is an invasion of Entry (45) in the Federal Legislative List, whether the goods are at the time the subject of a central excise or not, and no matter how improbable it is that any excise will ever be imposed upon them. Duties of excise in the nature of things will always be confined to a comparatively small number of articles; but it is a necessary corollary of the argument of the Government of India that the power to impose excise duties though only exercised with respect to this small group, is an absolute bar to the exercise by the Provinces of any jurisdiction by way of a tax on sales over every other material, commodity and article manufactured or produced in India and to be found in the Province. Nay, more; for though excise duties can only be imposed in respect of goods manufactured or produced in India, it is part of the Government of India's case that to impose a tax on the sale of goods manufactured or produced elsewhere will infringe the provisions of Sec. 297 (1) (b), Constitution Act, against discrimination. It is not necessary for me here to say whether I agree with the latter argument or not; it is sufficient to point out how on one ground or the other this interpretation of the federal entry would exclude the Province from an immense field of taxation in which the Government of India does not now and probably would never in the future seek to compete. I should find it exceedingly difficult to adopt an interpretation of the two entries which would have consequences such as these.

Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties, for Parliament must surely be presumed to have had Indian legislative practice in mind and unless

the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. There were several central excise duties in force in India at the date of the passing of the Constitution Act, imposed respectively upon motor spirit, kerosene, silver, sugar, matches, mechanical lighters, and iron and steel. In all the Acts by which these duties were imposed it is provided (and substantially by the same words) that the duty is to be paid by the manufacturer or producer, and on the issue of the excisable article from the place of manufacture or production. The Acts which imposed the cotton excise now repealed, were in the same form.

The only provincial excise duty in force was that on alcoholic liquor and intoxicating drugs. The Devolution Rules, 1920, which were made under S. 45-A of the then Government of India Act, for the purpose of distinguishing the functions of the Local Governments and local Legislatures of Governors' Provinces.

Classified a variety of subjects, in relation to the functions of Government, as central and provincial subjects, respectively. Among the provincial subjects appears the following:

> 16. Excise that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles...

The earlier part of this entry obviously describes an administrative and legislative sphere only, the taxing power being given in the last words quoted, which I take to mean excise duties on the articles mentioned and licence fees in relation to them. But here again, after examining various Provincial Acts relating to the control of alcohol, I have been unable to find any case of excise duties payable otherwise than by the producers or manufacturers or persons corresponding to them; I am speaking, of course, only of alcohol manufactured or produced in the Province itself. The Advocate General of India referred us to an Act of the Central Provinces (Central Provinces Excise Act (No. 2 of 1915)] which was said to make provision for the imposition of an excise duty on retail sales. I have been unable to find any such provision in the Act; it provides, it is true, as do other provincial Acts, for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for the privilege of selling alcohol, or as consideration for the temporary grant of a monopoly, but these are clearly not excise duties or anything like them. Provision was also made in most Provincial Acts for the payment of licence fees in connection with the production or sale of alcohol in the Province: but these fees are mentioned in the Devolution Rules Entry in addition to excise duties and are therefore something different from them.

Thus, at the date of the Constitution Act, though it seems that the word "excise" was not infrequently used as a general label for the system of internal indirect taxation or for the administration of a particular indirect tax (as salt excise or opium excise), the only kind of excise duties which were known in India by that name were duties collected from manufacturers or producers, and usually payable on the issue of the excisable articles from the place of manufacture or production. This also may not be conclusive in itself, but it seems a not unreasonable inference that Parliament intended the expression "duties of excise" in the Constitution Act to be understood in the sense in which up to that time it had always in fact been used in India, where indeed excise duties of any other kind were unknown. Nor indeed are excise duties properly so called often to be found at the present day which are not

collected at the stage of production or manufacture, whatever may have been the case in Blackstone's time, and whatever may have been the reasons for Johnson's definition of "Excise" in the first edition of his Dictionary (1755) as a hateful tax levied on commodities and adjudged not by the common Judges of property but wretches hired by those whom the excise is paid.

The conclusion at which I have arrived seems to me to be in harmony with what I conceive to be the general scheme of the Act and its method of differentiation between the functions and powers of the Centre and of the Provinces. It introduces no novel principle. It reconciles the conflict between the two entries without doing violence to the language of either, and it maps out their respective territories on a reasonable and logical basis. It would be strange indeed if the Central Government had the exclusive power to tax retail sales, even if the tax were confined to goods produced or manufactured in India, when the Province has an exclusive power to make laws with respect to trade and commerce, and with respect to the production, supply and distribution of goods, within the provincial boundaries. In the view which I take none of these inconsistencies will arise. Nor will the effect of this interpretation be to deprive the Centre of any source of revenue which it enjoys at present, nor of any which it is reasonable to anticipate that it might have enjoyed in the future. If I may be permitted to hazard a guess, the anxiety of the Government of India arises from the probability that a general adoption by Provinces of this method of taxation will tend to reduce the consumption of the taxed commodities and thus indirectly diminish the Central excise revenue. This however is a circumstance which this Court cannot allow to weigh with it if, as I believe, the interpretation of the Act is clear though it might be an element to take into consideration if there were real ambiguity or doubt. But I do not think there is either ambiguity or doubt, if the two entries are read together and interpreted in the light of one another. The difficulty with which the Government of India may be faced is of a kind which must inevitably arise from time to time in the working of a Federal Constitution, where a number of taxing authorities compete for the privilege of taxing the same taxpayer. In the present case, the result may well be that the Central Government will find itself unable to make such a distribution of the proceeds of central excise duties under S. 140 of the Act as it might otherwise desire to do; but these are not matters for this Court, and they must be left for adjustment by the interest concerned in a spirit of reasonableness and commonsense, qualities which I do not doubt are to be found in India as in other Federations.

I am of opinion that for the reasons which I have given the answer to the question referred to us is that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not ultra vires the Legislature of the Central Provinces and Berar, and since that is also the opinion of the whole Court we shall report to His Excellency accordingly.

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Gujarat University **v.** *Krishna Ranganath Mudholkar*

AIR 1963 SC 703

[Entry 11, List II referred to in this case has now been transferred as entry 25 of List III.]

Shrikant, son of Shri Krishna Mudholkar, appeared for the Secondary School Certificate Examination held by the State of Bombay in March 1960 and was declared successful. He took instruction in the various subjects prescribed for the examination through the medium of Marathi, which was his mother tongue and answered the questions at the examination also in Marathi. Shrikant joined the St. Xavier's College affiliated to the University of Gujarat, in the First Year Arts class and was admitted in the section in which instructions were imparted through the medium of English. After successfully completing the First Year Arts course in March 1961, Shrikant applied for admission to the classes preparing for the Intermediate Arts examination of the University through the medium of English. The Principal of the College informed Shrikant that in view of the provisions of the Gujarat University Act, 1949 and Statutes 207, 208 and 209 framed by the Senate of the University, as amended in 1961, he could not permit him to attend classes in which instructions were imparted through the medium of English without the sanction of the University. Shri Krishna, father of Shrikant then moved the Vice Chancellor of the University for sanction to permit Shrikant to attend the "English medium classes" in the St. Xavier's College. The Registrar of the University declined to grant the request. By another letter, Shrikant was "allowed to keep English as a medium of examination" but not for instruction.

A petition was then filed by Shrikrishna Madholkar on behalf of himself and his minor son Shrikant in the High Court of Gujarat for a writ or order in the nature of mandamus or other writ, direction or order requiring the University of Gujarat to treat Sections 4(27), 18(i)(xiv) and 38-A of the Gujarat University Act, 1949, and Statutes 207, 208 and 209 as void and inoperative and to forbear from acting upon or enforcing those provisions and requiring the Vice Chancellor to treat the letters or circulars issued by him in connection with the medium of instruction as illegal and to forbear from acting upon or enforcing the same, and also requiring the University to forbear from objecting to or from prohibiting the admission of Shrikant to "the English medium Intermediate Arts class", and requiring the Principal of the College to admit Shrikant to the "English medium Intermediate Arts class" on the footing that the impugned provisions of the Act, Statutes and letters and circulars were void and inoperative.

The High Court of Gujarat issued the writs prayed for. The University and the State of Gujarat separately appealed to the Supreme Court with certificates of fitness granted by the High Court.

Two substantial questions, which came up before the Supreme Court for determination:

(*1*) whether under the Gujarat University Act, 1949 it is open to the University to prescribe Gujarati or Hindi or both as an exclusive medium of media of instruction and examination in the affiliated colleges, and

(*2*) whether legislation authorising the University to impose such media would infringe Entry 66 of List I**,** Seventh Schedule to the Constitution.

J.C. SHAH, J. - 7. St. Xavier's College was affiliated to the University of Bombay under Bombay Act 4 of 1928. The legislature of the Province of Bombay enacted the Gujarat University Act, 1949 to establish and incorporate a teaching and affiliating University "as a measure of decentralisation and re-organisation" of University education in the Province. By

Section 5(3) of the Act, from the prescribed date all educational institutions admitted to the privileges of the University of Bombay and situate within the University area of Gujarat were deemed to be admitted to the privileges of the University of Gujarat. Section 3 incorporated the University with perpetual succession and a common seal. Section 4 of the Act enacted a provision which is not normally found in similar Acts constituting Universities. By that section various powers of the University were enumerated. These powers were made exercisable by diverse authorities of the University set out in Section 15. We are concerned in these appeals with the Senate, the Syndicate and the Academic Council. Some of the powers conferred by Section 4 were made exercisable by Section 18 by the Senate. The Senate was by that section authorised, subject to conditions as may be prescribed by or under the provisions of the Act, to exercise the powers and to perform the duties as set out in sub-section (1). By Section 20 certain powers of the University were made exercisable by the Syndicate, and by Section 22, the Academic Council was invested with the control and general regulation of, and was made responsible for, the maintenance of standards of teaching and examinations of the University and was authorised to exercise certain powers of the University. The powers and the duties of the Senate are to be exercised and performed by the promulgation of Statutes of the Syndicate by Ordinances and of the Academic Council by Regulations. In 1954, the Gujarat University framed certain Regulations dealing with the media of instruction. They are Statutes 207, 208 and 209. Statute 207 provided:

> (1) Gujarati shall be medium of Instruction and Examination.
>
> (2) Notwithstanding anything in clause (1) above, English shall continue to be the medium of instruction and examination for a period not exceeding ten years from the date on which Section 3 of the Gujarat University Act comes into force, except as prescribed from time to time by Statutes.
>
> (3) Notwithstanding anything in clause (1) above, it is hereby provided that non-Gujarati students and teachers will have the option, the former for their examination and the latter for their teaching work, to use Hindi as the medium, if they so desire. The Syndicate will regulate this by making suitable Ordinances in this behalf, if, as and when necessary.
>
> (4) Notwithstanding anything in (1), (2), (3) above, the medium of examination and instruction for modern indian languages and English may be the respective languages.

8. Statute 208 provided that the medium of instruction and examination in all subjects from June 1955 in First Year Arts, First Year Science and First Year Commerce in all subjects and from June 1956 in Inter Arts, Inter Science Inter Commerce and First Year Science (Agri.) shall cease to be English and shall be as laid down in Statute 207(1). This Statute further provided that a student or a teacher who feels that he cannot "use Gujarati or Hindi tolerably well", would be permitted the use of English in examination and instruction respectively upto November, 1960 (which according to the academic year would mean June 1961) in one or more subjects. Statute 209 is to the same effect enumerating therein the permitted use of English for the BA, BSc, and other examinations. After the constitution of a separate State of Gujarat, Act 4 of 1961 was enacted by the Gujarat State Legislature. By that Act the proviso to Section 4(27) was amended so as to extend the use of English as the medium of instruction beyond the period originally contemplated and Section 38-A which imposed an obligation upon all affiliated colleges and recognised institutions to comply with the provisions relating to the media of instruction was enacted. It was provided by Section 38-

A(2) that if an affiliated college or recognised institution contravenes the provisions of the Act, Rules, Ordinance and Regulations in respect of media of instruction the rights conferred on such institution or college shall stand withdrawn from the date of the contravention and that the college or institution shall cease to be affiliated college or recognised institution for the purpose of the Act. The Senate of the University thereafter amended Statutes 207 and 209. Material part of Statute 207 as amended is as follows:

> (1) Gujarati shall be the medium of instruction and examination:
> Notwithstanding anything contained in sub-item (*1*) above, Hindi will be permitted as an alternative medium of instruction and examination in the following faculties:
> (*i*) Faculty of Medicine, (*ii*) Faculty of Technology including Engineering, and (*iii*) Faculty of Law; and (*iv*) in all faculties for post graduate studies;
> (2) Notwithstanding anything contained in clause (1) above, English may continue to be the medium of instruction and examination for such period and in respect of such subjects and courses of studies as may, from time to time, be prescribed by the Statutes under Section 4(27) of the Gujarat University Act for the time being in force.
> (3) Notwithstanding anything contained in clause (1) above, it is hereby provided that students and teachers, whose mother tongue is not Gujarati will have the option, the former for their examination and the latter for their instruction to use Hindi as the medium, if they so desire.
> (4) Notwithstanding anything contained in clauses (1) and (3) above, it is hereby provided that the affiliated colleges, recognised Institutions and University Departments, as the case may be, will have the option to use, for one or more subjects, Hindi as a medium of instruction and examination for students whose mother tongue is not Gujarati.
> (5) Notwithstanding anything in clauses (1), (2), (3) and (4) above, the medium of examination and instruction for modern Indian languages and English may be the respective languages.

9. Statute 209 as amended provides that the medium of instruction and examination in all subjects in the examinations enumerated therein shall cease to be English and shall be as laid down in Statute 207 as amended with effect from the years mentioned against the respective examinations.

10. The Registrar of the University thereafter issued a circular on June 22, 1961 addressed to Principals of affiliated Colleges stating that the Vice Chancellor in exercise of the powers vested in him under Section 11(4)(*a*) of the Act was pleased to direct that:

> (*i*) Only those students who have done their secondary education through the medium of English and who have further continued their studies in First Year (Pre-University) Arts class in the year 1960-61 through English, shall be permitted to continue to use English as the medium of their examination in the Intermediate Arts class for one year i.e. in the year 1961-62, and
> (*ii*) the colleges be permitted to make arrangements for giving instructions to students mentioned in (i) above through the medium of English for only one year i.e. during the academic year 1961-62, and
> (*iii*) that the Principals shall satisfy themselves that only such students as mentioned in (i) above are permitted to avail themselves of the concession mentioned therein.

11. Shrikant had not appeared at the SSC Examination in the medium of English and under the first clause of the circular he could not be permitted by the Principal of the St.

Xavier's College to continue to use English as the medium of instruction in the Intermediate Arts class: if the Principal permitted Shrikant to do so the College would be exposed to the penalties prescribed by Section 38-A.

12. The petitioner challenged the authority of the University to impose Gujarati or Hindi as the exclusive medium of instruction under the powers conferred by the Gujarat University Act, 1949 as amended by Act 4 of 1961. The University contended that authority in that behalf was expressly conferred under diverse clauses of Section 4, and it being the duty of the Senate to exercise that power under Section 18(XIV), Statutes 207 and 209 were lawfully promulgated. In any event, it was submitted the University being a Corporation invested with control over higher education for the area in which it functions such a power must be deemed to be necessarily implied.

18. The Government of India may have in the year 1948 intended that English should be replaced in gradual stages as the medium of instruction by the language of the State or the Province, or region, but that will not be a ground for interpreting the provisions of the Act in a manner contrary to the intention of the legislature plainly expressed. This recommendation of the Government of India has been ignored if not by all, by a large majority of Universities. It is also true that in the Statement of Objects and Reasons of the Gujarat University Act, it was stated "... As recommended by the Committee, it is proposed to empower the University to adopt Gujarati or the national language as the medium of instruction except that for the first ten years English may be allowed as the medium of instruction in subjects in which this medium is considered necessary." But if the legislature has made no provision in that behalf a mere proposal by the Government, which is incorporated in the Statement of Objects and Reasons will not justify the court in assuming that the proposal was carried out. Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the legislature to enact a Statute, but in interpreting the Statute they must be ignored. We accordingly agree with the High Court that power to impose Gujarati or Hindi or both as an exclusive medium or media has not been conferred under clause (27) or any other clauses of Section 4.

20. (N)either under the Act as originally framed nor under the Act as amended by Act 4 of 1961 was there any power conferred on the University to impose Gujarati or Hindi or both as exclusive medium or media of instruction and examination and if no such power was conferred upon the University, the Senate could not exercise such a power. The Senate is a body acting on behalf of the University and its powers to enact Statutes must lie within the contour of the powers of the University conferred by the Act.

22. Power of the Bombay Provincial Legislature to enact the Gujarat University Act was derived from Entry 17 of the Government of India Act, 1935, List II of the Seventh Schedule - "Education including Universities other than those specified in para 13 of List I." In List I Item 13 were included the Banaras Hindu University and the Aligarh Muslim University. Therefore, except to the extent expressly limited by Item 17 of List II read with Item 13 of List I, a Provincial Legislature was invested with plenary power to enact legislation in respect of all matters pertaining to education including education at University level. The expression "education" is of wide import and includes all matters relating to imparting and controlling education; it may therefore have been open to the Provincial Legislature to enact legislation

prescribing either a federal or a regional language as an exclusive medium for subjects selected by the University. If by Section 4(27) the power to select the federal or regional language as an exclusive medium of instruction had been entrusted by the legislature to the University, the validity of the impugned statutes 207, 208 and 209 could not be open to question. But the legislature did not entrust any power to the University to select Gujarati or Hindi as an exclusive medium of instruction under Section 4(27). By the Constitution a vital change has been made in the pattern of distribution of legislative power relating to education between the Union Parliament and the State Legislatures. By Item 11 of List II of the Seventh Schedule to the Constitution, the State Legislature has power to legislate in respect of "education including Universities subject to the provisions of Items 63, 64, 65 and 66 of List I and 25 of List III". Item 63 of List I replaces with modification Item 13 of List I to the Seventh Schedule of the Government of India Act, 1935. Power to enact legislation with respect to the institutions known at the commencement of the Constitution as the Benaras Hindu University, the Aligarh Muslim University and the Delhi University, and other institutions declared by Parliament by laws to be an institution of national importance is thereby granted exclusively to Parliament. Item 64 invests the Parliament with power to legislate in respect of "institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament, by law, to be institutions of national importance". Item 65 vests in the Parliament power to legislate for "Union agencies and institutions for - (*a*) professional, vocational or technical training, including the training of police officers; or *(b)* the promotion of special studies or research; or (*c*) scientific or technical assistance in the investigation or detection of crime." By Item 66 power is entrusted to Parliament to legislate on "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to "vocational and technical training of labour". It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. Use of the expression "subject to" in Item 11 of List 11 of the Seventh Schedule clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislatures. In ***Hingir Rampur Coal Company* v. *State of Orissa*** [(1961) 2 SCR 537] this Court in considering the import of the expression "subject to" used in an entry in List II, in relation to an entry in List I observed that to the extent of the restriction imposed by the use of the expression "subject to" in an entry in List II, the power is taken away from the State Legislature. Power of the State to legislate in respect of education including Universities must to the extent to which it is entrusted to the Union Parliament, whether such power is exercised or not, be deemed to be restricted. If a subject of legislation is covered by Items 63 to 66 even if it otherwise falls within the larger field of "education including Universities" power to legislate on that subject must lie with the Parliament. The plea raised by counsel for the University and for the State of Gujarat that legislation prescribing the medium or media in which instruction should be imparted in institutions of higher education and in other

institutions always falls within Item 11 of List II has no force. If it be assumed from the terms of Item 11 of List II that power to legislate in respect of medium of instruction falls only within the competence of the State Legislature and never in the excluded field, even in respect of institutions mentioned in Items 63 to 65, power to legislate on medium of instruction would rest with the State, whereas legislation in other respects for excluded subjects would fall within the competence of the Union Parliament. Such an interpretation would lead to the somewhat startling result that even in respect of national institutions or Universities of national importance, power to legislate on the medium of instruction would vest in the legislature of the States within which they are situate, even though the State Legislature would have no other power in respect of those institutions. Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap: but to the extent of overlapping, the power conferred by Item 66 List I must prevail over the power of the State under Item 11 of List II. It is manifest that the excluded heads deal primarily with education in institutions of national or special importance and institutions of higher education including research, sciences, technology and vocational training of labour. The power to legislate in respect of primary or secondary education is exclusively vested in the States by Item 11 of List II, and power to legislate on medium of instruction in institutions of primary or secondary education must therefore rest with the State Legislatures. Power to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under Items 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items, must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, insofar it has a direct bearing and impact upon the legislative head of coordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by Item 66 List I to be vested in the Union.

23. The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within Entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the coordination of such standards either on an all-India or other basis impossible or even difficult. Thus, though the powers of the Union and of the State are in the Exclusive Lists, a degree of overlapping is inevitable. It is not possible to lay down any general test which would afford a solution for every question which might arise on this head. On the one hand, it is certainly within the province of the State Legislature to prescribe syllabi and courses of study and, of course, to indicate the medium or media of instruction. On the other hand, it is also within the power of the Union to legislate in respect of media of instruction so as to ensure coordination and determination of standards, that is, to ensure maintenance or improvement of standards. The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may

conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of the "doctrine of pith and substance" of the impugned enactment. The validity of the State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words, the validity of State legislation would depend upon whether it prejudicially affects coordination and determination of standards, but not upon the existence of some definite Union legislation directed to achieve that purpose. If there be Union legislation in respect of coordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Article 254(1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive lists, a State law trenching upon the Union field would still be invalid.

24. Counsel for the University submitted that the power conferred by Item 66 of List I is merely a power to coordinate and to determine standards i.e. it is a power merely to evaluate and fix standards of education, because, the expression "coordination" merely means evaluation, and "determination" means fixation. Parliament has therefore power to legislate only for the purpose of evaluation and fixation of standards in institutions referred to in Item 66. In the course of the argument, however, it was somewhat reluctantly admitted that steps to remove disparities which have actually resulted from adoption of a regional medium and the falling of standards, may be undertaken and legislation for equalising standards in higher education may be enacted by the Union Parliament. We are unable to agree with this contention for several reasons. Item 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject. Again there is nothing either in Item 66 or elsewhere in the Constitution which supports the submission that the expression "coordination" must mean in the context in which it is used merely evaluation, coordination in its normal connotation means harmonising or bringing into proper relation in which all the things coordinated participate in a common pattern of action. The power to coordinate, therefore, is not merely power to evaluate, it is a power to harmonise or secure relationship for concerted action. The power conferred by Item 66 List I is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power.

25. There is nothing in the entry which indicates that the power to legislate on coordination of standards in institutions of higher education does not include the power to legislate for preventing the occurrence of or for removal of disparities in standards. This power is not conditioned to be exercised merely upon the existence of a condition of disparity nor is it a power merely to evaluate standards but not to take steps to rectify or to prevent disparity. By express pronouncement of the Constitution makers, it is a power to coordinate, and of necessity, implied therein is the power to prevent what would make coordination impossible or difficult. The power is absolute and unconditional, and in the absence of any controlling reasons it must be given full effect according to its plain and expressed intention. It is true that "medium of instruction" is not an item in the Legislative List. It falls within Item

11 as a necessary incident of the power to legislate on education : it also falls within Items 63 to 66. Insofar as it is a necessary incident of the powers under Item 66 List I it must be deemed to be included in that item and therefore excluded from Item 11 List II. How far State legislation relating to medium of instruction in institutions has impact upon coordination of higher education is a matter which is not susceptible, in the absence of any concrete challenge to a specific statute, of a categorical answer. Manifestly, in imparting instructions in certain subjects, medium may have subordinate importance and little bearing on standards of education while in certain others its importance will be vital. Normally, in imparting scientific or technical instructions or in training students for professional courses like law, engineering, medicine and the like existence of adequate text books at a given time, the existence of journals and other literature availability of competent instructors and the capacity of students to understand instructions imparted through the medium in which it is imparted are matters which have an important bearing on the effectiveness of instruction and resultant standards achieved thereby. If adequate textbooks are not available or competent instructors in the medium, through which instruction is directed to be imparted are not available, or the students are not able to receive or imbibe instructions through the medium in which it is imparted, standards must of necessity fall, and legislation for coordination of standards in such matters would include legislation relating to medium of instruction.

26. If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text books and journals, competent teachers and incapacity of the students to understand the subjects, is likely to result in the lowering of standards, that legislation would, in our judgment, necessarily fall within Item 66 of List I and would be deemed to be excluded to that extent from the amplitude of the power conferred by Item 11 of List II.

29. We are unable, however, to agree with the High Court that Act 4 of 1961 insofar as it amended the proviso to Section 4(27) is invalid, because it is beyond the competence of the State Legislature. By the amendment of the proviso to Section 4(27), the legislature purported to continue the use of English as the medium of instruction in subjects selected by the Senate beyond a period of ten years prescribed by the Gujarat University Act 1949. Before the date on which the parent act was enacted, English was the traditional medium of instruction in respect of all subjects at the University level. By enacting the proviso as it originally stood, the university was authorised to continue the use of English as an exclusive medium of instruction in respect of certain subjects to be selected by the Senate. By the amendment it is common ground that no power to provide an exclusive medium other than the pre-existing medium is granted. Manifestly, imparting instruction through a common medium, which was before the Act the only medium of instruction all over the country, cannot by itself result in lowering standards and coordination and determination of standards cannot be affected thereby. By extending the provisions relating to imparting of instruction for a period longer than ten years through the medium of English in the subjects selected by the University, no attempt was made to encroach upon the powers of the Union under Item No. 66 List I.

30. The order of the High Court relating to the invalidity of the Statutes 207 and 209 of the University insofar as they purport to impose "Gujarati or Hindi or both as exclusive medium" of instruction, and the circulars enforcing those Statutes must therefore be confirmed.

Prafulla Kumar **v.** *Bank of Commerce, Khulna*

AIR 1947 PC 60

[*Doctrine of Pith and Substance*]

In this case, the validity of the Bengal Money Lenders Act, 1940 was challenged. The impugned section 30 of the Act provided:

> "Notwithstanding anything contained in any law for the time being in force, or in any agreement (1) No borrower shall be liable to pay after the commencement of this Act" –

more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest. Moreover, it is retrospective in its effect, and its limitations can be relied upon by a borrower by way of defence to an action by the moneylender or the borrower can himself institute a suit in respect of a loan to which the provisions of the Act apply.

Section 100, Government of India Act, 1935, is in the following terms:

"100. (1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. 7 to this Act (hereinafter ca1led the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincia1 Legislative List'}.

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

The Federal Legislative List referred to in this section assigned to the Federal Legislature jurisdiction to make laws with respect to

> "(28) Cheques, bills of exchange, promissory notes and other like instruments."
> "(33) Corporations, that is to say, the incorporation regulation and winding up of trading corporations including banking. ..."
> "(38) Banking, that is to say, the conduct of banking business …."

and denies that jurisdiction to Provincial Legislatures.

The Provincial Legislative List, however, empowered the Provincial Legislature in Item (27) to make laws with respect to "Trade and Commerce within the Province; ... money lending and money lenders," and therefore no objection could be taken to the provisions of the Bengal Money-lenders Act, if they were concerned only with the limitation of capital and interest recoverable.

[Entries 28, 33 and 38 are entries 46, 43 and 45 of List I and entry 27 is entry 30 of List II of the VII Schedule to the Constitution of India.]

LORD PORTER – 11. Having regard to these provisions the respondents say that whilst it is true that they are money-lenders, yet they are engaged in banking and are holders of promissory notes, matters which are solely within the Federal jurisdiction and that a Provincial Act such as the Bengal Money-lenders Act is ultra vires in that it deals with Federal matters. These matters, they say, are so intertwined with the rest of the Act that they cannot be disassociated and therefore the Act is wholly void. But whether this be so or not the particular loans, the subject matter of the actions under review, are secured by promissory notes and in addition are matters of banking; accordingly they say that the Act is void at any rate so far as concerns promissory notes or banking.

14. In the present cases the Judges of the High Court found in favour of the appellants on the ground that though the Federal List prevails over the Provincial List where the two lists come in conflict, yet the Act being a Money-lenders Act, deals with what is in one aspect at least a Provincial matter and is not rendered void in whole or in part by reason of its effect upon promissory notes. In their view the jurisdiction of the Provincial Legislature is not ousted by the inclusion of provisions dealing with promissory notes though that subject-matter is to be found in Item 28 of the Federal List. The reference to Bills of Exchange and promissory notes in that item, they held, only applies to those matters in their aspect of negotiability and not in their contractual aspect. In their contractual aspect the appropriate item, as they considered, was entry (10) of List 111 "contract". "Interest on promissory notes," they say,

> (I)s a matter with respect to contracts, a subject to be found in the Concurrent Legislative List. The Bengal Act has received the assent of the Governor-General and in view of the provisions of S 107 (2), Constitution Act, Ss. 29 (2) and 30, Bengal Money-lenders Act, 1940 must prevail.

I5. Section 107, Constitution Act (identical with Article 254 of the Constitution of India), is in the following terms:

> 107. (1) If any provision of a Provincial law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the provincial law shall, to the extent of the repugnancy, be void.
>
> (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:
>
> Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

I6. The High Court's conclusion would no doubt be true, if they are right in saying that interest on promissory notes is a matter with respect to contracts and therefore an item contained in the Concurrent List. The Act to which it was said to be repugnant was the Negotiable Instruments Act, 1881, which no doubt applied to the whole of India, but, as the High Court points out this Act is not a Federal but an existing Indian Act, and under the provisions of S. 107 (2) would give place to the Bengal Money-lenders Act (which had received the assent of the Governor-General) provided that Act does not deal with matters over which the Federal Legislature alone has jurisdiction. This opinion, however, was reversed in the Federal Court which thought the Act a clear interference with the subjects set out in Item 28 in the Federal List and declared the Bengal Act to be *ultra vires* in so far as it dealt with those subjects. It was not, however, in their opinion totally void.

17. The Federal Court had in fact already given the matter some consideration in two previous cases, viz: (1) 1940 FCR 188 (1) a case in which the Madras Agriculturists' Relief Act of 1938 was impugned. That Act did not specifically mention promissory notes but it did contain provisions limiting the liability and diminishing the debts of agriculturists in terms wide enough to include debts due on promissory notes. In that case, however, judgment had been obtained upon the promissory note and the Court held that inasmuch as the debt had passed into a claim Under a decree, before the Agriculturists' Relief Act had been enacted, there was nothing to preclude it from being scaled down under the terms of that Act. Accordingly the Court found it unnecessary to deal with a matter in which a claim on promissory notes as such was involved. (2) A similar result was reached in 1944 FCR 126 (2) a case upon which their Lordships have to pronounce at a later stage.

18. All the courts in India have considered the Bengal Money-lenders Act, to deal in pith and substance with money-lenders and money lending and with this view their Lordships agree. But such a view is not necessarily conclusive of the question in India and indeed, as the respondents contend, is not decisive of the matter even in Canada or Australia. With these and the other questions arising in the case their Lordships must now grapple.

19. The appellants set out their contentions under four heads. Firstly, they said that power to make laws with respect to money-lending necessarily imports the power to affect the lender's rights against the borrower upon a promissory note given in the course of a money-lending transaction. The Constitution Act they said must be read as a whole so as to reconcile item 28 of List I with Item 27 of List II, and so read Item 27 is a particular exception from the general provisions of Item 28.

20. Secondly, they argued that the impugned Act is in pith and substance an Act with respect to money-lenders and money-lending and is not rendered void in whole or in part because it incidentally touches upon matters outside the authorized field.

21. Thirdly, they maintained that upon its true construction, item 28 is confined to that part of the law relating to negotiable instruments which has reference to their negotiability and does not extend to that part which governs the contractual relationship existing between

the immediate parties to a bill of exchange or promissory note. That part, they said, lay in the field of contract.

22. If then the subject matter of the Act lay in contract, which is one of the items within the concurrent List, it was, it was true, in conflict with an existing Indian Law viz : the Negotiable Instruments Act, 1881 within the meaning of S.31 (1), Constitution Act, but inasmuch as the impugned Act had received the assent of the Governor-General, it must prevail over the Negotiable Instruments Act as a result of the provision of S. 107 (2), Constitution Act.

23. The Respondents on the other hand pointed out in the first place that the Constitution Act differs in form from the British North America Act and the Australian Commonwealth Act. Those Acts, they said, contain no concurrent list and therefore recognize, as the Constitution Act does not, that there must be some overlapping of powers. Moreover, the Indian Act contains a strict hierarchy of powers since under the terms of S. 100, Federal List prevails over both the Concurrent and the Provincial List, and the Concurrent List in its turn prevails over the Provincial List. “The Provincial Legislature", as it enacts, “has not power to make laws with respect to any of the matters enumerated in List 1", and this prohibition, they contend, extends to any matter whatsoever set out in the Federal List, however incidental to a matter contained in the Provincial List. No question could arise, they maintained, as to pith and substance, The Constitution Act directly prohibits any interference by a Province with any matter set out in List I.

24. For the same reasons they said that there could be no question of an exception out of the generality of expressions used in List I on the ground that a matter dealt with in List II was particularly described whereas it was only referred to generally in List I under a wider heading.

25. In any case they said the expression "Money Lending" was no more particular than the expression "Bills of Exchange, promissory notes, and other instruments of the like kind”. Finally, they contended that if money-lending was to be regarded as an incidence of contract, then the Negotiable Instruments Act being an Act of the Government of India had precedence over the' impugned Act, in those subjects with which they both dealt.

27. For instance it is no doubt true, as has been pointed out above, and has been accepted in the Courts in India that in the case of a matter contained in the Concurrent List, the Act of a Provincial Legislature which has been approved by the Governor-General prevails over an existing Indian Law (See S. 107 (2), Government of India Act, 1935). If then the impugned Act is to be considered as a matter of contract, it would prevail over the Negotiable Instruments Act if that Act or the part of it in respect of which repugnancy is alleged is also to be regarded as contractual and therefore coming within List III.

28. But this result depends upon two assumptions viz.: (1) that the impugned Act in dealing with promissory notes, or for that matter with banking, is concerned with contract and (2) that the reference to negotiable instruments, promissory notes and the like instruments in List I Item 28 is a reference to them in their capacity of negotiability only.

29. The point was raised in the Federal Court in 1940 FCR 188 but that Court did not find it necessary finally to decide it, though Sulaiman J. in his dissenting judgment inferentially

rejected it. Like the Federal Court, their Lordships in the present case do not find it necessary to express a final opinion upon these points, but it is, they think, essential to determine to what extent under the Indian Constitution Act of 1935 the jurisdiction of the several legislatures is affected by ascertaining what is the pith and substance of an impugned Act.

30. The two remaining points taken on behalf of the appellant can in their Lordships' opinion and indeed must be considered together since to say that power to make laws in respect to money-lending necessarily imparts power to affect the lender's rights in respect of promissory notes given as security in money-lending transactions is in their view to maintain that if the pith and substance of the Act, the validity of which is challenged, is money-lending, it comes within the Provincial jurisdiction. Three questions therefore arise, viz:

(1) Does the Act in question deal in pith and substance with money-lending ?
(2) If it does is it valid though it incidentally trenches upon matters reserved for the Federal Legislature?
(3) Once it is determined whether the pith and substance is money-lending, is the extent to which the Federal field is invaded a material matter?

31. (1) All the Courts in India have held that the transactions in question are in pith and substance money-lending transactions and their Lordships are of the same opinion. To take promissory note as security for a loan is the common practice of money-lenders and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in any real sense deal with money-lending. All the lender would have to do in order to oust its jurisdiction would be to continue his normal practice of taking the security of a promissory note and he would then be free from any restrictions imposed by the Provincial Legislature. In truth, however, the substance is money-lending and the promissory note is but the instrument for securing the loan.

32. (2) The second is a more difficult question and was put with great force by Counsel for the respondents. The principles, it was said, which obtain in Canada and Australia have no application to India. In the former instance either the Dominions and Provinces or the Commonwealth and States divide the jurisdiction between them, the ominion or as the case may be the States retaining the power not specifically given to the Provinces or the Commonwealth. In such cases it is recognized that there must be a considerable overlapping of powers. But in India, it is asserted, the difficulty in dividing the powers has been foreseen. Accordingly three, not two lists, have been prepared in order to cover the whole field and these lists have a definite order of priority attributed to them so that anything contained in List I is reserved solely for the Federal Legislature, and however incidentally it may be touched upon in an Act of the Provincial Legislature, that Act is ultra vires in whole or at any rate where in any place it affects an entry in the Federal List.

33. Similarly, any item in the Concurrent List if dealt with by the Federal Legislature is outside the power of the Provinces and it is only the matters specifically mentioned in List II over which the Province has complete jurisdiction, although so long as any item in the Concurrent List has not been dealt with by the Federal Legislature the Provincial Legislature is binding.

34. In their Lordships' opinion this argument should not prevail. To take such a view is to simplify unduly the task of distinguishing between the powers of divided jurisdictions. It is not possible to make so clean a cut between the Powers of the various legislatures: they are bound to overlap from time to time.

35. Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap. As Sir Maurice Gwyer C. J. said in 1940 FCR 188, 201:

> It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the .Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character-for the purpose of determining whether it is legislation with respect to matters in this list or in that.

36. Their Lordships agree that this passage correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominion legislation. No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.

37. Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with.

38. (3) Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

39. This view places the precedence accorded to the three lists in its proper perspective. No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, priority in what respect ? Does the priority

of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view.

40. If this be correct it is unnecessary to determine whether the jurisdiction as to promissory notes given to the Federal Legislature is or is not confined to negotiability. The Bengal Money-lenders Act is valid because it deals in pith and substance with money-lending, not because legislation in respect of promissory notes by the Federal Legislature is confined to legislation affecting their negotiability– a matter as to which their Lordships express no opinion.

41. It will be observed that in considering the principles involved their Lordships have dealt mainly with the alleged invalidity of the Act, based upon its invasion of the Federal entry, "promissory notes" Item (25) in List I. They have taken this course, because the case was so argued in the Courts in India.

42. But the same considerations apply in the case of banking, Whether it be urged that the Act trenches upon the Federal List by making regulations for banking or promissory notes, it is still an answer that neither of those matters is its substance and this view is supported by its provisions exempting scheduled and notified banks from compliance with its requirements.

43. In the result their Lordships are of opinion that the Act is not void either in whole or in part as being ultra vires the Provincial Legislature. This opinion renders it unnecessary to pronounce upon the effect of the Ordinance No.11 of 1945, purporting to validate, inter alia, the impugned Act and their Lordships express no opinion upon it. But having regard to their views expressed in this judgment they will humbly advise His Majesty that the appeal be allowed.

* * * * *

State of Karnataka v. *Drive-in Enterprises*

AIR 2001 SC 1328

V.N. KHARE, J. - This appeal is directed against the judgment of the Karnataka High Court passed in the writ petition filed by the respondent herein whereby sub-clause (*v*) of clause (*i*) of Section 2 of the Karnataka Entertainments Tax Act, 1958 ("the Act") was struck down as being beyond the legislative competence of the State Legislature.

2. The respondent herein, is the owner and proprietor of a drive-in-theatre in the outskirts of Bangalore city wherein cinema films are exhibited. It is alleged that the drive-in-theatre is distinct and separate in its character from other cinema houses or theatres. The drive-in-cinema is defined under Rule 111-A of the Karnataka Cinemas (Regulation) Rules, 1971 (hereinafter referred to as "the Rules") framed in exercise of the powers conferred on the State Government under Section 19 of the Karnataka Cinemas (Regulation) Act, 1964. The definition of drive-in-cinema runs as under:

> "111-A. (1) 'Drive-in-cinema' means a cinema with an open-air theatre premises into which admission may be given normally to persons desiring to view the cinema while sitting in motor cars. However, where an auditorium is also provided in a 'drive-in-cinema' premises, persons other than those desiring to view the cinema while sitting in motor cars can also be admitted. Such drive-in-cinemas may have a capacity to accommodate not more than one thousand cars;"

The drive-in-theatre of the respondent with which we are concerned here is a cinema with an open-air theatre into which admissions are given to persons desiring to see cinema while sitting in their motor cars taken inside the theatre. The drive-in-theatre has also an auditorium wherein other persons who are without cars, view the film exhibited therein either standing or sitting. The persons who are admitted to view the film exhibited in the auditorium are required to pay Rs 3 for admission therein. It is not disputed that the State Government has levied entertainment tax on such admission and the same is being realised. However, if any person desires to take his car inside the theatre with a view to see the exhibition of the films while sitting in his car in the auditorium, he is further required to pay a sum of Rs. 2 to the proprietor of the drive-in-theatre. The appellant State in addition to charging entertainment tax on the persons being entertained, levied entertainment tax on admission of cars inside the theatre. This levy was challenged by the proprietors of the drive-in-theatres by means of writ petitions before the Karnataka High Court which were allowed and levy was struck down by a Single Judge of the High Court. The said judgment was affirmed by a Division Bench of that Court. It was held, that the levy being not on a person entertained (i.e. car/motor vehicle), the same was ultra vires. After the aforesaid decision, the Karnataka Legislature amended the Act by Act 3 of 1985. By the said amendment, sub-clause (*v*) was added to clause (*i*) of Section 2 of the said Act. Simultaneously, Sections 4-A and 6 of the Act were also amended. After the aforesaid amendments, the appellant herein, again levied entertainment tax on admission of cars into the drive-in-theatre. This levy was again challenged by means of a petition under Article 226 of the Constitution and the said writ petition was allowed, and as stated above, the High Court struck down sub-clause (*v*) to clause (*i*) of Section 2 of the Act.

3. Learned counsel appearing for the appellant urged that insertion of sub-clause (*v*) of clause (*i*) of Section 2 of the Act is a valid piece of legislation and after its insertion and amendment of Section 6 and Section 4-A of the Act, the appellant State was competent to levy and realise the entertainment tax on the admission of cars/motor vehicles inside the drive-in-theatre. Learned counsel urged that in pith and substance, the levy is on the person entertained and not on the admission of cars/motor vehicles inside the drive-in-theatre. It was also urged that the State Legislature is fully competent to impose such a levy.

4. Learned counsel for the respondent, inter alia, urged that the drive-in-theatre is a different category of cinema unlike cinema houses or theatres, that the special feature of the drive-in-theatre is that a person can view the film exhibited therein while sitting in his car, that the admission of cars/motor vehicles into the drive-in-theatre is incidental and part of the concept of drive-in-theatre, that the film that is shown in drive-in-theatre is like any other film shown in cinema houses, and that the State Legislature is not competent to levy entertainment tax on admission of motor vehicles inside the drive-in-theatre. Learned counsel further argued that the incidence of tax being on the entertainment, the State Legislature is competent to enact law imposing tax only on persons entertained. In a nutshell, the argument is that the State Legislature can levy entertainment tax on human beings and not on any inanimate object. According to learned counsel, since the vehicle is not a person entertained, the State Legislature is not competent to enact law to levy entertainment tax on the admission of cars/motor vehicles inside the drive-in-theatre.

5. On the arguments of learned counsel of parties, the question arises as to whether the State Legislature is competent to enact law to levy tax under Entry 62 List II of the Seventh Schedule on admission of cars/motor vehicles inside the drive-in-theatre.

6. Whereas in the present case, the vires of an enactment is impugned on the ground that the State Legislature lacks power to enact such an enactment, what the court is required to ascertain is the true nature and character of such an enactment with reference to the power of the State Legislature to enact such a law. While adjudging the vires of such an enactment, the court must examine the whole enactment, its object, scope and effect of its provision. If on such adjudication it is found that the enactment falls substantially on a matter assigned to the State Legislature, in that event such an enactment must be held to be valid even though nomenclature of such an enactment shows that it is beyond the competence of the State Legislature. In other words, when a levy is challenged, its validity has to be adjudged with reference to the competency of the State Legislature to enact such a law, and while adjudging the matter what is required to be found out is the real character and nature of levy. In sum and substance, what is to be found out is the real nature of levy, its pith and substance and it is in this light the competency of the State Legislature is to be adjudged. The doctrine of pith and substance means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature, it cannot be held to be ultra vires merely because its nomenclature shows that it encroaches upon matters assigned to another heading of legislation. The nomenclature of a levy is not conclusive for determining its true character and nature. It is no longer res integra that the nomenclature of a levy is not a true test of nature of a levy. In ***Goodyear India Ltd.* v. *State of Haryana*** [(1990) 2 SCC 71], it was held that the nomenclature of an Act is not conclusive and for determining the true character and nature of

a particular levy with reference to the legislative competence of the legislature, the court will look into the pith and substance of the legislation. In ***R.R. Engineering Co.* v. *Zila Parishad, Bareilly*** [(1980) 3 SCC 330], the question arose as to whether the Zila Parishad can levy tax on calling or property. The argument was that the levy is tax on income, therefore, it is ultra vires. However this Court held thus: (SCC Headnote)

> "The fact that the tax on circumstances and property is often levied on calling or property is not conclusive of the nature of the tax; it is only as a matter of convenience *that income is adopted as a yardstick or measure for assessing the tax*. The measure of the tax is not a true test of the nature of the tax. Considering the pith and substance of the tax, it falls in the category of a tax on '*a man's financial position, his status taken as a whole* and includes what may not be properly comprised under the term "property" and at the same time ought not to escape assessment'. " (emphasis supplied)

7. In ***Kerala SEB* v. *Indian Aluminium Co. Ltd***. [(1976) 1 SCC 466], it was held thus:

> "For deciding under which entry a particular legislation falls the theory of 'pith and substance' has been evolved by the courts. If in pith and substance a legislation falls within one list or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another list, the Act as a whole would be valid notwithstanding such incidental trenching."

8. In ***Governor-General-in-Council* v. *Province of Madras*** [AIR 1945 PC 98], the question arose as to whether the levy was sales tax or excise duty. In that connection the Privy Council held:

> "Its real nature, its 'pith and substance' is that it imposes a tax on the sale of goods. No other succinct description could be given of it except that it is a 'tax on the sale of goods'. It is in fact a tax which according to the ordinary canons of interpretation appears to fall precisely within Entry 48 of the Provincial Legislative List."

9. In ***(Morris) Leventhal* v. *David Jones Ltd***. [AIR 1930 PC 129], the question arose as to whether the legislature can impose bridge tax when the power to legislate was really in respect of "tax on land". The levy of bridge tax was held valid under legislative power of tax on land. It was held as thus: (AIR p. 133)

> "The appellants' contention that though directly imposed by the legislature, the bridge tax is not a land tax, was supported by argument founded in particular on two manifest facts. The bridge tax does not extend to land generally throughout New South Wales, but to a limited area comprising the City of Sydney and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is *not within the true significance of the term a tax*. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation." (emphasis supplied)

10. In ***Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*** [AIR 1962 All 83] which was subsequently approved in ***Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*** [AIR 1965 SC 895], the question arose as to whether the Municipal Board can levy

water tax when the power to legislate was in respect of the land and building. The High Court held that in pith and substance *water tax is not on water but it is a levy on land and building*.

11. We are in full agreement with the aforestated statement of law and are of the view that it is not the nomenclature of the levy which is decisive of the matter, but its real nature and character for determining the competency or power of the State Legislature to enact law imposing the levy. It is in the light of the aforesaid statement of law, we would examine the validity of levy challenged in the present case. Before we deal with the question in hand, we would first examine the provisions of the Act. Section 2(*a*) of the Act defines "admission". "Admission" includes admission as a spectator or as one of the audiences, and admission for the purpose of amusement by taking part in an entertainment. Clause (*b*) of Section 2 defines "admission to an entertainment" which includes admission to any place in which an entertainment is held. Clause (*ca*) of Section 2 defines "cinema theatre" as any place of entertainment in which cinematography shows are held to which persons are admitted for payment. Clause (*e*) of Section 2 of the Act defines "entertainment", which means a horse race or cinematography shows including exhibition of video films to which persons are admitted on payment.

12. Section 2(*i*) defines "payment for admission" which runs as under:

> "2. (*i*)(*i*) any payment made by a person who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof for admission to which a payment involving a tax or a higher tax is required; * * *
>
> (*v*) *any payment for admission of a motor vehicle into the auditorium of a cinema known as drive-in-theatre.*" (emphasis supplied)

Section 3 is a charging section. The relevant provisions run as under:

> "3. *Tax on payment for admission to entertainments*.- (1) There shall be levied and paid to the State Government on each payment for admission (excluding the amount of tax) to an entertainment, other than the entertainment referred to in sub-clause (*iii*) of clause (*e*) of Section 2, entertainment tax at 70 per cent of such payment.
>
> (2) Notwithstanding anything contained in sub-section (1) there shall be levied and paid to the State Government (except as otherwise expressly provided in this Act) on every complimentary ticket issued by the proprietor of an entertainment, the entertainment tax at the appropriate rate specified in sub-section (1) in respect of such entertainment, as if full payment had been made for admission to the entertainment according to the class of seat or accommodation which the holder of such ticket is entitled to occupy or use; and for the purpose of this Act, the holder of such ticket shall be deemed to have been admitted on payment."

Sub-section (1) of Section 6 runs as under:

> "6. *Manner of payment of tax*.- (1) Save as otherwise provided in Section 4-A or 4-B, the entertainment tax shall be levied in respect of each payment for admission or each admission on a complimentary ticket and shall be calculated and paid on the number of admissions."

13. Entry 62 List II of the Seventh Schedule empowers the State Legislature to levy tax on luxuries, entertainment, amusements, betting and gambling. Under Entry 62, the State

Legislature is competent to enact law to levy tax on luxuries and entertainment. The incidence of tax is on entertainment. Since entertainment necessarily implies the persons entertained, therefore, the incidence of tax is on the persons entertained. Coming to the question whether the State Legislature is competent to levy tax on admission of cars/motor vehicles inside the drive-in-theatre especially when it is argued that cars/motor vehicles are not the persons entertained. Section 3 which is the charging provision, provides for levy of tax on each payment of admission. Thus, under the Act, the State is competent to levy tax on each admission inside the drive-in-theatre. The challenge to the levy is on the ground that the vehicle is not a person entertained and, therefore, the levy is ultra vires. It cannot be disputed that the car or motor vehicle does not go inside the drive-in-theatre of its own. It is driven inside the theatre by the person entertained. In other words the person entertained is admitted inside the drive-in-theatre along with the car/motor vehicle. Thereafter the person entertained while sitting in his car inside the auditorium views the film exhibited therein. This shows that the person entertained is admitted inside the drive-in-theatre along with the car/motor vehicle. This further shows that the person entertained carries his car inside the drive-in-theatre in order to have better quality of entertainment. The quality of entertainment also depends on with what comfort the person entertained has viewed the cinema films. Thus, the quality of entertainment obtained by a person sitting in his car would be different from a squatter viewing the film show. The levy on entertainment varies with the quality of comfort with which a person enjoys the entertainment inside the drive-in-theatre. In the present case, a person sitting in his car or motor vehicle has the luxury of viewing cinema films in the auditorium. It is the variation in the comfort offered to the person entertained for which the State Government has levied entertainment tax on the person entertained. The real nature and character of the impugned levy is not on the admission of cars or motor vehicles, but the levy is on the person entertained who takes the car inside the theatre and watches the film while sitting in his car. We are, therefore, of the view that in pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading "admission of vehicle" is a levy on entertainment and not on admission of vehicle inside the drive-in-theatre. As long as in pith and substance the levy satisfies the character of levy, i.e. "entertainment", it is wholly immaterial in what name and form it is imposed. The word "entertainment" is wide enough to comprehend in it, the luxury or comfort with which a person entertains himself. Once it is found there is a nexus between the legislative competence and subject of taxation, the levy is justified and valid. We, therefore, find that the State Legislature was competent to enact sub-clause (*v*) of clause (*i*) of Section 2 of the Act. We accordingly hold that the impugned levy is valid.

14. For the aforesaid reasons, we are of the view that the High Court fell in serious error in holding that sub-clause (*v*) of clause (*i*) of Section 2 of the Act is ultra vires Entry 62 List II of the Seventh Schedule.

15. Consequently, this appeal deserves to be allowed. The judgment under appeal is set aside. The writ petition shall stand dismissed. The appeal is allowed.

* * * * *

State of Rajasthan **v.** *G. Chawla*

AIR 1959 SC 544

M. HIDAYATULLAH, J. - This appeal was preferred by the State of Ajmer, bat after the reorganisation of States, the State of Rajasthan stands substituted for the former State. It was filed against the decision of the Judicial Commissioner of Ajmer, who certified the case as fit for appeal to this Court under Article 132 of the Constitution.

2. The Ajmer Legislative Assembly enacted the Ajmer (Sound Amplifiers Control) Act, 1952 (Ajmer III of 1953), (hereinafter called the Act) which received the assent of the President on 9-3-1953. This Act was successfully impugned by the respondents before the learned Judicial Commissioner, who held that it was in excess of the powers conferred on the State Legislature under Section 21 of the Government of Part C States Act, 1951 (49 of 1951), and therefore, ultra vires the State Legislature.

3. The respondents (who were absent at the hearing) were prosecuted under Section 3 of the Act for breach of the first two conditions of the permit granted to the first respondent, to use sound amplifiers on May 15 and 16, 1954. These amplifiers, it was alleged against them, were so tuned as to be audible beyond 30 yards (Condition 1) and were placed at a height of more than 6 feet from the ground (Condition 2). The second respondent was at the time of the breach, operating the sound amplifiers for the *Sammelan,* for which permission was obtained.

4. On a reference under Section 432 of the Code of Criminal Procedure, the Judicial Commissioner of Ajmer held that the pith and substance of the Act fell within entry No. 31 of the Union list and not within entry No. 6 of the State List, as was claimed by the State.

5. Under Article 246(4) of the Constitution, Parliament had power to make laws for any part of the territory of India not included in Part A or B of the First Schedule, notwithstanding that such matter was a matter enumerated in the State List. Section 21 of the Government of Part C States Act (49 of 1951) enacted:

> "(1) Subject to the provisions of this Act, the Legislative Assembly of a State, may undertake laws for the whole or any part of the State with respect to any of the matters enumerated in the State List or in the Concurrent list, * * * * *
>
> (2) Nothing in sub-section (1) shall derogate from the power conferred on Parliament by the Constitution to make laws with respect to any matter for a State or any part thereof."

6. Under these provisions, the legislative competence of the State Legislature was confined to the two lists other than the Union list. If, therefore, the subject-matter of the Act falls substantially within an Entry in the Union list, the Act must be declared to be unconstitutional, but it is otherwise, if it falls substantially within the other two lists, since prima facie there is no question of repugnancy to a Central statute or of an "occupied field".

7. The rival entries considered by the Judicial Commissioner read as follows:

Entry No. 31 of the Union List – Post and Telegraphs; Telephones, wireless, broadcasting and other like forms of communication.

Entry No. 6 of the State List – Public health and sanitation, hospitals and dispensaries.

The attention of the learned Judicial Commissioner was apparently not drawn to entry No. 1 of the State List, which is to the following effect:

Entry No. 1 of the State List – Public order (but not including the use of naval, military or air forces of the Union in aid of civil power.

Shri H.J. Umrigar relied upon the last Entry either alone, or in combination with entry No. 6 of the State List, and we are of opinion that he was entitled to do so.

8. After the dictum of Lord Selborne in ***Queen* v. *Burah*** [(1878) 3 App Cas 889], oft-quoted and applied, it must be held as settled that the legislatures in our Country possess plenary powers of legislation. This is so even after the division of legislative powers, subject to this that the supremacy of the legislatures is confined to the topics mentioned as Entries in the lists conferring respectively powers on them. These Entries, it has been ruled on many an occasion, though meant to be mutually exclusive are sometimes not really so. They occasionally overlap, and are to be regarded as *enumeratio simplex* of broad categories. Where in an organic instrument such enumerated powers of legislation exist and there is a conflict between rival lists, it is necessary to examine the impugned legislation in its pith and substance, and only if that pith and substance falls substantially within an entry or entries conferring legislative power, is the legislation valid, a slight transgression upon a rival list, notwithstanding. This was laid down by Gwyer C.J. in ***Subramanyam Chettiar* v. *Muthuswamy Goundan*** [(1940) FCR 188, 201] in the following words:

> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that."

This dictum was expressly approved and applied by the Judicial Committee in ***Prafulla Kumar Mukherjee* v. *Bank of Commerce, Ltd., Khulna*** [(1947) LR 74 IA 23] and the same view has been expressed by this Court on more than one occasion. It is equally well settled that the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given.

9. It becomes, therefore, necessary to examine closely how the Act is constructed and what it provides. The Act in its preamble expresses the intent as the control of the 'use' of sound amplifiers. The first section deals with the title, the extent, the commencement and the interpretation of the Act. It does not unfold its pith and substance. The last two sections provide for penalty for unauthorised use of sound amplifiers and the power of police officers to arrest without warrant. They stand or fall with the constitutionality or otherwise of the second section, which contains the essence of the legislation.

10. That section prohibits the use in any place, whether public or otherwise, of any sound amplifier except at times and places and subject to such conditions as may be allowed, by order in writing either generally or in any case or class of cases by a police officer not below the rank of an inspector, but it excludes the use in a place other than a public place, of a sound

amplifier which is a component part of a wireless apparatus duly licensed under any law for the time being in force. In the explanation which is added, "public place" is defined as a place (including a road, street or way, whether a thoroughfare or not or a landing place) to which the public are granted access or have a right to resort or over which they have a right to pass.

11. The gist of the prohibition is the "use" of an external sound amplifier not a component part of a wireless apparatus, whether in a public place or otherwise, without the sanction in writing of the designated authority and in disregard of the conditions imposed on the use thereof. It does not prohibit the use in a place other than a public place of a sound amplifier which is a component part of a wireless apparatus.

12. There can be little doubt that the growing nuisance of blaring loudspeakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure can be said to fall within one or more of the entries in the State List. It must be admitted that amplifiers are instruments of broadcasting and even of communication, and in that view of the matter, they fall within Entry 31 of the Union list. The manufacture, or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus is one matter, but the control of the '*use*' of such apparatus though legitimately owned and possessed, to the detriment of tranquillity, health and comfort of others is quite another. It cannot be said that public health does not demand control of the use of such apparatus by day or by night, or in the vicinity of hospitals or schools, or offices or habited localities. The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of and obligation to others, emerges as a manifest nuisance to them. Nor is it any valid argument to say that the pith and substance of the Act falls within Entry 31 of the Union list, because other loud noises, the result of some other instruments etc., are not equally controlled and prohibited.

13. The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the entry in the Union list, even though the amplifier, the use of which is regulated and controlled is an apparatus for broadcasting or communication.

14. On a view of the Act as a whole, we think that the substance of the legislation is within the powers conferred by entry No. 6 and conceivably entry No. 1 of the State List, and it does not purport to encroach upon the field of entry No. 31, though it incidentally touches upon a matter provided there. The end and purpose of the legislation furnishes the key to connect it with the State List. Our attention was not drawn to any enactment under entry No. 31 of the Union list by which the ownership and possession of amplifiers was burdened with any such regulation or control, and there being thus no question of repugnancy or of an occupied field, we have no hesitation in holding that the Act is fully covered by the first cited entry and conceivably the other in the State List.

15. The Judicial Commissioner's order, with respect, cannot be upheld, and it must be set aside. We allow the appeal and reverse the decision, and we declare the Act in all its parts to be intra vires the State Legislature. As the matter is four years old we do not order a retrial and we record that the State does not, as a result of the reversal of the decision under appeal, propose to prosecute the respondents, and that a statement to this effect was made before us at the hearing.

K.C. Gajapati Narayan Deo v. *State of Orissa*

1954 SCR 1

MUKHERJEA J. - These six appeals arise out of as many applications, presented to the High Court of Orissa, under Article 226 of the Constitution, by the proprietors of certain permanently settled estates within the State of Orissa, challenging the constitutional validity of the legislation known as the Orissa Estates Abolition Act, 1952 (hereinafter called "the Act") and praying for mandatory writs against the State Government restraining them from enforcing the provisions of the Act so far as the estates owned by the petitioners are concerned.

2. The impugned Act was introduced in the Orissa State Legislature on the 17th of January, 1950, and was passed by it on 28th September, 1951. It was reserved by the State Governor for consideration of the President and the President gave his assent on 23rd January, 1952. The Act thus receives the protection of Articles 31(4) and 31(A)of the Constitution though it was not and could not be included in the list of statutes enumerated in the Ninth schedule to the Constitution, as referred to in Article 31(B).

3. The Act, so far as its main features are concerned, follows the pattern of similar statutes passed by the Bihar, Uttar Pradesh and Madhya Pradesh Legislative Assemblies. The primary purpose of the Act is to abolish all zemindary and other proprietary estates and interests in the State of Orissa and after eliminating all the intermediaries, to bring the ryots or the actual occupants of the lands in direct contact with the State Government. It may be convenient here to refer briefly to some of the provisions of the Act which are material for our present purpose. The object of the legislation is fully set out in the Preamble to the Act which discloses the public purpose underlying it. Section 2(*g*) defines an "estate" as meaning any land held by an intermediary and included under one entry in any of the general registers of revenue-paying lands and revenue-free lands prepared and maintained under the law for the time being in force by the Collector of a district. The expression "intermediary" with reference to any estate is then defined, and it means a proprietor, sub-proprietor, landlord, landholder ... thikadar, tenure-holder, under-tenure-holder and includes the holder of inam estate, jagir and maufi tenures and all other interests of similar nature between the ryot and the State. Section 3 of the Act empowers the State Government to declare, by notification, that the estate described in the notification has vested in the State free from all incumbrances. Under Section 4 it is open to the State Government, at any time before issuing such notification, to invite proposals from "intermediaries" for surrender of their estates and if such proposals are accepted, the surrendered estate shall vest in the Government as soon as the agreement embodying the terms of surrender is executed. The consequences of vesting either by issue of notification or as a result of surrender are described in detail in Section 5 of the Act. It would be sufficient for our present purpose to state that the primary consequence is that all lands comprised in the estate including communal lands, non-ryoti lands, waste lands, trees, orchards, pasture lands, forests, mines and minerals, quarries, rivers and streams, tanks, water channels, fisheries, ferries, hats and bazars, and buildings or structures together with the land on which they stand shall, subject to the other provisions of the Act, vest absolutely in the State Government free from all incumbrances and the intermediary shall cease to have any interest in them. Under Section 6, the intermediary is allowed to keep for himself his homestead and buildings and structures used for residential or trading purposes such as golas,

factories, mills etc. but buildings used for office or estate purposes would vest in the Government. Section 7 provides that an intermediary will be entitled to retain all lands used for agricultural or horticultural purposes which are in his khas possession at the date of vesting. Private lands of the intermediary, which were held by temporary tenants under him, would however vest in the Government and the temporary tenants would be deemed to be tenants under the Government, except where the intermediary himself holds less than 33 acres of land in any capacity. As regards the compensation to be paid for the compulsory acquisition of the estates, the principle adopted is that the amount of compensation would be calculated at a certain number of years' purchase of the net annual income of the estate during the previous agricultural year, that is to say, the year immediately preceding that in which the date of vesting falls. First of all, the gross asset is to be ascertained and by gross asset is meant the aggregate of the rents including all cesses payable in respect of the estate. From the gross asset certain deductions are made in order to arrive at the net income. These deductions include land revenue or rent including cesses payable to the State Government, the agricultural income tax payable in the previous year, any sum payable as chowkidary or municipal tax in respect of the buildings taken over as office or estate buildings and also costs of management fixed in accordance with a sliding percentage scale with reference to the gross income. Any other sum payable as income tax in respect of any other kind of income derived from the estate would also be included in the deductions. The amount of compensation thus determined is payable in 30 annual equated instalments commencing from the date of vesting and an option is given to the State Government to make full payment at any time. These in brief are the main features of the Act.

4. There was a fairly large number of grounds put forward on behalf of the appellants before the High Court in assailing the validity of the Act. It is to be remembered that the question of the constitutional validity of three other similar legislative measures passed, respectively, by the Bihar, Uttar Pradesh and Madhya Pradesh Legislative Assemblies had already come for consideration before this Court and this Court had pronounced all of them to be valid with the exception of two very minor provisions in the Bihar Act. In spite of all the previous pronouncements there appears to have been no lack of legal ingenuity to support the present attack upon the Orissa legislation, and as a matter of fact, much of the arguments put forward on behalf of the appellants purported to have been based on the majority judgment of this Court in the Bihar appeals, where two small provisions of the Bihar Act were held to be unconstitutional.

5. The arguments advanced on behalf of the appellants before the High Court have been classified by the learned Chief Justice in his judgment under three separate heads. In the first place, there were contentions raised, attacking the validity of the Act as a whole. In the second place, the validity of the Act was challenged as far as it related to certain specified items of property included in an estate e.g. private lands, buildings, waste lands etc. Thirdly, the challenge was as to the validity of certain provisions in the Act relating to determination of compensation payable to the intermediary, with reference either to the calculation of the gross assets or the deductions to be made therefrom for the purpose of arriving at the net income.

6. The learned Chief Justice in a most elaborate judgment discussed all the points raised by the appellants and negatived them all except that the objections with regard to some of the matters were kept open. Mr Justice Narasimham, the other learned Judge in the Bench, while

agreeing with the Chief Justice as to other points, expressed, in a separate judgment of his own, his suspicion about the bona fides of the Orissa Agricultural Income Tax (Second Amendment) Act, 1950, and he was inclined to hold that though ostensibly it was a taxation measure, it was in substance nothing else but a colourable device to cut down drastically the income of the intermediaries so as to facilitate further reduction of their net income as provided in clause (*b*) of Section 27(1) of the Act. He, however, did not dissent from the final decision arrived at by the Chief Justice, the ground assigned being that whenever there is any doubt regarding the constitutionality of an enactment, the doubt should always go in favour of the legislature. The result was that with the exception of the few matters that were kept open, all the petitions were dismissed. The proprietors have now come before us on appeal on the strength of certificates granted by the High Court under Articles 132 and 133 of the Constitution as well as under Section 110 of the Code of Civil Procedure.

7. No contention has been pressed before us on behalf of the appellants attacking the constitutional validity of the Act as a whole. The arguments that have been advanced by the learned counsel for the appellants can be conveniently divided under three heads: In the first place, there has been an attack on the validity of the provisions of two other statutes, namely, the Orissa Agricultural Income Tax (Amendment) Act, 1950, and the Madras Estates Land (Amendment) Act, 1947, insofar as they affect the calculation of the net income of an estate for the purpose of determining the compensation payable under the Act. In the second place, the provisions of the Act have been challenged as unconstitutional to the extent that they are applicable to private lands and buildings of the proprietors, both of which vest as parts of the estate, under Section 5 of the Act. Lastly, the manner of payment of compensation money, as laid down in Section 37 of the Act, has been challenged as invalid and unconstitutional.

8. Under the first head the appellants' main contention relates to the validity of the Orissa Agricultural Income Tax (Amendment) Act, 1950. This Act, it is said, is not a bona fide taxation statute at all, but is a colourable piece of legislation, the real object of which is to reduce, by artificial means, the net income of the intermediaries, so that the compensation payable to them under the Act might be kept down to as low a figure as possible. To appreciate this contention of the appellants, it would be necessary to narrate a few relevant facts. Under Section 27(1)(*b*) of the Act, any sum payable in respect of an estate as agricultural income tax, for the previous agricultural year, constitutes an item of deduction which has to be deducted from the gross asset of an estate for the purpose of arriving at its net income, on the basis of which the amount of compensation is to be determined. The Estates Abolition Bill was published in the local gazette on 3rd January, 1950. As has been said already, it was introduced in the Orissa Legislative Assembly on the 17th of January following and it was passed on 28th September, 1951. There was an Agricultural Income Tax Act in force in the State of Orissa from the year 1947 which provided a progressive scale of taxation on agricultural income, the highest rate of tax being 3 annas in the rupee on a slab of over Rs 30,000 received as agricultural income. On 8th January, 1950, that is to say, five days after the publication of the Abolition Bill, an amended agricultural income tax bill was published in the Official Gazette. At that time Mr H.K. Mahtab was the Chief Minister of Orissa and this bill was sponsored by him. The changes proposed by this Amendment Act were not very material. The highest rate was enhanced from 3 annas to 4 annas in the rupee and the highest slab was reduced from Rs 30,000 to Rs 20,000. For some reason or other, however, this bill was dropped and a revised bill was published in the local gazette on 22nd July, 1950, and it passed into law on 10th of August following. This new Act admittedly

made changes of a very drastic character regarding agricultural income tax. The rate of taxation was greatly enhanced for slabs of agricultural income above Rs 15,000 and for the highest slab the rate prescribed was as much as 12 annas 6 pies in the rupee. It was stated in the statement of objects and reasons that the enhanced agricultural income was necessary for financing various development schemes in the State. This, it is said, was wholly untrue for it could not be disputed that almost all the persons who came within the higher income group and were primarily affected by the enhanced rates were intermediaries under the Estates Abolition Bill which was at that time before the Select Committee and was expected to become law very soon, and as the legislature had already definitely decided to extinguish this class of intermediaries, it was absurd to say that an increased taxation upon them was necessary for the development schemes. The object of this amended legislation, according to the appellants, was totally different from what it ostensibly purported to be and the object was nothing else but to use it as a means of effecting a drastic reduction in the income of the intermediaries, so that the compensation payable to them may be reduced almost to nothing. This change in the provisions of the Agricultural Income Tax Bill, it is further pointed out, synchronized with a change in the Ministry of the Orissa State. The original amended bill was introduced by the then Chief Minister, Mr H.K. Mahtab, who was in favour of allowing suitable compensation to expropriated zemindars; but his successor, who introduced the revised bill, was said to be a champion of the abolition of zemindary rights with little or no compensation to the proprietors. In these circumstances, the argument of the learned counsel is that the agricultural income tax legislation being really not a taxation statute but a mere device for serving another collateral purpose constitutes a fraud on the Constitution and as such is invalid, either in its entirety, or at any rate to the extent that it affects the estate abolition scheme. We have been referred to a number of decisions on this point where the doctrine of colourable legislation came up for discussion before courts of law; and stress is laid primarily upon the pronouncement of the majority of this Court in the case of *State of* ***Bihar*** **v.** ***Maharaja Kameshwar Singh*** [1952 SCR 889] which held two provisions of the Bihar Land Reforms Act, namely, Sections 4(*b*) and 23(*f*) to be unconstitutional on the ground, among others, that these provisions constituted a fraud on the Constitution. The fact that the provisions in the amended Agricultural Income Tax Act were embodied in a separate statute and not expressly made a part of the Abolition Act itself should not, it is argued, make any difference in principle. As the question is of some importance and is likely to be debated in similar cases in future, it would be necessary to examine the precise scope and meaning of what is known ordinarily as the doctrine of "colourable legislation".

9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power [Vide *Cooley's Constitutional Limitations*, Vol 1 p 379]. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are

limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in ***Attorney-General for Ontario* v. *Reciprocal Insurers*** [1924 AC 328 at 337]:

> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avows on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction; yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires [See *Lefroy on Canadian Constitution*, page 75].

10. In support of his contention that the Orissa Agricultural Income Tax (Amendment) Act, 1950 is a colourable piece of legislation and hence ultra vires the Constitution, the learned counsel for the appellants, as said above, placed considerable reliance upon the majority decision of this Court in the case of ***State of Bihar* v. *Sir Kameshwar Singh*** [1952 SCR 889] where two clauses of the Bihar Land Reform Act were held to be unconstitutional as being colourable exercise of legislative power under Entry 42 of List III of Schedule VII of the Constitution. The learned counsel has also referred us, in this connection, to a number of cases, mostly of the Judicial Committee of the Privy Council, where the doctrine of colourable legislation came up for consideration in relation to certain enactments of the Canadian and Australian Legislatures. The principles laid down in these decisions do appear to us to be fairly well settled, but we do not think that the appellants in these appeals could derive much assistance from them.

11. In the cases from Canada, the question invariably has been whether the Dominion Parliament has, under colour of general legislation, attempted to deal with what are merely

provincial matters, or conversely whether the Provincial Legislatures under the pretence of legislating on say of the matters enumerated in Section 92 of the British North America Act really legislated on a matter assigned to the Dominion Parliament. In the case of ***Union Colliery Company of British Columbia Ltd.* v. *Bryden*** [1899 AC 580] the question raised was whether Section 4 of the British Columbian Coal Mines Regulation Act, 1890, which prohibited Chinamen of full age from employment in underground coal working, was, in that respect, ultra vires of the Provincial Legislature. The question was answered in the affirmative. It was held that if it was regarded merely as a coal working regulation, it could certainly come within Section 92, sub-section (10) or (13), of the British North America Act; but its exclusive application to Chinamen, who were aliens or naturalised subjects, would be a statutory prohibition which was within the exclusive authority of the Dominion Parliament, conferred by Section 91 sub-section (25) of the Act. As the Judicial Committee themselves explained in a later case [Vide ***Cunningham* v. *Tomeyhomma***, 1903 AC 151, 157] the regulations in the British Columbian Act "were not really aimed at the regulation of coal mines at all, but were in truth a device to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and in effect to prohibit their continued residence in that province since it prohibited their earning their living in that province".

12. On the other hand, in ***Re Insurance Act of Canada*** [1932 AC 41] the Privy Council had to deal with the constitutionality of Sections 11 and 12 of the Insurance Act of Canada passed by the Dominion Parliament under which it was declared to be unlawful for any Canadian company or an alien, whether a natural person or a foreign company to carry on insurance business except under a licence from the Minister, granted pursuant to the provisions of the Act. The question was whether a foreign or British insurer licensed under the Quebec Insurance Act was entitled to carry on business within that Province without taking out a licence under the Dominion Act? It was held that Sections 11 and 12 of the Canadian Insurance Act, which required the foreign insurers to be licensed, were ultra vires, since in the guise of legislation as to aliens and immigration — matters admittedly within the Dominion authority - the Dominion legislature was seeking to intermeddle with the conduct of insurance business which was a subject exclusively within the provincial authority. The whole law on this point was thus summed up by Lord Maugham in ***Attorney-General for Alberta* v. *Attorney-General for Canada*** [1939 AC 117]:

> "It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive power of the other."

13. The same principle has been applied where the question was not of one legislature encroaching upon the exclusive field of another but of itself violating any constitutional guarantee or prohibition. As an illustration of this type of cases we may refer to the Australian case of ***Moran* v. *Deputy Commissioner of Taxation for New South Wales*** [1940 AC 838]. What happened in that case was that in pursuance of a joint Commonwealth and States scheme to ensure to wheat growers in all the Australian States "a payable price for their produce" a number of Acts were passed by the Commonwealth Parliament imposing taxes on flour sold in Australia for home consumption, so as to provide a fund available for payment of moneys to wheat growers. Besides a number of taxing statutes, which imposed tax on flour, the Wheat Industry Assistance Act 53 of 1938 provided for a fund into which the taxes were to be paid and of which certain payments were to be made to the wheat growers in accordance with State legislation. In the case of Tasmania where the quantity of wheat grown was

relatively small but the taxes were imposed as in the other States, it was agreed as a part of the scheme and was provided by Section 14 of the Wheat Industry Assistance Act that a special grant should be made to Tasmania, not subject to any federal statutory conditions but intended to be applied by the Government of Tasmania, in paying back to Tasmanian millers, nearly the whole of the flour tax paid by them and provision to give effect to that purpose was made by the Flour Tax Relief Act 40 of 1938 of the State of Tasmania. The contention raised was that these Acts were a part of a scheme of taxation operating and intended to operate by way of discriminating between States or parts of States and as such were contrary to the provisions of Section 51(*ii*) of the Commonwealth Australian Constitution Act. The matter came up for consideration before a full Court of the High Court of Australia and the majority of the Judges came to the conclusion that such legislation was protected by Section 96 of the Constitution, which empowered the Parliament of the Commonwealth to grant financial assistance to any State on such terms and conditions as the Parliament thought fit. Evatt, J. in a separate judgment dissented from the view and held that under the guise of executing the powers under Section 96 of the Constitution, the legislature had really violated the constitutional prohibition laid down in Section 51(*ii*) of the Constitution. There was an appeal taken to the Privy Council. The Privy Council affirmed the judgment of the majority but pointed out that "cases may be imagined in which a purported exercise of the power to grant financial assistance under Section 96 would be merely colourable. Under the guise and pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be ultra vires the Commonwealth Parliament".

14. We will now come to the decision of the majority of this Court regarding two clauses in the Bihar Land Reforms Act which seems to be the sheet anchor of the appellants' case[13]. In that case the provisions of Sections 23(*f*) and 4(*b*) of the Bihar Land Reforms Act were held to be invalid by the majority of this Court not on the ground that, in legislating on these topics, the State Legislature had encroached upon the exclusive field of the Central Legislature, but that the subject-matter of legislation did not at all come within the ambit of Item 42 of List III, Schedule VII of the Constitution under which it purported to have been enacted. As these sections did not come within Entry 42, the consequence was that half of the arrears of rent as well as 12½% of the gross assets of an estate were taken away, otherwise than by authority of law and therefore there was a violation of fundamental rights guaranteed by Article 31(1) of the Constitution. This was a form of colourable legislation which made these provisions ultra vires the Constitution.

15. It may be stated here that Section 23 of the Bihar Land Reforms Act lays down the method of computing the net income of an estate or a tenure which is the subject-matter of acquisition under the Act. In arriving at the net income certain deductions are to be made from the gross asset and the deductions include, among others, revenue, cess and agricultural income tax payable in respect of the properties and also the costs of management. Section 23(*f*) provided another item of deduction under which a sum representing 4 to 12½% of the gross asset of an estate was to be deducted as "costs of works for benefit to the raiyat". The other provision contained in Section 4(*b*) provides that all arrears of rent which had already accrued due to the landlord prior to the date of vesting, shall vest in the State and the latter would pay only 50% of these arrears to the landlord. Both these provisions purported to have been enacted under Entry 42 of List III Schedule VII of the Constitution and that entry speaks of "principles on which compensation for property acquired is to be determined and the form

and manner in which that compensation is to be given". It was held in the ***Bihar*** case [Vide ***State of Bihar* v. *Kameshwar Singh***, 1952 SCR 889] by the majority of this Court that the item of deduction provided for in Section 23(*f*) was a fictitious item wholly unrelated to facts. There was no definable pre-existing liability on the part of the landlord to execute works of any kind for the benefit of the raiyat. What was attempted to be done, therefore, was to bring within the scope of the legislation something which not being existent at all could not have conceivable relation to any principle of compensation. This was, therefore, held to be a colourable piece of legislation which though purporting to have been made under Entry 42 could not factually come within its scope.

16. The same principle was held applicable in regard to acquisition of arrears of rent which had become due to the landlord prior to the date of vesting. The net result of this provision was that the State Government was given the power to appropriate to itself half of the arrears of rent due to the landlord without giving him any compensation whatsoever. Taking the whole and returning the half meant nothing more or less than taking the half without any return and this, it was held, could not be regarded as a principle of compensation in any sense of the word. It was held definitely by one of the learned Judges, who constituted the majority, that Item 42 of List III was nothing but the description of a legislative head and in deciding the competency of the legislation under this entry, the court is not concerned with the justice or propriety of the principles upon which the assessment of compensation is directed to be made; but it must be a principle of compensation, no matter whether it was just or unjust and there could be no principle of compensation based upon something which was unrelated to facts. It may be mentioned here that two of the three learned Judges who formed the majority did base their decision regarding the invalidity of the provision, relating to arrears of rent, mainly on the ground that there was no public purpose behind such acquisition. It was held by these Judges that the scope of Article 31(4) is limited to the express provisions of Article 31(2) and although the court could not examine the adequacy of the provision for compensation contained in any law which came within the purview of Article 31(4), yet that clause did not in any way debar the court from considering whether the acquisition was for any public purpose. This view was not taken by the majority of the court and Mr Narasaraju, who argued the appeals before us, did not very properly pursue that line of reasoning. This being the position, the question now arises whether the majority decision of this Court with regard to the two provisions of the Bihar Act is really of any assistance to the appellants in the cases before us. In our opinion, the question has got to be answered in the negative.

17. In the first place, the line of reasoning underlying the majority decision in the ***Bihar*** case cannot possibly have any application to the facts of the present case. The Orissa Agricultural Income Tax (Amendment) Act, 1950 is certainly a legislation on "taxing of agricultural income" as described in Entry 46 of List II of the Seventh Schedule. The State Legislature had undoubted competency to legislate on agricultural income tax and the substance of the amended legislation of 1950 is that it purports to increase the existing rates of agricultural income tax, the highest rate being fixed at 12 annas 6 pies in the rupee. This may be unjust or inequitable, but that does not affect the competency of the legislature. It cannot be said, as was said in the Bihar case, that the legislation purported to be based on something which was unrelated to facts and did not exist at all. Both in form and in substance the Act was an agricultural income tax legislation and agricultural income tax is certainly a relevant item of deduction in the computation of the net income of an estate and is not unrelated to it

as Item 23(*f*) of the Bihar Act was held to be. If under the existing law the agricultural income tax was payable at a certain rate and without any amendment or change in the law, it was provided in the Estates Abolition Act that agricultural income tax should be deducted from the gross asset at a higher rate than what was payable under law, it might have been possible to argue that there being no pre-existing liability of this character it was really a non-existing thing and could not be an ingredient in the assessment of compensation. But here the Agricultural Income Tax (Amendment) Act was passed in August 1950. It came into force immediately thereafter and agricultural income tax was realised on the basis of the amended Act in the following year. It was, therefore, an existing liability in 1952, when the Estates Abolition Act came into force. It may be that many of the people belonging to the higher income group did disappear as a result of the Estates Abolition Act, but even then there were people still existing upon whom the Act could operate.

18. The contention of Mr Narasaraju really is that though apparently it purported to be a taxation statute coming under Entry 46 of List II, really and in substance it was not so. It was introduced under the guise of a taxation statute with a view to accomplish an ulterior purpose, namely, to inflate the deductions for the purpose of valuing an estate so that the compensation payable in respect of it might be as small as possible. Assuming that it is so, still it cannot be regarded as a colourable legislation in accordance with the principles indicated above, unless the ulterior purpose which it is intended to serve is something which lies beyond the powers of the legislature to legislate upon. The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid. Under Entry 42 of List III which is a mere head of legislative power the legislature can adopt any principle of compensation in respect to properties compulsorily acquired. Whether the deductions are large or small, inflated or deflated they do not affect the constitutionality of a legislation under this entry. The only restrictions on this power, as has been explained by this Court in the earlier cases, are those mentioned in Article 31(2) of the Constitution and if in the circumstances of a particular case the provision of Article 31(4) is attracted to a legislation, no objection as to the amount or adequacy of the compensation can at all be raised. The fact that the deductions are unjust, exorbitant or improper does not make the legislation invalid, unless it is shown to be based on something which is unrelated to facts. As we have already stated, the question of motive does not really arise in such cases and one of the learned Judges of the High Court in our opinion pursued a wrong line of enquiry in trying to find out what actually the motives were which impelled the legislature to act in this manner. It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation or that it lies within the exclusive field of another legislature. The result is that in our opinion the Orissa Agricultural Income Tax (Amendment) Act, 1950 could not be held to be a piece of colourable legislation, and as such invalid. The first point raised on behalf of the appellants must therefore fail.

19. The other point raised by the learned counsel for the appellants under the first head of his arguments relates to the validity of certain provisions of the Madras Estates Land (Orissa Amendment) Act, 1947. This argument is applicable only to those estates which are situated in what is known as ex-Madras area, that is to say which formerly belonged to the State of Madras but became a part of Orissa from 1st April, 1936. The law regulating the relation of

landlord and tenant in these areas is contained in the Madras Estates Land Act, 1908 and this Act was amended with reference to the areas situated in the State of Orissa by the amending Act 19 of 1947. The provisions in the amended Act, to which objections have been taken by the learned counsel for the appellants, relate to settlement and reduction of rents payable by raiyats. Under Section 168 of the Madras Estates Land Act, settlement of rents in any village or area for which a record of rights has been published can be made either on the application of the landholder or the raiyats. On such application being made, the Provincial Government may at any time direct the Collector to settle fair and equitable rents in respect of the lands situated therein. Sub-section (2) of Section 168 expressly provides that in settling rents under this section, the Collector shall presume, until the contrary is proved, that the existing rate of rent is fair and equitable and he would further have regard to the provisions of this Act for determining the rates of rent payable by raiyats. Section 177 provides that when any rent is settled under this chapter, it can neither be enhanced nor reduced for a period of 20 years, except on grounds specified in Sections 30 and 38 of the Act respectively. The amending Act of 1947 introduced certain changes in this law. A new section, namely, Section 168-A was introduced and a further provision was added to Section 177 as sub-section (2) of that section, the original section being renumbered as sub-section (1). Section 168-A of the amended Act runs as follows:

> "(1) Notwithstanding anything contained in this Act the Provincial Government may, on being satisfied that the exercise of the powers hereinafter mentioned is necessary in the interests of public order or of the local welfare or that the rates of rent payable in money or in kind whether commuted, settled or otherwise fixed are unfair or inequitable invest the Collector with the following powers:
>
> (*a*) Power to settle fair and equitable rents in cash;
>
> (*b*) Power, when settling rents to reduce rents if in the opinion of the Collector the continuance of the existing rents would on any ground, whether specified in this Act or not, be unfair and inequitable.
>
> (2)The power given under this section may be made exercisable within specified areas either generally or with reference to specified cases or class of cases."
>
> Sub-section (2) which has been added to Section 177 stands thus:
>
> "2. (*a*)Notwithstanding anything in sub-section (1) where rent is settled under the provisions of Section 168-A, the Provincial Government may either retrospectively or prospectively prescribe the date on which such settlement shall take effect. In giving retrospective effect the Provincial Government may, at their discretion, direct that the rent so settled shall take effect from a date prior to the commencement of the Madras Estates Land (Orissa Amendment) Act, 1947."

20. The appellants' contention is that by these amended provisions the Provincial Government was authorised to invest the Collector with power to settle and reduce rents, in any way he liked, unfettered by any of the Rules and principles laid down in the Act and the Provincial Government was also at liberty to direct that the reduction of rents should take effect retrospectively, even with reference to a period for which rents had already been paid by the tenant. Under Section 26 of the Orissa Estates Abolition Act, the gross asset of an estate is to be calculated on the basis of rents payable by raiyats for the previous agricultural year. According to the appellants, the State Government made use of the provisions of the amended Madras Estates Land (Orissa Amendment) Act to reduce arbitrarily the rents

payable by raiyats and further to make the reduction take effect retrospectively, so that the diminished rents could be reckoned as rents for the previous year in accordance with the provision of Section 26 of the Estates Abolition Act and thus deflate the basis upon which the gross asset of an estate was to be computed.

21. It is conceded by the learned counsel for the appellants that the amendments in the Madras Estates Land Act are no part of the Estates Abolition Act of Orissa and there is no question of any colourable exercise of legislative powers in regard to the enactment of these provisions. The legislation, however, has been challenged, as unconstitutional, on two grounds. First of all, it is urged that by the amended sections mentioned above, there has been an improper delegation of legislative powers by the legislature to the Provincial Government, the latter being virtually empowered to repeal existing laws which govern the relations between landlord and tenant in those areas. The other ground put forward is that these provisions offend against the equal protection clause embodied in Article 14 of the Constitution. It is pointed out that the Provincial Government is given unfettered discretion to choose the particular areas where the settlement of rent is to be made. The Government has also absolute power to direct that the reduced rents should take effect either prospectively or retrospectively in particular cases as they deem proper. It is argued that there being no principle of classification indicated in these legislative provisions and the discretion vested in the Government being an uncontrolled and unfettered discretion guided by no legislative policy, the provisions are void as repugnant to Article 14 of the Constitution.

22. In reply to these arguments it has been contended by the learned Attorney-General that, apart from the fact as to whether the contentions are well-founded or not, they are not relevant for purposes of the present case. The arguments put forward by the appellants are not grounds of attack on the validity of the Estates Abolition Act, which is the subject-matter of dispute in the present case, and it is not suggested that the provisions of the Estates Abolition Act relating to the computation of gross asset on the basis of rents payable by raiyats is in any way illegal. The grievance of the appellants in substance is that the machinery of the amended Act is being utilised by the Government for the purpose of deflating the gross asset of an estate. We agree with the learned Attorney-General that if the appellants are right in their contention, they can raise these objections if and when the gross assets are sought to be computed on the basis of the rents settled under the above provisions. If the provisions are void, the rents settled in pursuance thereof could not legitimately form the basis of the valuation of the estate under the Estates Abolition Act and it might be open to the appellants then to say that for purposes of Section 26 of the Estates Abolition Act, the rents payable for the previous year would be the rents settled under the Madras Estates Land Act, as it stood unamended before 1947. The learned counsel for the appellants eventually agreed with the views of the Attorney-General on this point and with the consent of both sides we decided to leave these questions open. They should not be deemed to have been decided in these cases.

23. The appellants' second head of arguments relates to two items of property, namely, buildings and private lands of the intermediary, which, along with other interests, vest in the State under Section 5 of the Act.

24. There are different provisions in the Act in regard to different classes of buildings. Firstly, dwelling houses used by an intermediary for purposes of residence or for commercial or trading purposes remain with him on the footing of his being a tenant under the State in respect to the sites thereof and paying such fair and equitable rent as might be determined in

accordance with the provisions of the Act. In the second place, buildings used primarily as office or kutchery for management of the estates or for collection of rents or as rest houses for estate servants or as golas for storing of rents in kind vest in the State and the owner is allowed compensation in respect thereof. In addition to these, there are certain special provisions in the Act relating to buildings constructed after 1st January, 1946, and used for residential or trading purposes, in respect to which the question of bona fides as to its construction and use might be raised and investigated by the Collector. There are separate provisions also in respect to buildings constructed before 1st January, 1946, which were not in possession of the intermediary at the date of coming into force of the Act. The questions arising in regard to this class of cases have been left open by the High Court and we are not concerned with them in the present appeals. No objection has been taken by the appellants in respect to the provisions of the Act relating to buildings used for residential or trade purposes. Their objections relate only to the building used for estate or office purposes which vest in the State Government under the provisions of the Act.

25. In regard to these provisions, it is urged primarily that the buildings raised on lands do not necessarily become parts of the land under Indian law and the legislature, therefore, was wrong in treating them as parts of the estate for purposes of acquisition. This contention, we are afraid, raises an unnecessary issue with which we are not at all concerned in the present cases. Assuming that in India there is no absolute rule of law that whatever is affixed to or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself, there is nothing in law which prevents the State Legislature from providing as a part of the estates abolition scheme that buildings, lying within the ambit of an estate and used primarily for management or administration of the estate, would vest in the Government as appurtenances to the estate itself. This is merely ancillary to the acquisition of an estate and forms an integral part of the abolition scheme. Such acquisition would come within Article 31(2) of the Constitution and if the conditions laid down in clause (4) of that article are complied with, it would certainly attract the protection afforded by that clause. Compensation has been provided for these buildings in Section 26(2)(*iii*) of the Act and the annual rent of these buildings determined in the prescribed manner constitutes one of the elements for computation of the gross asset of an estate. The contention of the appellants eventually narrows down to this that the effect of treating the annual valuation of the buildings as part of the gross asset of the estate in its entirety, leads to unjust results, for if these buildings were treated as separate properties, the intermediaries could have got compensation on a much higher scale in accordance with slab system adopted in the Act. To this objection, two answers can be given. In the first place, if these buildings are really appurtenant to the estate, they can certainly be valued as parts of the estate itself. In the second place, even if the compensation provided for the acquisitions of the buildings is not just and proper, the provision of Article 31(4) of the Constitution would be a complete answer to such acquisition.

26. As regards the private lands of the proprietor, the appellants have taken strong exception to the provisions of the Act so far as they relate to private lands in possession of temporary tenants. In law these lands are in possession of the proprietor and the temporary tenants cannot acquire occupancy rights therein, yet they vest, under the Act, in the State Government on the acquisition of an estate, the only exception being made in cases of small landholders who do not hold more than 33 acres of land in any capacity. Section 8(1) of the Act gives the temporary tenants the right to hold the lands in their occupation under the State Government on the same terms as they held them under the proprietor. Under the Orissa

Tenants Protection Act, which is a temporary Act, the landholder is not entitled to get contractual or competitive rents from these temporary tenants in possession of his private lands and the rent is fixed at two-fifths of the gross produce. It is on the basis of this produce rent which is included in the computation of the gross asset of an estate under Section 26 of the Act, that the landholder gets compensation in respect to the private lands in occupation of temporary tenants. The appellants' main contention is that although in these lands both the *malevaram* and *kudivaram* rights, that is to say, both the proprietor's as well as the raiyat's interests are united in the landholder, the provisions of the Act indicated above, have given no compensation whatsoever for the *kudivaram* or the tenant's right and in substance this interest has been confiscated without any return. This, in our opinion, is a wrong way of looking at the provisions for compensation made in the Act. The Orissa Act, like similar Acts passed by the legislatures of other States, provides for payment of compensation on the basis of the net income of the whole estate. One result of the adoption of this principle, undoubtedly is, that no compensation is allowed in respect of potential values of properties; and those parts of an estate which do not fetch any income have practically been ignored. There is no doubt that the Act does not give anything like a fair or market price of the properties acquired and the appellants may be right in their contention that the compensation allowed is inadequate and improper but that does not affect the constitutionality of the provisions. In the first place, no question of inadequacy of compensation can be raised in view of the provision of Article 31(4) of the Constitution and it cannot also be suggested that the rule for payment of compensation on rental basis is outside the ambit of Entry 42 of List III. This point is concluded by the earlier decision of this Court in ***Raja Suriya Pal Singh* v.** ***State of U.P.*** [1952 SCR 1056] and is not open to further discussion. Mr Narasaraju is not right in saying that the compensation for the private lands in possession of temporary tenants has been given only for the landlord's interest in these properties and nothing has been given in lieu of the tenant's interest. The entire interest of the proprietor in these lands has been acquired and the compensation payable for the whole interest has been assessed on the basis of the net income of the property as represented by the share of the produce payable by the temporary tenants to the landlord. It is true that the Orissa Tenants Protection Act is a temporary statute, but whether or not it is renewed in future, the rent fixed by it has been taken only as the measure of the income derivable from these properties at the date of acquisition.

27. Mr Narasaraju further argues that his clients are not precluded from raising any objection on the ground of inadequacy of compensation in regard to these private lands by reason of Article 31(4) of the Constitution as the provision of that article is not attracted to the facts of the present case. What is said is that the original Estates Abolition Bill, which was pending before the Orissa Legislature at the time when the Constitution came into force, did not contain any provision that the private lands of the proprietor in occupation of temporary tenants would also vest in the State. This provision was subsequently introduced by way of amendment during the progress of the bill and after the Constitution came into force. It is argued, therefore, that this provision is not protected by Article 31(4). The contention seems to us to be manifestly untenable. Article 31(4) is worded as follows:

> "If any bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2)."

Thus it is necessary first of all that the bill, which ultimately becomes law, should be pending before the State Legislature at the time of the coming into force of the Constitution. That Bill must be passed by the Legislature and then receive the assent of the President. It is the law to which the assent of the President is given that is protected from any attack on the ground of non-compliance with the provisions of clause (2) of Article 31. The fallacy in the reasoning of the learned counsel lies in the assumption that the Bill has got to be passed in its original shape without any change whatsoever, before the provision of clause (4) of Article 31 could be attracted. There is no warrant for such assumption in the language of the clause. The expression "passed by such Legislature" must mean "passed with or without amendments" in accordance with the normal procedure contemplated by Article 107 of the Constitution. There can be no doubt that all the requirements of Article 31(4) have been complied with in the present case and consequently there is no room for any objection to the legislation on the ground that the compensation provided by it is inadequate.

28. The last contention of the appellants is directed against the provision of the Act laying down the manner of payment of the compensation money. The relevant section is Section 37 and it provides for the payment of compensation together with interest in 30 annual equated instalments leaving it open to the State to make the payment in full at any time prior to the expiration of the period. The validity of this provision has been challenged on the ground that it is a piece of colourable legislation which comes within the principle enunciated by the majority of this Court in the *Bihar case*13 referred to above. It is difficult to appreciate this argument of the learned counsel. Section 37 of the Act contains the legislative provision regarding the form and the manner in which the compensation for acquired properties is to be given and as such it comes within the clear language of Entry 42 of List III, Schedule VII of the Constitution. It is not a legislation on something which is non-existent or unrelated to facts. It cannot also be seriously contended that what Section 37 provides for, is not the giving of compensation but of negativing the right to compensation as the learned counsel seems to suggest. There is no substance in this contention and we have no hesitation in overruling it. The result is that all the points raised by the learned counsel for the appellants fail and the appeals are dismissed.

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Union of India v. *H.S. Dhillon*

AIR 1972 SC 1061

[*Residuary Power of Legislation*]

S. M. SIKRI, C.J. - This appeal is from the judgment of the High Court of Punjab and Haryana in Civil Writ No. 2291 of 1970, which was heard by a Bench of five Judges. Four Judges held that Section 24 of the Finance Act, 1969, in so far as it amended the relevant provisions of the Wealth Tax Act, 1957, was beyond the legislative competence of Parliament. Pandit, J., however, held that the impugned Act was intra vires the legislative powers of Parliament. The High Court accordingly issued a direction to the effect that the Wealth Tax Act, as amended by Finance Act, 1969, in so far as it includes the capital value of the agricultural land for the purposes of computing net wealth, was ultra vires the Constitution of India.

2. We may mention that the majority also held that the impugned Act was not a law with respect to Entry 49, List II of the Seventh Schedule to the Constitution; in other words, it held that this tax was not covered by Entry 49, List II of the Seventh Schedule.

3. The Wealth Tax Act, 1957, was amended by Finance Act, 1969, to include the capital value of agricultural land for the purposes of computing net wealth. "Assets" is defined in Section 2(*c*) to include property of every description, movable or immovable. The exclusions need not be mentioned here as they relate to earlier assessment years. "Net Wealth" is defined in Section 2(*m*) to mean "the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, includes assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owned by the assessee on the valuation date". Other than certain debts which are set out in the definition. "Valuation date" in relation to any year for which the assessment is to be made under this Act is defined in Section *2*(*q*) to mean the last day of the previous year as defined in Section 3 of the Income Tax Act, if an assessment were to be made under this Act for that year. We need not set out the proviso here. Section 3 is the charging section which reads:

> 3. Subject to the other provisions contained in this Act there shall be charged for every assessment year commencing on and from the first day of April, 1957, a tax hereinafter referred to as the "wealth-lax" in respect of the net wealth on the correspondent valuation date of every individual, Hindu Undivided Family and company at the rate or rates specified in the Schedule.

8. The submissions of Mr Setalvad, appearing on behalf of the Union in brief were these: That the impugned Act is not a law with respect to any entry (including Entry 49) in List II, if this is so, it must necessarily fall within the legislative competence of Parliament under Entry 86, read with Entry 97 or Entry 97 by itself read with Art 248 of the Constitution; the words "exclusive of agricultural land" in Entry 86 could not cut down the scope of either Entry 97, List I or Article 248 of the Constitution

9. The submissions of Mr Palkiwala, who appeared on behalf of the respondent in the appeal, and the other counsel for the interveners, in brief, were these: It was the scheme of the

Constitution to give States exclusive powers to legislate in respect of agricultural land, income on agricultural land and taxes thereon; in this context the object and effect of specifically excluding agricultural land from the scope of Entry 86 was also take it out of the ambit of Entry 97 List I and Article 248; the High Court was wrong in holding that the impugned Act was not a law in respect of Entry 49, List II.

10. It was further urged by Mr Setalvad that the proper way of testing the validity of a parliamentary statute under our Constitution was first to see whether the parliamentary legislation was with respect to a matter or tax mentioned in List II, if it was not, no other question would arise. The learned counsel for the respondent contended that this manner of enquiry had not been even hinted in any of the decisions of the Court during the last 20 years of its existence and there must accordingly be something wrong with this test. He urged that in so far as this test is derived from the Canadian decisions, the Canadian Constitution is very different and those decisions ought not to be followed here and applied to our Constitution.

11. It seems to us that the best way of dealing with the question of the validity of the impugned Act with the contentions of the parties is to ask ourselves two questions:

first is the impugned Act legislation with respect to Entry 49, List II and
secondly if it is not, is it beyond the legislative competence of Parliament.

13. It seems to us unthinkable that the Constitution-makers, while creating a sovereign democratic republic, withheld certain matters or taxes beyond the legislative competency of the Legislatures in this country either legislating singly or jointly. The language of the relevant articles on the contrary is quite clear that this was not the intention of the Constituent Assembly. Chapter I of Part XI of the Constitution deals with "Distribution of Legislative powers".

14. Reading Article 246 with the three lists in the Seventh Schedule, it is quite clear that Parliament has exclusive power to make laws with respect to all the matters enumerated in List I and this notwithstanding anything in clauses (2) and (3) of Article 246. The State Legislatures have exclusive powers to make laws with respect to any of the matters enumerated in List'11, but this is subject to clauses (1) and (2) of Article 246. The object of this subjection is to make Parliamentary legislation on matters in Lists I and III paramount. Under clause (4) of Article 246 Parliament is competent also to legislate on a matter enumerated in State List for any part of the territory of India not included in a State. Article 248 gives the residuary powers of legislation to the Union Parliament.

15. This scheme of distribution of legislative power has been derived from the Government of India Act, 1935, but in one respect there is a great deal of difference, and it seems to us that this makes the scheme different in so far as the present controversy is concerned. Under the Government of India Act, the residuary powers were not given either to the Central Legislature or to the Provincial Legislatures. The reason for this was given in the Report of the Joint Committee on Indian Constitutional Reform, Volume I, Para 56. The reason was that there was profound cleavage of opinion existing in India with regard to allocation of residuary legislative powers. The result was the enactment of Section 104 of the Government of India Act.

17. There does not seem to be any dispute that the Constitution-makers wanted to give residuary powers of legislation to the Union Parliament. Indeed, this is obvious from Article 248 and Entry 97, List I. But there is a serious dispute about the extent of the residuary power. It is urged on behalf of the respondent that the words "exclusive of agricultural land" in Entry 86, List I, were words of prohibition, prohibiting Parliament from including capital value of agricultural land in any law levying tax on capital value of assets. Regarding Entry 97, List I, it is said that if a matter is specifically excluded from an entry in List I, it is apparent that it was not the intention to include it under Entry 97, List I; the words "exclusive of agricultural land" in Entry 86 by themselves constituted a matter and therefore they could not fall within the words "any other matter" in Entry 97, List I. Our attention was drawn to a number of entries in List I where certain items have been excluded from List I. For example, in Entry 82, taxes on agricultural income have been excluded from the ambit of "taxes on income", in Entry 84 there is exclusion of duties of excise on alcoholic liquors for human consumption and on opium, Indian hemp and other narcotic drugs and narcotics; in Entry 86, agricultural land has been excluded from the field of taxes on the capital value of the assets; in Entry 87, agricultural land has again been excluded from the Union Estate duty in respect of property; and in Entry 88, agricultural land has been further excluded from the incidence of duties in respect of succession to property. It was urged that the object of these exclusions was to completely deny Parliament competence to legislate on these excluded matters.

18. It will be noticed that all the matters and taxes which have been excluded, except taxes on the capital value of agricultural land under Entry 86, List I, fall specifically within one of the entries in List II. While taxes on agricultural income have been excluded from Entry 82, List I, they form Entry 46, List II, duties of excise excluded in Entry 84, List I, have been included in Entry 51, List II; agricultural land exempt in Entry 87 has been incorporated as Entry 48, List II; and similarly, agricultural land exempted from the incidence of duties in respect of succession to property has been made the subject-matter of duties in respect of succession in Entry 47, List II.

19. It seems to us that from this scheme of distribution it cannot be legitimately inferred that taxes on the capital value of agricultural land were designedly excluded from Entry 97, List I. If the residuary subject had ultimately been assigned to the States could it have been seriously argued that vis-a-vis the states the matter of taxes on "Capital value of agricultural land" would have been outside the powers of States? Obviously not, if so, there can be no reason for excluding it from the residuary powers ultimately conferred on Parliament. The content of the residuary power, does not change with its conferment on Parliament.

20. It may be that it was thought that a tax on capital value of agricultural land was included in Entry 49, List II. This contention will be examined a little later. But if on a proper interpretation of Entry 49, List II, read in the light of Entry 86, List I, it is held that tax on the capital value of agricultural land is not included within Entry 49, List II or that the tax imposed by the impugned statute does not fall either in Entry 49, List II or Entry 86, List I, it would be arbitrary to say that it does not fall within Entry 97, List I. We find it impossible to limit the width of Article 248, and Entry 97, List I by the words "exclusive of agricultural land" in Entry 86, List I. We do not read the words "any other matter" in Entry 97 to mean that it has any reference to topics excluded in Entries 1-96; List I. It is quite clear that the

words "any other matter" have reference to matters on which the Parliament has been given power to legislate by the enumerated Entries 1-96, List I and not to matters on which it has not been given power to legislate. The matter in Entry 86, List I, is the whole entry and not the Entry without the words "exclusive of agricultural land". The matter in Entry 86, List I, again is not tax on capital value of assets but the whole entry. We may illustrate this point with reference to some other entries. In Entry 9, List I "Preventive Detention for reasons connected with defence, foreign affairs or the security of India" the matter is not Preventive Detention but the whole entry. Similarly, in Entry 3, List III "Preventive Detention for reasons connected with the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community" the matter is not Preventive Detention but the whole entry. It would be erroneous to say that Entry 9, List I and Entry 3, List III deal with the same matter. Similarly, it would, we think, be erroneous to treat Entry 82, List I (taxes on income other than agricultural income) as containing two matters, one, tax on income, and the other, as "other than agricultural income". It would serve no useful purpose to multiply illustrations.

21**.** It seems to us that the function of Article 246(1), read with Entries 1-96, List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly we do not interpret the words "any other matter" occurring in Entry 97, List I, to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words "any other matter" had to be used because Entry 97, List I follows Entries 1-96, List I. It is true that the field of legislation is demarcated by Entries 1-96, List I, but demarcation does not mean that if Entry 97, List I confers additional powers, we should refuse to give effect to it. At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms On its terms the only question to be asked is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.

22**.** It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field.

24**.** We are compelled to give full effect to Article 248 because we know of no principle of construction by which we can cut down the wide words of a substantive article like Article 248 by the wording of entry in Schedule VII. If the argument of the respondent is accepted Article 248 would have to be re-drafted as follows:

> Parliament has exclusive power to make any law with respect to any matter not mentioned in the Concurrent List or State List, provided it has not been mentioned by way of exclusion in any entry in List I.

We simply have not the power to add a proviso like this to Article 248.

25**.** We must also mention that no material has been placed before us to show that it was ever in the mind of anybody, who had to deal with the making of the Constitution, that it was

the intention to prohibit all the Legislatures in this country from legislating on a particular topic.

31. Two points emerge from this. The Constituent Assembly knew how to prohibit Parliament from levying a tax (see proposed Article 198-A set out above). Secondly, they knew of certain taxes as taxes on the use or consumption of goods. The proposal to include them in the Provincial List was not accepted. Indeed, Shri T.T. Krishnamachari said this about this proposals:

> Sir, one other recommendation of the Expert Committee is, I am afraid, rather mischievous. That is, they have suggested in regard to Sales Tax—which is Item 58 in List 2—that the definition should be enlarged so as to include Use Tax as well, going undoubtedly on the experience of the American State Use Tax which, I think, is a pernicious recommendation. I think, it finds a reflection in the mention of Sales Tax in Item 58 which ought not to be there.

32. If Parliament were to levy a Use Tax, it could hardly be thrown out on the ground that it cannot be included in the residuary powers because the tax was known at the time of the framing of the Constitution. Indeed it does not seem to be a sound principle of interpretation to adopt to first ascertain whether a tax was known to the framers of the Constitution and include it in the residuary powers only if it was not known. This would be an impossible test to apply. Is the Court to ask members of the Constituent Assembly to give evidence or is the Court to presume that they knew of all the possible taxes which were being levied throughout the world? In our view the only safe guide for the interpretation of an article or articles of an organic instrument like our Constitution is the language employed, interpreted not narrowly but fairly in the light of the broad and high purposes of the Constitution, but without doing violence to the language. To interpret Article 248 in the way suggested by the respondent would in our opinion b**e** to do violence to the language.

33. We are, however, glad to find from the following extracts from the debates that our interpretation accords with what was intended.

34. Entry 91 in the draft Constitution corresponds to the present Entry 97, List I. Article 217 of the draft Constitution corresponds to Article 246 of the Constitution. Article 223 of the draft Constitution corresponds to Article 248 of the Constitution.

35. While dealing with Entry 91, List I of the draft Constitution, Sardar Hukam Singh moved the following amendments:

"That in Entry 91 of List I, the word 'other' be deleted."

36. Extracts from the debates on the proposed amendment are reproduced below:

Sardar Hukam Singh (***Constituent Assembly Debates***, Volume 9, page 854):

> The object of this Entry 91 is, whatever is not included in Lists II and III must be deemed to have been included in this list, I feel that it would be said in very simple words, if the word 'other' were omitted, and then there would be no need for this list absolutely. Ultimately, it comes to this that whatever is not covered by Lists II and III is all embraced in the Union List. This could be said in very simple words and we need not have taken all this trouble which we have taken.

37. Mr Naziruddin Ahmad (***Constituent Assembly Debates***, Volume 9, page 855):

Mr President, Sir, I do not wish to oppose Entry 91. It is too late to do it, but I should submit that the moment we adopted Entry 91, it would involve serious redrafting of certain articles and entries. Under Article 217 we have stated in substance that entries in List I will belong to Union, List II to States and List III common to both. That was the original arrangement under which we started. We took the scheme from the Government of India Act. When an entry like 91 was considered at an earlier stage we agreed that the residuary power should be with the Centre. This was an innovation, as there was nothing like it in the Government of India Act. As soon as we accept Entry No. 91, Article 217 and a few other articles would require redrafting and Entries 1 to 90 would be redundant. In fact all the previous entries—from 1 to 90 would be rendered absolutely unnecessary. I fail to see the point now retaining Entries 1 to 90. If every subject which is not mentioned in Lists II and III is to go to the Centre what is the point in enumerating Entries 1 to 90 of List I? That would amount to absolutely needless, cumbersome detail. All complications would be avoided and matters simplified by redrafting Article 217 to say that all matters enumerated in List II must belong to the States, and all makers enumerated in List III are assigned to the Centre and the States concurrently and that every other conceivable subject must come within the purview of the Centre. There was nothing more simple or logical than that. Instead, a long elaborate List has been needlessly incorporated. This was because List I was prepared in advance and Entry No. 91 was inserted by way of afterthought. As soon as Entry 91 was accepted, the drafting should have been altered accordingly. Article 217 should have been re-written on the above lines and matters would have been simplified. May I suggest even at this late stage that these needless entries be scrapped and Article 217 be re written and things made simple? I had an amendment to that effect but I did not move it because I know that any reasons behind an amendment would not be deemed fit for consideration by the House.

38**.** Prof. Shibban Lal Saksena (***Constituent Assembly Debates***, Vol. 9 pages 855-56):

Sir, today is a great day that we are passing this entry almost without discussion. This matter has been the subject of discussion in this country for several years for about two decades. Today it is being allowed to be passed without any discussion. The point of view of Mr Naziruddin Ahmad is not correct. In fact Dr Ambedkar has said that if there is anything left, it will be included in this Item 91. I, therefore, think that it is a very important entry. There should not be any deletion of Items 1 to 90. I know this entry will include everything that is already contained in the first 90 entries as well as whatever is left. This entry will strengthen the Centre and weld our nation into one single nation behind a strong Centre. Throughout the last decade the fight was that provincial autonomy should be so complete that the Centre should not be able to interfere with the provinces, but now the times are changed. We are now for a strong Centre. In fact some friends would like to do away with provincial autonomy and would like a unitary Government. This entry gives powers to the Centre to have legislation on any subject which has escaped the scrutiny of the House. I support this entry.

39**-**40. The Honourable Dr B.R. Ambedkar (***Constituent Assembly Debates***, Vol. 9, pages 856-857):

My President, I propose to deal with the objection raised by my friend Sardar Hukam Singh. I do not think he has realised what is the purpose of Entry 91 and I should therefore like to state very clearly what the purpose of Entry 91 in List I is. It is really to define a limit or scope of List I and I think we could have dealt with this matter, viz., of the definition of and scope of Lists II and III by adding an entry such as 67 which would read:

Anything not included in List II or III shall be deemed to fall in List I.'

That is really the purpose of it. It could have been served in two different ways, either having an entry such as the one 91 included in List I or to have any entry such as the one which I have suggested ....'that anything not included in List II or III shall fall in List I'. That is the purpose of it. But such an entry is necessary and there can be no question about it. Now I come to the other objection which has been repeated if not openly at least whispered as to why we are having these 91 entries in List I when as a matter of fact we have an article such as 223 which is called residuary article which is 'Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List'. Theoretically I quite accept the proposition that when anything which is not included in List II or List III is by a specific article of the Constitution handed over to the Centre, it is unnecessary to enumerate these categories which we have specified in List I. The reason why this is done is this. Many States people, and particularly the Indian States at the beginning of the labours of the Constituent Assembly, were very particular to know what are the legislative powers of the Centre. They wanted to know categorically and particularly; they were not going to be satisfied by saying that the Centre will have only residuary powers. Just to allay the fears of the Provinces and the fears of the Indian States, we had to particularise what is included in the symbolic phrase 'residuary powers'. That is the reason why we had to undergo this labour notwithstanding the fact that we had Article 223.

I may also say that there is nothing very ridiculous about this, so far as our Constitution is concerned, for the simple reason that it has been the practice of all federal constitutions to enumerate the powers of the Centre, even those federations which have got residuary powers given to the Centre. Take for instance the Canadian Constitution. Like the Indian Constitution, the Canadian Constitution also gives what are called residuary powers to the Canadian Parliament. Certain specified and enumerated powers are given to the Provinces. Notwithstanding this fact, the Canadian Constitution, I think in Article 99, proceeds to enumerate certain categories and certain entries on which the Parliament of Canada can legislate. That again was done in order to allay the fears of the French Provinces which were going to be part and parcel of the Canadian Federation. Similarly also in the Government of India Act, the same scheme has been laid down there and Section 104 of the Government of India Act, 1935, is similar to Article 223 here. It also lays down the proposition that the Central Government will have residuary powers. Notwithstanding that, it had its List I. Therefore, there is no reason, no ground to be over critical about this matter. In doing this we have only followed as I said, the requirements of the various Provinces to know specifically what these residuary powers are, and also we have followed well-known conventions which have been followed in any other federal constitutions. I hope the House will not accept either the amendment of my friend Sardar Hukam Singh nor take very seriously the utterings of my friend Mr Naziruddin Ahmad."

41. It seems to us that this discussion clearly shows that it was realised that the old Entry 91 would cover every matter which is not included in Lists II and III, and that entries were enumerated in List I following the precedent of the Canadian Constitution and also to inform the provinces and particularly the Indian States as to the legislative powers the Union was going to have.

42. The same conclusion is also arrived at if we look at some of the speeches made when the third reading of the Constitution was taken up. Extracts from those speeches are reproduced below.

43. Shri Alladi Krishnaswami Ayyar (***Constituent Assembly Debates***, Vol. 11, p. 838):

> In regard to the distribution and allocation of legislative power, this Assembly has taken into account the political and economic conditions obtaining in the country at present and has not proceeded on any a priori theories as to the principles of distribution in the Constitution of a Federal Government. In regard to distribution, the Centre is invested with residuary power, specific subjects of national and all India importance being expressly mentioned.

44. Shri T.T. Krishnamacharl (***Constituent Assembly Debates***, Vol. 11, pp. 952-954):

> I would in this connection deal with a point raised regarding the vesting of the residuary powers. I think more than one honourable member mentioned that the fact that the residuary power is vested in the Centre in our Constitution, makes it a unitary Constitution. It was, I think, further emphasised by my honourable friend Mr Gupta in the course of his speech. He said: 'The test is there. The residuary power is vested in the Centre'. I am taking my friend Mr Gupta quite seriously, because he appears to be a careful student who has called out this particular point from some text book on federalism. I would like to tell honourable members that it is not a very important matter in assessing whether a particular Constitution is based on a federal system from the point of view whether the residuary power is vested in the States or in the Central Government. Mr K.C. Wheare who has written recently a book on Federalism has dealt with this point.
>
> Now if you ask me why we have really kept the residuary power with the Centre and whether it means anything at all, I will say that it is because we have gone to such absolute length to enumerate the powers of the Centre and of the States and also the powers that are to be exercised by both of them in the concurrent field. In fact, to quote Professor Wheare again, who has made a superficial survey of the Government of India Act, the best point in the Government of India Act is the complete and exhaustive enumeration of powers of Schedule VII. *To my mind there seems to be the possibility of only one power that has not been enumerated, which might be exercised in the future by means of the use of the residuary power, namely the capital levy on agricultural land. This power has not been assigned either to the Centre or to the Units. It may be that that/allowing the scheme of Estate Duty and succession duty on urban and agricultural property, even if the Centre has to take over this power under the residuary power after some time. It would assign the proceeds of this levy to the provinces, because all things that are supposed to be associated with agriculture are assigned to the provinces. I* think the vesting of the residuary power is only a matter of a academic significance today. To say that because residuary power is vested in the Centre and not in the provinces this is not a Federation would not be correct."

45. The above speech of Mr T.T. Krishnamachari shows that the members were aware that certain known taxes had not been included specifically in the three lists.

46. It is, therefore, difficult to escape from the conclusion that in India there is no field of legislation which has not been allotted either to Parliament or to the State Legislatures.

47. The last sentence applies much more to the Constitution of a sovereign democratic republic. It is true that there are some limitations in Part III of the Constitution on the Legislatures in India but they are of a different character. They have nothing to do with legislative competence. If this is the true scope of residuary powers of Parliament, then we are unable to see why we should not, when dealing with a Central Act, enquire whether it is legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament. If a Central Act does not enter or invade these prohibited

fields there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in.

48. It was accepted that this test had been applied in Canada, but it was argued that the Canadian Constitution is completely different from the Indian Constitution. It is true that the wording of Sections 91 and 92 of the Canadian Constitution is different and the Judicial Committee has interpreted these sections differently at different periods, but whatever the interpretation, it has always held that the lists are exhaustive. The scheme of distribution of legislative powers between the Dominion and the Provinces is essentially the same as under our Constitution. In this matter it is best to quote the words of the Judicial Committee or some learned authors rather than interpret Sections 91 and 92 ourselves.

66. Be that as it may, we are unable to see how the adoption of this mode of enquiry will destroy the federal structure of our Constitution. The State Legislatures have full legislative authority to pass laws in respect of entries in List II, and subject to legislation by Parliament on matters in List III.

67. It was also said that if this was the intention of the Constitution-makers they need not have formulated List I at all. This is the point which was taken by Sardar Hukam Singh and other in the debates referred to above and was answered by Dr Ambedkar. But apart from what has been stated by Dr Ambedkar in his speech extracted above there is some merits and legal affect in having included specific items in List I for when there are three lists it is easier to construe List II in the light of Lists I and II. If there had been no List I, many items in List II would perhaps have been given much wider interpretation than can be given under the present scheme. Be that as it may, we have the three lists and a residuary power and therefore it seems to us that in this context if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises.

68. In view of this conclusion, we now come to the question, i.e. whether the impugned Act is a law with respect to Entry 49, List II, or whether it imposes a tax mentioned in Entry 49 in List II? On this matter we have three decisions of this Court and although these decisions were challenged we are of the opinion that they interpreted Entry 49, List II correctly.

69. In ***Sudhir Chand Nawa*** **v.** ***Wealth Tax Officer*** [AIR 1969 SC 59] this Court was concerned with the validity of the Wealth Tax Act, 1957, as it originally stood. This Court proceeded on the assumption that the Wealth Tax Act was enacted in exercise of the powers under Entry 86, List I. It was argued before this Court that since the expression 'net wealth' includes non-agricultural lands and buildings of an assessee, and power to levy tax on lands and buildings is reserved to the State Legislatures by Entry 49, List II of the Seventh Schedule, Parliament is incompetent to legislate for the levy of wealth-tax on the capital value of assets which include non-agricultural lands and buildings.

70. In rejecting this argument the Court observed:

> The tax which is imposed by Entry 86, List I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of

> the assessee; it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of assets, but the general liability of the assessee to pay his debts and to discharge his lawful obligations, have to be taken into account....Again Entry 49 List II of the Seventh Schedule contemplates the levy of tax on lands and buildings, or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of powers under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our Judgment, make the fields of legislation under the two entries overlapping.

71. It was urged on behalf of the respondent that in ***Assistant Commissioner of Urban Land Tax* v. *The Buckingham and Carnatic Co. Ltd.*** [(1970)1 SCR 268], this Court held that a tax on the capital value of lands and buildings could be imposed under Entry 49, List II, but it seems to us that this is not a correct readings of that decision. Reliance is placed on the following sentence at page 277:

> We see no reason, therefore, for holding that the Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II.

72. The above observations have to be understood in the context of what was stated later. Ramaswami, J., later observed in that Judgment as follows:

> The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals, and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account..... But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings, is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of powers under Entry 86, List I, tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II, the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The *two taxes are entirely different in their basic concept and fell on different* subject-matters. (Emphasis supplied).

74. The requisites of a tax under Entry 49, List II, may be summarised thus:

(1) It must be a tax on units, that is lands and buildings separately as units.

(2) The tax cannot be a tax on totality, i. e., it is not a composite tax on the value of all lands and buildings.

(3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns **or** occupies it or two or more persons own or occupy it.

75. In short, the tax under Entry 49, List II, is not a personal tax but a tax on property.

76. It seems to us that this Court definitely held and we agree with the conclusion that the nature of the wealth tax imposed under the Wealth Tax Act, as originally stood, was different from that of a tax under Entry 49, List II, and it did not fall under this entry.

82. In our view the High Court was right in holding that the impugned Act was not a law with respect to Entry 49, List II, or did not impose a tax mentioned in Entry 49, List II. If that is so, then the legislation is valid either under Entry 86, List I, read with Entry 97, List I or Entry 97, List I standing by itself.

83. Although we have held that the impugned Act does not impose a tax mentioned in Entry 49, List II, we would like to caution that in case the real effect of a Central Act, whether called a Wealth Tax Act or not, is to impose a tax mentioned in Entry 49, List I, the tax may be bad as encroaching upon the domain of State Legislatures.

86. Although it is not necessary to decide the question whether the impugned Act falls within Entry 86, List I, read with Entry 97, List I, or Entry 97, List I alone, as some of our breathren are of the view that the original Wealth Tax Act fell under Entry 86, List I, we might express our opinion on that point. It seems to us that there is a distinction between a true net wealth tax and a tax which can be levied under Entry 86, List I. While legislating in respect of Entry 86, List I, it is not incumbent on Parliament to provide for deduction of debits in ascertaining the capital value of assets. Similarly, it is not incumbent on State Legislatures to provide for deduction of debits while legislating in respect of Entry 49, List II. For example the State Legislature need not, while levying tax under Entry 49, List II, provide for deduction of debits owed by the owner of the property. It seems to us that the other part of entry, i. e. "tax on the capital of companies". In Entry 86, List I, also seems to indicate that this entry is not strictly concerned with taxation of net wealth because capital of a company is in one sense a liability of the company and not its asset. Even if it is regarded as an asset, there is nothing in the entry to compel Parliament to provide for deduction of debits. It would also be noticed that Entry 86, List I, deals only with individuals and companies but net wealth tax can be levied not only on individuals but on other entities and associations also. It is true that under Entry 86, List I, aggregation is necessary because it is a tax on the capital value of assets of an individual but it does not follow from this that Parliament is obliged to provide for deduction of debits in order to determine the capital value of assets of an individual or a company. Therefore, it seems to us that the whole of the impugned Act clearly falls within Entry 97, List I. We may mention that this Court has never held that the original Wealth Tax Act fell under Entry 86, List I. It was only assumed that the original Wealth Tax Act fell within Entry 86, List I, and on that assumption this entry was analysed and contrasted with Entry 49, List

II. Be that as it may, we are clearly of the opinion that no part of the impugned legislation falls within Entry 86, List I.

87. However, assuming that the Wealth Tax Act, as originally enacted, is held to be legislation under Entry 86, List I, there is nothing in the Constitution to prevent Parliament from combining its powers under Entry 86, List I with its powers under Entry 97, List I. There is no principle that we know of which debars Parliament from relying on the powers under specified Entries 1 to 96, List I and supplement them with the powers under Entry 97, List I and Article 248, and for that matter powers under entries in the Concurrent List.

90. It was contended that the case of residuary powers was different but we are unable to see any difference in principle. Residuary power is as much power as the power conferred under Article 246 of the Constitution in respect of a specified item.

91. *In* ***In re: The Regulation and Control of Aeronautics in Canada*** [1932 AC 54, 77], the Privy Council upheld the validity of a Parliamentary statute after supplementing the powers under the specified items in Section 91 with the residuary powers. It observed:

> To sum up, having regard (*a*) to the terms of Section 132; (b) to the terms of the convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of Section 91, Items 2, 5, and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by a specific words in the Provinces. *As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good Government of Canada.* Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under Section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion. (emphasis supplied).

92. In conclusion we hold that the impugned Act is valid. The appeal is accordingly allowed and the Judgment and order of the High Court set aside and Civil Writ No. 2291 of 1970 in the High Court dismissed. There will be no order as to costs, either here or in the High Court.

* * * * *

Hoechst Pharmaceuticals Ltd. v. *State of Bihar*

AIR 1983 SC 1019

[*Doctrine of Repugnancy – Article 254*]

The Bihar Finance Act, 1981, ('Act' for short) under Section 5 provided for the imposition of a surcharge at 10 per cent of the total amount of the tax payable by a dealer whose gross turnover during a year exceeded Rs. 5 lakhs, in addition to the tax payable by him.

The facts in Civil Appeal No. 2567 / 1982 as gathered from the judgment are as follows.

Messrs Hoechst Pharmaceuticals Limited and Messrs Glaxo Laboratories (India) Limited are companies incorporated under the Companies Act, 1956 engaged in the manufacture and sale of various medicines and life-saving drugs throughout India including the State of Bihar. They have their branch or sales depot at Patna registered as a dealer under Section 14 of the Act and effect sales of their products through wholesale distributors or stockists appointed in Bihar who, in their turn, sell them to retailers through whom the medicines and drugs reach the consumers. Almost 94 per cent of the medicines and drugs sold by them are at the controlled price exclusive of local taxes under the *Drugs (Prices Control) Order, 1979 issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act* and they are expressly prohibited from selling these medicines and drugs in excess of the controlled price so fixed by the Central Government from time to time which allows the manufacturer or producer to pass on the tax liability to the consumer. The appellants have their printed price-lists of their medicines and drugs showing the price at which they sell to the retailers as also the retail price, both inclusive of excise duty. One of the terms of their contract is that sales tax and local taxes will be charged wherever applicable.

The appellants produced in the Court the orders of assessment together with notices of demand, for the assessment years 1980-81 and 1981-82. These figures showed the magnitude of the business carried on by these appellants in the State of Bihar alone and their capacity to bear the additional burden of surcharge levied under sub-section (1) of Section 5 of the Bihar Finance Act, 1981.

The High Court referred to the decision in ***S. Kodar*** v. ***State of Kerala*** [AIR 1974 SC 2272] where this court upheld the constitutional validity of sub-section (2) of Section 2 of the Tamil Nadu Additional Sales Tax Act, 1970 which is in pari materia with sub-section (3) of Section 5 of the Act and which interdicts that no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable by him. It held that the surcharge levied under sub-section (1) of Section 5 is in reality an additional tax on the aggregate of sales effected by a dealer during a year and that it was not necessary that the dealer should be enabled to pass on the incidence of tax on sale to the purchaser in order that it might be a tax on the sale of goods. Merely because the dealer is prevented by sub-section (3) of Section 5 of the Act from collecting the surcharge, it does not cease to be a surcharge on sales tax. Relying on ***Kodar*** case, the Court held that:

- the charge under sub-section (1) of Section 5 of the Act falls at a uniform rate of 10 percent of the tax on all dealers falling within the class specified therein i.e. whose gross turnover during a year exceeds Rs. 5 lakhs, and is therefore not discriminatory and violative of Article 14 of the Constitution,
- nor is it possible to say that because a dealer is disabled from passing on the incidence of surcharge to the purchaser, sub-section (3) of Section 5 imposes an unreasonable restriction on the fundamental right guaranteed under Article 19(1) (*g*).

As regards the manufacturers and producers of medicines and drugs, the High Court held

- that there was no irreconcilable conflict between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order, 1979 and both the laws are capable of being obeyed.

In spite of the decision of the Supreme Court in ***Kodar*** case, the appellants challenged the constitutional validity of sub-section (3) of Section 5 of the Act on the ground that the court in that case did not consider the effect of price fixation of essential commodities by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which, by reason of Section 6 of that Act, has an overriding effect notwithstanding any other law inconsistent therewith.

A. P. SEN, J. - 3. The principal contention advanced by the appellants in these appeals is that the field of price fixation of essential commodities in general, and drugs and formulations in particular, is an occupied field by virtue of various control orders issued by the Central Government from time to time under sub-section (1) of Section 3 of the Essential Commodities Act, 1955 which allows the manufacturer or producer of goods to pass on the tax liability to the consumer and therefore the State legislature of Bihar had no legislative competence to enact sub-section (3) of Section 5 of the Act which interdicts that no dealer liable to pay a surcharge, in addition to the tax payable by him, shall be entitled to collect the amount of surcharge, and thereby trenches upon a field occupied by a law made by Parliament. Alternatively, the submission is that if sub-section (3) of Section 5 of the Act were to cover all sales including sales of essential commodities whose prices are fixed by the Central Government by various control orders issued under the Essential Commodities Act, then there will be repugnancy between the State law and the various control orders which according to Section 6 of the Essential Commodities Act must prevail. There is also a subsidiary contention put forward on behalf of the appellants that sub-section (1) of Section 5 of the Act is ultra vires the State legislature inasmuch as the liability to pay surcharge is on a dealer whose gross turnover during a year exceeds Rs. 5 lakhs or more i.e. inclusive of transactions relating to sale or purchase of goods which have taken place in the course of inter-State trade or commerce or outside the State or in the course of import into, or export of goods outside the territory of India. The submission is that such transactions are covered by Article 286 of the Constitution and therefore are outside the purview of the Act and thus they cannot be taken into consideration for computation of the gross turnover as defined in Section *2*(*j*) of the Act for the purpose of bearing the incidence of surcharge under sub-section (1) of Section 5 of the Act.

10. In ***Kodar*** case [***S. Kodar* v. *State of Kerala,*** AIR 1974 SC 2272], this court upheld the constitutional validity of the Tamil Nadu Additional Sales Tax Act, 1970 which imposes additional sales tax at 5 per cent on a dealer whose annual gross turnover exceeds Rs. 10 lakhs. The charging provision in subsection (1) of Section 2 of that Act is in terms similar to sub-section (1) of Section 5 of the Act, and provides that the tax payable by a dealer whose turnover for a year exceeds Rs. 10 lakhs shall be increased by an additional tax at the rate of 5 per cent of the tax payable by him. Sub-section (2) of that Act is in pari materia with sub-section (3) of Section 5 of the Act and provides that no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable by him. The court laid down that:

(1) The additional tax levied under sub-section (1) of Section 2 of that Act was in reality a tax on the aggregate of sales effected by a dealer during a year and therefore the additional tax was really a tax on the sale of goods and not a tax on the income of a dealer and therefore falls within the scope of Entry 54 of List II of the Seventh Schedule.

(2) Generally speaking, the amount or rate of tax is a matter exclusively within the legislative judgment and so long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness cannot be questioned by the court. The imposition of additional tax on a dealer whose annual turnover exceeds Rs. 10 lakhs is not an unreasonable restriction on the fundamental rights guaranteed under Article 19(1) (*g*) or (*f*) as the tax is upon the sale of goods and was not shown to be confiscatory.

(3) It is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for seller to collect the tax from the purchasers. Merely because sub-section (2) of Section 2 of that Act prevented a dealer from passing on the incidence of additional tax to the purchaser, it cannot be said that the Act imposes an unreasonable restriction upon the fundamental rights under Article 19(l)(*g*) or (*f*). The Act was not violative of Article 14 of the Constitution as classification of dealers on the basis of their turnover for the purpose of levy of additional tax was based on the capacity of dealers who occupy a position of economic superiority by reason of their greater volume of business i.e. on capacity to pay and such classification for purposes of the levy was not unreasonable.

12. Sub-section (1) of Section 5 of the Act provides for the levy of surcharge on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs and the material provisions of which are in the following terms:

5. Surcharge. (1) Every dealer whose grosss turn over during a year exceeds rupees five lakhs shall, in addition to the tax payable by him under this Part, also pay a surcharge at such rate not exceeding 10 per cent of the total amount of the tax payable by him, as may be fixed by the State Government by a notification published in the Official Gazette….

Sub-section (3) of section 5 of the Act, the constitutional validity of which is challenged provides:

Notwithstanding anything to the contrary contained in this Part, no dealer mentioned in sub-section (1), who is liable to pay surcharge, shall be entitled to collect the amount of this surcharge.

13. It is fairly conceded that not only sub-section (1) of Section 5 of the Act which provides for the levy of surcharge on dealers whose gross turnover during a year exceeds Rs. 5 lakhs, but also sub-section (3) of Section 5 of the Act which enjoins that no dealer who is liable to pay a surcharge under sub-section (1) shall be entitled to collect the amount of surcharge payable by him, are both relatable to Entry 54 of List II of the Seventh Schedule which reads:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

14. There can be no doubt that the Central and the State legislations operate in two different and distinct fields. The Essential Commodities Act provides for the regulation, production, supply, distribution and pricing of essential commodities and is relatable to Entry 33 of List III of the Seventh Schedule which reads:

33. Trade and commerce in, and the production, supply and distribution of,—

(*a*) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

17. We are here concerned with the impact of sub-section (3) of Section 5 of the Act on the price structure of formulations, but nonetheless much stress was laid on fixation of price of bulk drugs under Paragraph 3(2) which allows a reasonable return to the manufacturer under sub-paragraph (3) thereof. A manufacturer or producer of such bulk drugs is entitled to sell it at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable. The amount credited to the Drugs Prices Equalisation Account is meant to compensate a manufacturer, importer or distributor the shortfall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, or securing the equitable distribution and availability at fair prices, of drugs after meeting the expenses incurred by the Government in connection therewith. Every manufacturer, importer or distributor is entitled to make a claim for being compensated for the shortfall.

25. Much emphasis was laid on fixation of price of bulk drugs under Paragraph 3 which provides by sub-paragraph (1) that the Government may, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price and subject to the provisions of sub-paragraph (2) and after making such enquiry as it deems fit, fix from time to time, by notification in the official Gazette, the maximum price at which such bulk drug shall be sold. Sub-paragraph (2) enjoins that while fixing the price of a bulk drug under sub-paragraph (1), the Government may take into account the average cost of production of each bulk drug manufactured by efficient manufacturer and allow a reasonable return on net worth. Explanation thereto defines the expression "efficient manufacturer" to mean a manufacturer (i) whose production of such bulk drug in relation to the total production of such bulk drug in the country is large, or (ii) who employs efficient technology in the production of such bulk drug. Sub-paragraph (3) provides that no person shall sell a bulk drug at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

28. It cannot be doubted that a surcharge partakes of the nature of sales tax and therefore it was within the competence of the State legislature to enact sub-section (1) of Section 5 of the Act for the purpose of levying surcharge on certain class of dealers in addition to the tax payable by them. When the State legislature had competence to levy tax on sale or purchase of goods under Entry 54, it was equally competent to select the class of dealers on whom the charge will fall. If that be so, the State legislature could undoubtedly have enacted sub-section (3) of Section 5 of the Act prohibiting the dealers liable to pay a surcharge under sub-section (1) thereof from recovering the same from the purchaser. It is fairly conceded that sub-section (3) of Section 5 of the Act is also relatable to Entry 54. The contention however is that there is conflict between Paragraph 21 of the Control Order which allows a manufacturer or producer of drugs to pass on the liability to pay sales tax and sub-section (3) of Section 5 of the Act which prohibits such manufacturers or producers from recovering the surcharge and therefore it is constitutionally void. It is said that the courts should try to adopt the rule of harmonious

construction and give effect to Paragraph 21 of the Control Order as the impact of sub-section (3) of Section 5 of the Act is on fixation of price of drugs under the Drugs (Prices Control) Order and therefore by reason of Section 6 of the Essential Commodities Act, Paragraph 21 of the Control Order which provides for the passing on of tax liability must prevail. The submission rests on a construction of Article 246(3) of the Constitution and it is said that the power of the State legislature to enact a law with respect to any subject in List II is subject to the power of Parliament to legislate with respect to matters enumerated in Lists I and III.

29. It is convenient at this stage to deal with the contention of the appellants that if sub-section (3) of Section 5 of the Act were to cover all sales including sales of essential commodities whose prices are controlled by the Central Government under the various control orders issued under sub-section (1) of Section 3 of the Essential Commodities Act, then there will be repugnancy between the State law and such control orders which according to Section 6 of the Essential Commodities Act must prevail. In such a case, the State law must yield to the extent of the repugnancy. In ***Harishankar Bagla*** **v.** ***State of M.P.*** [AIR 1954 SC 465], the court had occasion to deal with the non obstante clause in Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 which was in pari materia with Section 6 of the Essential Commodities Act and it was observed:

> The effect of Section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, or the orders made thereunder. In other words, the orders made under Section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the order made under Section 3 it does not operate in that field for the time being.

The court added that after an order is made under Section 3 of that Act, Section 6 then steps in wherein Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than that Act.

30. Placing reliance on the observations in ***Harishankar Bagla*** case, it is urged that the effect of the non obstante clause in Section 6 of the Essential Commodities Act is to give an overriding effect to the provisions of Paragraph 21. It is further urged that Paragraph 21 of the Control Order having been issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which permits the manufacturer or producer to pass on the liability to pay sales tax must prevail and sub-section (3) of Section 5 of the Act which is inconsistent therewith is by-passed. The contention appears to be misconceived. The appellants being manufacturers or producers of formulations are not governed by Paragraph 21 of the Control Order but by Paragraph 24 thereof and therefore the price chargeable by them to a wholesaler or distributor is inclusive of sales tax. There being no conflict between sub-section (3) of Section 5 of the Act and Paragraph 24 of the Control Order, the question of non obstante clause to Section 6 of the Essential Commodities Act coming into play does not arise.

31. Even otherwise i.e. if some of the appellants were governed by Paragraph 21 of the Control Order that would hardly make any difference. Under the scheme of the Act, a dealer is free to pass on the liability to pay sales tax payable under Section 3 and additional sales tax payable under Section 6 to the purchasers. Sub-section (3) of Section 5 of the Act however imposes a limitation on dealers liable to pay surcharge under sub-section (1) thereof from collecting the amount of surcharge payable by them from the purchasers which only means that surcharge payable by such dealers under sub-section (1) of Section 5 of the Act will cut into the profits earned by such dealers. The controlled price or retail price of medicines and drugs under Paragraph 21 remains the same, and the consumer interest is taken care of inasmuch as the liability to pay surcharge under subsection (3) of Section 5 cannot be passed on. That being so, there is no conflict between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order. The entire submission advanced by learned counsel for the appellants proceeds on the hypothesis that the various control orders issued under sub-section (1) of Section 3 of the Essential Commodities Act are for the protection of the manufacturer or producer. There is an obvious fallacy in the argument which fails to take into account the purpose of the legislation.

32. Where the fixation of price of an essential commodity is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middleman for whom it would be unprofitable to carry on business at fixed rate or that it does not ensure a reasonable return to the manufacturer or producer on the capital employed in the business of manufacturing or producing such an essential commodity.

33. The contention that in the field of fixation of price by a control order issued under sub-section (1) of Section 3 of the Essential Commodities Act, the Central Government must have due regard to the securing of a reasonable return on the capital employed in the business of manufacturing or producing an essential commodity is entirely misconceived. The predominant object of issuing a control order under sub-section (1) of Section 3 of the Act is to secure the equitable distribution and availability of essential commodities at fair prices to the consumers, and the mere circumstance that some of those engaged in the field of industry, trade and commerce may suffer a loss is no ground for treating such a regulatory law to be unreasonable, unless the basis adopted for price fixation is so unreasonable as to be in excess of the power to fix the price, or there is a statutory obligation to ensure a fair return to the industry. In ***Shree Meenakshi Mills Ltd.*** **v.** ***Union of India*** [A1R 1974 SC 366] Ray, C. J. speaking for the court rejected the contention that the controlled price must ensure a reasonable return on the capital employed in the business of manufacturing or producing essential commodities…

36. The principal point in controversy is: Whether there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order and therefore sub-section (3) of Section 5 must yield to that extent. The submission is that if Parliament chooses to occupy the field and there is price fixation of an essential commodity with liberty to pass on the burden of tax to the consumer by a law made by Parliament under Entry 33 of List III of the Seventh Schedule, then it is not competent for the State legislature to enact a provision

like sub-section (3) of Section 5 of the Act while enacting a law under Entry 54 of List II prohibiting the passing on of liability of tax to the purchaser.

37. The true principle applicable in judging the constitutional validity of sub-section (3) of Section 5 of the Act is to determine whether in its pith and substance it is a law relatable to Entry 54 of List II of the Seventh Schedule and not, whether there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order made under sub-section (1) of Section 3 of the Essential Commodities Act, is therefore void. In dealing with the question, we must set out Article 246 of the Constitution which is based on Section 100 of the Government of India Act, 1935….

38. It is obvious that Article 246 imposes limitations on the legislative powers of the Union and State legislatures and its ultimate analysis would reveal the following essentials :

1. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The non obstante clause in Article 246(1) provides for predominance or supremacy of Union legislature. This power is not encumbered by anything contained in clauses (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246 (1). The combined effect of the different clauses contained in Article 246 is no more and no less than this : that in respect of any matter falling within List I, Parliament has exclusive power of legislation.
2. The State legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III. The exclusive power of the State legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State legislature.
3. Both Parliament and the State legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III.

39. Article 254 provides for the method of resolving conflicts between a law made by Parliament and a law made by the legislature of a State with respect to a matter falling in the Concurrent List….

40. We find it difficult to subscribe to the proposition advanced on behalf of the appellants that merely because of the opening words of Article 246(3) of the Constitution "subject to clauses (1) and (2)" and the non-obstante clause in Article 246(1) "notwithstanding anything in clauses (2) and (3)", sub-section (3) of Section 5 of the Act which provides that no dealer shall be entitled to collect the amount of surcharge must be struck down as ultra vires the State legislature inasmuch as it is inconsistent with Paragraph 21 of the Drugs (Prices Control) Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which enables the manufacturer or producer of drugs to pass on the liability to pay sales tax to the consumer. The submission is that sub-section (3) of Section 5 of the Act enacted by the State legislature while making a law under Entry 54 of List II of the Seventh Schedule which interdicts that a dealer liable to

pay surcharge under sub-section (1) of Section 5 of the Act shall not be entitled to collect it from the purchaser, directly trenches upon Union power to legislate with respect to fixation of price of essential commodities under Entry 33 of List III. It is said that if both are valid, then ex hypothesi the law made by Parliament must prevail and the State law pro tanto must yield. We are afraid, the contention cannot prevail in view of the well accepted principles.

41. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the entries in the Union and State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non-obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

42. Union and State legislatures have concurrent power with respect to subjects enumerated in List III, subject only to the provision contained in clause (2) of Article 254 i.e. provided the provisions of the State Act do not conflict with those of any Central Act on the subject. However, in case of repugnancy between a State Act and a Union law on a subject enumerated in List III, the State law must yield to the Central law unless it has been reserved for the assent of the President and has received his assent under Article 254(2).

43. As regards the distribution of legislative powers between the Union and the States, Article 246 adopts with immaterial alterations the scheme for the distribution of legislative powers contained in Section 100 of the Government of India Act, 1935. Our Constitution was not written on a clean slate because a Federal Constitution had been established by the Government of India Act, 1935 and it still remains the framework on which the present Constitution is built. The provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act, 1935 and the principles laid down in connection with the nature and interpretation of legislative power contained in the Government of India Act, 1935 are applicable, and have in fact been applied, to the interpretation of the Constitution.

45. With regard to the interpretation of non obstante clause in Section 100(1) of the Government of India Act, 1935 Gwyer, C.J. observed:

> It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other.
>
> In all cases of this kind the question before the Court", according to the learned Chief Justice is not "how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now".

47. Earl Loreburn, L.C. delivering the judgment of the Judicial Committee in ***Attorney General for Ontario*** case observed that in the interpretation of Sections 91 and 92 of the British North America Act:

> If the text is explicit, the text is conclusive alike for what it directs and what it forbids.When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

48. In ***A.L.S.P.P.L. Subrahmanyan Chettiar* v. *Muttuswami Goundan*** [AIR 1941 FC 47], Gwyer, C.J. reiterated that the principles laid down by the Privy Council in a long line of decisions in the interpretation of Sections 91 and 92 of the British North America Act, 1867 must be accepted as a guide for the interpretation of Section 100 of the Government of India Act, 1935 :

> It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation with respect of matters in this list or in that.

49. It has already been stated that where the two lists appear to conflict with each other, an endeavour, should be made to reconcile them by reading them together and applying the doctrine of pith and substance. It is only when such attempt to reconcile fails that the non obstante clause in Article 246(1) should be applied as a matter of last resort. For, in the words of Gwyer, C. J. in ***C.P. and Berar Taxation Act*** case:

> For the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

50. The observations made by the Privy Council in the ***Citizens Insurance Company*** case, were quoted with approval by Gwyer, C.J. in ***C.P. and Berar Taxation Act*** case, and he observed that an endeavour should be made to reconcile apparently conflicting provisions and that the general power ought not to be construed as to make a nullity of a particular power operating in the same field. The same duty of reconciling apparently conflicting provisions was reiterated by Lord Simonds in delivering the judgment of the Privy Council in ***Governor-General in Council* v. *Province of Madras*** [AIR 1945 PC 98]:

> For in a Federal constitution, in which there is a division of legislative powers between Central and Provincial legislatures, it appears to be inevitable that controversy should arise

> whether one or other legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls.

Their Lordships approved of the decision of the Federal Court in ***Province of Madras* v. *Boddu Paidanna & Sons*** [AIR 1942 FC 33] where it was held that when there were apparently conflicting entries the correct approach to the question was to see whether it was possible to effect a reconciliation between the two entries so as to avoid a conflict and overlapping.

51. In ***Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna*** [AIR 1947 PC 60], Lord Porter delivering the judgment of the Board laid down that in distinguishing between the powers of the divided jurisdictions under Lists I, II and III of the Seventh Schedule to the Government of India Act, 1935, it is not possible to make a clean cut between the powers of the various legislatures. They are bound to overlap from time to time, and the rule which has been evolved by the Judicial Committee whereby an impugned statute is examined to ascertain its pith and substance or its true character for the purpose of determining in which particular list the legislation falls, applies to Indian as well as to Dominion legislation. In laying down that principle, the Privy Council observed:

Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap.

The Privy Council quoted with approval the observations of Gwyer, C. J. in ***Subrahmanyan Chettiar*** case quoted above, and observed :

> No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial Legislation could never effectively be dealt with.

52. It would therefore appear that apparent conflict with the federal power had to be resolved by application of the doctrine of pith and substance and incidental encroachment. Once it is found that a law made by the Provincial legislature was with respect to one of the matters enumerated in the Provincial List, the degree or extent of the invasion into the forbidden field was immaterial. "The invasion of the provinces into subjects in the Federal List," in the words of Lord Porter, "was important":

> (N)ot, … because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned

> Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking ? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

The passage quoted above places the precedence accorded to the three Lists in its proper perspective. In answering the objection that that view does not give sufficient effect to the non obstante clause in Section 100(1) of the Government of India Act, 1935, as between the three Lists, the Privy Council observed:

> Where they come in conflict List I has priority over Lists III and II and List III has priority over List II.

But added:

> The priority of the Federal legislature would not prevent the Provincial Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.

It would therefore appear that the constitutionality of the law is to be judged by its real subject-matter and not by its incidental effect on any topic of legislation in another field.

53. The decision of the Privy Council in ***Prafulla Kumar Mukherjee*** case, has been repeatedly approved by the Federal Court and this court as laying down the correct rule to be applied in resolving conflicts which arise from overlapping powers in mutually exclusive lists.. It may be added as a corollary of the pith and substance rule that once it is found that in pith and substance an impugned Act is a law on a permitted field any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act.

57. It is well settled that the validity of an Act is not affected if it incidentally trenches upon matters outside the authorized field and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature.

62. The question is whether the field is not clear and the two legislations meet and therefore on the doctrine of federal supremacy sub-section (3) of Section 5 of the Act must be struck down as ultra vires. The principle deducible from the dictum of Lord Dunedin as applied to the distribution of legislative powers under Article 246 of the Constitution is that when the validity of an Act is challenged as ultra vires, the answer lies to the question, what is the pith and substance of the impugned Act ? No doubt, in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in List II, then it is under the terms of Article 246(3) not to be deemed to come within the classes of subjects assigned exclusively to Parliament under Article 246(1) even though the classes of subjects looked at singly overlap in many respects. The whole distribution of powers must be looked at as Gwyer, C.J. observed in ***C.P. and Berar Taxation Act*** case, in determining the question of validity of the Act in question.

Moreover, as Gwyer, C.J. laid down in ***Subrahmanyan Chettiar*** case, and affirmed by Their Lordships of the Privy Council in ***Prafulla Kumar Mukherjee*** case, it is within the competence of the State legislature under Article 246(3) to provide for matters which, though within the competence of Parliament, are necessarily incidental to effective legislation by the State legislature on the subject of legislation expressly enumerated in List II.

63. We must then pass on to the contention advanced by learned counsel for the appellants that there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order and therefore sub-section (3) of Section 5 of the Act is void to that extent. Ordinarily, the laws could be said to be repugnant when they involve impossibility of obedience to them simultaneously but there may be cases in which enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. The question of "repugnancy" arises only with reference to a legislation falling in the Concurrent List but it can be cured by resort to Article 254(2).

64. As we have endeavoured so far, the question raised as to the constitutional validity of sub-section (3) of Section 5 of the Act has to be determined by application of the rule of pith and substance whether or not the subject-matter of the impugned legislation was competently enacted under Article 246, and therefore the question of repugnancy under Article 254 was not a matter in issue. The submission put forward on behalf of the appellants however is that there is direct collision and/or irreconcilable conflict between sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which is relatable to Entry 33 of List III. It is sought to be argued that the words "a law made by Parliament which Parliament is competent to enact" must be construed to mean not only a law made by Parliament with respect to one of the matters enumerated in the Concurrent List but they are wide enough to include a law made by Parliament with respect to any of the matters enumerated in the Union List. The argument was put in this form. In considering whether a State law is repugnant to a law made by Parliament, two questions arise: First, is the law made by Parliament viz. the Essential Commodities Act, a valid law ? For, if it is not, no question of repugnancy to a State law can arise. If however it is a valid law, the question as to what constitutes repugnancy directly arises. The second question turns on a construction of the words "a law made by Parliament which Parliament is competent to enact" in Article 254(1).

66. Nicholas in his ***Australian Constitution,*** 2nd Edition, p. 303, refers to three tests of inconsistency or repugnancy :

1. There may be inconsistency in the actual terms of the competing statutes;
2. Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and
3. Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter.

In ***Ch. Tika Ramji* v. *State of U.P.*** [AIR 1956 SC 676], the court accepted the above three rules evolved by Nicholas, among others, as useful guides to test the question of repugnancy.

67. Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception, viz. that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together.

69. We fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore sub-section (3) of Section 5 of the Act which is a law made by the State legislature is void under Article 254(1). The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy, become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and Lists I and III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non obstante clause in Article 246(1) read with the opening words "subject to" in Article 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as "List I". But if Article

254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List - in other words, if clause (2) is to be the guide in the determination of scope of clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (*a*) a law made by Parliament or (*b*) an existing law. There was a controversy at one time as to whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (*a*) and (*b*) or (*b*) alone. It is now settled that the words "with respect to" qualify both the clauses in Article 254(1) viz, a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The underlying principle is that the question of repugnancy arises only when both the legislatures are competent to legislate in the same field i.e. with respect to one of the matters enumerated in the Concurrent List. Hence, Article 254(1) cannot apply unless both the Union and the State laws relate to a subject specified in the Concurrent List, and they occupy the same field.

70. This construction of ours is supported by the observations of Venkatarama Ayyar, J. speaking for the court in ***A.S. Krishna*** case [***A.S. Krishna* v. *State of Madras***, AIR 1957 SC 297] while dealing with Section 107(1) of the Government of India Act, 1935 to the effect:

For this section to apply, two conditions must be fulfilled : (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void.

72. We are unable to appreciate the contention that sub-section (3) of Section 5 of the Act being a State law must be struck down as ultra vires as the field of fixation of price of essential commodities is an occupied field covered by a Central legislation. It is axiomatic that the power of the State legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for projecting the power of Parliament to make a law under Entry 33 of List III into the State's power of taxation under Entry 54 of List II. Otherwise, Entry 54 will have to be read as : 'Taxes on the sale or purchase of goods *other than essential commodities et cetera'*. When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92A of List I and there can be no further curtailment of the State's power of taxation. It is a well established rule of construction that the entries in the three lists must be read in a broad and liberal sense and must be given the widest scope which their meaning is fairly capable of because they set up a machinery of Government.

73. The controversy which is now raised is of serious moment to the States, and a matter apparently of deep interest to the Union. But in its legal aspect, the question lies within a very narrow compass. The duty of the court is simply to determine as a matter of law, according to the true construction of Article 246(3) of the Constitution, whether the State's power of

taxation of sale of goods under Entry 54 of List II and to make ancillary provisions in regard thereto, is capable of being encroached upon by a law made by Parliament with respect to one of the matters enumerated in the Concurrent List. The contention fails to take into account that the Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246.

74. It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control.

76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. In ***M.P.V. Sundararamier & Co.*** **v.** ***State of A.P.*** [AIR 1958 SC 468] this court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.

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Zaverbhai Amaidas v. *State of Bombay*

AIR 1954 SC 752 : (1955) 1 SCR 799

VENKATARAMA AYYAR, J. - This is an appeal against the judgment of the High Court of Bombay dismissing a revision petition filed by the appellant against his conviction under Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946.

2. The charge against the appellant was that on 6th April, 1951, he had transported 15 maunds of juwar from his village of Khanjroli to Mandvi without a permit, and had thereby contravened Section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949. The Resident First Class Magistrate of Bardoli who tried the case, found him guilty, and sentenced him to imprisonment till the rising of the Court and a fine of Rs 500. The conviction and sentence were both affirmed by the Sessions Judge, Surat, on appeal. The appellant thereafter took up the matter in revision to the High Court of Bombay, and there for the first time, took the objection that the Resident First Class Magistrate had no jurisdiction to try the case, because under Section 2 of the Bombay Act 36 of 1947 the offence was punishable with imprisonment, which might extend to seven years, and under the Second Schedule to the Criminal Procedure Code, it was only the Sessions Court that had jurisdiction to try such offence. The answer of the State to this contention was that subsequent to the enactment of the Bombay Act 36 of 1947, the Essential Supplies (Temporary Powers) Act had undergone substantial alterations, and was finally recast by the Central Act 52 of 1950; that the effect of these amendments was that Act 36 of 1947 had become inoperative, that the governing Act was Act 52 of 1950, and that as under that Act the maximum sentence for the offence in question was three years, the Resident First Class Magistrate had jurisdiction over the offence.

3. The revision petition was heard by a Bench consisting of Bavdekar and Chainani, JJ. Bavdekar, J. was of the opinion that the amendments to the Essential Supplies (Temporary Powers) Act including the re-enactment of Section 7 in Act 52 of 1950 did not trench on the field covered by the Bombay Act 36 of 1947, which accordingly remained unaffected by them. Chainani, J., on the other hand, held that both Act 36 of 1947 and Act 52 of 1950 related to the same subject-matter, and that as Act 52 of 1950 was a Central legislation of a later date, it prevailed over the Bombay Act 36 of 1947. On this difference of opinion, the matter came up under Section 429, Criminal Procedure Code for hearing before Chagla, C.J., who agreed with Chainani, J. that there was repugnancy between Section 7 of Act 52 of 1950 and Section 2 of the Bombay Act 36 of 1947, and that under Article 254(2), the former prevailed; and the revision petition was accordingly dismissed. Against this judgment, the present appeal has been preferred on a certificate under Article 132(1), and the point for determination is whether contravention of Section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949 is punishable under Section 2 of the Bombay Act 36 of 1947, in which case the trial by the Resident First Class Magistrate would be without jurisdiction; or whether it is punishable under Section 7 of the Essential Supplies (Temporary Powers) Act, as amended by Act 52 of 1950, in which case, the trial and conviction of the appellant by that Magistrate would be perfectly legal.

4. It is now necessary to refer in chronological sequence to the statutes bearing on the question. We start with the Essential Supplies (Temporary Powers) Act 24 of 1946 enacted by the Central Legislature by virtue of the powers conferred on it by 9 and 10, George VI, Chapter 39. It applied to the whole of British India. Section 3 of the Act conferred power on the Central Government to issue orders for regulating the production, supply and distribution of essential commodities, and under Section 4, this power could be delegated to the Provincial Government. Section 7(1) provided for punishment for contravention of orders issued under the Act, and ran as follows:

> "If any person contravenes any order made under Section 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty;
>
> Provided that where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall make such direction, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole or as the case may be, a part of the property."

The State of Bombay considered that the maximum punishment of three years' imprisonment provided in the above section was not adequate for offences under the Act, and with the object of enhancing the punishment provided therein, enacted Act 36 of 1947. Section 2 of the said Act provided (omitting what is not material for the present purpose) that "Notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act, 1946, whoever contravenes an order made or deemed to be made under Section 3 of the said Act, shall be punished with imprisonment which may extend to seven years, but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine." This section is avowedly repugnant to Section 7(1) of the Essential Supplies (Temporary Powers) Act. Section 107(2) of the Government of India Act, which was the Constitution Act then in force, enacted that,

> "Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

On the footing that the subject-matter of Act 36 of 1947 fell within the Concurrent List, the Bombay Government obtained the assent of the Governor-General therefor, and thereafter, it came into force on 25th November, 1947. The position therefore was that by reason of Section 107(2) of the Government of India Act, Act 36 of 1947 prevailed in Bombay over Section 7 of the Essential Supplies (Temporary Powers) Act; but at the same time, it was subject under that section to all and any "further legislation with respect to the same matter", that might be enacted by the Central Legislature.

5. The contention of the State is that there was such further legislation by the Central Legislature in 1948, in 1949 and again in 1950, and that as a result of such legislation, Section 2 of the Bombay Act 36 of 1947 had become inoperative. In 1948 there was an amendment of the Essential Supplies (Temporary Powers) Act, whereby the proviso to Section 7(1) was repealed and a new proviso substituted, which provided inter alia that,

> "Where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall direct that any property in respect of which the order has been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in writing it is of opinion that the direction should be made not in respect of the whole, or as the case may be, a part of the property."

The Essential Supplies (Temporary Powers) Act was again amended in 1949. Under this amendment, the proviso to Section 7(*i*) was repealed, and a new clause substituted in the following terms:

> "(*b*) Where the contravention is of an order relating to foodstuffs, the Court shall
>
> (*i*) sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may, in addition, impose a sentence of fine, unless for reasons to be recorded, it is of opinion that a sentence of fine only will meet the ends of justice; And
>
> (*ii*) direct that any property in respect of which the order has been contravened or a part thereof shall be forfeited to His Majesty, unless for reasons to be recorded it is of opinion that such direction is not necessary to be made in respect of the whole, or, as the case may be, a part of the property."

Then came Central Act 52 of 1950, under which the old Section 7 was repealed and a new section enacted in the following terms:

> "(1) If any person contravenes any order under Section 3 relating to cotton textiles he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine; and any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government.
>
> (2)If any person contravenes any order under Section 3 relating to foodstuffs,—
>
> (*a*) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice; and
>
> (*b*) any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government, unless for reasons to be recorded the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property:
>
> Provided that where the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrains exceeding twice the maximum quantity so prescribed, the Court shall—
>
> (*a*)sentence him to imprisonment for a term which may extend to seven years and to a fine not less than twenty times the value of the foodgrain found in his possession, and

(*b*)direct that the whole of such foodgrain in excess of the prescribed quantity shall be forfeited to the Government.

Explanation.— A person in possession of foodgrain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this sub-section.

(3) If any person contravenes any order under Section 3 relating to any essential commodity other than cotton textiles and food-stuffs, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both, and if the order so provides, any property in respect of which the Court is satisfied that the order has been contravened may be forfeited to the Government.

(4) If any person to whom a direction is given under sub- section (4) of Section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

6. It must be mentioned that while the amendments of 1948 and 1949 were made when Section 107(2) of the Government of India Act was in force, the Constitution of India Act had come into operation, when Act 52 of 1950 was enacted. Article 254(2) of the Constitution is as follows:

"Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

7. This is, in substance, a reproduction of Section 107(2) of the Government of India Act, the concluding portion thereof being incorporated in a proviso with further additions. Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under Section 107(2) of the Government of India Act, it was observed by Lord Waston in ***Attorney-General for Ontario* v. *Attorney-General for the Dominion*** [(1896) AC 348] that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute. That would appear to have been the position under Section 107(2) of the Government of India Act with reference to the subjects mentioned in the Concurrent List. Now, by the proviso to Article 254(2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under Section 107(2) of the Government of India Act, and enact a law adding to, amending, varying or repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can, acting under the proviso to Article 254(2), repeal a State law. But where it does not expressly do so, even then, the State law will be void under that provision if it

conflicts with a later "law with respect to the same matter" that may be enacted by Parliament.

8. In the present case, there was no express repeal of the Bombay Act by Act 52 of 1950 in terms of the proviso to Article 254(2). Then the only question to be decided is whether the amendments made to the Essential Supplies (Temporary Powers) Act by the Central Legislature in 1948, 1949 and 1950 are "furthers legislation" falling within Section 107(2) of the Government of India Act or "law with respect to the same matter" falling within Article 254(2). The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254(2) will have no application. The principle embodied in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

9. Considering the matter from this standpoint, the first question to be asked is, what is the subject-matter of the Bombay Act 36 of 1947? The preamble recites that it was "to provide for the enhancement of penalties for contravention of orders made under the Essential Supplies (Temporary Powers) Act, 1946". Then the next question is, what is the scope of the subsequent legislation in 1948, 1949 and 1950? As the offence for which the appellant has been convicted was committed on 6th April, 1951, it would be sufficient for the purpose of the present appeal to consider the effect of Act 52 of 1950, which was in force on that date. By that Act, Section 7(1) of the Essential Supplies (Temporary Powers) Act as passed in 1946 and as amended in 1948 and 1949 was repealed, and in its place, a new section was substituted. The scheme of that section is that for purposes of punishment, offences under the Act are grouped under three categories - those relating to cotton textiles, those relating to foodstuffs, and those relating to essential commodities other than textiles or foodstuffs. The punishments to be imposed in the several categories are separately specified. With reference to foodstuffs, the punishment that could be awarded when the offence consists in possession of foodgrains exceeding twice the maximum prescribed, is imprisonment for a term which may extend to seven years, with further provisions for fine and forfeiture of the commodities. In other cases, there is the lesser punishment of imprisonment, which may extend to three years. Section 7 is thus a comprehensive code covering the entire field of punishment for offences under the Act, graded according to the commodities and to the character of the offence. The subject of enhanced punishment that is dealt with in Act 36 of 1947 is also comprised in Act 52 of 1950, the same being limited to the case of hoarding of foodgrains. We are, therefore, entirely in agreement with the opinion of Chagla, C.J. and Chainani, J. that Act 52 of 1950 is a legislation in respect of the same matter as Act 36 of 1947.

10. Bavdekar, J. who came to the contrary conclusion observed, and quite correctly, that to establish repugnancy under Section 107(2) of the Government of India Act, it was not necessary that one legislation should say "do" what the other legislation says "don't", and that repugnancy might result when both the legislations covered the same field. But he took the view that the question of enhanced penalty under Act 36 of 1947 was a matter different from that of punishment under the Essential Supplies (Temporary Powers) Act, and as there was

legislation in respect of enhanced penalty only when the offence was possession of foodstuffs in excess of twice the prescribed quantity, the subject-matter of Act 36 of 1947 remained untouched by Act 52 of 1950 in respect of other matters. In other words, he considered that the question of enhanced punishment under Act 36 of 1947 was a matter different from that of mere punishment under the Essential Supplies (Temporary Powers) Act and its amendments; and in this, with respect, he fell into an error. The question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under Act 36 of 1947 and under Act 52 of 1950 constitutes a single subject-matter and cannot be split up in the manner suggested by the learned Judge. On this principle rests the rule of construction relating to statutes that "when the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one". (Maxwell on Interpretation of Statutes, 10th Edition, pages 187 and 188). "It is a well settled rule of construction", observed Goddard, J. in ***Smith* v. *Benabo*** [(1937) 1 KB 518] "that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute: see ***Michell* v. *Brown*** [1 El & El 267, 274] per Lord Campbell".

11. It is true, as already pointed out, that on a question under Article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. We must accordingly hold that Section 2 of Bombay Act 36 of 1947 cannot prevail as against Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946 as amended by Act 52 of 1950.

12. The appellant also sought to argue that the subject-matter of the legislation in Act 36 of 1947 was exclusively in the Provincial List, and that Section 107(2) of the Government of India Act and Article 254(2) of the Constitution which apply only with reference to legislation on subjects which are in the Concurrent List, have no application. The very legislation on which the appellant relies viz. Act 36 of 1947, proceeds, as already stated, on the basis that the subject-matter is in the Concurrent List. The appellant raised this question before the learned Judges of the Bombay High Court, and they rejected it. In the application for, leave to appeal to this Court which was presented under Article 132(1), the only ground that was put forward as involving a substantial question as to the interpretation of the Constitution was, whether the Bombay Act 36 of 1947 was repugnant and void under Article 254 of the Constitution. No other question having been raised in the petition, we must decline to permit the appellant to raise this point.

13. In the result, the appeal fails and is dismissed.

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FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

Automobile Transport (Rajasthan) Ltd. v. *State of Rajasthan*

AIR 1962 SC 1406

[C*ompensatoryTaxes and regulatory measures do not violate the freedom of trade, commerce and intercourse*]

The validity of the Rajasthan Motor Vehicles Taxation Act, 1951 and the rules thereunder was assailed in this case. The impugned section 4 of the Act read:

"4. ***Imposition of tax***.- (*1)* Save as otherwise provided by this Act or by rules made thereunder or by any other law for the time being in force, no motor vehicle shall be used in any public place or kept for use in Rajasthan unless the owner thereof has paid in respect of it, a tax at the appropriate rate specified in the Schedules to this Act within the time allowed by Section 5 and, save as hereinafter specified, such tax shall be payable annually notwithstanding that the motor vehicle may from time to time cease to be used

(*2*) An owner who keeps a motor vehicle of which the certificate of fitness and the certificate of registration are current, shall, for the purposes of this Act be presumed to keep such vehicle for use.

(*3*) A person who keeps more than ten motor vehicles for use solely in the course of trade and industry shall be entitled to a deduction of ten per cent. On the aggregate amount of tax to which he is liable.

Explanation.- The expression "trade and industry" includes transport for hire."

The appellants carried on the business of plying stage carriages of different fleet strength operating in different parts of the State of Rajasthan. Tax under the Act was imposed on the appellants in respect of their motor vehicles for the period beginning on April 1, 1951 and ending on March 31, 1954. When the appellants failed to pay the tax demanded from them, certificates under Section 13 of the Act were issued for recovery of the tax as arrears of land revenue. On receipt of the demand notices, the appellants filed appeals before the transport commissioner, Jaipur under section 14 of the Act which were dismissed.

The Rajasthan High Court had dismissed the writ petitions filed by the appellants challenging the validity of the Act as violative of the freedom of trade, commerce and intercourse under Article 301 of the Constitution.

S. K. DAS, J. – 8. We must now say a few words regarding the historical background. It is necessary to do this, because extensive references have been made to Australian and American decisions, Australian decisions with regard to the interpretation of Section 92 of the Australian Constitution and American decisions with regard to the Commerce clause of the American Constitution. This Court pointed out in the ***Atiabari Tea Co.*** case that it would not be always safe to rely upon the American or Australian decisions in interpreting the provisions of our Constitution. Valuable as those decisions might be in showing how the problem of freedom of trade, commerce and intercourse was dealt with in other federal constitutions, the provisions of our Constitution must be interpreted against the historical background in which our Constitution was made; the background of problems which the Constitution-makers tried to solve according to the genius of the Indian people whom the Constitution-makers represented in the Constituent Assembly. The first thing to be noticed in

this connection is that the Constitution-makers were not writing on a clean slate. They had the Government of India Act, 1935 and they also had the administrative set up which that Act envisaged. India then consisted of various administrative units known as Provinces, each with its own administrative set up. There were differences of language, religion etc. Some of the Provinces were economically more developed than the others. Even inside the same Province, there were under developed, developed and highly developed areas from the point of view of industries, communications etc. The problem of economic integration with which the Constitution-makers were faced was a problem with many facets. Two questions, however, stood out; one question was how to achieve a federal, economic and fiscal integration, so that economic policies affecting the interests of India as a whole could be carried out without putting an ever-increasing strain on the unity of India, particularly in the context of a developing economy. The second question was how to foster the development of areas which were under-developed without creating too many preferential or discriminative barriers. Besides the Provinces, there were the Indian States also known as Indian India. After India attained political freedom in 1947 and before the Constitution was adopted, the process of merger and integration of the- Indian States with the rest of the country had been accomplished so that when the Constitution was first passed the territory of India consisted of Part A States, which broadly stated, represented the Provinces in British India, and Part B States which were made up of Indian States. There were trade barriers raised by the Indian States in the exercise of their legislative powers and the Constitution-makers had to make provisions with regard to those trade barriers as well. The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the constitutions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Article 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or quasi-federal Constitution, namely, that the units of the Union have also certain powers as has the Union itself. One of the grievances made on behalf of the intervening States before us was that the majority view in the ***Atiabari Tea Co.*** case did not give sufficient importance to the power of the States under the Indian Constitution to raise revenue by taxes under the legislative heads entrusted to them, in interpreting the series of articles relating to trade, commerce and intercourse in Part XIII of the Constitution. It has been often stated that freedom of inter-State trade and commerce in a federation has been a baffling problem to constitutional experts in Australia, in America and in other federal constitutions. In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations which may be broadly stated thus: first, in the larger interests of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether; and third, there must be a power of intervention by the Union in any case of crisis to deal with particular problems that may arise in any part of India. As we shall presently show, all these three considerations have played their part in the series of articles which we have to consider in Part XIII of the Constitution. Therefore, in interpreting the relevant articles in Part XIII we must have regard to the general scheme of the Constitution of India with special reference to Part III (Fundamental Rights), Part XII (Finance, Property etc. containing Articles 276 and 286) and their inter-relation to Part XIII

in the context of a federal or quasi-federal Constitution in which the States have certain powers including the power to raise revenues for their purposes by taxation.

10. We have tried to summarise above the various stand points and views which were canvassed before us and we shall now proceed to consider which, according to us, is the correct interpretation of the relevant articles in Part XIII of the Constitution. We may first take the widest view, the view expressed by Shah, J. in the ***Atiabari Tea Co.*** case a view which has been supported by the appellants and one or two of the interveners before us. This view, we apprehend, is based on a purely textual interpretation of the relevant articles in Part XIII of the Constitution and this textual interpretation proceeds in the following way. Article 301 which is in general terms and is made subject to the other provisions of Part XIII imposes a general limitation on the exercise of legislative power, whether by the Union or the States, under any of the topics - taxation topics as well as other topics - enumerated in the three lists of the Seventh Schedule, in order to make certain that "trade, commerce and intercourse throughout the territory of India shall be free". Having placed a general limitation on the exercise of legislative powers by Parliament and the State Legislatures, Article 302 relaxes that restriction in favour of Parliament by providing that that authority "may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest". Having relaxed the restriction in respect of Parliament under Article 302, a restriction is put upon the relaxation by Article 303(1) to the effect that Parliament shall not have the power to make any law giving any preference to any one State over another or discriminating between one State and another by virtue of any entry relating to trade and commerce in Lists I and III of the Seventh Schedule. Article 303(1) which places a ban on Parliament against the giving of preferences to one State over another or of discriminating between one State and another, also provides that the same kind of ban should be placed upon the State Legislature also legislating by virtue of any entry relating to trade and commerce in Lists II and III of the Seventh Schedule. Article 303(2) again carves out an exception to the restriction placed by Article 303(I) on the powers of Parliament, by providing that nothing in Article 303(I) shall prevent Parliament from making any law giving preference to one State over another or discriminating between one State and another, if it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. This exception applies only to Parliament and not to the State Legislatures. Article 304 comprises two clauses and each clause operates as a proviso to Articles 301 and 303. Clause (1) of that article provides that the legislature of a State may "impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced". This clause, therefore, permits the levy on goods imported from sister States any tax which similar goods manufactured or produced in that State are subject to under its taxing laws. In other words, goods imported from sister States are placed on a par with similar goods manufactured or produced inside the State in regard to State taxation within the State allocated field. Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax etc. not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is

undoubtedly calculated to fetter inter-State trade and commerce. Now, clause (*b*) of Article 304 provides that notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. The proviso to clause (*b*) says that no bill or amendment for the purposes of clause (*b*) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. This provision appears to be the State analogue to the Union Parliament's authority defined by Article 302, in spite of the omission of the word 'reasonable' before the word 'restrictions' in the latter article. Leaving aside the pre-requisite of previous Presidential sanction for the validity of State legislation under clause (*b*) provided in the proviso thereto, there are two important differences between Article 302 and Article 304(*b*) which require special mention. The first is that while the power of Parliament under Article 302 is subject to the prohibition of preferences and discriminations decreed by Article 303(1) unless Parliament makes the declaration contained in Article 303(2), the State's power contained in Article 304(*b*) is made expressly free from the prohibition contained in Article 303(1), because the opening words of Article 304 contain a non obstante clause both to Article 301 and Article 303. The second difference springs from the fact that while Parliament's power to impose restrictions under Article 302 upon freedom of commerce in the public interest is not subject to the requirement of reasonableness, the power of the States to impose restrictions on the freedom of commerce in the public interest under Article 304 is subject to the condition that they are reasonable.

On the basis of the aforesaid textual construction, which is perhaps correct so far as it goes, the view expressed is that the freedom granted by Article 301 is of the widest amplitude and is subject only to such restrictions as are contained in the succeeding articles in Part XIII. But even in the matter of textual construction there are difficulties. One of the difficulties which was adverted to during the Constituent Assembly debates related to the somewhat indiscriminate or inappropriate use of the expressions "subject to" and "notwithstanding" in the articles in question. Article 302, as we have seen, makes a relaxation in favour of Parliament. Article 303 again imposes a restriction on that relaxation "notwithstanding anything in Article 302"; but Article 303 relates both to Parliament and the State Legislature, though Article 302 makes no relaxation in favour of the State Legislature. The non obstante clause in Article 303 is, therefore, somewhat inappropriate. Clause (2) of Article 303 carves out an exception from the restriction imposed on Parliament by clause (1) of Article 303. But again clause (2) relates only to Parliament and not to the State Legislature even though clause (1) relates to both. Article 304 again begins with a non obstante clause mentioning both Article 301 and Article 303, though Article 304 relates only to the legislature of a State. Article 303 relates to both the State legislature and Parliament and again the non obstante clause in Article 304 is somewhat inappropriate. The fact of the matter is that there is such a mix up of exception upon exception in the series of articles in Part XIII that a purely textual interpretation may not disclose the true intendment of the articles. This does not mean that the text of the articles, the words used therein, should be ignored. Indeed, the text of the articles is a vital consideration in interpreting them; but we must at the same time remember that we are dealing with the constitution of a country and the inter-connection of the different parts of the constitution forming part of an integrated whole must not be lost sight of. Even textually, we must ascertain the true meaning of the word "free" occurring in Article 301. From what

burdens or restrictions is the freedom assured? This is a question of vital importance even in the matter of construction. In Section 92 of the Australian Constitution the expression used was "absolutely free" and repeatedly the question was posed as to what this freedom meant.

As the language employed in Article 301 runs unqualified the Court, bearing in mind the fact that that provision has to be applied in the working of an orderly society, has necessarily to add certain qualifications subject to which alone that freedom may be exercised. This point has been very lucidly discussed in the dissenting opinion which Fullagar, J. wrote in ***Mc Carter* v. *Brodie*** [(1950) 80 CLR 432] an opinion which was substantially approved by the Privy Council in ***Hughes and Vale Proprietary Ltd.* v. *State of New South Wales*** [(1955) A.C. 241]. The learned Judge gave several examples to show the distinction between what was merely permitted regulation and what was true interference with freedom of trade and commerce. He pointed out that in the matter of motor vehicles most countries have legislation which requires the motor vehicle to be registered and a fee to be paid on registration. Every motor vehicle must carry lamps of a specified kind in front and at the rear and in the hours of darkness these lamps must be alight if the vehicle is being driven on the road. Every motor vehicle must carry a warning device, such as a horn; it must not be driven at a speed or in a manner which is dangerous to the public. In certain localities a motor vehicle must not be driven at more than a certain speed. The weight of the load which may be carried on a motor vehicle on a public highway is limited. Such examples may be multiplied indefinitely. Nobody doubts that the application of rules like the above does not really affect the freedom of trade and commerce; on the contrary they facilitate the free flow of trade and commerce. The reason is that these rules cannot fairly be said to impose a burden on a trader or deter him from trading: it would be absurd, for example, to suggest that freedom of trade is impaired or hindered by laws which require a motor vehicle to keep to the left of the road and not drive in a manner dangerous to the public. If the word "free" in Article 301 means "freedom to do whatever one wants to do", then chaos may be the result; for example, one owner of a motor vehicle may wish to drive on the left of the road while another may wish to drive on the right of the road. If they come from opposite directions, there will be an inevitable clash. Another class of examples relates to making a charge for the use of trading facilities, such as, roads, bridges, aerodromes etc. The collection of a toll or a tax for the use of a road or for the use of a bridge or for the use of an aerodrome is no barrier or burden or deterrent to traders who, in their absence, may have to take a longer or less convenient or more expensive route. Such compensatory taxes are no hindrance to anybody's freedom so long as they remain reasonable; but they could of course be converted into a hindrance to the freedom of trade. If the authorities concerned really wanted to hamper anybody's trade, they could easily raise the amount of tax or toll to an amount which would be prohibitive or deterrent or create other impediments which instead of facilitating trade and commerce would hamper them. It is here that the contrast, between "freedom" (Articles 301) and "restrictions" (Articles 302 and 304) clearly appears: that which in reality facilitates trade and commerce is not a restriction, and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade; but the distinction, if it has to be drawn, is real and clear. For the tax to become a prohibited tax it has to be a direct tax the effect of which is

to hinder the movement part of trade. So long as a tax remains compensatory or regulatory it cannot operate as a hindrance.

11. The most serious objection to the widest view canvassed before us is that it ignores altogether that in the conception of freedom of trade, commerce and intercourse in a community regulated by law freedom must be understood in the context of the working of an orderly society. The widest view proceeds on the footing that Article 301 imposes a general restriction on legislative power and grants a freedom of trade, commerce and intercourse in all its series of operations, from all barriers, from all restrictions, from all control and from all regulation, and the only qualification that is to be found in the article is the opening clause, namely, subject to the other provisions of Part XIII. This in actual practice will mean that if the State Legislature wishes to control or regulate trade, commerce and intercourse in such a way as to facilitate its free movement, it must yet proceed to make a law under Article 304(*b*) and no such bill can be introduced or moved in the Legislature of a State without the previous sanction of the President. The practical effect would be to stop or delay effective legislation which may be urgently necessary. Take, for example, a case where in the interests of public health, it is necessary to introduce urgently legislation stopping trade in goods which are deleterious to health, like the trade in diseased potatoes in Australia. If the State Legislature wishes to introduce such a bill, it must have the sanction of the President. Even such legislation as imposes traffic regulations would require the sanction of the President. Such an interpretation would, in our opinion, seriously affect the legislative power of the State Legislatures which power has been held to be plenary with regard to subjects in List II, The States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in List II. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State list (List II) and the Concurrent List (List III) under which a State Legislature has power to make laws. Under some of these entries the State Legislature may impose different kinds of taxes and duties, such as property tax, profession tax, sales tax, excise duty etc., and legislation in respect of any one of these items may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by the Legislature of a State which has a repercussion on tariffs, licensing, marketing regulations, price-control etc. must have the previous sanction of the President, then the Constitution insofar as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless. In our view the concept of freedom of trade, commerce and intercourse postulated by Article 301 must be understood in the context of an orderly society and as part of a Constitution which envisages a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and the legitimacy of some degree of regulatory control, whether by the Union or the States: this is irrespective of the restrictions imposed by the other articles in Part XIII of the Constitution. We are, therefore, unable to

accept the widest view as the correct interpretation of the relevant articles in Part XIII of the Constitution.

12. We proceed now to deal with another interpretation of the relevant provisions in Part XIII: this interpretation may be characterised as the narrow interpretation. According to this interpretation taxing laws are governed by the provisions of Part XII of the Constitution and except Article 304(*a*) none of the other provisions of Part XIII extend to taxing laws. An additional argument is that the provisions of Part XIII apply only to such legislation as is made under entries in the Seventh Schedule which deal with trade, commerce and intercourse. According to this argument Entry 42 in List I, which refers to inter-State trade and commerce, Entry 26 in List II which deals with trade and commerce within the State subject to the provisions of Entry 33 in List III, and Entry 33 in List III which deals with trade and commerce as specified therein, are the only entries legislation relating to which attracts the provisions of Part XIII, and legislation on other topics is not affected by those provisions. In support of this argument assistance has been sought from the heading of Part XIII and from the use of the expression "subject to" in Article 301. It has been pointed out that the title of Part XIII is trade, commerce and intercourse; intercourse, it is stated, means commercial intercourse there being no separate legislative entry in any of the three lists relating to intercourse and the word "throughout" has reference to space rather than to movement. The expression "subject to", it is stated, means "conditional upon", thus connecting the provisions of Article 303 with the provisions of Article 301. Article 303 specifically uses the expression "by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule". It is argued that by reason of the connection between Article 301 and Article 303, the words "by virtue of any entry relating to trade and commerce etc." must be read into Article 301 also so that Article 301 will then be construed as a fetter on the commerce power i.e., the power given to the legislature to make laws under entries relating to trade and commerce only. As to taxation being out of the provisions of Part XIII of the Constitution except for Article 304(*a*), the argument is that we must look to the historical background of Section 297 of the Government of India Act, 1935 and Articles 274, 276 and 285 to 288 in Part XII of the Constitution. It is pointed out that the power to tax is an incident of sovereignty and it is divided between the Union and the States under the Constitution; Part XII of the Constitution deals with several aspects of taxation and all the restrictions on the power to tax are contained in Part XII which, according to this interpretation, is self-contained. Therefore, so it is argued, the freedom guaranteed by Article 301 does not mean freedom from taxation, because taxation is not a restriction within the meaning of the relevant articles in Part XIII.

13. It would appear from what we have stated above that this interpretation consists of two main parts: one part is that taxation simpliciter is not within the terms of Article 301 and the second part is that Article 301 must take colour from the provisions of Article 303 which, it is said, is restricted to legislation with respect to entries relating to trade and commerce in any of the lists in the Seventh Schedule. In ***Atiabari Tea Co.*** case this Court dealt with the correctness or otherwise of this narrow interpretation and by the majority decision held against it. The majority judgment in the ***Atiabari Tea Co.*** case deals with the arguments advanced in support of the interpretation in detail and as we are substantially in agreement

with the reasons given in that judgment, we do not think that any useful purpose would be served by repeating them. It is enough to point out that though the power of levying tax is essentially for the very existence of government, its exercise may be controlled by constitutional provisions made in that behalf. It cannot be laid down as a general proposition that the power to tax is outside the purview of any constitutional limitations. We have carefully examined the provisions in Part XII of the Constitution and are unable to agree that those provisions exhaust all the limitations on the power to impose a tax. The effect of Article 265 was considered in the majority decision and it was pointed out that the power of taxation under our Constitution was subject to the condition that no tax shall be levied or collected except by authority of law. Article 245 which deals with the extent of laws made by Parliament and by the Legislatures of States expressly states that the power of Parliament and of the State Legislatures to make laws is "subject to the provisions of this Constitution". The expression "subject to the provisions of this Constitution" is surely wide enough to take in the provisions of both Part XII and Part XIII. In view of the provisions of Article 245, we find it difficult to accept the argument that the restrictions in Part XIII of the Constitution do not apply to taxation laws. As to the argument that Article 301 must take colour from Article 303, we are unable to accept as correct the argument that the provisions of Article 303 must delimit the general terms of Article 301. It seems to us that so far as Parliament is concerned, Article 303(1) carves out an exception from the relaxation given in favour of Parliament by Article 302; the relaxation given by Article 302 is itself in the nature of an exception to the general terms of Article 301. It would be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.

14. After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed for on behalf of the majority of the States cannot be accepted, namely, that the relevant articles in Part XIII apply only to legislation in respect of the entries relating to trade and commerce in any of the lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them.

15. This disposes of two of the main interpretations which have been canvassed before us. We accept neither the widest interpretation nor the narrow interpretation for the reasons which we have already indicated. It remains now to consider some of the other interpretations which have been canvassed before us. Mr Lalnarain Sinha has in substance contended that Article 301 is restricted to freedom from geographical barriers only; Mr D. Sahu has contended that Article 301 is confined to (*i*) inter-State barriers, and (*ii*) customs-barriers which at one time existed between the Indian States and the adjacent British Indian territory. In our opinion both these interpretations proceed on a somewhat narrow basis and are not justified by the general words used in Article 301 and the other relevant articles in Part XIII of the Constitution. In our opinion the ambit of the relevant articles in Part XIII is wider than

what these interpretations assume it to be. While on this point it may be advisable to refer to the contrast between Article 19 in Part III and Article 301 in Part XIII of the Constitution. Article 19 guarantees to all citizens certain rights which are compendiously stated to be the right to freedom; two such rights are (*i*) to move freely throughout the territory of India and (*ii*) to carry on any occupation, trade or business. The right to move freely throughout the territory of India is subject to reasonable restrictions in the interests of the general public or for the protection of any Scheduled Tribe. The right to carry on any occupation, trade or business is subject to reasonable restrictions in the interests of the general public and in particular to any law relating to the carrying on by the State, of any trade, business etc. whether to the exclusion, complete or partial, of citizens or otherwise. The first contrast between Article 19 and Article 301 is that Article 19 guarantees the right to freedom to a citizen whereas freedom granted by Article 301 is not confined to citizens. Another distinction which has been drawn is that Article 19 looks at the right from the point of view of an individual, whereas Article 301 looks at the matter from the point of view of freedom of the general volume of trade, commerce and intercourse. We do not think that this distinction, if any such distinction at all exists, is material in the present cases, because an individual trader may complain of a violation of his freedom guaranteed under Article 19(1)(*g*) and he may also complain if the freedom assured by Article 301 has been violated. In a particular set of circumstances the two freedoms need not be the same or need not coalesce. In some of the Australian decisions a distinction was sought to be drawn between the free flow of the same volume of inter-State trade and the individual's right to carry on his trade in more than one State and it was argued that Section 92 of the Australian Constitution related to the free flow of the volume of trade as distinguished from an individual's right to carry on his trade. Such a distinction was negatived and the Privy Council pointed out that the redoubtable Mr James who fought many a battle for the freedom of his trade and occupation was after all an individual. Another aspect of this contrast between Article 19 and Article 301 of the Constitution which has been adverted to before us is this : it has been argued that if a law imposing a restriction on the right of a citizen to carry on his trade or business is justified under clause (6) of Article 19 as being in the interests of the general public, that law cannot again be impeached as being violative of Article 301; otherwise, so it is argued, the Constitution will be taking away by Article 301 what it has granted by clause (6) of Article 19. The argument is that trade or business must be such as a person is entitled to carry on before he can complain of any impediment to the freedom of that trade or business. This is an aspect of the problem which may require a more detailed and careful examination in an appropriate case. If we are right in the view which we are expressing that the freedom granted by Article 301 does not take in regulatory measures or compensatory taxes for the use of trading facilities, then whether we look at such measures from the point of view of Article 19(l)(*g*) or from the point of view of Article 301, the result will be the same. It is not possible, however, to say from a contrast of Article 19 with Article 301 that the latter article relates only to freedom from geographical barriers as was contended by Mr Lalnarain Sinha. By geographical barrier Mr Sinha apparently meant something like a customs barrier. His point was that the freedom assured by Article 301 was a freedom from any restriction for goods crossing that barrier in the course of trade. He said that that barrier might be put up anywhere, that is, either at the State border or even within the territories of a State. Thus, according to

him, it was only when a restriction was put upon goods crossing such a barrier either in the shape of an imposition or otherwise, that Article 301 was violated. It seems to us that this will be restricting too much the freedom which Article 301 is intended to assure. Suppose that instead of saying that a tax will be paid upon goods carried in the course of trade over a certain imaginary line drawn across any part of India, it was said that if a contract was made for the sale of goods lying or to be manufactured at place A and to be delivered at place B situated across the line, there would then be no restriction put upon the goods crossing any imaginary line or any geographical barrier. We think that Article 301 contemplated that trade in the given illustration would be free from the restriction mentioned. If Article 301 is intended to protect trade in movement from restrictions, with which view we think Mr Lalnarain Sinha also agreed, then it would be impossible to interpret Article 301 as contemplating only freedom from restrictions against movement of goods in the course of trade across geographical barriers. We are for this reason unable to accept Mr Sinha's contention. Mr Ranadeb Chaudhuri appearing on behalf of one of the interveners accepted the majority view that Article 301 was aimed at the movement aspect of trade, commerce and intercourse; this he called the "channelling" of trade, commerce and intercourse. But he raised the question of subsidy and said that Article 303 which related to discrimination and preference also aimed at the mischief of subsidy which might be given to a State by way of preference or discrimination; that mischief, he said, would come within Article 303 even if it did not relate to the movement aspect of trade and commerce. We are not concerned in the present cases with the question of subsidy and need not, therefore, consider the argument of Mr Ranadeb Chaudhuri with regard to it.

16. As to the word "intercourse" there has also been some argument before us. On behalf of some of the States it has been contended that the word "intercourse" in the context in which it occurs in Article 301 means commercial intercourse. On behalf of the appellants it has been argued that the word "intercourse" takes in not merely trade and commerce in the strict sense, but also activities, such as, movement of persons for the purpose of friendly association with one another, telephonic communications etc. For the purpose of the cases which we are considering nothing very much turns upon whether we take the word "intercourse" in a wide sense or in a narrow sense. Even taking the word 'intercourse' in a wide sense, the question will still be what does the word "free" mean? Does it mean free from all regulation, even regulation which is necessary for an orderly society? We have already stated that the word "free" in Article 301 cannot be given that wide meaning.

17. We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the majority in the ***Atiabari Tea Co.*** case is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(*b*) of the Constitution.

18. Now the question is, do the relevant provisions of the Act read with the Schedules fall within what we have called permitted regulation which does not really or materially affect freedom of trade, commerce and intercourse; or do the taxes imposed by the relevant

provisions of the Act read with the Schedules come within the category of compensatory taxes which are no hindrance to freedom of trade, commerce and intercourse, being taxes for the use of trading facilities in the shape of roads, bridges etc. In an earlier part of this judgment we have quoted Section 4 which is the charging section. That section makes it quite clear that the tax is imposed on a motor vehicle which shall be used in any public place or kept for use in Rajasthan; the tax is to be at appropriate rates specified in the Schedules to the Act and save as specified in the Act the tax shall be payable annually notwithstanding that the motor vehicle may, from time to time, cease to be used. Section 7 says in effect that if the motor vehicle in respect of which such tax has been paid has not been used for a continuous period of not less than three months, then the owner shall be entitled to a refund of an amount equal to 1/12 of the annual rate of the tax paid. It appears from the Schedules that a vehicle other than a transport vehicle is charged with a consolidated tax, according as the motor vehicle is fitted with pneumatic tyres or not. The rate of tax varies according to the nature of the vehicle, whether it is a motor cycle, or a motor tricycle drawing a tractor, or a side car etc. Schedule II relates to transport vehicles which again are classified into various categories, those fitted with pneumatic tyres and those not so fitted, motor vehicles plying for conveyance of passengers and light personal luggage, goods vehicles plying under public carrier's permit etc. The quantum of tax is fixed with regard to the seating capacity in some cases and loading capacity in other cases. The tax on some goods vehicles is fixed per day or per annum. Schedules III relates to goods vehicles only. A classification is again made between different classes of goods vehicles fitted with pneumatic tyres, conveying a trailer etc. The tax fixed is a tax for use per day. Schedule IV deals with vehicles plying with a private carrier's permit. Here again a classification is made of vehicles fitted with pneumatic tyres, with a general permit for use in Rajasthan and those with a permit for plying within the limits of one region only. The tax varies according to the loading capacity etc.

19. An examination of these provisions indicates clearly enough that the taxes imposed are really taxes on motor vehicles which use the roads in Rajasthan or are kept for use therein, either throughout the whole area or parts of it. The tax is payable by all owners of motor vehicles, traders or otherwise, dealing with the question whether these taxes were reasonable restrictions on the right of individuals to move freely throughout the territory of India etc. the High Court said:

> In this connection, it is well to remember that the State maintains old roads, and makes new ones, and these roads are at the disposal of those who use motor vehicles either for private purposes or for trade or commerce. This naturally costs the State. It has, therefore, to find funds for making new roads and maintenance of those that are already in existence. These funds can only be raised through taxation, and if the State taxes the users of motor vehicles in order to make and maintain roads, it can hardly be said that the State is putting unreasonable restrictions on the individuals' right to move freely throughout the territory of India, or to practise any profession or to carry on any occupation, trade or business. We have looked into figures of income and expenditure in this connection of the Rajasthan State to judge whether this taxation is reasonable. We find that in 1952-53 income from motor vehicles taxation under the Act was in the neighbourhood of 34 lakhs. In that very year, the expenditure on new

roads and maintenance of old roads was in the neighbourhood of 60 lakhs. In 1954-55, the estimated income from the tax was 35 lakhs, while the estimated expenditure was over 65 lakhs. It is obvious from these figures that the State is charging from the users of motor vehicles something in the neighbourhood of 50% of the cost it has to incur in maintaining and making roads.

The High Court further pointed out that in the case of private motor cars the tax was Rs 12 per seat and for an ordinary five-seater car, it came to Rs 60 per year. On payment of this amount the owner of the motor vehicle could use the car anywhere in Rajasthan and all the roads were open to him. In the case of a goods vehicle, the tax was Rs 2000 per year for a goods vehicle with a load capacity of over five tons i.e. over 135 maunds. Assuming that such a vehicle could be reasonably used for 200 days in a year, the tax amounted to Rs 10 per day for about 140 maunds of goods carried over any length of the roads in Rajasthan. This worked out to about Re 1 for 14 maunds i.e. almost an anna a maund. If the Act and the Schedules appended thereto are examined in this manner, it will be noticed that the tax imposed is really a tax for the use of the roads in Rajasthan and it cannot be said that it hinders the free movement of trade, commerce and inter course. The taxes are compensatory taxes which instead of hindering trade, commerce and intercourse facilitate them by providing roads and maintaining the roads in a good state of repairs. Whether a tax is compensatory or not cannot be made to depend on the preamble of the statute imposing it. Nor do we think that it would be right to say that a tax is not compensatory because the precise or specific amount collected is not actually used in providing any facilities. It is obvious that if the preamble decided the matter, then the mercantile community would be helpless and it would be the easiest thing for the legislature to defeat the freedom assured by Article 301 by stating in the preamble that it is meant to provide facilities to the tradesmen. Likewise actual user would often be unknown to tradesmen and such user may at some time be compensatory and at others not so. It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test, and in the nature of things that cannot be done.

20. Nor do we think that it will make any difference that the money collected from the tax is not put into a separate fund so long as facilities for the trades people who pay the tax are provided and the expenses incurred in providing them are borne by the State out of whatever source it may be. In the cases under our consideration the tax is based on passenger capacity of commercial buses and loading capacity of goods vehicles; both have some relation to the wear and tear caused to the roads used by the buses. In basing the taxes on passenger capacity or loading capacity, the legislature has merely evolved a method and measure of compensation demanded by the State, but the taxes are still compensation and charge for regulation.

21. We were addressed at some length on the distinction between a tax, a fee and an excise duty. It was also pointed out to us that the taxes raised under the Act were not specially ear-marked for the building or maintenance of roads. We do not think that these considerations necessarily determine whether the taxes are compensatory taxes or not. We

must consider the substance of the matter and so considered, there can be no doubt that the taxes imposed are no hindrance to the freedom of trade, commerce and intercourse. If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of trade and commerce may well be considered unimpaired. In such a case the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought and received.

22. We have, therefore, come to the conclusion that the Act does not violate the provisions of Article 301 of the Constitution and the taxes imposed under the Act are compensatory taxes which do not hinder the freedom of trade, commerce and intercourse assured by that article. The taxes imposed were, therefore, legal and the High Court rightly dismissed the writ petitions filed by the appellants. In the result the appeals fail and are dismissed.

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Jindal Stainless Ltd. **v.** *State of Haryana*

AIR 2006 SC 2550

[*Concept of "compensatory tax" vis-a-vis Article 301*]

By order dated 26.9.2003, the referring Bench of Hon'ble Ruma Pal, J. and P. Venkatarama Reddy, J. doubted the correctness of the view taken in ***M/s Bhagatram Rajeevkumar* v. *Commissioner of Sales Tax, M.P.*** relied on in the subsequent decision of this Court in the case of ***State of Bihar* v. *Bihar Chamber of Commerce***. All the matters were ordered to be placed before the Hon'ble the Chief Justice for appropriate directions and accordingly, the matter came to the Constitution Bench to decide with certitude the parameters of the judicially evolved concept of "compensatory tax" vis-a-vis Article 301. The referral order is in ***Jindal Strips Ltd.*** (now known as ***Jindal Stainless Ltd.***) **v.** ***State of Haryana*** under Article 145(3).

S.H. KAPADIA, J. – 2. For this purpose, we are required to examine the source from which the concept of compensatory tax is judicially derived, the nature and character of compensatory tax and its parameters in the context of Article 301.

3. In a batch of appeals, the constitutional validity of the Haryana Local Area Development Tax Act, 2000 has been challenged on two grounds : (1) that, the Act is violative of Article 301 and is not saved by Article 304; and (2) that, the Act in fact seeks to levy sales tax on inter-State sales, which is outside the competence of the State Legislature. However, the referral order is confined to the above-mentioned first question.

4. Jindal Strips Ltd. is an industry manufacturing products within the State of Haryana. The raw-material is purchased from outside the State. The finished products are sent to other States on consignment basis or stock transfer basis. No sales tax is paid on the input of the raw material. Similarly, no sales tax is paid on the export of finished products.

5. The impugned Act came into force w.e.f. 5th May, 2000 to provide for levy and collection of tax on the entry of goods into the local areas of the State for consumption or use therein. The Act is enacted to provide for levy and collection of tax on the entry into a local area of the State, of a motor vehicle for use or sale, and of other goods for use or consumption therein. The Act seeks to impose entry tax on all goods brought into a "local area". The entire State is divided into local areas. The Act covers not only vehicles bringing goods into the State but also vehicles carrying goods from one local area to another. However, those who pay sales tax to the State are exempt from payment of entry tax. Ultimately, the entry tax only falls on concerns, like Jindal Strips, which, by virtue of the provisions of the Central Sales Tax Act, 1956, pay sales tax on purchase of raw-material and sale of finished goods to other States and do not pay sales tax to the State of Haryana. This is the context in which the challenge to the Act under Article 301 has been made. At this stage, we may point out that prior to September 30, 2003, section 22 stated that the tax collected under the Act shall be distributed by the State Government amongst the local bodies to be utilized for the development of local areas. However, on 30th September, 2003, section 22 was amended clarifying that the tax levied and collected shall be utilized for facilitating free flow of trade and commerce.

REASONS FOR THE REFERRAL ORDER:

6. In ***Atiabari Tea Co. Ltd.*** **v.** ***State of Assam***, it was held that taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions on the freedoms guaranteed to trade under Part-XIII of the Constitution. However, the prohibition of restrictions on free trade is not an absolute one. Statutes restrictive of trade can avoid invalidation if they comply with Article 304(a) or (b) .

7. In ***Automobile Transport (Rajasthan) Ltd.*** **v.** ***State of Rajasthan***, it was held that only such taxes as directly and immediately restrict trade would fall within the purview of Article 301 and that any restriction in the form of taxes imposed on the carriage of goods or their movement by the State Legislature can only be done after satisfying the requirements of Article 304(b).

8. According to M/s Jindal Strips and similarly situated other appellants, the impugned Haryana Local Area Development Tax Act, 2000 imposes a restriction on trade and is violative of Article 301, particularly, when the provisions of Article 304(b) have not been complied with.

9. The judgment of this Court in ***Atiabari Tea Co***. was delivered by a Constitution Bench of five Judges. However, an exception to Article 301 and its operation was judicially crafted in ***Automobile Transport***. In that case, the challenge was to the Rajasthan Motor Vehicles Taxation Act, 1951. The challenge under Article 301 was rejected by the Constitution Bench of seven Judges of this Court by holding vide para 19 that "the taxes are compensatory taxes which instead of hindering trade, commerce and intercourse facilitate them by providing roads and maintaining the roads". Vide para 21 of the report, it was observed that "if a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of trade and commerce may well be considered unimpaired." Thus, the concept of "compensatory taxes" was propounded. Therefore, taxes which would otherwise interfere with the unfettered freedom under Article 301 will be protected from the vice of unconstitutionality if they are compensatory.

10. In ***Automobile Transport***, it was said, vide para 19, that "a working test for deciding whether a tax is a compensatory or not is to enquire whether the trade is having the use of certain facilities for the better conduct of its business and paying not patently much more than what is required for providing the facilities".

11. Right from 1962 up to 1995, this working test was applied by this Court in relation to motor vehicles taxes for deciding whether the impugned levy was compensatory or not. The decisions proceeded on the principle adumbrated in ***Automobile Transport***, which was paraphrased by Mathew, J. speaking for a Bench of three Judges in ***G.K. Krishnan*** **v.** ***State of T.N.*** in which it was observed that "the very idea of a compensatory tax is service more or less commensurate with the tax levied".

15. To sum up: the pre-1995 decisions held that an exaction to reimburse/recompense the State the cost of an existing facility made available to the traders or the cost of a specific facility planned to be provided to the traders is compensatory tax and that it is implicit in such a levy that it must, more or less, be commensurate with the cost of the service or facility.

Those decisions emphasized that the imposition of tax must be with the definite purpose of meeting the expenses on account of providing or adding to the trading facilities either immediately or in future provided the quantum of tax is based on a reasonable relation to the actual or projected expenditure on the cost of the service or facility. However, the post-1995 decisions in ***Bhagatram*** case and in the case of ***Bihar Chamber of Commerce***, now say that even if the purpose of imposition of the tax is not merely to confer a special advantage on the traders but to benefit the public in general including the traders, that levy can still be considered to be compensatory. According to this view, an indirect or incidental benefit to traders by reason of stepping up the developmental activities in various local areas of the State can be brought within the concept of compensatory tax, the nexus between the tax known as compensatory tax and the trading facilities not being necessarily either direct or specific.

ARGUMENTS:

17. Mr. Shanti Bhushan, learned senior counsel appearing on behalf of the Jindal Stainelss Ltd. submitted that in ***Atiabari Tea Co.*** this court held that even a tax legislation would have to bear the scrutiny of Part-XIII of the Constitution and such legislation could infringe Article 301 to 304 of the Constitution; that the tax laws were within the ambit of Part-XIII of the Constitution; that seven-Judge Constitution Bench of this court in ***Automobile Transport*** for the first time judicially evolved the principle of compensatory taxes which would be outside the purview of Part-XIII and which could not be said to impede free flow of trade and commerce [majority view]. Such compensatory taxes were no hindrance to freedom of trade so long as they remained reasonable. Such compensatory taxes, in essence and reality, facilitated trade and commerce and they were not restrictions, it was held that the substance of the matter has to be determined in each case. Learned counsel placed reliance on the judgment of Justice Das from pages 522 to 523, in this regard. Learned counsel submitted that the working test laid down in the ***Automobile Transport*** is good even today. Under the test, although the precise amount collected may not be actually used to provide any facility, the tax collected should be by and large commensurate with the cost of the facilities provided for the trade. Learned counsel, therefore, submitted that the working test laid down in ***Automobile Transport*** is the only test which would differentiate the tax imposed for augmenting general revenue from the compensatory tax. Learned counsel submitted that there is a basic difference between the law infringing freedom of trade and the law which imposes regulations which in effect facilitates or promotes trade. According to the learned counsel, regulations provide for necessary services to enable free movement of traffic and, therefore, they cannot be described as restrictions impeding the freedom under Article 301; that in the case of regulations the tax imposed is incidental in order to compensate for the facilities provided. On the other hand, it was urged that a tax law is in essence an exercise to augment the general revenue of the State and not for providing facilities and services for the trade. A tax law which does not in return provide services and facilities for the free movement of trade, can never be compensatory. Learned counsel further submitted that in ***Bhagatram*** case, the Division Bench of this court held that "the concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as

invalid". In that case the Division Bench of this court relied upon the judgment of this court in the case of ***Hansa Corporation***. Mr. Shanti Bhushan, learned counsel for the assessees, submitted that the judgment of this court in the case of ***Bhagatram*** was erroneous on two counts. Firstly, the reliance on ***Hansa Corporation*** was totally misplaced because ***Hansa Corporation*** did not deal with the issue of what is compensatory tax. In fact, that question was expressly not gone into. Secondly, learned counsel submitted that to the extent of Bhagatram1 holding that the concept of compensatory tax has been widened as stated above, the said judgment was contrary to the law laid down by the seven-Judge Bench decision of this court in the case of ***Automobile Transport*** and, therefore, needs to be overruled. Mr. Shanti Bhushan further contended that the Division Bench of this court in the case of ***Bihar Chamber of Commerce*** has followed the judgment of this court in the case of ***Bhagatram*** and has held that even though the tax was for augmenting the general revenue of the State, judicial notice could be taken of the fact that the State provides several facilities to the trade including laying and maintenance of roads, waterways, markets etc. and on that basis it was held that the State had established the impugned tax to be compensatory in nature. In short, Mr. Shanti Bhushan's submission was that the aforestated two judgments in ***Bhagatram*** and in ***Bihar Chamber of Commerce*** were erroneous to the extent indicated above; that they were contrary to the judgment of seven-Judge Bench of this court in the case of ***Automobile Transport***. Learned counsel urged that if the test, laid down in the case of ***Bhagatram*** and in the case of ***Bihar Chamber of Commerce***, was held to be applicable then as a consequence there would be no difference between a tax and a compensatory tax. It was urged that therefore this court should evolve parameters of compensatory tax for future guidance. Learned counsel submitted that to be compensatory, tax must be levied to augment facilities for trade and that is how a tax was held not to impede but to facilitate trade (in ***Automobile Transport***). It was submitted that the essence of compensatory tax is that the services rendered or facilities provided should be more or less commensurate with the tax levied and the tax should not be patently more than what was required to provide the trading facility. It was submitted that the tax imposed for augmenting general revenue of the State is not compensatory; that any tax law which is designed or which has the effect of disrupting trade movement in inter-State trade and commerce between States is contrary to the concept of freedom of trade embodied in Article 301. It was submitted that the compensatory character of tax should be self-evident from the taxing law itself and it cannot be judged from the manner in which the tax revenue is utilized in course of time. It was urged that in the case of ambiguity, the burden would fall on the State to show that in essence the levy was imposed as a recompense for the facilities/services provided by the State. It was urged that in the case of ***Sanjay Trading Company* v. *Commissioner of Sales Tax***, the tax was held to be compensatory based on the figures furnished by the State and it was found that the levy was imposed to offset the loss caused by the abolition of octroi which according to the learned counsel is totally missing in the case of Haryana Local Area Development Tax Act, 2000.

23. Shri P.P. Rao, learned senior counsel appearing on behalf of the State of Haryana, submitted that the impugned 2000 Act does not suffer from want of levy competence; that the State legislature has the competence under entry 52 list II to enact the impugned law; that the State legislature is competent to levy such tax because the incidence of tax is on the entry of

goods into a local area for consumption, use or sale therein and, therefore, it is not a tax on the import of goods from outside India, nor a tax on the manufacture of goods, nor a tax on the export of the goods to places outside the State. Finally, it is not a sales tax. Learned counsel further contended that under entry 52 list II it is not obligatory for the State to enact a law for the levy of entry tax on goods which are brought for use, consumption or sale; it is within the power of the State to make a law for levy of such tax on goods brought for use, consumption or sale. Learned counsel submitted that the legislature has selected goods brought for use or consumption in a local area for the purposes of the levy; that it is within the power of the State to make a law for levy of tax on goods for any of the three purposes or for one of them or two of them. Learned counsel submitted that Article 286 read with entry 41, entry 83, entry 92A and entry 92B does not have any bearing on the constitutional validity of the impugned 2000 Act because the above entries deal with different subjects; that the entry tax is not a tax on sale of goods affected by branch transfer or export out-of-State. Learned counsel urged that the entry tax is compensatory in character and, therefore, the impugned levy which is compensatory in nature, as can be seen from section 22 of the said Act, does not attract Article 301 and Article 304(a) of the Constitution. Learned counsel submitted that section 22 of the Act was amended on September 30, 2003 clarifying that the tax levied and collected shall be utilized for facilitating free flow of trade and commerce. Learned counsel, therefore, submitted that the levy is compensatory in nature. Learned counsel next contended that the compensatory levy need not satisfy the rule of *quid pro quo* strictly; that it is sufficient that there is some relation or nexus between facilities provided and the tax imposed. Even the concept of fee has undergone significant change over the years as a result of a catena of decisions of this court and, therefore, this reference under Article 145(3) of the Constitution was uncalled for. As a matter of preliminary submission, Shri P.P. Rao, learned senior counsel for the State, contended that in view of the amendment made by Act 18 of 2003 adding an explanation to section 22 of the impugned 2000 Act clarifying that the tax collected shall be utilized for developing and maintaining infrastructure facilities useful for free flow of trade, the question involved in this matter has become academic. On merits learned counsel urged that the Constitution contemplates levy of taxes and levy of fees. He urged that in the case of fees, quid pro quo is an essential element though not in taxes. However, compensatory taxes are an exception; they contain an element of quid pro quo but not to the extent as in the case of "fees". Learned counsel placed reliance in this connection on the judgment of this court in the case of ***M/s International Tourist Corporation* v. *State of Haryana***. Learned counsel submitted that the extent of *quid pro quo* required in a fee has undergone a sea-change and it would be irrational to insist on such a test in the case of compensatory tax. Learned counsel next submitted that the element of compensation in compensatory taxes needs to be interpreted taking note of constitutional developments, the changed perception of the entire relationship of fundamental rights and directive principles as well as the sea-change in the concept of fee particularly with reference to the element of *quid pro quo*. Learned counsel submitted that the principles of law declared in ***Bhagatram*** are consistent with contemporary thinking about the basic concepts of tax, fee and compensatory tax with due regard to the developments subsequent to ***Automobile Transport***.

INTRODUCTION:

27. Section 8 of Article 1 of the U.S. Constitution contains what is called "Commerce Clause", which regulates trade and commerce. Keeping in mind the dual form of government in USA and the concept of "Police Power" vis-`-vis the "Taxing Power", the U.S. Supreme Court has held that the commerce power embodied in the commerce clause implies the power to regulate; that is the power to prescribe the rule by which commerce is to be governed (See: Constitutional Law by Stone). Section 8 of Article 1 is an authorization in favour of the Congress to enact laws for the protection and encouragement of commerce among the States. By its own force, it creates an area of trade free from interference by the States. Therefore, the commerce clause is per se a limitation upon the power of the States and is not dependent upon the law being enacted. It prohibits the States from enacting a law which impedes free flow of trade between the States.

28. On the other hand, section 92 of the Australian Constitution provides for freedom of trade and commerce. It does not seek to regulate as in case of commerce clause. However, it has been held in numerous decisions of the Privy Council and the Australian High Courts that section 92 leaves open the regulation of trade and commerce at all events until the regulation is enacted provided it does not impede the true freedom of inter-State commerce. This reasoning is based on the principle that all trade and commerce must be conducted subject to law. Thus, we have the difference between taxing and regulatory laws. This is how the concept of "regulatory charges" came about.

Article 301 is inspired by section 92 of the Australian Constitution when it refers to freedom of trade and commerce, however, Article 301 is subject to limitations and conditions in Articles 302, 303 and 304 which are borrowed from the commerce clause under Article 1 of the US Constitution. Therefore, Part-XIII is an amalgam of the United States and Australian Constitutions which brings out the difference between regulatory and taxing powers. This is how the concept of Payment for Revenue and concept of Payment for Regulation arose. This is how the regulatory power stood excluded from the taxing power and on that reasoning in ***Automobile Transport*** case, this Court took the view that compensatory taxes constitute an exception to Article 301. It is a judicially evolved concept. However, the basis of that concept was not discussed by this Court in that case which we have done in this case. Suffice it to state at this stage that the basis of special assessments, betterment charges, fees, regulatory charges is "recompense/reimbursement" of the cost or expenses incurred or incurrable for providing services/facilities based on the principle of equivalence unlike taxes whose basis is the concept of "burden" based on the principle of ability to pay. At this stage, we may clarify that in the above case of Automobile Transport6, this Court has equated regulatory charges with compensatory taxes and since it is the view expressed by a Bench of seven Judges, we have to proceed on that basis. The fall-out is that compensatory tax becomes a sub-class of fees.

SCOPE OF ARTICLES 301, 302 AND 304

30. Article 301 states that subject to the other provisions of Part-XIII, trade, commerce and intercourse throughout India shall be free. It is not freedom from all laws but freedom from such laws which restrict or affect activities of trade and commerce amongst the States.

Although Article 301 is positively worded, in effect, it is negative as freedom correspondingly creates general limitation on all legislative power to ensure that trade, commerce and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws which go beyond regulations which burdens, restricts or prevents the trade movement between States and also within the State. Since "freedom" correspondingly imposes "limitation", we have the doctrine of "direct and immediate effect" of the operation of the impugned law on the freedom of trade and commerce in Article 301 as enunciated in ***Atiabari Tea Co.***

31. Article 301 is, therefore, not only an authorization to enact laws for the protection and encouragement of trade and commerce amongst the States but by its own force creates an area of trade free from interference by the State and, therefore, Article 301 per se constitutes limitation on the power of the State. Article 301 is, however, subject to the other provisions of Articles 302, 303 and 304. It states that subject to other provisions of Part-XIII, trade, commerce and intercourse throughout India shall be free.

32. Article 301 is binding upon the Union Legislature and the State Legislatures, but Parliament can get rid of the limitation imposed by Article 301 by enacting a law under Article 302. Similarly, a law made by the State Legislature in compliance with the conditions imposed by Article 304 shall not be hit by Article 301. Article 301 thus provides for freedom of inter-State as well as intra-State trade and commerce subject to other provisions of Part-XIII and correspondingly it imposes a general limitation on the legislative powers which limitation is relaxed under the following circumstances:

a) Limitation is relaxed in favour of the Parliament under Article 302, in which case Parliament can impose restrictions in public interest. Although the fetter is limited enabling the Parliament to impose by law restrictions on the freedom of trade in public interest under Article 302, nonetheless, it is clarified in clause (1) of Article 303 that notwithstanding anything contained in Article 302, the Parliament is not authorized even in public interest, in the making of any law, to give preference to one State over another. However, the said clarification is subject to one exception and that too only in favour of the Parliament, where discrimination or preference is admissible to the Parliament in making of laws in case of scarcity. This is provided in clause (2) of Article 303.

b) As regards the State Legislatures, apart from the limitation imposed by Article 301, clause (1) of Article 303 imposes additional limitation, namely, that it must not give preference or make discrimination between one State or another in exercise of its powers relating to trade and commerce under Entry 26 of List-II or List-III. However, this limitation on the State Legislatures is lifted in two cases, namely, it may impose on goods imported from sister State(s) or Union Territories any tax to which similar goods manufactured in its own State are subjected but not so as to discriminate between the imported goods and the goods manufactured in the State [See Clause (a) of Article 304]. In other words, clause (a) of Article 304 authorizes a State Legislature to impose a non-discriminatory tax on goods imported from sister State(s), even though it interferes with the freedom of trade and commerce guaranteed by Article 301. Secondly, the ban under Article 303(1) shall stand lifted even if discriminatory restrictions are imposed by the State Legislature provided they fulfill the following three conditions, namely, that such restrictions shall be in public interest;

they shall be reasonable; and lastly, they shall be subject to the procurement of prior sanction of the President before introduction of the bill.

33. Broadly, the above analysis of the scheme of Articles 301 to 304 shows that Article 304 relates to the State Legislature while Article 302 relates to the Parliament in the matter of lifting of limitation, which, as stated above, flows from the freedom of trade and commerce guaranteed under Article 301. Article 304 also confers upon the State Legislature power to lift the limitations imposed on it by Article 301 and clause (1) of Article 303. This aspect is important because the doctrine of "direct and immediate effect" which is mentioned in ***Atiabari Tea Co***. emerges from the concept of "limitation" embodied in Article 301. It is this doctrine of direct and immediate effect which constitutes the basis of the working test propounded vide para 19 in ***Automobile Transport***. Therefore, whenever the law is impugned as violative of Article 301, the Courts will have to examine the effect of the operation of the impugned law on the inter-State and the intra-State movement of goods, which movement constitutes an integral part of trade.

GENERIC CONCEPT OF COMPENSATORY TAX: INTRODUCTION

35. The concept of compensatory tax is not there in the Constitution but is judicially evolved in ***Automobile Transport*** as a part of regulatory charge. Consequently, we have to go into concepts and doctrines of taxing powers vis-a-vis regulatory powers, particularly when the concept of compensatory tax was judicially crafted as an exception to Article 301 in ***Automobile Transport***.

DIFFERENCE BETWEEN EXERCISE OF TAXING AND REGULATORY POWER:

36. In the generic sense, tax, toll, subsidies etc. are manifestations of the exercise of the taxing power. The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produces regulative effects on trade and commerce. The difficulty arises because taxation is also used as a measure of regulation. There is a working test to decide whether the law impugned is the result of the exercise of regulatory power or whether it is the product of the exercise of the taxing power. If the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory. Payment for regulation is different from payment for revenue. If the impugned taxing or non-taxing law chooses an activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301. However, if the law enacted is to enforce discipline or conduct under which the trade has to perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. This is the way of reconciling the concept of compensatory tax with the scheme of Articles 301, 302 and 304. For example, for installation of pipeline carrying gas from Gujarat to Rajasthan, which passes through M.P., a fee charged to provide security to the pipeline will come in the category of manifestation of regulatory power. However, a tax levied on sale or purchase of gas which flows from that very pipe is a manifestation of exercise of the taxing power. This example indicates the difference between taxing and regulatory powers.

DIFFERENCE BETWEEN "A TAX", "A FEE" AND "A COMPENSATORY TAX"

37. ***PARAMETERS OF COMPENSATORY TAX: -*** As stated above, in order to lay down the parameters of a compensatory tax, we must know the concept of taxing power.

38. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the taxpayer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the States' action. It is assessed on certain elements of business, such as, manufacture, purchase, sale, consumption, use, capital etc. but its payment is not a condition precedent. It is not a term or condition of a licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden.

39. On the other hand, a fee is based on the "principle of equivalence". This principle is the converse of the "principle of ability" to pay. In the case of a fee or compensatory tax, the "principle of equivalence" applies. The basis of a fee or a compensatory tax is the same. The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit. In the case of a tax, even if there is any benefit, the same is incidental to the government action and even if such benefit results from the government action, the same is not measurable. Under the principle of equivalence, as applicable to a fee or a compensatory tax, there is an indication of a quantifiable data, namely, a benefit which is measurable.

40. A tax can be progressive. However, a fee or a compensatory tax has to be broadly proportional and not progressive. In the principle of equivalence, which is the foundation of a compensatory tax as well as a fee, the value of the quantifiable benefit is represented by the costs incurred in procuring the facility/services which costs in turn become the basis of reimbursement/recompense for the provider of the services/facilities. Compensatory tax is based on the principle of "pay for the value". It is a sub-class of "a fee". From the point of view of the Government, a compensatory tax is a charge for offering trading facilities. It adds to the value of trade and commerce which does not happen in the case of a tax as such. A tax may be progressive or proportional to income, property, expenditure or any other test of ability or capacity (principle of ability). Taxes may be progressive rather than proportional. Compensatory taxes, like fees, are always proportional to benefits. They are based on the principle of equivalence. However, a compensatory tax is levied on an individual as a member of a class, whereas a fee is levied on an individual as such. If one keeps in mind the "principle of ability" vis-a-vis the "principle of equivalence", then the difference between a tax on one hand and a fee or a compensatory tax on the other hand can be easily spelt out. Ability or capacity to pay is measurable by property or rental value. Local rates are often charged according to ability to pay. Reimbursement or recompense are the closest equivalence to the cost incurred by the provider of the services/facilities. The theory of compensatory tax is that it rests upon the principle that if the government by some positive action confers upon individual(s), a particular measurable advantage, it is only fair to the community at large that the beneficiary shall pay for it. The basic difference between a tax on one hand and a fee/compensatory tax on the other hand is that the former is based on the

concept of burden whereas compensatory tax/fee is based on the concept of recompense/reimbursement. For a tax to be compensatory, there must be some link between the quantum of tax and the facility/services. Every benefit is measured in terms of cost which has to be reimbursed by compensatory tax or in the form of compensatory tax. In other words, compensatory tax is a recompense/reimbursement.

41. In the context of Article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally bring in net-revenue to the government but that circumstance is not an essential ingredient of compensatory tax.

43. To sum up, the basis of every levy is the controlling factor. In the case of "a tax", the levy is a part of common burden based on the principle of ability or capacity to pay. In the case of "a fee", the basis is the special benefit to the payer (individual as such) based on the principle of equivalence. When the tax is imposed as a part of regulation or as a part of regulatory measure, its basis shifts from the concept of "burden" to the concept of measurable/quantifiable benefit and then it becomes "a compensatory tax" and its payment is then not for revenue but as reimbursement/ recompense to the service/facility provider. It is then a tax on recompense. Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees and compensatory taxes are based on the principle of equivalence and on the basis of reimbursement/recompense. If the impugned law chooses an activity like trade and commerce as the criterion of its operation and if the effect of the operation of the enactment is to impede trade and commerce then Article 301 is violated.

BURDEN ON THE STATE

44. Applying the above tests/parameters, whenever a law is impugned as violative of Article 301 of the Constitution, the Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must facially indicate the benefit which is quantifiable or measurable. It must broadly indicate proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/recompense for the quantifiable/ measurable benefit provided or to be provided to its payer(s). As soon as it is shown that the Act invades freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304(b).

SCOPE OF ARTICLES 301, 302 & 304 VIS-A-VIS COMPENSATORY TAX

45. As stated above, taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions on the freedom guaranteed to trade under Part-XIII of the Constitution. This principle is well settled in the case of ***Atiabari Tea Co.*** It is equally important to note that in ***Atiabari Tea Co***., the Supreme Court propounded the doctrine of "direct and immediate effect". Therefore, whenever a law is challenged on the ground of violation of Article 301, the Court has not only to examine the

pith and substance of the levy but in addition thereto, the Court has to see the effect and the operation of the impugned law on inter-State trade and commerce as well as intra-State trade and commerce.

46. When any legislation, whether it would be a taxation law or a non-taxation law, is challenged before the court as violating Article 301, the first question to be asked is: what is the scope of the operation of the law? Whether it has chosen an activity like movement of trade, commerce and intercourse throughout India, as the criterion of its operation? If yes, the next question is: what is the effect of operation of the law on the freedom guaranteed under Article 301? If the effect is to facilitate free flow of trade and commerce then it is regulation and if it is to impede or burden the activity, then the law is a restraint. After finding the law to be a restraint/restriction one has to see whether the impugned law is enacted by the Parliament or the State Legislature. Clause (b) of Article 304 confers a power upon the State Legislature similar to that conferred upon Parliament by Article 302 subject to the following differences:

(a) While the power of Parliament under Article 302 is subject to the prohibition of preference and discrimination decreed by Article 303(1) unless Parliament makes the declaration under Article 303(2), the State power contained in Article 304(b) is made expressly free from the prohibition contained in Article 303(1) because the opening words of Article 304 contains a non-obstante clause both to Article 301 and Article 303.

(b) While the Parliament's power to impose restrictions under Article 302 is not subject to the requirement of reasonableness, the power of the State to impose restrictions under Article 304 is subject to the condition that they are reasonable.

(c) An additional requisite for the exercise of the power under Article 304(b) by the State Legislature is that previous Presidential sanction is required for such legislation.

WHY WAS THE MATTER PLACED BEFORE A BENCH OF FIVE JUDGES:

47. The concept of compensatory taxes was propounded in the case of ***Automobile Transport*** in which compensatory taxes were equated with regulatory taxes. In that case, a working test for deciding whether a tax is compensatory or not was laid down. In that judgment, it was observed that one has to enquire whether the trade as a class is having the use of certain facilities for the better conduct of the trade/business. This working test remains unaltered even today.

48. As stated above, in the post 1995 era, the said working test propounded in the ***Automobile Transport*** stood disrupted when in ***Bhagatram*** case, a Bench of three Judges enunciated the test of "some connection" saying that even if there is some link between the tax and the facilities extended to the trade directly or indirectly, the levy cannot be impugned as invalid. In our view, this test of "some connection" enunciated in ***Bhagatram*** case is not only contrary to the working test propounded in ***Automobile Transport*** case but it obliterates the very basis of compensatory tax. We may reiterate that when a tax is imposed in the regulation or as a part of regulatory measure the controlling factor of the levy shifts from burden to reimbursement/recompense. The working test propounded by a Bench of seven Judges in the case of ***Automobile Transport*** and the test of "some connection" enunciated by

a Bench of three Judges in ***Bhagatram*** case cannot stand together. Therefore, in our view, the test of "some connection" as propounded in ***Bhagatram*** case is not applicable to the concept of compensatory tax and accordingly to that extent, the judgments of this Court in ***Bhagatram Rajeevkumar* v. *Commissioner of Sales Tax, M.P.*** and ***State of Bihar* v. *Bihar Chamber of Commerce*** stand overruled.

CONCLUSION:

50. In our opinion, the doubt expressed by the referring Bench about the correctness of the decision in ***Bhagatram*** case followed by the judgment in the case of ***Bihar Chamber of Commerce*** was well-founded.

51. We reiterate that the doctrine of "direct and immediate effect" of the impugned law on trade and commerce under Article 301 as propounded in ***Atiabari Tea Co. Ltd.* v. *State of Assam*** and the working test enunciated in ***Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*** for deciding whether a tax is compensatory or not vide para 19 of the report, will continue to apply and the test of "some connection" indicated in para 8 of the judgment in ***Bhagatram Rajeevkumar* v. *Commissioner of Sales Tax, M.P***.and followed in the case of ***State of Bihar* v. *Bihar Chamber of Commerce*** is, in our opinion, not good law. Accordingly, the constitutional validity of various local enactments which are the subject matters of pending appeals, special leave petitions and writ petitions will now be listed for being disposed of in the light of this judgment.

* * * * *

G.K. Krishnan v. *State of Tamil Nadu*

(1975) 1 SCC 375

The writ petitions challenged the validity of the notification [G. 0. No. 2044 - Home dated September 20, 1971] by the Government of Tamil Nadu enhancing of motor vehicles tax on omnibuses from Rs. 30 per seat per quarter to Rs. 100 per seat per quarter.

The petitioner was the owner of an omnibus which had a capacity to accommodate 54 passengers. He obtained a permit on May 16, 1968 to operate it as a contract carriage and was paying tax at the rate of Rs 30 per seat per quarter under the Madras Motor Vehicles Taxation Act 3 of 1931 (the 'Act'). This Act was passed with a view to abolish levy of tolls in the Presidency of Madras and the levy of taxes on motor vehicles by local bodies. The rate of tax which originally stood at Rs 10 per seat per quarter was increased to Rs 30 per seat per quarter when the system of issuing permits for omnibuses by the regional transport authorities came into vogue. The Government of Tamil Nadu by G. 0. M.S.923 - Home, dated April 19, 1969 increased the rate of tax with respect to omnibuses from Rs. 30 to Rs. 50 per seat per quarter with effect from July 1, 1969. It was announced that this measure was taken with a view to avoid unhealthy competition between omnibuses and regular stage carriages and to put down the misuse of omnibuses. The owners of omnibuses questioned the validity of the notification in Writ Petition No. 1412 of 1969. During the pendency of the writ petitions, the government increased the rate of tax from Rs. 50 to Rs. 100 per seat per quarter with effect from September 1, 1970 by G. 0. M.S.434-Home, dated February 27, 1970. The avowed object of this measure also was to avoid unhealthy competition of omnibuses with regular stage carriages. A number of writ petitions were filed challenging the validity of this notification. The High Court allowed the writ petitions and quashed the notifications holding that they were a device to eliminate the operation of contract carriages and that the notifications were not issued in the exercise of taxing powers. The result was that the rate of tax was restored to Rs. 30 per seat per quarter.

Appeals were preferred against this decision to the Supreme Court. Thereafter, the Government of Tamil Nadu issued G. 0. M. S. 2044-Home dated September 20, 1971, enhancing the tax from Rs. 30 to Rs. 100 per seat per quarter with effect from July 1, 1971. It was the G. 0. which the petitioner challenged in the writ petition.

K.K. MATHEW, J. - 8. The tax was imposed by the government in the exercise of its power under Section 4 of the Madras Motor Vehicles Taxation Act, 1931.

10. The second submission raises the point whether tax in question is a restriction on the freedom of trade, commerce and intercourse guaranteed by Article 301 of the Constitution.

14. Article 301 imposes a general limitation on all legislative power in order to secure that trade, commerce and intercourse throughout the territory of India shall be free. Article 302 gave power to Parliament to impose general restrictions upon that freedom. But a restriction is put on this relaxation by Article 303(1) which prohibits Parliament from giving preference to one State over another or discriminating between one State and another by virtue of the entries relating to trade and commerce in Lists I and III of Seventh Schedule and a similar restriction is placed on the States, though the reference to the States is inappropriate. Each of the clauses of Article 304 operates as a proviso to Articles 301 and 303. Article 304 (*a*) places goods imported from sister-States on a par with similar goods manufactured or produced inside the State in regard to State taxation within the allocated field. Article 304(6)

is the State analogue to Article 302, for it makes the State's power contained in Article 304 (*b*) expressly free from the prohibition contained in Article 303(1) by reason of the opening words of Article 304. Whereas in Article 302 the restrictions are not subject to the requirement of reasonableness, the restrictions under Article 304(6) are so subject.

The word 'free' in Article 301 does not mean freedom from regulation. There is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and laws imposing on those engaged therein rules of proper conduct or other restraints directed to the due and orderly manner of carrying out the activities. This distinction is described as regulation. The word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied. The true solution, perhaps, in any given case, could be found by distinguishing between features of the transaction or activity in virtue of which it fell within the category of trade, commerce and intercourse and those features which, though invariably found to occur in some form or another in the transaction or action are not essential to the conception. What is relevant is the contrast between the essential attribute of trade and commerce and the incidents of the transaction which do not give it necessarily the character of trade and commerce. Such matters relating to hours, equipment, weight/size of load, lights, which form the incidents of transportation, even if inseparable, do not give the transaction its essential character of trade or commerce.

15. Regulations like rules of traffic facilitate freedom of trade and commerce whereas restrictions impede that freedom. The collection of toll or tax for the use of roads, bridges, or aerodromes, etc., do not operate as barriers or hindrance to trade. For a tax to become a prohibited tax, it has to be a direct tax, the effect of which is to hinder the movement part of the trade. If the tax is compensatory or regulatory, it cannot operate as a restriction on the freedom of trade or commerce.

16. The question for consideration then is, whether the tax here, is a compensatory tax.

17. Strictly speaking, a compensatory tax is based on the nature and the extent of the use made of the roads, as, for example, a mileage or ton-mileage charge or the like, and if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant roads and the collection of the exaction involves no substantial interference with the movement. The expression 'reasonable compensation' is convenient but vague. The standard of reasonableness can only lie in the severity with which it bears on traffic and such evidence of extravagance in its assessment as come from general considerations. What is essential for the purpose of securing freedom of movement by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a road. The difficulties are very great in defining this conception. But the conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon transportation in aid of the general expenditure of the State. It is clear that the motor vehicles require, for their safe, efficient and economical use, roads of considerable width, hardness and durability; the maintenance of such roads will cost the government money. But, because the users of vehicles generally, and of public motor vehicles in particular, stand in a special and direct relation to such roads, and may be said to derive a special and direct benefit from them, it seems not unreasonable that they should be called

upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of the State. If, however, a charge is imposed, not for the purpose of obtaining a proper contribution to the maintenance and upkeep of the road, but for the purpose of adversely affecting trade or commerce, then it would be a restriction on the freedom of trade, commerce or intercourse.

18. In the counter-affidavit filed on behalf of the State, the averment is that Government has incurred an expenditure of Rs 19.51 crores in the year 1970-71 on the maintenance and construction of roads while the receipts from out of vehicle tax is only Rs. 16.38 crores. It is also stated therein that the amount of Rs. 19.51 crores did not include the grants made to local bodies like municipalities and Panchayat Unions for the repair and maintenance of roads within their jurisdiction. "Road costs", according to the affidavit, not only includes the cost of construction and maintenance of roads, but also the costs relating to the erection and maintenance of traffic control devices, safety measures, improvements to old layouts and the increased establishment of enforcement staff.

19. In the ***Automobile*** case, this Court said that it would not be right to say that a tax is not compensatory because the precise or specific amount collected is not actually used for providing any facilities and that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities, and that it would be impossible to judge the compensatory nature of a tax by a meticulous test and, in the nature of things, it could not be done.

20. It is well to remember the practical administrative difficulties in imposing a tax at a rate per mile. It is always difficult to evolve a formula which will in all cases ensure exact compensation for the use of the road by vehicles having regard to their type, weight and mileage. Rough approximation, rather than mathematical accuracy, is all that is required. In all such matters', it is well to remember the profound truth of the saying: "it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits".

22. It has been said that the amount of the charges and the method of collection are primarily for determination by the State itself, although they must be reasonable and fixed according to some uniform, fair and practical standard. If the tax is attacked on the ground that it is excessive, the burden of proof is upon the one attacking its validity. Although any method of taxation which has a direct bearing upon or connection with the use of the highways is apparently valid, a tax which has no such apparent bearing and is not shown to be compensatory, but is rather a tax on the privilege of engaging in trade or commerce, is beyond the power of the State. Nor is it necessary that there should be a separate fund or express allocation of money for the maintenance of roads to prove the compensatory purpose when such purpose is proved by alternative evidence.

24. It is clear from the counter-affidavit filed that Rs. 19.51 crores have been spent not only for the maintenance of roads but also for construction of new ones and that the receipt from the vehicle tax was only Rs. 16.38 crores. However, it is not clear whether any capital expenditure for construction of new roads really entered into the actual levy of vehicle tax. It

might be that even if the cost of construction of new roads is excluded, the receipts would not be sufficient to meet the expenses incurred for maintenance of old roads and, therefore, it is difficult to say that in actual fact, capital expenditure for construction of new roads was taken into account in the levy of vehicle tax.

28. In the civil appeals, two points have been raised, namely, (1) that the tax imposed is excessive and therefore, it operates as unreasonable restriction upon the fundamental right of the appellants to carry on the business; and (2) that the imposition of different rates of tax on contract and stage carriages is discriminatory and is, therefore, hit by Article 14.

29. So far as the first contention is concerned, we do not think that any material has been placed before us to hold that the tax. is confiscatory and operates as an unreasonable restriction upon the appellants' right to carry on the trade. We have already held that the tax is compensatory in character. If that is so, we do not think that it can operate as an unreasonable restriction upon the fundamental right of the appellants to carry on their business, for, the very idea of a compensatory tax is service more or less commensurate with the tax levied. No citizen has a right to engage in trade by business without paying for the special services he receives from the State. That is part of the cost of carrying on the business.

30. Mr Gupte contended that there was no reason for imposing vehicle tax at a higher rate on contract carriages than on stage carriages. He said that both stage carriages and contract carriages are similarly situated with respect to the purpose of vehicle taxation, namely, the use of the road and, therefore, a higher vehicle tax on contract carriages is manifestly discriminatory. In other words, the argument was that the classification of the vehicles as stage carriages and contract carriages for the purpose of a higher levy of vehicle tax on contract carriages has no reasonable relation to the purpose of the Act.

32. The reason for enhancing the vehicle tax on contract carriages is stated in the counter-affidavit. It is as follows: Commercial vehicles consist of public transport passenger buses, namely stage carriages and contract carriages and goods vehicles namely, trucks of varying capacity. The tax on lorries is graduated, based on the permitted laden weight, the higher the laden weight, the higher the amount of tax. So far as the passenger buses are concerned, the stage carriages cannot do unlimited mileage. But contract carriages, depending upon the organisational efficiency, can do much more distance of travel per day as there is flexibility of space and time for its operation. The stage carriages have to operate only on fixed time schedules and on fixed routes and the number of miles they can negotiate is limited by the rule to 250 miles. Besides, they can operate only on roads duly certified by the concerned authorities as fit for such operation. On the other hand, in the case of contract carriages, there is neither any fixed time schedule nor any fixed route; the number of miles they can run is also quite unlimited; they are free to operate on any route whether the road is certified as fit for such traffic or not. Hence the contract carriages can run a larger number of miles than stage carriages and therefore the wear and tear of the road caused would be greater and in the case of roads which are not fit for such operation, the damage to the road surface due to wear and tear is quite likely to be much larger, involving higher cost of maintenance of such roads; in other words, the contract carriage even with the same passenger seating capacity as a stage carriage can travel on any road and on any type of surface at any time of the day, or night, and thus can cause greater damage to roads, especially of the inferior type of road surfaces which

it traverses. The higher speed of vehicle will induce correspondingly higher impact stresses on the pavement structure than the vehicle of the same capacity at lower speeds. These higher stresses in the pavement layers affect the performance characteristics and durability of the surface. Also, higher speeds require longer accelerating and decelerating distances which brings in the maximum value of the frictional coefficient causing increased wear and tear of the road surfaces. Moreover, the load factor of a stage carriage including the passenger luggage may be comparatively low. In the counter-affidavit it is also stated that the rate of tax payable on stage carriage is Rs. 65 per seat per quarter and a surcharge of 10 paise per rupee on the fare collected, though there is a provision for compounding the tax collected at Rs. 25 per seat per quarter under the Tamil Nadu Motor Vehicles (Taxation of Passengers and Goods) Act, 1952, is also payable by their owners and that owners of contract carriages are not liable to pay the surcharge.

35. Under Section 46 of the Motor Vehicles Act, 1939, an application for stage carriage permit must contain, among other things, the route or routes or the area or areas to which the application relates, the minimum and maximum number of daily trips proposed to be provided in relation to each route or area and the time table of normal trips. Section 48 of that Act is clear that the regional transport authority may attach a condition that the vehicle shall be used only in a specified area or on a specified route and also fix the minimum or maximum number of daily trips, the number of passengers, the weight and nature of passenger luggages. An application for a contract carriage permit must contain, among other things, specification of the area for which the permit is required (*see* Section 49) and the regional transport authority may attach a condition that the vehicle or vehicles can be used only in a specified area or specific route or routes and that except in accordance with specified conditions, no contract of hiring, other than an extension or modification of a subsisting contract may be entered into outside the specified area (*see* Section 51). A stage carriage permit may authorize the use of the vehicle as a contract carriage (*see* Section 42). The State Government is authorised by Section 43 to issue directions as to the fixing of fares and freights including the maximum and minimum thereof for stage carriages and contract carriages. The limit of the speed of any motor vehicle can be fixed by the State Government or an authority authorised in that behalf and the maximum speed shall in no case exceed the maximum fixed in the eighth schedule (*see* Section 71).

36. It cannot be said that a classification made on the basis of the capacity of the contract carriages to run more miles is unreasonable because those carriages will be using the road more than the stage carriages which have got a time schedule, specified routes and minimum and maximum number of trips. A person who challenges a classification as unreasonable has the burden of proving it. There is always a presumption that a classification is valid, especially in a taxing statute. The ancient proposition that a person who challenges the reasonableness of a classification, and therefore, the constitutionality of the law making the classification, has to prove it by relevant materials, has been reiterated by this Court recently. In the context of commercial regulation, Article 14 is offended only if the classification rests on grounds wholly irrelevant to the achievement of the objective, and this lenient standard is further weighted in the State's favour by the fact that a statutory discrimination will not be set aside if a state of facts may reasonably be conceived by that Court to justify it.

39. Therefore, this Court has to assume, in the absence of any materials placed by the appellants and petitioners, that the classification is reasonable. It was a matter exclusively within the knowledge of the petitioners and the appellants as to how many mile the contract carriages would run on an average per day or month. When, in the counter-affidavit the allegation was made that the owners of the contract carriages are free to run at any time throughout the State, without restrictions the inference which the State wanted the Court to draw was that the owners of the contract carriages were utilizing this freedom for running more miles than the stage carriages. As to the number of miles run by the contract carriages, it was not possible for the State Government to furnish any statistics. They could only say that since there are no restrictions, they must have run more miles and that cannot be said to be a purely speculative assessment. If the petitioners and the appellants had a case that contract carriages were not running more miles on an average than the stage carriages, it would have been open for them to place relevant materials before the Court as the materials were within their exclusive knowledge and possession. In these circumstances, we think there is the presumption that the classification is reasonable, especially in the light of the fact that the classification is based on local conditions of which the Government was fully cognizant. Since the petitioners and the appellants have not discharged the burden of proving that the classification is unreasonable, we hold that the levy of an enhanced rate of vehicle tax on contract carriages was not hit by Article 14.

40. We dismiss the writ petitions and appeals.

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M/s. *Video Electronics (Pvt.) Ltd.* v. *State of Punjab*

AIR 1990 SC 820

[The question considered in these writ petitions was: How to harmonise the power of different States in the Union of India to legislate and/or give appropriate directions within the parameters of the subjects in List II of the Seventh Schedule of the Constitution with the principle of economic unity envisaged in Part XIII of the Constitution of India. The court also considered the provisions of exemption, encouragement/incentives given by different States to boost up or help economic growth and development in those States, and in so doing the attempt of the States to give preferential treatment to the goods manufactured or produced in those States.]

SABYASACHI MUKHARJI, C.J. - 2. Petitioner 1 in W.P. No. 803 of 1988 is a partnership firm carrying on business in New Delhi. Petitioner 2 is its partner and petitioner 3 is another partnership business carrying on business at Kanpur in U.P. consisting of petitioner 4 and other partners. The petition challenges the constitutional validity of Notification No. ST-II-7558/X-9(208)-1981 U.P. Act XV-48 Order 85 dated December 26, 1985 issued by Uttar Pradesh Government under Section 4-A of the Uttar Pradesh Sales Tax Act, 1948. A prior Notification No. ST-II/604-X-9(208)-1981 U.P. Act XV-48-Order 85 dated January 29, 1985 was superseded by the aforesaid notification dated December 26, 1985. It also challenges the constitutional validity of Notification No. ST-II/8202/X-9(208)-1981 issued by Uttar Pradesh Government under Section 8(5) of the Central Sales Tax Act, 1956 which superseded a previous notification. It also challenges the constitutional validity of Section 4-A of the Uttar Pradesh Sales Tax Act, 1948 as substituted by U.P. Act 22 of 1984 and also Section 8(5) of the Central Sales Tax Act, 1956 and consequentially all actions and proceedings taken by the respondent under Section 5-A of the said Act. The respondents to this application are the State of Uttar Pradesh, the Union of India, and the Commissioner of Sales Tax, Uttar Pradesh.

3. It is stated that the petitioners carry on the business of selling cinematographic films and other equipments like projectors, sound recording and reproducing equipment, industrial X-ray films, graphic art films, photo films etc. in the State of Uttar Pradesh and in Delhi. The petitioners sell the goods upon receiving these from the manufacturers from outside the State of U.P. They are dealers on behalf of those manufacturers. The petitioners are dealers of Hindustan Photo Films Mfg. Co. Ltd., a Government of India undertaking. In U.P. there is a single point levy of sales tax. The State of U.P. has issued two notifications under Section 4-A of the U.P. Sales Tax Act and under Section 8(5) of the Central Sales Tax Act exempting new units of manufacturers as defined in the Act in respect of the various goods for different periods ranging from 3 to 7 years as the case may be, from payment of any sales tax. These notifications are annexed and terms thereof are set out in Annexures A-1 and B-1 to the writ petition.

4. The notification dated December 26, 1985 stated, inter alia:

> "The Governor is pleased to direct that in respect of any goods manufactured in an industrial unit, which is a new unit as defined in the aforesaid Act of 1948 established in the areas mentioned in column 2 of the Table given below, the date of starting production whereof falls on or after the first day of October, 1982 but not later than March 31, 1990, no

> tax under the aforesaid Act of 1956 shall be payable by the manufacturer thereof on the turnover of sales on such goods for the period specified in column 3 against each, which shall be reckoned from the date of first sale if such sale takes place not later than 6 months from the date of starting production subject to certain conditions mentioned."

5. In column 2 categories have been made for exemption and have been divided in two categories, one in case of units with capital investment not exceeding 3 lakhs of rupees and another in cases of the units with capital investment exceeding 3 lakhs of rupees. For one the period of exemption is 5 years while for the latter it is 7 years. Period of exemption varies from 3 to 7 years in different districts. More or less similar were the terms of notification dated January 29, 1985.

6. The case of the petitioners is that they did not initially feel the adverse effects of discrimination on account of these notifications. Petitioners point out that the manufacturers covered by the said notification are entitled to sell the articles manufactured by them without liability to pay sales tax while the manufacturers in other States and non-manufacturers of the same article selling the same goods in the State are liable to pay sales tax under the local Sales Tax Act as well as under the Central Sales Tax Act. The petitioners found that they had become liable to pay sales tax on their sales on 12 per cent + 10 per cent surcharge (13.2 per cent) under the U.P. Sales Tax Act on photographic and graphic arts material and @ 8 per cent + 10 per cent surcharge (8.8 per cent) on medical X-ray films and chemicals and a minimum of 10 per cent on their inter-State turnover whereas the manufacturers in the State of U.P. and their dealers had no tax liability by virtue of the exemption granted under the impugned notifications. Thus the petitioners contend that the goods sold by them became costlier by 8.8 per cent to 13.2 per cent depending on the items sold compared to the goods of manufacturers in the State of U.P. They had given a chart illustrating the position. They, hence, contended that they became subject to gross discrimination and their business was crippled and wanted to sustain the said contention by referring to a chart showing gross sale prices of the products in diverse States. In the premises the petitioners challenge these provisions as ultra vires the Constitution of India, the rights guaranteed under Part XIII as also under Articles 14 and 19(1)(g) of the Constitution.

7. The question is: are these notifications valid, proper and sustainable in the light of Part XIII of the Constitution of India judged in the background of the said articles.

8. Apart from the submission that the provisions impugned violate Articles 19(1)(g) and 14 of the Constitution, and are in violation of the principles of natural justice, the main challenge to these provisions by Mr Salve was that they violated the provisions of Articles 301 to 305 of Part XIII of the Constitution of India. The contention of the petitioners was that, subject to other provisions of Part XIII, trade, commerce and intercourse throughout the territory of India was enjoined to be free. Article 302 of the Constitution empowers the Parliament by law to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Article 303 indicates the restrictions on the legislative powers of the Union and the States with regard to trade and commerce, and stipulates that, notwithstanding anything contained in Article 302, neither Parliament nor the legislature of the States shall have power to make any law giving or authorising the giving of any

preference to one State over another or making or authorising the making of any discrimination between one State and another by virtue of any entry relating to trade and commerce in any list of the Seventh Schedule. Sub-clause (2) of Article 303 enjoins that nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Article 304 deals with restrictions on trade, commerce and intercourse among States. Article 305 saves certain existing laws and laws providing for State monopolies.

10. Our attention was drawn to the decision of this Court in ***Atiabari Tea Co. Ltd.*** **v.** ***State of Assam*** [AIR 1961 SC 232]. There this Court was concerned with the Assam Taxation (on Good Carried by Roads and Inland Waterways) Act, 1954 which was passed under Entry 56 of List II of the Seventh Schedule to the Constitution. The appellants therein contended that the Act had violated the freedom of trade guaranteed by Article 301 of the Constitution and as it was not passed after obtaining the previous sanction of the President as required by Article 304(b), it was ultra vires. The respondent therein had urged that taxing laws were governed only by Part XII and not Part XIII (which contained Articles 301 and 304) and in the alternative that the provisions of Part XIII applied only to such legislative entries in the Seventh Schedule as dealt specifically with trade, commerce and intercourse. Gajendragadkar, Wanchoo and Das Gupta, JJ. held that the Act violated Article 301 and since it did not comply with the provisions of Article 304(b) it was ultra vires and void. On the contrary, Chief Justice Sinha held that the Assam Act did not contravene Article 301 and was not ultra vires. According to the learned Chief Justice, neither the one extreme position that Article 301 included freedom from all taxation nor the other that taxation was wholly outside the purview of Article 301 was correct; and that the freedom conferred by Article 301 did not mean freedom from taxation simpliciter but only from the erection of trade barriers, tariff walls and imposts which had a deleterious effect on the free flow of trade, commerce and intercourse. Justice Shah on the other hand expressed the view that the Assam Act infringed the guarantee of freedom of trade and commerce under Article 301 and as the Bill was not moved with the previous sanction of the President as required by Article 304(b) nor was it validated by the assent of the President under Article 255(c), it was ultra vires and void.

11. In construing the provisions with which we are concerned herein, in our opinion, it is instructive to remind ourselves, as was said in ***James*** **v.** ***Commonwealth of Australia*** [1936 AC 578], that the relevant provision of the Constitution has to be read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another, and therefore, Gajendragadkar, J. as the learned Chief Justice then was, at p. 860 of the said report, rightly in our opinion, posed the problem as follows:

> "In construing Article 301 we must, therefore, have regard to the general scheme of our Constitution as well as the particular provisions in regard to taxing laws. The construction of Article 301 should not be determined on a purely academic or doctrinaire considerations; in construing the said Article we must adopt a realistic approach and bear in mind the essential features of the separation of powers on which our Constitution rests. It is a federal constitution which we are interpreting, and so the impact of Article

> 301 must be judged accordingly. Beside it is not irrelevant to remember in this connection that the article we are construing imposes a constitutional limitation on the power of the Parliament and State legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement?"

12. It is in that light we must examine the impugned provision. It is necessary to bear in mind that taxes may and sometimes do amount to restrictions but it is only such taxes as directly and immediately restrict trade that would fall within the mischief of Article 301. Mr Salve, however, rightly reminded us that regulatory measures or measures imposing compensatory taxes for using trading facilities do not come within the purview of restrictions contemplated under Article 301. Here, it is necessary to refer to the decision of this Court in the ***Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*** which was a decision of a bench of this Court consisting of seven learned Judges, and was concerned with the Rajasthan Motor Vehicles Taxation Act, 1951. Sub-section (1) of Section 4 of that Act provided that no motor vehicle shall be used in any public place or kept for use in Rajasthan unless the owner thereof had paid in respect of it, a tax at the appropriate rate specified in the schedules to that Act within the time allowed. The appellants therein were carrying on the business of plying stage carriages in the State of Ajmer. They held permits and plied their buses on diverse routes. There was one route which lay mainly in Ajmer State but it crossed narrow strips of the territory of the State of Rajasthan. Another route, Ajmer to Kishangarh, was substantially in the Ajmer State, but a third of it was in Rajasthan. Formerly, there was an agreement between the Ajmer State and the former State of Kishangarh, by which neither State charged any tax or fees on vehicles registered in Ajmer or Kishangarh. Later, Kishangarh became a part of Rajasthan. On the passing of the Rajasthan Motor Vehicles Taxation Act, 1951, and the promulgation of the rules made thereunder, the Motor Vehicles Taxation Officer, Jaipur, demanded of the appellants payment of the tax due on their motor vehicles for the period from April 1, 1951 to March 31, 1954. The appellants challenged the legality of the demand on the grounds that Section 4 of the Act read with the Schedules constituted a direct and immediate restriction on the movement of trade and commerce with and within Rajasthan inasmuch as motor vehicles which carried passenger and goods within or through Rajasthan had to pay tax which imposed a pecuniary burden on commercial activity and was therefore hit by Article

301 of the Constitution and was not saved by Article 304(b) inasmuch as the proviso to Article 304(b) was not complied with, nor was the Act assented to by the President within the meaning of Article 255 of the Constitution. It was held by Das, Kapur, Sarkar and Subba Rao, JJ. as the learned Judges then were, that the Rajasthan Motor Vehicles Taxation Act, 1951 did not violate the provisions of Article 301 of the Constitution of India and that the taxes imposed under the Act were compensatory or regulatory taxes which did not hinder the freedom or trade, commerce and intercourse assured by that article. Das, Kapur and Sarkar, JJ. held that the concept of freedom of trade, commerce and intercourse postulated by Article 301 must be understood in the context of an ordinary society and as part of a Constitution which envisaged a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and legitimacy of some degree of regulatory control, whether by the Union or the States. Mr Justice Subba Rao, as the learned Chief Justice then was, observed that the freedom declared under Article 301 referred to the right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State, or other impediments operating as such barriers ; and the said freedom was not impeded, but on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provisions for services, maintenance of roads, provision for aerodromes, wharfs etc., with or without compensation. Parliament may by law impose restrictions, it was stated, on such freedom in the public interest, and the States also, in exercise of their legislative power, may impose similar restrictions, subject to the proviso mentioned therein. Laws of taxation were not outside the freedom enshrined either in Article 19 or 301. Mr Justice Hidayatullah, as the learned Chief Justice then was, and Rajagopala Ayyangar and Mudholkar, JJ. held that Section 4(1) of the Rajasthan Motor Vehicles Taxation Act, 1951 offended Article 301 of the Constitution, and as resort to the procedure prescribed by Article 304(b) was not taken it was ultra vires the Constitution. The pith and substance of the Act was the levy of tax on motor vehicles in Rajasthan or their use in that State irrespective of where the vehicles came from and not legislation in respect of inter-State trade or commerce. A tax which is made the condition precedent of the right to enter upon and carry on business is a restriction on the right to carry on trade and commerce within Article 301 of the Constitution. The tax levied under the Act was not truly a fair recompense for wear and tear of roads but a restriction which Article 301 forbade. The Act was not, in its true character, regulatory. In judging the situation it would be instructive to bear in mind the observations of Mr Justice Das at p. 512 of the report, where he observed that in evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations which may be broadly stated thus: first, in the larger interests of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether; and third, there must be a power of intervention by the Union in any case of crisis to deal with particular problems that may arise in any part of India. At p. 523 of the report, it was reiterated that for the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. Dealing with wide interpretation Justice Das observed at pp. 523-24 of the said report as follows:

> "The widest view proceeds on the footing that Article 301 imposes a general restriction on legislative power and grants a freedom of trade, commerce and intercourse

> in all its series of operations, from all barriers, from all restrictions, from all regulation, and the only qualification that is to be found in the article is the opening clause, namely, subject to the other provisions of Part XIII. This in actual practice will mean that if the State legislature wishes to control or regulate trade, commerce and intercourse in such a way as to facilitate its free movement, it must yet proceed to make a law under Article 304(b) and no such Bill can be introduced or moved in the legislature of a State without the previous sanction of the President. The practical effect would be to stop or delay effective legislation which may be urgently necessary. Take, for example, a case where in the interests of public health, it is necessary to introduce urgently legislation stopping trade in goods which are deleterious to health, like the trade in diseased potatoes in Australia. If the State legislature wishes to introduce such a Bill, it must have the sanction of the President. Even such legislation as imposes traffic regulations would require the sanction of the President. Such an interpretation would, in our opinion, seriously affect the legislative power of the State legislatures which power has been held to be plenary with regard to subjects in List II."

13. Mr Justice Subba Rao, as the learned Chief Justice then was, at page 550 of the report, observed that if a law directly and immediately imposes a tax for general revenue purposes on the movement of trade, it would be violating the freedom. The learned Judge reiterated that the court will have to ascertain whether the impugned law in a given case affects directly the said movement or indirectly and remotely affects it.

14. Mr Salve, however, sought to contend that as regards the local sales tax, there were broadly two well accepted propositions, namely, sales tax was a tax levied for the purpose of general revenue. Secondly, it was neither a compensatory tax nor a measure regulating any trade. Reliance was placed on the observations of Mr Justice Raghubar Dayal, J. in ***Firm A.T.B. Mehtab Majid & Co.* v. *State of Madras*** [AIR 1963 SC 928] but the context in which the said observations were made has to be examined. That case dealt with a petition under Article 32 of the Constitution. The petitioners therein were dealers in hides and skins in the State of Madras. The impugned sales tax assessment related to turnover of sales of tanned hides and skins which had been obtained from outside the State of Madras. The main contention was that the tanned hides and skins imported from outside and sold inside the State were, under Rule 16 of the Madras General Sales Tax Rules, subject to a higher rate of tax than the tax imposed on hides and skins tanned and sold within the State and this discriminatory taxation offended Article 304 of the Constitution. The contentions of the respondents therein were that sales tax did not come within the purview of Article 304(a) as it was not a tax on the import of goods at the point of entry, that the impugned rule was not a law made by the State legislature, that the impugned rule by itself did not impose the tax but fixed the single point at which the tax was imposed by Sections 3 and 5 of the Act was to be levied; and that the impugned rule was not made with an eye on the place of origin of the goods. It was held that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulating measures.

15. Reliance was also placed by Mr Salve on the observations of Justice Raghubar Dayal in ***A. Hajee Abdul Shakoor & Co.* v. *State of Madras*** [AIR 1964 SC 1729]. See also the observations in ***State of Madras* v. *N.K. Nataraja Mudaliar*** [AIR 1969 SC 147] and ***Andhra***

Sugars Ltd.* v. *State of Andhra Pradesh [AIR 1968 SC 599] where at p. 718 of the report it was reiterated that a sales tax which discriminates against goods imported from other States may impede the free flow of trade and is then invalid unless protected by Article 304(a). It is, however, necessary to bear in mind that in N.K. Nataraja Mudaliar case6 at pp. 850-51 Mr Justice Bachawat after referring to several cases observed as follows:

> "But there can be no doubt that a tax on such sales would not normally offend Article 301. That article makes no distinction between movement from one part of the State to another part of the same State and movement from one State to another. Now, if a tax on intra-State sale does not offend Article 301, logically, I do not see how a tax on inter-State sale can do so. Neither tax operates directly or immediately on the free flow of trade or the free movement of the transport of goods from one part of the country to the other. The tax is on the sale. The movement is incidental to and a consequence of the sale."

16. There was a reference in the said judgment to the observations of Jagannatha Das, J. in ***Bengal Immunity Co. Ltd.* v. *State of Bihar*** [AIR 1955 SC 661] wherein it was stated:

> "Now it is not disputed that a tax on a purely internal sale which occurs as a result of the transportation of goods from a manufacturing centre within the State to a purchasing market within the same State is clearly permissible and not hit by anything in the Constitution. If a sale in that kind of trade can bear the tax and is not a burden on the freedom of trade, it is difficult to see why a single point tax on the same kind of sale where a State boundary intervenes between the manufacturing centre and the consuming centres need be treated as a burden, especially where that tax is ultimately to come out of the residents of the very State by which such sale is taxable. Freedom of trade and commerce applies as much within a State as outside it. It appears to me again, with great respect, that there is no warrant for treating such a tax as in any way contrary either to the letter or the spirit of the freedom of trade, commerce and intercourse provided under Article 301."

17. It was contended that the Central Sales Tax Act ex-hypothesi violates Article 301 of the Constitution since it is a tax on inter-State movement of goods. Shah, J. in Mudaliar case6 at p. 841 of the report observed that tax under the Central Sales Tax Act on inter-State sales, it must be noticed, is in its essence a tax which encumbers movement of trade or commerce, if it - (a) occasions the movement of goods from one State to another; (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. It was contended by Mr Salve that by exempting the local manufacturers from both local and central sales tax, the State Government has clearly made the imposition of both local and central sales tax discriminatory and prejudicial to outside goods. The goods of the local manufacturer, when sold by him, do not bear any tax whereas the goods imported from outside the State have to bear the burden of sales tax. It was also contended that similarly, the goods of a local manufacturer, when exported from the State of U.P. do not have to bear tax, while goods brought into the State of U.P. and further exported in competition with the local goods have to bear the tax, so there is clear discrimination against goods produced by manufacturers situated outside the State. The discrimination within the meaning of Article 301 read with Article 304 arises where there is a difference in the rates of sales tax levied, it was sought to be

emphasised by Mr Sanjay Parikh for some of the petitioners. This proposition has been reiterated by this Court in a large number of cases, according to counsel, and we were referred to the observations in ***State of Madhya Pradesh* v. *Bhailal Bhai*** [AIR 1964 SC 1006] and ***Mudaliar*** case where at p. 847 Shah, J. reiterated that imposition of differential rates of tax by the same State on goods manufactured or produced in the State and similar goods imported in the State is prohibited under Article 304(a). It was also reiterated by this Court in ***Rattan Lal & Co.* v. *Assessing Authority*** [AIR 1970 SC 1742] dealing with the Punjab General Sales Tax Act that when a taxing State was not imposing rates of tax on imported goods different from the rates of tax on goods manufactured or produced, Article 304 had no application. So long as the rate was the same, Article 304 was satisfied. Reference was made to ***Indian Cement* v. *State of Andhra Pradesh*** [(1988) 1 SCC 743] , wherein at p. 759 this Court observed that variation of the rate of inter-State sales tax did affect free trade and commerce and created a local preference which was contrary to the scheme of Part XIII of the Constitution. To similar effect are the observations to which Mr Sanjay Parikh has referred us in ***Weston Electroniks* v. *State of Gujarat*** [(1988) 2 SCC 568]. Mr Salve strongly relied on the observations of Justice Cardozo in ***C.A.F. Seelig Inc.* v. *Charles H. Baldwin*** [79 L ed 2d 1033, 1038] where the learned Judge observed while he was dealing with Article (1) Section 8, clause (3) of the American Constitution which is known as the 'Commerce Clause' - "This part of the Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together and that in the long run prosperity and salvation are in union and not division." This passage has been cited with approval in this Court in Atiabari case1 by Gajendragadkar, J. as aforesaid.

18. We were referred to the observations of ***Firm A.T.B. Mehtab Majid & Co***. case. It was contended that the acceptance of the petitioner's case would not conflict with the plenary power of the State to grant exemptions under the Act because statutory powers have to yield to constitutional inhibitions and, therefore, Article 304(a) and (b) being envisaged to safeguard the economic unity of the country, these must have precedence. It was also contended that the petitions under Article 301 read with Article 304(a) are clearly maintainable.

20. The question as we see is, how to harmonise the construction of the several provisions of the Constitution. It is true that if a particular provision being taxing provision or otherwise impedes directly or immediately the free flow of trade within the Union of India then it will be violative of Article 301 of the Constitution. It has further to be borne in mind that Article 301 enjoins that trade, commerce and intercourse throughout the territory of India shall be free. The first question, therefore, which one has to examine in this case is, whether the sales tax provisions (exemption etc.) in these cases directly and immediately restrict the free flow of trade and commerce within the meaning of Article 301 of the Constitution. We have examined the scheme of Article 301 of the Constitution read with Article 304 and the observations of this Court in Atiabari case1, as also the observations made by this Court in ***Automobile Transport, Rajasthan*** case. In our opinion, Part XIII of the Constitution cannot be read in isolation. It is part and parcel of a single constitutional instrument envisaging a federal scheme and containing general scheme conferring legislative powers in respect of the

matters relating to List II of the Seventh Schedule on the States. It also confers plenary powers on States to raise revenue for its purposes and does not require that every legislation of the State must obtain assent of the President. Constitution of India is an organic document. It must be so construed that it lives and adapts itself to the exigencies of the situation, in a growing and evolving society, economically, politically and socially. The meaning of the expressions used there must, therefore, be so interpreted that it attempts to solve the present problem of distribution of power and rights of the different States in the Union of India, and anticipate the future contingencies that might arise in a developing organism. Constitution must be able to comprehend the present at the relevant time and anticipate the future which is natural and necessary corollary for a growing and living organism. That must be part of the constitutional adjudication. Hence, the economic development of States to bring these into equality with all other States and thereby develop the economic unity of India is one of the major commitments or goals of the constitutional aspirations of this land. For working of an orderly society economic equality of all the States is as much vital as economic unity.

21. The taxes which do not directly or immediately restrict or interfere with trade, commerce and intercourse throughout the territory of India, would therefore be excluded from the ambit of Article 301 of the Constitution. It has to be borne in mind that sales tax has only an indirect effect on trade and commerce. Reference may be made to the Constitution Bench judgment of this Court in ***Andhra Sugar Ltd.*** **v.** ***State of A.P.,*** where this Court observed that normally a tax on sale of goods does not directly impede the free movement of transport. See also the observations in ***Mudaliar*** case6 where at p. 851 it was observed that a tax on sale would not normally offend Article 301. That article made no distinction between movement from one part of State to another part of the same State and movement from one State to another. In this connection, reference may also be made to the observations in Bengal Immunity case8. Both the preceding cases clearly establish that if a taxing provision in respect of intra-State sale does not offend Article 301, logically it would not affect the freedom of trade in respect of free flow and movement of goods from one part of the country to the other under Article 301 as well.

22. It has to be examined whether difference in rates per se discriminates so as to come within Articles 301 and 304(a) of the Constitution. It is manifest that free flow of trade between two States does not necessarily or generally depend upon the rate of tax alone. Many factors including the cost of goods play an important role in the movement of goods from one State to another. Hence the mere fact that there is a difference in the rate of tax on goods locally manufactured and those imported would not amount to hampering of trade between the two States within the meaning of Article 301 of the Constitution. As is manifest, Article 304 is an exception of Article 301 of the Constitution. The need of taking resort to the exception will arise only if the tax impugned is hit by Articles 301 and 303 of the Constitution. If it is not then Article 304 of the Constitution will not come into picture at all. See the observations in ***Nataraja Mudaliar*** case6 at pp. 843-46 of the report. It has to be borne in mind that there may be differentiations based on consideration of natural or business factors which are more or less in force in different localities. A State might be allowed to impose a higher rate of tax on a commodity either when it is not consumed at all within the State or if it is felt that the burden falling on consumers within the State, will be more than

that and large benefit is derived by the revenue. The imposition of a rate of sales tax is influenced by various political, economic and social factors. Prevalence of differential rate of tax on sales of the same commodity cannot be regarded in isolation as determinative of the object to discriminate between one State and another. Under the Constitution originally framed revenue from sales tax was reserved for the States.

23. In ***V. Guruviah Naidu & Sons* v. *State of Tamil Nadu*** [(1977) 1 SCR 1065, 1070], this Court observed as follows :

> "Article 304(a) does not prevent levy of tax on goods; what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent discrimination against imported goods by imposing tax on such goods at a rate higher than that borne by local goods since the difference between the two rates would constitute a tariff wall or fiscal barrier and thus impede the free flow of inter-State trade and commerce. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale of which it is levied. The scheme of Items 7(a) and 7(b) of the Second Schedule to the State Act is that in case of raw hides and skins which are purchased locally in the State, the levy of tea would be at the rate of 3 per cent at the point of last purchase in the State. When those locally purchased raw hides and skins are tanned and are sold locally as dressed hides an skins, no levy would be made on such sales as those hides and skins have already been subjected to local tax at the rate of 3 per cent when they were purchased in raw form. As against that, in the case of hides and skins which have been imported from other States in raw form and are thereafter tanned and then sold inside the State as dressed hides and skins, the levy of tax is at the rate of 1 1/2 per cent at the point of first sale in the State of the dressed hides and skins. This levy cannot be considered to be discriminatory as it takes into account the higher price of dressed hides and skins compared to the price of raw hides and skins. It also further takes note of the fact that no tax under the State Act has been paid in respect of those hides and skins. The legislature, it seems, calculated the price of hides and skins in dressed condition to be double the price of such hides and skins in raw state. To obviate and prevent any discrimination or differential treatment in the matter of levy of tax, the legislature therefore prescribed a rate of tax for sale of dressed hides and skins which was half of the levied under Item 7(a) in respect of raw hides and skins."

24. The object is to prevent discrimination against the imported goods by imposing tax on such goods at a rate higher than that borne by local goods. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale on which it is levied. Every differentiation is not discrimination. The word 'discrimination' is not used in Article 14 but is used in Articles 16, 303 and 304(a). When used in Article 304(a), it involves an element of intentional and purposeful differentiation thereby creating economic barrier and involves an element of an unfavourable bias. Discrimination implies an unfair classification. Reference may be made to the observations of this Court in ***Kathi Raning Rawat* v. *State of Saurashtra*** [AIR 1952 SC 123], where Chief Justice Shastri reiterated that all legislative differentiation is not necessarily discriminatory. Justice Fazal Ali noticed the distinction between 'discrimination

without reason' and 'discrimination with reason'. The whole doctrine of classification is based on this and on the well-known fact that the circumstances covering one set of provisions or objects may not necessarily be the same as those covering another set of provisions and objects so that the question of unequal treatment does not arise as between the provisions covered by different sets of circumstances.

25. Where the general rate applicable to the goods locally made and on those imported from other States is the same nothing more normally and generally is to be shown by the State to dispel the argument of discrimination under Article 304(a), even though the resultant tax amount on imported goods may be different. Here, reference may be made to ***Ratan Lal*** case. In the instant writ petition, in the State of U.P. those producers or manufacturers who do not come within the ambit of notifications, have to pay tax on their goods at the general rate described and there is no differentiation or discrimination qua the imported goods. The question naturally arises whether the power to grant exemption to specified class of manufacturers for a limited period on certain conditions as provided by Section 4-A of the U.P. Sales Tax Act is violative of Article 304(a). It was contended by the petitioners that Part XIII of the Constitution was envisaged for preserving the unity of India as an economic unit and, hence, it guarantees free flow of trade and commerce throughout India including between State and State and as such Article 304(a), even though an exception to Article 301, yet applies where an exemption is granted by one State to a special class of manufacturers for a limited period on certain conditions. It was so submitted that either a State should grant exemption to all goods irrespective of the fact that the goods are locally manufactured or imported from other States, else it would be violative of Articles 304 and 304(a).

26. It was submitted by the respondents that this is not the correct position. This argument ignores the basic feature of the Constitution and also the fact that the concept of economic unity may not necessarily be the same as it was at the time of Constitution-making. The result of the same would be acceptance of the view that a State which was technically and economically weak in 1950 due to various factors, must always remain the same and cannot be helped to develop economically by granting concessions/exemptions or allowing subsidies etc. for establishing new industries so as to be economically developed. It was also submitted that if all the parts of India that is to say all the States are economically strong or developed then only can economic unity as a whole be assured and strengthened. Hence, the concept of economic unity is ever-changing with very wide horizons and cannot and should not be imprisoned in a strait-jacket of the concept and notion as advocated by the petitioners. Economic unity of India is one of the constitutional aspirations of India and safeguarding the attainment and maintenance of that unity are objectives of the Indian Constitution. It would be wrong, however, to assume that India as a whole is already an economic unit. Economic unity can only be achieved if all parts of whole of Union of India develop equally, economically. Indeed, in the affidavits of opposition various grounds have been indicated on behalf of the respondents suggesting the need for incentives and exemptions, and these were suggested to be absolutely necessary for economic viability and survival for these industries in these States. These were based on cogent and intelligible reasons of economic encouragement and growth. There was a rationale in these which is discernible. The power to grant exemption is always inherent in all taxing statutes. If the suggestions/submissions as advanced by the

petitioners are accepted, it was averred, and in our opinion rightly, that it will destroy completely or make nugatory the plenary powers of the States. If the exemption is based on natural and business factors and does not involve any intentional bias, the impugned notifications to grant exemption of limited period on certain specific conditions cannot be held to be bad. Judged by that yardstick, the present notifications cannot be held to be violative of the constitutional provisions. An examination of Article 304(a) would reveal that what is being prohibited by this article which is really an exception to Article 301 will not apply if Article 301 does not apply.

27. In the instant case the general rate applicable to locally made goods is the same as that on imported goods. Even supposing without admitting that sales tax is covered by Article 301 as a tax directly and immediately hampering the free flow of trade, it does not follow that it falls within the exemption of Article 304 and it would be hit by Article 301. Still the general rate of tax which is to be compared under Article 304(a) is at par and the same qua the locally made goods and the imported goods.

28. Concept of economic barrier must be adopted in a dynamic sense with changing conditions. What constitutes an economic barrier at one point of time often ceases to be so at another point of time. It will be wrong to denude the people of the State of the right to grant exemptions which flow from the plenary powers of legislative heads in List II of the Seventh Schedule of the Constitution. In a federal polity, all the States having powers to grant exemption to specified class for limited period, such granting of exemption cannot be held to be contrary to the concept of economic unity. The contents (sic concept) of economic unity by the people of India would necessarily include the power to grant exemption or to reduce the rate of tax in special cases for achieving the industrial development or to provide tax incentives to attain economic equality in growth and development. When all the States have such provisions to exempt or reduce rates the question of economic war between the States inter se or economic disintegration of the country as such does not arise. It is not open to any party to say that this should be done and this should not be done by either one way or the other. It cannot be disputed that it is open to the States to realise tax and thereafter remit the same or pay back to the local manufacturers in the shape of subsidies and that would neither discriminate nor be hit by Article 304(a) of the Constitution. In this case and as in all constitutional adjudications the substance of the matter has to be looked into to find out whether there is any discrimination in violation of the constitutional mandate.

29. In ***Kalyani Stores* v.** ***State of Orissa*** [AIR 1966 SC 1686], Shah, J. (as the learned Chief Justice then was), speaking for himself and on behalf of Chief Justice Gajendragadkar, Wanchoo, J. and Sikri, J. observed that the restriction on the freedom of trade, commerce and intercourse throughout the territory of India declared by Article 301 of the Constitution cannot be justified unless it falls within Article 304. Exercise of power under Article 304(a) can be effective only if the tax or duty on goods imported from other States and the tax or duty imposed on similar goods manufactured or produced in that State is such that there is no discrimination. Hidayatullah, J. as the learned Chief Justice then was, observed, at p. 883 of the report, that Article 304(a) imposes no ban but lifts the ban imposed by Articles 301 and 303 subject to one condition. That article is enabling and prospective.

30. Counsel for the respondents drew our attention to Articles 38 and 39 of the Constitution. The striving for the attainment of the objects enshrined in these articles is enjoined. For achieving these objects the States have necessarily to develop themselves economically so as to secure economic unity and to minimise the inequalities and imbalances between State and State and region and region. If the power to grant exemption has been conferred for achieving these objects on all, it is not possible to assail these as violative of Article 304 as the latter article has to be interpreted in conjunction with others and not in isolation. Reference may be made to the observations of this Court in ***Bharat General & Textile Industries Ltd.* v. *State of Maharashtra*** where it was held that Section 41 of the Bombay Sales Tax Act, did not contravene Articles 14 and 19 of the Constitution of India and the State Government could validly classify new units producing edible oil as distinct and separate from other units and validly withdraw the exemption in relation to such units only. It is true that the aforesaid observations were made in the context different from Article 304(a) but basically the concept of equality embodied in Articles 304(a) and 16 (sic 14) are the same. Article 14 enjoins upon the State to treat every person equal before the law while Article 304(a) enjoins upon the State not to discriminate with respect to imposition of tax on imported goods and the locally made goods. The petitioners made reference to several decisions of this Court, namely, ***H. Anraj* v. *Government of T.N.*** [(1986)1 SCC 414], ***Indian Cement* v. *State of A.P.***, ***Weston Electroniks* v. *State of Gujarat***, ***West Bengal Hosiery Assn.* v. *State of Bihar*** wherein it has been reiterated that difference in rate of sales tax is hit by Articles 301 and 304 but the said conclusions were arrived at in the context of a controversy not in the present form and the question of exemption as such did not arise in these cases, as explained later. These cases were not at all concerned with granting of exemption to a special class for a limited period on specific conditions of maintaining the general rate of tax on the goods manufactured by all those producers in the State who do not fall within the exempted category at par with the rate applicable to imported goods as we have read these cases. Hence, it was not necessary in those decisions to consider the problem in its present aspect. If, however, the said power is exercised in a colourable manner intentionally or purposely to create unfavourable bias by prescribing a general lower rate on locally manufactured goods either in the shape of general exemption to locally manufactured goods or in the shape of lower rate of tax, such an exercise of power can always be struck down by the courts. That is not the situation in the instant cases. The aforesaid decisions, therefore, are not authorities for the general proposition that while maintaining the general rate at par, special rates for certain industries for a limited period could not be prescribed by the States.

32. In respect of the decisions aforesaid relied on behalf of the petitioner, on examination of the observations in ***Indian Cement*** case to the contrary to which state hereinbefore on this aspect must be confined to the facts of that case alone as the said decision had no occasion to consider it in the full light. In the aforesaid view of the matter the challenge in these petitions to the aforesaid exemptions cannot, in our opinion, be upheld. The writ petitions dealing with the U.P. matters on the same contentions, therefore, fail.

* * * * *

Shree Mahavir Oil Mills v. *State of J. & K.*

1996 (11) SCC 39

B.P. JEEVAN REDDY, J. - 2. The State of Jammu and Kashmir seeks to encourage and promote the industrialisation of the State - like every other State in the country. Edible oil industry is one such. Because of certain inherent problems, the cost of production of edible oil in Jammu and Kashmir is said to be higher than the cost of production of similar edible oil in the adjoining States with the result that the manufacturers of edible oil in the adjoining States are able to sell their products in Jammu and Kashmir at a price lower than the price at which the local manufacturers are able to sell. This is said to have created a situation where the local industries faced the prospect of closure; at any rate, they were not able to compete with the out-State manufacturers. They approached their Government, which is seeking to protect their interest by inter alia exempting them totally from the levy of sales tax on the sale of their products. That has given rise to the writ petition from which the present appeal arises. On the Jammu and Kashmir High Court dismissing the writ petition, they have approached this Court.

3. The Jammu and Kashmir General Sales Tax Act contains four Schedules. Each of the Schedules carries a particular rate of sales tax. Edible oils were previously included in Schedule D which prescribes the rate of tax at four per cent. On 20-12-1993, edible oils were shifted from Schedule D to Schedule C, which prescribes the rate of tax at eight per cent. (It is stated that SRO 213 of 1993 issued on 3-12-1993 shifting edible oils from Schedule D to Schedule C was rescinded within about a week thereafter but was reissued as SRO 124 of 1994 on 27-5-1994.)

4. With a view to protect the local edible oil industry, the Government of Jammu and Kashmir issued SRO 93 of 1991 on 7-3-1991 under Section 5 of the Jammu and Kashmir General Sales Tax Act, 1962 directing that "the goods manufactured by a dealer operating as a small-scale industrial unit in the State and registered with Director of Industries and Commerce, Handicrafts or Handloom Development, subject to the conditions specified below, shall be exempted from payment of tax to the extent and for the period specified in the Schedule forming Annexure A". All the units manufacturing edible oil in the State are small-scale industrial units as defined by the Jammu and Kashmir Government. (It appears that initially the limit was an investment of rupees ten lakhs according to which one unit in the State did not qualify as a small-scale industrial unit. Subsequently, it is stated, the limit of investment was raised to rupees thirty lakhs, as a result of which the said unit also fell under the definition of small-scale unit.) The exemption was total and the period of exemption was five years - which has later been extended by another five years.

5. The result of the orders aforementioned was that while until December 1993/May 1994, the manufacturers of edible oil in other States were obliged to pay sales tax on the sales effected by them in the State of Jammu and Kashmir at the rate of four per cent, the local manufacturers were totally exempted therefrom. In December 1993/May 1994, the rate of tax was raised from four per cent to eight per cent, as stated above. With the raising of the rate of sales tax to eight per cent, the outside manufacturers were obliged to pay at eight per cent while the local manufacturers were exempt fully. It is then that some of the outside

manufacturers including the appellants herein, approached the Jammu and Kashmir High Court by way of writ petitions which were dismissed by a learned Single Judge. The letters patent appeals preferred by the appellants have also been dismissed by the Division Bench relying mainly upon the decision of this Court in ***Video Electronics (P) Ltd.*** **v.** ***State of Punjab*** [(1990) 3 SCC 87].

6. Shri Harish Salve, learned counsel for the appellants, assailed the correctness of the judgment of the High Court on several grounds. Counsel submitted that the orders of the Government of Jammu and Kashmir exempting all the edible oil industries in the State from payment of sales tax unconditionally amounts to discriminating against the out-State manufacturers which is prohibited by Articles 301 and 304 of the Constitution. Counsel submitted that Part XIII of the Constitution prohibits raising of fiscal barriers by the States, for such barriers are bound to interfere with the free movement of trade and commerce throughout the territory of India. Raising of protective walls may be justified in international trade. The Government of India can and has been providing several such protectionist measures all these years to encourage the growth and establishment of industries in the country and to protect them from competition from foreign manufacturers. But similar measures cannot be provided by the State Governments internally, i.e., within the country. Parliament can, no doubt, provide such measures but not the State Governments and certainly not without the prior sanction/assent of the President of India. Learned counsel submitted that the decision in ***Video Electronics*** has not been correctly understood by the High Court and that it does not purport to support the impugned measure. Learned counsel relied upon several decisions rendered by this Court under Part XIII in support of his submissions.

7. On the other hand, Shri M.L. Verma, learned counsel for the State of Jammu and Kashmir, placed strong reliance upon the ratio and upon certain observations made in ***Video Electronics***. Notwithstanding certain minor differences, learned counsel submitted, the principle of the said decision clearly applies to the facts of this case. Shri Verma submitted that when the rate of tax was four per cent and the exemption in favour of local manufacturers was operating, the appellants never protested. Only when the rate of tax was raised from four to eight per cent, with the exemption in favour of local manufacturers continuing, the appellants came forward with writ petitions. If they were not aggrieved when the rate was four per cent, they cannot equally be aggrieved merely because the rate is raised to eight per cent. Counsel brought to our notice certain figures relating to turnover of the appellants within the State of Jammu and Kashmir and emphasised that the impugned measure has not really hurt the appellants' business and that the volume of their turnover continues to rise notwithstanding the impugned measure. The submission is that the appellants can have no real or genuine grievance in the matter. Coupled with this, Shri Verma submitted, is the need for protecting the local manufacturers. Because of the peculiar economic conditions prevailing in the State, the cost of production of the local manufacturers is substantially higher than the cost of production of edible oil in the adjoining States or in other States in the country. Unless the impugned protective measure is provided to the local manufacturers, Shri Verma submitted, it was not possible for the local manufacturers to survive in the market. They would have been eliminated from their business and trade by the out-State manufacturers who are able to sell their goods at a lesser price. The purpose of the impugned

measure, Shri Verma submitted, is, therefore, laudable. It is not directed against the out-State manufacturers but only towards saving the local ones. Even otherwise, counsel submitted, the principle of classification relevant under Article 14 has been held by this Court to be equally applicable under Article 304 and if so, it must be held that the classification made between local and out-State manufacturers is a reasonable one and designed to further the aforesaid laudable object.

8. Article 301 declares that "subject to the other provisions *of this Part*, trade, commerce and intercourse throughout the territory of India shall be free". (emphasis supplied) An exception is, however, provided in favour of Parliament by Article 302 which says that "Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India *as may be required in the public interest.*"(emphasis supplied) The power conferred upon Parliament by Article 302 is, however, qualified by a rider provided in clause (1) of Article 303 which says that the power conferred upon Parliament by Article 302 shall not, however, empower Parliament - or the legislature of a State - "to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule". [It is not very clear why clause (1) of Article 303 uses the words "nor the legislature of a State" when Article 302 does not refer to the legislature of a State at all. Probably, the idea was to declare affirmatively - in the interest of removing any doubt - that even a legislature of a State shall not have the power to make any law giving or authorising the giving of any preference to one State over another or making or authorising the making of any discrimination between one State and another by virtue of their power to make a law with reference to the entries relating to trade and commerce in the Seventh Schedule. Further, the addition of words "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule" at the end of the clause have also given rise to a good amount of controversy, which we shall refer to later, to the extent relevant]. Clause (2) of Article 303, is in the nature of a clarification. It says that "nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is *necessary* to do so for the purpose of dealing with a *situation arising from scarcity of goods* in any part of the territory of India". (emphasis supplied) Article 304 deals with the power of the State Legislatures. It begins with a non obstante clause: "Notwithstanding anything in Article 301 or Article 303." Article 303 was also referred to in this non obstante clause evidently for the reason that clause (1) of Article 303 refers to "the legislature of a State" besides referring to Parliament. Article 304 contains two clauses. Clause (*a*) states that "the legislature of a State may by law - (*a*) impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subject, *so, however, as not to discriminate between goods so imported and goods so manufactured or produced*". (emphasis supplied) The wording of this clause is of crucial significance. The first half of the clause would make it appear at the first blush that it merely states the obvious: one may indeed say that the power to levy tax on goods imported from other States or Union Territories flows from Article 246 read with Lists II and III in the Seventh Schedule and not from this clause. That is of course

so, but then there is a meaning and a very significant principle underlying the clause, if one reads it in its entirety. The idea was not really to empower the State Legislatures to levy tax on goods imported from other States and Union Territories - that they are already empowered by other provisions in the Constitution - but to declare that that power shall not be so exercised as to discriminate against the imported goods vis-à-vis locally manufactured goods. The clause, though worded in positive language has a negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods. *In the matter of levy of tax* - and this is important to bear in mind - the clause tells the State Legislatures - "tax you may the goods imported from other States/Union Territories but do not, in that process, discriminate against them vis-à-vis goods manufactured locally". In short, the clause says: levy of tax on both ought to be at the same rate. This was and is a ringing declaration against the States creating what may be called "tax barriers" - or "fiscal barriers", as they may be called - at or along their boundaries in the interest of freedom of trade, commerce and intercourse throughout the territory of India, guaranteed by Article 301. As we shall presently point out, this clause does not prevent in any manner the States from encouraging or promoting the local industries in such manner as they think fit *so long* as they do not use the weapon of taxation to discriminate against the imported goods vis-à-vis the locally manufactured goods. To repeat, the clause bars the States from creating tax barriers - or fiscal barriers, as they can be called - around themselves and/or insulate themselves from the remaining territories of India by erecting such "tariff walls". Part XIII is premised upon the assumption that so long as a State taxes its residents and the residents of other States uniformly, there is no infringement of the freedom guaranteed by Article 301; no State would tax its people at a higher level merely with a view to tax the people of other States at that level. And it is this clause which has a crucial bearing on this case. Now coming to clause (*b*), it empowers the legislature of the State to make a law and "impose such *reasonable restrictions* on the freedom of trade, commerce or intercourse with or within that State *as may be required in the public interest*; provided that no Bill or amendment for the purposes of clause (*b*) shall be introduced or moved in the legislature of a State without the previous sanction of the President". (This proviso has, of course, to be read along with Article 255 which says that if the Act receives the assent of the President, the non-compliance with the requirement of obtaining the previous sanction to the introduction of the Bill is cured.) Though in appearance this clause reads like conferring on the State Legislatures a power akin to the power conferred upon Parliament by Article 302, there are certain distinctions. Firstly, while Article 302 does not use the expression 'reasonable' before the word 'restrictions,' this clause does. Secondly, this power can be exercised by the State Legislature only with the "previous sanction" of the President - which means the Union Ministry, or with the assent of the President, as explained above. It is probably our history which impelled the Founding Fathers to lay store by the Central Government in the matter of imposing restrictions, or reasonable restrictions, as the case may be, on the freedom of trade, commerce and intercourse. The freedom guaranteed, it is worthy of notice, is "*throughout the territory of India*" and not merely between the States as such; the emphasis is upon the oneness of the territory of India. Part XIII starts with this concept of oneness but then it provides exceptions to that rule, as stated above, to meet certain emerging situations. As a matter of fact, it can well be said that clause (*a*) of Article 304 is *not* really an exception to Article 301,

notwithstanding the non obstante clause in Article 304 and that it is but a restatement of a facet of the very freedom guaranteed by Article 301, viz., power of taxation by the States. (We need not refer to the other articles in Part XIII for the purposes of this case.)

9. Having noticed the scheme of Part XIII, we may now turn to decided cases to see how these articles have been understood over the last fifty years.

10. The first decision to be noticed is, of course, in ***Atiabari Tea Co. Ltd.* v. *State of Assam***. The Legislature of Assam enacted the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act, 1961 providing for levy of tax on certain goods carried by road or inland waterways in the State of Assam. Its constitutionality was questioned by a large number of tea companies who sold most of their produce outside the State of Assam after transporting it by road or waterways to West Bengal and other States. The majority opinion (Gajendragadkar, Wanchoo and Das Gupta, JJ.) stated their conclusion in the following words:

> "Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and *if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301*, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Article 304(*b*). It is not as if no restrictions at all can be imposed on the free movement of trade."

It was also held:

> "Thus considered we think it would be reasonable and proper to hold that *restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade*. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. ... We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement?"

11. In ***Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*** validity of Section 4(1) of the Rajasthan Motor Vehicles Taxation Act, 1951 was challenged. The section levied a tax on all motor vehicles used in any public place or kept for use at the rates specified in the Schedules. Violation of the provision invited penalties provided under Section 11. Certain operators challenged the Act as violative of Articles 301 and 304(*b*). Since serious doubts were expressed with respect to the propositions enunciated by the majority and by Shah, J. in

Atiabari Tea Co. Ltd. the matters were referred to a larger Constitution Bench of seven Judges. By a majority of 4:3, (S.K. Das, Kapur and Sarkaria, JJ. joined by Subba Rao, J.), this Court upheld the constitutionality of the Act on the ground that the taxes levied by it are compensatory in nature and, therefore, outside the purview of Article 301. Once outside the purview of Article 301, it was held, Article 304 was also not attracted.

12. Subba Rao, J. concurred with the above propositions though the learned Judge stated the propositions flowing from his opinion at pp. 564-565 separately. The majority opined that:

> "The interpretation which was accepted by the majority in the ***Atiabari Tea Co.*** case is correct, but subject to this clarification. *Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution*." (emphasis supplied)

13. ***A.T.B. Mehtab Majid & Co.*** **v.** ***State of Madras*** arose under the Madras General Sales Tax Act, 1939. The effect of Section 3 of the Act read with Rule 16 was that tanned hides and skins imported from outside the State of Madras and sold within the State were subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State. Similarly, hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State were also subject to higher rate of tax than hides or skins purchased in raw condition in the State and tanned within the State. This distinction was attacked as violative of Articles 301 and 304(*a*) of the Constitution. Following the law laid down in ***Atiabari Tea Co. Ltd***. and ***Rajasthan Automobiles*** the Constitution Bench held:

> "It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304(*a*).
>
> Article 304(*a*) enables the legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that *if the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to sub-rule of Rule 16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down*."

14. ***State of Madras*** **v.** ***N.K. Nataraja Mudaliar*** [AIR 1969 SC 147] considered the validity of sub-sections (2), (2-A) and (5) of Section 8 of the Central Sales Tax Act, 1956. The respondent's case was that they were violative of Articles 301, 302, 303 and 304. It was held by Shah, J. (speaking for himself, Mitter and Vaidyalingam, JJ.) that while the Central sales tax imposed under Section 3 violates Article 301 being a tax on movement of goods, it was saved by Article 302. The levy of different rates by sub-section (2-A) was justified on the ground that the Act was meant for imposing tax to be collected and retained by the State and

that in such a case the provision does not amount to a law contemplated by clause (1) of Article 303. For the same reason, it was held, leaving it to the States to levy tax at different rates also does not amount to practising discrimination. Article 304(*a*), it is significant to note, was said to have no application for the reason that it was not a case where tax was imposed on imported goods at a different rate from the rate leviable on goods manufactured locally. Certain observations made by Shah, J. are relied upon by the learned counsel for Jammu and Kashmir and must, therefore, be set out:

> "The flow of trade does not necessarily depend upon the rates of sales tax: it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rates of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the country goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a particular commodity, the rate of tax is 2% but if the benefit of that low rate is offset by the freight which a merchant in another State may have to pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State, even though the rate of tax in that State may be higher. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors - natural and business - enter into the maintenance of trade relations and *the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States*."

15. It is significant to notice that these observations were made in the context of the argument that different rates of Central sales tax in different States on sale of similar goods is discriminatory. It was not a case like the present one where a State is levying a different/higher rate of tax on goods imported from other States than the rate applicable to sales of similar goods manufactured within that State. We are unable to see how these observations help the State.

18. ***H. Anraj* v. *Govt. of T.N.*** [(1986) 1 SCC 414] is a decision of a Bench of two learned Judges. The Government of Tamil Nadu exempted the lottery tickets issued by it totally while levying tax on lottery tickets issued by other Governments and sold in Tamil Nadu. The Court held that laws imposing taxes can amount to restriction on trade, commerce and intercourse if they hampered the free flow of trade unless they are compensatory in nature and that the sales tax which had the effect of discriminating between goods of one State and another may affect free flow of trade and would be offensive to Article 301 unless saved by Article 304(*a*). It was held that the direct and immediate result of the notification was to impose an unfavourable and discriminatory tax.

19. ***Indian Cement* v. *State of A.P.*** [(1988) 1 SCC 743] is also a decision of two learned Judges. The Government of Andhra Pradesh had issued two notifications, one under Section 9(1) of the A.P. General State Sales Tax Act, 1957 and the other under Section 8(5) of the Central Sales Tax Act. Under the first notification, sales tax on sale of

> "cement manufactured by cement factories situated in the State and sold to the manufacturing units situated within the State for the purpose of..."

was reduced from 13.5% to 4%. Under the second notification, the Central sales tax was reduced to two per cent. The Government of Karnataka also issued a similar notification reducing in similar situation, Central sales tax from 15% to 2%. These were challenged as violative of Articles 301 and 304 and the challenge was upheld. The first ground upheld was that the "reasonable restrictions" contemplated by Article 304(*b*) can be imposed by a law made by the legislature of the State and not by the orders of the Government, i.e., by executive action. The second ground given by the Bench (Ranganath Misra and M.M. Dutt, JJ.) is that "Variation of the rate of inter-State sales tax does affect free trade and commerce and creates a local preference which is contrary to the scheme of Part XIII of the Constitution." and hence bad. In the course of discussion, the Bench observed:

> "There can be no dispute that taxation is a deterrent against free flow. As a result of favourable or unfavourable treatment by way of taxation, the course of flow of trade gets regulated either adversely or favourably. If the scheme which Part XIII guarantees has to be preserved in national interest, it is necessary that the provisions in the article must be strictly complied with. One has to recall the farsighted observations of Gajendragadkar, J. in ***Atiabari Tea Co***. case and the observations then made obviously apply to cases to the type which is now before us."

20. The facts in ***Weston Electroniks* v. *State of Gujarat*** [(1988) 2 SCC 568] are similar. Until 1981, the tax on sale of electronic goods under the Gujarat Sales Tax Act was fifteen per cent whether the goods were manufactured within the State of Gujarat and sold or imported from outside. In 1981 - and again in 1986 - however, a distinction was made between locally manufactured goods and those imported into the State. A lower rate was prescribed for the former. This was held to be discriminatory and offensive to Articles 301 and 304.

22. ***Video Electronics (P) Ltd.* v. *State of Punjab***: [(1988) 4 SCC 134] inasmuch as strong and almost exclusive reliance is placed by the learned counsel for the State of Jammu and Kashmir on this decision, it is necessary to examine the facts of and the law laid down in this decision (rendered by a Bench of three learned Judges) a little more closely. In this decision, notifications issued by two States, viz., Uttar Pradesh and Punjab were considered. The notification issued by the Government of Uttar Pradesh provided an exemption in favour of new units, established in specified areas and for the prescribed period (three to seven years) specified therein. It was further stipulated that the said benefit shall be available only to those new units which have commenced their production between the two dates specified by the Government. The Punjab notification provided that "rate of the sales tax payable by an electronic manufacturing unit existing in Punjab in cases of electronic goods specified in Annexure A was prescribed at one per cent as against the normal 12 per cent". (This is how the purport of the provision has been set out in the decision.) Both notifications were impugned as violative of Articles 301 and 304. The Bench comprising Mukharji, C.J., Ranganathan and Verma, JJ. upheld both the notifications. So far as the Uttar Pradesh notification was concerned, it was held that inasmuch as it was a case of grant of exemption "to a special class for a limited period on specific conditions" and was not extended to all the producers of those goods, it does not offend the freedom guaranteed by Article 301. Similarly, in the case of Punjab notification, it was held that since the exemption is for certain specified goods and also because "an overwhelmingly large number of local manufacturers of similar goods are subject to sales tax", it cannot be said that local manufacturers were favoured as

against the outside manufacturers. In the course of their judgment, the Bench made certain observations which are strongly relied upon by Shri M.L. Verma, J. The observations are to the effect that while judging whether a particular exemption granted by the State offends Articles 301 and 304, it is necessary to take into account various factors. A State which is technically and economically weak on account of various factors should be allowed to develop economically by granting concessions, exemptions and subsidies to new industries. All parts of the country are not equally developed, industrially and economically. The concept of economic unity is an ever-changing one; it cannot be imprisoned in a strait-jacket. India is not already an economic unit. Economic unity is possible only when all the units of the country develop equally. The power to grant exemption is inherent in all taxing statutes and the Government cannot be deprived of this power by invoking Articles 301 and 304. The concept of economic barriers must be understood in a dynamic sense. The concept of economic unity or economic barriers must be read along with the power of exemption inhering in the State Governments. Where every State is exempting or reducing the rates of sales tax, there can be no question of an economic war between them.

> "A backward State or a disturbed State cannot with parity engage in competition with advanced or developed States. Even within a State, there are often backward areas which can be developed only if some *special incentives* are granted. If the incentives in the form of subsidies or grant are given to any part of (*sic* or) units of a State so that it may come out of its limping or infancy to compete as equals with others, that, in our opinion, does not and cannot contravene the spirit and the letter of Part XIII of the Constitution. However, this is permissible only if there is a valid reason, that is to say, if there are justifiable and rational reasons for differentiation. If there is none, it will amount to hostile discrimination."

23. All the above observations were made to justify (1) grant of incentives and subsidies and (2) exemption granted to new industries, of a specified type (small-scale industries commencing production within the two specified dates) and for a short period. They were not meant to nor can they be read as justifying a blanket exemption to all small-scale industries in the State irrespective of their date of establishment. The case before us clearly falls within the ratio of the Constitution Bench decision in ***A.T.B. Mehtab Majid*** and the decisions in ***Indian Cement***, ***W.B. Hosiery Assn.*** and ***Weston Electroniks***. The limited exception created in ***Video Electronics*** does not help the State herein for the reason that exemption concerned herein is neither confined to "new industries", nor is circumscribed by other conditions of the nature stipulated in the Uttar Pradesh notification. It is not possible to go on extending the limited exception created in the said judgment, by stages, which would have the effect of robbing the salutary principle underlying Part XIII of its substance. Indeed, it has been the contention of Shri Salve that, on principle, the exception carved out in ***Video Electronics*** is unsustainable. For the purpose of this case, it is not necessary for us to say anything about the correctness of ***Video Electronics***. Suffice it to say that the limited exception carved out therein cannot be widened or expanded to cover cases of a different kind. It must be held that the total exemption granted in favour of small-scale industries in Jammu and Kashmir producing edible oil (there are no large-scale industries in that State producing edible oil) is not sustainable in law.

24. Shri Salve has brought to our notice a recent decision of the Supreme Court of USA in ***West Lynn Creamery, Inc.* v. *Jonathan Healy, Commr. of Massachusetts Deptt. of Food***

and Agriculture [Cases Nos. 93-141 rendered on 17-6-1994]. The petitioner was a milk dealer licensed to do business in the State of Massachusetts. Most of the milk consumed in that State was imported from other States. In 1992, the Government declared a State of emergency in view of declining trend in the price of raw milk. It found that the cost of production of milk in Massachusetts is higher than the cost of production in other States and that to preserve and protect the milk industry in Massachusetts, it is necessary to take certain measures. Accordingly, an order was issued soon after the declaration of emergency which created the Massachusetts Dairy Equalisation Fund. A levy was imposed upon all the milk sold in the State. At the end of each month, the proceeds of such levy were distributed among the producers of milk in Massachusetts alone. This order was attacked as violative of the Commerce Clause contained in Article 1(8) of the United States Constitution, which reads: "The Congress shall have power - to regulate Commerce with Foreign nations and among the several States, and with the Indian Tribes." The Court held (with one learned Judge, Scalia, J., concurring with the conclusion but on a reasoning different from that of the majority) that the order is bad. The majority observed that the " *'negative' aspect of the Commerce Clause* prohibits economic protectionism - that is, regulatory measures designed to benefit in-State economic interests by burdening out-of-State competitors.... Thus, State statutes that clearly discriminate against inter-State commerce are routinely struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." The Court observed that the avowed purpose and undisputed effect of the order is to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States and that the premium payments are effectively a tax which makes milk produced out of State more expensive. The Court further observed that a pure subsidy funded out of general revenues ordinarily imposes no burden on inter-State commerce and that it merely assists local business. The impugned order, however, the Court pointed out, was "funded principally from taxes on the sale of milk produced in other States ...". To the same effect is the decision in ***Bacchus Imports Ltd.* v. *Dias*** [460 US 263 (1984)].

25. Now, what is the ratio of the decisions of this Court so far as clause (*a*) of Article 304 is concerned? In our opinion, it is this: the States are certainly free to exercise the power to levy taxes on goods imported from other States/Union Territories but this freedom, or power, shall not be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in the immediate context that States are free to encourage and promote the establishment and growth of industries within their States by all such means as they think proper *but* they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-à-vis similar goods manufactured/produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about. A limited exception has no doubt been carved out in ***Video Electronics*** but, as indicated hereinbefore, that exception cannot be enlarged lest it eat up the main provision. So far as the present case is concerned, it does not fall within the limited exception aforesaid; it falls within the ratio of ***A.T.B. Mehtab Majid*** and the other cases following it. It must be held that by exempting unconditionally the edible oil produced within the State of Jammu and

Kashmir altogether from sales tax, even if it is for a period of ten years, while subjecting the edible oil produced in other States to sales tax at eight per cent, the State of Jammu and Kashmir has brought about discrimination by taxation prohibited by Article 304(*a*) of the Constitution.

26. We are unable to see any substance in the objection raised by Shri Verma that not having attacked the exemption notification when the rate of tax was four per cent, the appellants should not be allowed to question the same when the rate of tax has climbed to eight per cent. There can be no question of any acquiescence in matters affecting constitutional rights or limitations. Similarly, the argument that the volume of trade of the appellants has not shown a downward trend in spite of the said exemption is equally immaterial apart from the fact that an explanation is offered therefor by Shri Salve. Yet another contention of Shri Verma that the principle of classification applicable under Article 14 is equally applicable under Articles 301 and 304(*a*) is of little help to the respondent-State. Article 14 speaks of equality; Article 301 speaks of freedom and Article 304(*a*) speaks of uniform taxation of both the imported goods and the locally produced goods by the States. According to Shri Verma, edible oil produced and sold in the State of Jammu and Kashmir and the edible oil produced in other States and sold in the State of Jammu and Kashmir fall in two different classes and that the said classification is designed to achieve the objective of industrialisation of the State. We find it difficult to appreciate how can the concept of classification be read into clause (*a*) of Article 304 to undo the precise object and purpose underlying the clause. Shri Verma repeatedly stressed that the object underlying the impugned measure is a laudable one and that it seeks to serve and promote the interest of the State of Jammu and Kashmir which is economically and industrially an undeveloped State, besides being a disturbed State. We may agree on this score but then the measures necessary in that behalf have to be taken by the appropriate authority and in the appropriate manner. Part XIII of the Constitution itself contains adequate provisions to remedy such a situation and there is no reason why the necessary measures cannot be taken to protect the edible oil industry in the State in accordance with the provisions of the said Part. Keeping the said aspect in view, we invoke our power under Article 142 of the Constitution and mould the relief to suit the exigencies of the situation.

27. We declare that the exemption granted by Notification No. SRO 93 of 1991 to local manufacturers/producers of edible oil is violative of the provisions contained in Articles 301 and 304(*a*). At the same time, we direct that: (*a*) the appellants shall not be entitled to claim any amounts by way of refund or otherwise by virtue of or, as a consequence of, the declaration contained herein and (*b*) that the declaration of invalidity of the impugned notification shall take effect on and from 1-4-1997. Till that date, i.e., up to and inclusive of 31-3-1997, the impugned notification shall continue to be effective and operative. Appeal allowed in the above terms.

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PRESIDENT'S RULE IN STATES

State of Rajasthan v. *Union of India*

AIR 1977 SC 1361

[*Judicial Review of Imposition of President's Rule in States*]

Original Suits 1 to 6 of 1977, filed on behalf of the States of Rajasthan, Madhya Pradesh, Punjab, Bihar, Himachal Pradesh, and Orissa against the Union of India under Article 131 of the Constitution of India and three Writ Petitions, 67 to 69 of 1977, by three members of the Legislative Assembly of the State of Punjab against the Union of India and Shri Charan Singh, the Union Home Minister and Shri Zail Singh, Chief Minister of Punjab raised common questions of law and fact.

The State of Rajasthan had asked for a declaration that what it described as a "directive", contained in the letter dated April 18, 1977, issued by Shri Charan Singh, the Union Home Minister, to the Chief Minister of the State was "unconstitutional, illegal and ultra vires the Constitution" and also a declaration that the plaintiff State was "not constitutionally or legally obliged to comply with or to give effect to the directive contained in the said letter". The other States also had raised similar contentions in this case.

The principal common submissions on behalf of the plaintiffs as well as the petitioners were:

"Firstly, that the letter of Shri Charan Singh dated April 18, 1977, discloses the sole ground of an impending proclamation under Article 356 of the Constitution to be followed by a dissolution of the Legislative Assembly of the State concerned and that such a proclamation, resulting necessarily in the dismissal of the Ministries in the six States and the dissolution of their Legislative Assemblies upon the grounds given in the letter, is prima facie outside the purview of Article 356 of the Constitution.

"Secondly, that, in any case, the condition precedent to the dissolution of the State Legislative Assemblies is a ratification by both Houses of Parliament of the Presidential action under Article 356 so that no dissolution, at any rate, of a Legislative Assembly can take place without ascertaining the wishes of both the Houses of Parliament.

"Thirdly, that the grounds given being outside the constitutionally authorised purposes and objectives make the proposed action, on the face of it mala fide and unconstitutional. Our attention was also drawn to certain assertions in the plaints and petitions for advancing the pleas of "malice in fact" and "malice in law".

Impugned Letter: "D.O. No. 355/MS/T/77 HOME MINISTER, INDIA
NEW DELHI, April 18, 1977.

Dear Shri Joshi,

We have given our earnest and serious consideration to the most unprecedented political situation arising out of the virtual rejection, in the recent Lok Sabha elections, of candidates belonging to the ruling party in various States. The resultant climate of uncertainty is causing grave concern to us. We have reasons to believe that this has created a sense of diffidence at different levels of Administration. People at large do not any longer appreciate the propriety of continuance in power of a party which has been unmistakably rejected by the electorate. The climate of uncertainty, diffidence and disrespect has already given rise to serious threats to law and order.

2. Eminent constitutional experts have long been of the opinion that when a Legislature no longer reflects the wishes or views of the electorate and when there are reasons to believe that the Legislature and the electorate are at variance, dissolution, with a view to obtaining a fresh mandate from the electorate would be most appropriate. In the circumstances prevailing in your State, a fresh appeal to the political sovereign would not only be permissible but also necessary and obligatory.

3. I would, therefore, earnestly commend for your consideration that you may advise your Governor to dissolve the State Assembly in exercise of powers under Article 174(2) (*b*) and seek a fresh mandate from the electorate. This alone would, in our considered view, be consistent with constitutional precedents and democratic practices.

4. I would be grateful if you would kindly let me know by the 23rd what you propose to do.

With regards,

Yours; sincerely,
Sd./- Charan Singh)

Shri Harideo Joshi, Chief Minister of Rajasthan, Jaipur."

To substantiate the allegation that the letter constituted a "threat" of action under Article 356 of the Constitution to dismiss the Government, to dissolve the Legislative Assembly of each plaintiff State and to impose the President's rule upon it, corroboration was sought from a report of a talk of Shri Shanti Bhushan, the Minister for Law, Justice and Company Affairs, on the All India Radio, which appeared in the Statesman of April 23, 1977. Although, reports in newspapers do not constitute admissible evidence of their truth, yet, I reproduce the extract which was either attached to or its substance reproduced in the plaints, only to test whether, even assuming that its contents were to be proved, by admissible evidence, to be given in due course, all the allegations will, taken together, constitute something actionable. The report said:

Advice to Nine States a Constitutional duty, say Shanti Bhushan.

Mr Shanti Bhushan, Union Law Minister, said on Friday night that a clear case had been made out by dissolution of the Assemblies in nine Congress-ruled States and holding of fresh elections, reports Samachar.

In an interview in the Spotlight programme of All India Radio he said that the most important basic feature of the Constitution was democracy, which meant that a Government should function with the broad consent of the people and only so long as it enjoyed their confidence. If State Governments chose to govern the people after having lost the confidence of the people, they would be undemocratic Governments, he said.

Under Article 355, a duty had been cast on the Union Government to ensure that State Governments were carried on in accordance with the Constitution.

The Home Minister, Mr Charan Singh, had appealed to the Chief Ministers of the nine States to advise their Governors to recommend to the President dissolution of the State Assemblies. This was because a serious doubt had been cast on their enjoying the people's confidence, their party having been rejected in the recent Lok Sabha elections, the Law Minister said.

EXERCISE OF POWER **:** Mr Shanti Bhushan was asked whether the Centre would not be failing in its duty if it did not exercise its power at this crucial juncture to test the legitimacy of a State Government.

He replied that after all whenever the power was conferred by the Constitution, it was not done simply for the sake of conferring it. Obviously the Constitution contemplated the

circumstances under which that power should be exercised. When those circumstances arose it was obligatory on the part of the Centre to exercise that power.

Mr Shanti Bhushan said he failed to see'why the State Governments objected to going to the people to seek their mandate. "If we recognise the real sovereignty and supremacy of the people, there cannot be any possible objection". If someone claimed a divine right to rule whether the people wanted him or not, then of course, there could be an objection to go to the people.

***PREMATURE END*:** Explaining the Constitutional provisions relating to premature dissolution of State Assemblies, Mr Shanti Bhushan said two articles deal with this matter. Article 172 provided for the normal term which was earlier five years. But this had been extended to six years by the Constitution 42nd Amendment Act. Then Article 174 gave the Governor the power to dissolve the Legislative Assembly from time to time even during the normal period of five or six years. Normally this power was to be exercised with the aid and advice of the-Council of Ministers.

He was asked whether it was permissible for the President to resort to Article 356 if the Council of Ministers failed to aid and advise the Governor to dissolve the Assembly under Article 174.

Mr Shanti Bhushan explained that under Article 355 a duty had been cast on the Union Government to ensure that the Governments in States were carried on in accordance with the Constitution. The most important provision in the Constitution "rather the most important basic feature of the Constitution" was democracy which meant that a Government should function with the broad consent of the people and only so long as it enjoyed the confidence of the people.

***CONTINUED CONFIDENCE* :** Mr Shanti Bhushan said that the mere fact that at one time the Governments in the States enjoyed the confidence of the people did not give them the right to govern unless they continued to enjoy that confidence. If a situation arose in which a serious doubt was cast upon the Government enjoying the continued confidence of the people, then the provision for premature dissolution of the Assembly immediately came into operation.

The provision not merely gives the power but it casts a duty because this power is coupled with duty, namely, the Assembly must be dissolved immediately and the Government must go to the people to see whether it has continued confidence of the people to govern. Even after having lost the confidence of the people; if the Government chose to govern people, it would be undemocratic. This would not be in accordance with the provisions of the Constitution.

This was precisely the philosophy behind the wide powers given to the President under Articles 355 and 356. Obviously some authority had to be given the power to ensure that the functionaries under the Constitution were working in accordance with the Constitution.

As there were a number of States, obviously no single State could be given this power. Therefore, this power was entrusted to the Union Government to see that the State *Governments* were acting in accordance with the Constitution, which meant in accordance with democratic principles and conventions.

***NOT WHOLLY IMMORAL*:** Answering another question, Mr Shanti Bhushan did not agree that the whole of the Constitution 42nd Amendment Act was immoral. But there were serious objections to that Act on the ground of ethics. When this amendment was rushed through Parliament, the five years term of the members was over. Their term had really expired and they did not have the continued mandate to enact such an important Act as the 42nd

Amendment. The results of the Lok Sabha elections had' also shown that the people had not really given them the mandate to enact the amendment.

The other objection to the 42nd Amendment was that during the Emergency important leaders of the opposition parties were in jail. They could not express their views.

Mr Shanti Bhushan said that the 42nd Amendment had been enacted. As the Ministers had taken an oath to abide by the Constitution, they could not ignore the provisions of the 42nd Amendment so long as it remained. With the result it was not possible to have elections in those States where the State Governments had not lost the mandate of the people as was reflected in the Lok Sabha elections).

M.H. BEG, C. J. - 30. So far as the letter of Shri Charan Singh is concerned, it certainly does not contain even a reference to Article 356 of the Constitution. Nevertheless, the speech of Shri Shanti Bhushan, assuming that it was correctly reported, does mention Articles 355 and 356 of the Constitution and expounds a view of one of the basic purposes of the Constitution the observance of which could, in the opinion of the Law Minister, be secured by resort to Article 356 of the Constitution. The speech does express the view of the Law Minister that there was a duty cast upon the Union Government by Article 355 of the Constitution to secure a conformity between the current opinion of the electorate and the composition of the legislatures in the different States where the Governments in power today reflected the opinions of the majority of electors in each State prevalent only at a time when the last election to the State Legislative Assembly was held. The question whether these State Governments retain the confidence of the electorate or not at present could only be answered decisively by the electors themselves. That was the exclusive right and privilege of the electors under a democratic constitutional scheme and the law. According to the Law Minister, the elected representatives cannot set up a right to continue in power now, despite an overwhelmingly adverse verdict of the electorate against the party to which members of these Governments belong. In his opinion, to do so would be contrary to the basic norms of democracy underlying our Constitution.

31. If what was assumed to be proposed to be done, under the "threat" of a constitutionally prescribed mode of executive action, could, in no circumstances, be done under Article 356, we may be able to check a misuse or excess of constitutional power provided judicial control over all purported exercise of power of issuing proclamations, under Article 356, is not either impliedly or expressly barred even if a proposed action is plainly ultra vires. But, if the views of the two Union Ministers state the constitutional position correctly, no question of an "abuse" or "misuse of powers" for a collateral purpose or a "detournement de Pouvoir" or a "fraud upon the Constitution" or "malice in fact" or "malice in law" (terms denoting different shades of culpability and types of excess of power), can arise on the allegations of threatened action in the cases before us, which really amount only to this: The Union Government proposes to act under Article 356 of the Constitution to give electors in the various States a fresh chance of showing whether they continue to have confidence in the State Governments concerned and their policies despite the evidence to the contrary provided by the very recent Lok Sabha elections.

32. One purpose of our Constitution and laws is certainly to give electors a periodic opportunity of choosing their State legislature and, thereby, of determining the character of

their State's Government also. It is the object of every democratic constitution to give such opportunities. Hence, a policy devised to serve that end could not be contrary to the basic structure or scheme of the Constitution. The question whether they should have that opportunity now or later may be a question of political expediency or executive policy. Can it be a question of legal right also unless there is a prohibition against the dissolution of a legislative assembly before a certain period has expired? If there had been a constitutional prohibition, so that the proposed action of the Union Government could have contravened that constitutional interdict, we would have been obliged to interfere, but, can we do so when there is no constitutional provision which gives the legislature of a State the right to continue undissolved despite certain supervening circumstances which may, according to one view, make its dissolution necessary?

33. It may have been possible for this Court to act if facts and the circumstances mentioned to support proposed action were so completely outside the purview of Article 356 or so clearly in conflict with a constitutional provision that a question of excess of power could have apparently arisen. If, for example, an authoritative statement, on behalf of the Union Government, was issued that a dissolution is proposed only because the Chief Minister or the whole Council of Ministers of a State belongs to a particular caste or creed, it could be urged that the proposed action would contravene the fundamental rights of Indian citizens of equality before the law and absence of discrimination on such a ground. There is, however, no such allegation or its particulars in the plaints before us which may be capable of giving rise to the inference that any such constitutionally prohibited action is intended by the Union Government.

34. The choice between a dissolution and re-election or a retention of the same membership of the legislature or the Government for a certain period could be matters of political expediency and strategy under a democratic system. Under our system, quest of political power, through formation of several political parties, with different socio-economic policies and programmes and ideologies, is legal. Hence, it cannot be said that a mere attempt to get more political power for a party, as a means of pursuing the programme of that party, as opposed to that of other parties, is constitutionally prohibited or per se illegal. There may be moral or even political objections to such courses in certain circumstances. It may be urged that States should be permitted to function undisturbed by any directions or advice by the Union Government despite their differences with it on matters of socio-economic or political policy or complexion. Rights were asserted, on behalf of State legislators, as though they were legal rights to continue as legislators until the expiry of the constitutionally fixed spans of lives of their legislatures, barring cases of earlier dissolution. We are only concerned here with legal rights to dissolve and legal obstacles to such dissolution.

35. It could be argued, with considerable force, on political and moral grounds, that electors should be given a fresh opportunity of pronouncing their verdict upon the policies and programmes of the Governments in the States when very convincing proof of wide divergence between their views and those of their Governments has become available. The Law Minister's view is that, where there is an overwhelmingly large electoral verdict in a State against the party to which its Government belongs, the situation not only justifies but makes resort to a fresh election or an appeal to the political sovereign imperative. This I think,

is largely a political and moral issue. We are only concerned with its relationship to constitutional provisions. If its impact on the minds and feelings of electors or those officers who have to carry on the day to day administration is such that it will frustrate the very objects of a Government under the Constitution or make it impossible for the Government in a State to function as it ought to under the Constitution, it may come to the conclusion that action under Article 356 of the Constitution is called for. We cannot forget that Article 356(1) calls for an assessment of a "situation". We cannot anticipate decisions or interdict possible actions in situations which may or may not arise, due to all kinds of factors—economic, social, moral, and' political.

36. If the Union Government thinks that the circumstances of the situation demand that the State Governments must seek a fresh mandate to justify their moral rights, in the eyes of the people to continue to exercise power in the interests of their electors, or else the discontent of the masses may have its repercussion not only on the law and order situation but will also affect legal responsibilities or duties which the Union Government has towards a particular State or towards Indian citizens in general, all of whom live in some State or other, can we say that resort to Article 356 of the Constitution is not called for? I think that it is impossible to substitute our judgment for that of the Union Government on such a matter.

37. Even if it is possible to see a federal structure behind the setting up of separate executive, legislative, and judicial organs in the State and to urge, as it has been urged before us, that so long as the State Governments and their legislatures are not shown to have committed a dereliction of their constitutional duties or violations of any constitutional provisions, they ought not to be interfered with by the Union Government, it is also apparent, both from the mechanism provided by Article 356 of our Constitution, as well as the manner in which it has been used on numerous occasions in the past, since the inception of our Constitution, that the Union Government is capable of enforcing its own views on such matters against those of the State 'Governments as to how the State Governments should function and who should hold the reins of power in the States so as to enable the Constitution to work in the manner the Union Government wants it to do in a situation such as the one now before us. Article 131 of the Constitution was certainly not meant to enable us to sit as a Court of appeal on such a dispute between the Union Government and a State Government. And, our Constitution is not an inflexible instrument incapable of meeting the needs of such a situation.

38. It may be that, under our Constitution, there is too great a scope for struggle merely for seats of power so that the grand purposes enshrined in the Preamble to our Constitution and the correct governmental policies needed by the mass of our people to give reality to their dreams tend to be neglected in scrambles for political power. The issue before us, however, is not whether one party or another has failed in the very objectives and purposes for which people give unto themselves Constitutions such as ours. It is not for us to decide whether a party which has had its opportunities in the past has adequately met the objects of lodging political and legal power in its hands, or, whether those who now wield power at the Centre will do so more wisely, more honestly, or more effectively, from the point of view of the interests of the masses of our people or public good. These are questions for the people themselves to answer.

39. I think that the two Union Ministers have stated certain grounds for inferring that the time has come to give the people - the political sovereign - a chance to pronounce its verdict on the fates of State Governments and legislatures in the nine States also in a manner which is constitutionally not open to objection. In so far as Article 356(1) may embrace matters of political and executive policy and expediency courts cannot interfere with these unless and until it is shown what constitutional provision the President is going to contravene or has contravened on admitted grounds of action under Article 356(1) for, while Article 74(2) disables Courts from inquiring into the very existence or nature or contents of ministerial advice to the President, Article 356(5) makes it impossible for Courts to question the President's satisfaction "on any ground". Hence, Courts can only determine the validity of the action on whatever may remain for them to consider on what are admitted, on behalf of the President, to be grounds of Presidential satisfaction. Learned counsel for the plaintiffs and petitioners, when confronted with Article 356(5), said they would challenge its validity as a provision violating the basic structure of the Constitution. We, however, heard objections to the maintainability of suits and petitions even apart from the specific bar in Article 356(5). And, I propose to deal principally with those other objections.

41. Assuming, therefore, that the letter of Shri Charan Singh in the context of the reported speech of the Law Minister formed the basis of an absolutely correct inference that action under Article 356 of the Constitution would be taken by the President if the "advice" to the Chief Ministers of States contained in it is not accepted, the only question we need determine here is whether such a use of Article 356 of the Constitution was, in any way, unconstitutional or legally mala fide. Another way of putting the same issue would be to ask whether the purposes stated by the Union Law Minister for the proposed action under Article 356 of the Constitution, assuming that such a proposal or threat could be found there, could be said to be extraneous to the purposes of Article 356 of the Constitution.

42. Mr R.K. Garg, arguing for the petitioners from Punjab, has put forward what appears to us to be, according to the very authority cited by the learned counsel, on the mode of construing our Constitution, a very good justification for the view said to have been propounded by the Union Law Minister. Mr Garg relied on a passage from the judgment of Sikri, C.J., in ***H. H. Kesavananda Bharati Sripadagalaoaru*** **v.** ***State of Kerala*** [(1973) 4 SCC 225] I must interpret Article 368 in the setting of our Constitution, in the background of our history and in the light of our aspirations and hopes, and other relevant circumstances. No other constitution combine under its wings such diverse people, numbering now more than 550 millions, with different languages and religions and in different stages of economic development, into one nation, and no other nation is faced with such vast socio-economic problems.

It was also said there:

> I need hardly observe that I am not interpreting an ordinary statute, but a Constitution which apart from setting up a machinery for government, has a noble and grand vision. The vision was put in words in the Preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of Directive Principles.

> It seems to me that if "aspirations and hopes of the people", "the noble and grand vision found in the Preamble", and the chapter on "Directive Principles of State Policy" are to be taken into account in deciding whether the provisions of the Constitution are being carried out by a particular Government or not, the scope of interference under Article 356 of the Constitution, so that the provisions of the Constitution may be observed, becomes quite wide and sweeping. So long as we are bound by the majority view in ***Kesavananda Bharati*** case, the purposes and the doctrines lying behind its provisions also become, if one may so put it, more or less, parts of the Constitution. Whether a particular view or proposed action, in a particular situation, amounts to enforcing or subverting the Constitution thus becomes a highly controversial political issue on which the letter of the Constitution tends to be relegated to the background.

44. It is true that Article 356 occurs in part XVIII, dealing with "emergency provisions". But there are emergencies and emergencies. An emergency covered by Article 352 can only be declared if "the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance". Article 352(3) shows that what is known as "the present and imminent danger rule" is applicable to such emergencies. It is not necessary that the grave emergency contemplated by Article 352 must be preceded by actual occurrence of war or internal disturbance. The imminence of its danger is enough. But, Article 356, in contrast, does not contain such restrictions. The effects of a "proclamation of emergency" under Article 352 are given in Articles 353 and 354 of the Constitution.

45. After the first three articles of Chapter XVIII follows Article 355. Now, the provisions dealing with the proclamation of emergency under Article 352, which has to be grave and imminent, seem to be covered by the first part of the duty of the Union towards a State mentioned in Article 355, but the second part of that duty, mentioned in Article 355, seems to be of a somewhat different and broader character. The second part seems to cover all steps which are enough "to ensure" that the Government of every State is carried on in accordance with the provisions of the Constitution, Its sweep seems quite wide. It is evident that it is this part of the duty of the Union towards each State which is sought to be covered by a proclamation under Article 356. That proclamation is not of a grave emergency. In fact the word 'emergency' is not used there. It is a proclamation, intended either to safeguard against the failure of the constitutional machinery in a State or to repair the effects of a breakdown. It may be either a preventive or a curative action. It is enough if "the President" which, in view of the amended Article 73(1) really means the Union Council of Ministers, concludes that "the Government of the State cannot be carried on in accordance with the provisions of the Constitution". On the other hand, action under Article 352 is, more properly, only defensive and protective action to be taken to avert or meet a grave and imminent danger.

46. What is the Constitutional machinery whose failure or imminent failure the President can deal with under Article 356? Is it enough if a situation has arisen in which one or more provisions of the Constitution cannot be observed? Now what provisions of the Constitution, which are not being observed in a State, or to what extent they cannot be observed are matters on which great differences of opinion are possible. If a broad purpose, such as that of a democratic Government, contained in the Preamble to our Constitution which was used by this Court, as was done in ***H. H. Kesasananda Bharati*** case, to infer what has been called the

"basic structure", was meant also to be served by Article 356, the scope of a "situation" in which proclamations under it can be made would seem wide. If the "basic structure" embraces basic democratic norms, the Constitutional Machinery of Article 356 could conceivably be used by the Union Government for securing compliance with its view of such norms when, in its opinion, the State Government has failed to observe them. The Union Government could say: "If, what we think is basic to a democratic system is not done by you, we will conclude that the Government of your State cannot be carried on by you in accordance with the provisions of the Constitution. In that case, we will take over your power, under Article 356, and do that for the people of your State which you should yourself have done". Article 356(1) of the Constitution, at any rate, does not seem to us to stand in the way of such a view.

47. Again, if the Directive Principles of State Policy, which embrace a vast field of legislation for the welfare of the masses of our people, are also parts of the basic structure, which has to be ensured or maintained by the use of the constitutional machinery, the failure of a State Government or its legislature to carry out any of the Constitution's mandates or directives, by appropriate legislation, may, according to a possible view, be construed as a failure of its duties to carry out what the Constitution requires. Our difficulty is that the language of Article 356 is so wide and loose that to crib and confine it within a straight jacket will not be just interpreting or construing it but will be Constitution making legislation which, again, does not, strictly speaking, lie in our domain.

48. The above-mentioned possibilities seem to follow, quite conceivably from the fairly broad language used in Article 356(1) and the rather loose meaning of the basic structure of the Constitution which this Court seems to have adopted in ***Kesavananda Bharati*** case. This view of the "basic structure" seems, so to speak, to annex doctrines to provisions. If that be so, it becomes impossible for us to say that the Union Government, even if it resorts to Article 356 of the Constitution to enforce a political doctrine or theory, acts unconstitutionally, so long as that doctrine or theory is covered by the under lying purposes of the Constitution found in the Preamble which has been held to be a part of the Constitution.

49. We have not sat here to determine whether the concept of a basic structure, found in ***Kesavananda Bharati*** case, requires any clarification or a more precise definition. I may mention here that I gave the following exposition of what I understood to be "the basic structure" of our Constitution of which, according to ***Kesavananda Bharati*** case, the doctrine of the Supremacy of the Constitution was a part:

> Neither of the three constitutionally separate organs of State can, according to the basic scheme of our Constitution today, leap outside the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the logical and natural meaning of the principle of Supremacy of the Constitution.

51. The basic assumption underlying the views expressed above is that each of the three organs of the State - the Executive, the Legislature, and the Judiciary has its own orbit of authority and operation. It must be left free by the other organs to operate within that sphere even if it commits errors there. It is not for one of the three organs of State either to correct or to point an accusing finger at the other merely because it thinks that some error has been

committed by the other when acting within the limits of its own powers. But, if either the Executive or the Legislature exceeds the scope of its powers, it places itself in the region where the effects of that excess should be capable of removal by the Judiciary which ought to redress the wrong done when properly brought up before it. A scrupulous adherence to this scheme is necessary for the smooth operations of our constitutional mechanism of checks and balances. It implies due respect for and confidence in each organ of our Republic by the other two.

53. It has, however, been vehemently contended before us that just as it is a part of the constitutional scheme that neither the Executive nor the Legislature should attempt to interfere with the functions of the Judiciary, operating within its own sphere, and, just as the Judiciary does not interfere with executive or legislative functions so long as there is no excess of power, which may be questioned before Courts, similarly, the Union Government cannot interfere with the normal functions of the Government in a State on the plea that there is a lack of conformity between the legal rights of the State Government and the opinions of the electorate which could affect only the moral rights of a State Government to continue in power. It was submitted that such an allegedly moral ground does not give the Union Government the legal right of action under Article 356 of the Constitution. This, it is urged by Mr Niren De, raises a constitutional issue of grave import.

54. In some of the plaints, it is asserted that the moral plea sought to be given the colour of a legal right of action under Article 356 (1), on behalf of the people of the State, is an attempt to give' a legal and constitutional garb to what is only a matter of political strategy. It is suggested that the Union Government wants to take an undue advantage of the temporary gust of feeling which is believed to be sweeping the country as a result of the recent overwhelming victory of the Janata party and its political allies. In other words, both the questions of the extent of State autonomy in a federal structure, and an alleged misuse of constitutional power under Article 356 of the Constitution, on grounds said to be extraneous to it, have been raised on behalf of the States. These considerations are placed before us as aids to a proper construction of Article 356(1) as well as matters which deserve careful scrutiny and adjudication after ascertainment of correct facts.

56. A conspectus of the provisions of our Constitution will indicate that, whatever appearance of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal. I mention the use that has been made of the constitutional provisions because constitutional practice and convention become so interlinked with or attached to constitutional provisions and are often so important and vital for grasping the real purpose and function of constitutional provisions that the two cannot often be viewed apart. And, where the content of powers appears so vague and loose, from the language of a provision, as it seems to us to be in Article 356 (1), for the reasons given above, practice and convention may so crystallise as to become more significant than the letter of the law. At any rate, they cannot be divorced from constitutional law. They seem to us to be relevant even in understanding the purpose, the import, and the meaning of the words used in Article 356 (1). This will be apparent also from a perusal of the judgment of this Court in ***Samsher Singh*** v. ***State of Punjab*** [(1974) 2 SCC 831].

61. If then our Constitution creates a Central Government which is "amphibian", in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case, the question which we are driven back to consider is whether an assessment of the "situation" in which the Union Government should move either on the federal or unitary plane are matters for the Union Government itself or for this Court to consider and determine. Each organ of the Republic is expected to know the limits of its own powers. The Judiciary comes in generally only when any question of ultra vires action is involved, because questions relating to vires appertain to its domain.

62. I may point out that there are various aspects of relations between the Union and the States governed by different provisions of the Constitution. I may here refer to those which relate to giving of "directions" by the Union Government to the State Governments because [The court referred to article 365 and proceeded]

63. Articles 256 and 257 mention a wide range of subjects on which the Union Government may give executive directions to State Governments. Article 73(1) (*a*) of the Constitution tells us that the executive power of the Union extends to all matters on which "Parliament has power to make laws". Article 248 of the Constitution vests exclusively in the Parliament residuary powers of making laws on any matter not enumerated in the Concurrent or State Lists. Article 256 of the Constitution covers cases where the President may want to give directions in exercise of the executive power of the Union to a State Government in relation to a matter covered by an existing law made by Parliament which applies to that State. But, Article 257(1) imposes a wider obligation upon a State to exercise its powers in such a way as not to impede the exercise of executive power of the Union which, as would appear from Article 73 of the Constitution, read with Article 248 may cover even a subject on which there is no existing law but on which some legislation by Parliament is possible. It could, therefore, be argued that, although, the Constitution itself does not lay down specifically when the power of dissolution should be exercised by the Governor on the advice of a Council of Ministers in the State, yet, if a direction on that matter was properly given by the Union Government to a State Government, there is a duty to carry it out. The time for the dissolution of a State Assembly is not covered by any specific provision of the Constitution or any law made on the subject It is possible, however, for the Union Government, in exercise of its residuary executive power to consider it a fit subject for the issue of an appropriate direction when it considers that the political situation in the country is such that a fresh election is necessary in the interest of political stability or to establish the confidence of the people in the Government of a State.

64. Undoubtedly, the subject is one on which appropriate and healthy conventions should develop so that the power under Article 356(1) is neither exercised capriciously or arbitrarily nor fails to be exercised when a political situation really calls for it. If the views of the Union Government and State Government differ on the subject, there is no reason why the Union Government should not aid the development of what it considers to be a healthy practice or convention by appropriate advice or direction, and, even to exercise its powers under Article 356(1) for this purpose when it considers the observance of such a directive to be so essential that the constitutional machinery cannot function as it was meant to do unless it interferes. This Court cannot, at any rate, interdict such use of powers under Article 356(1) unless and

until resort to the provision, in a particular situation, is shown to be so grossly perverse and unreasonable as to constitute patent misuse of this provision or an excess of power on admitted facts. On the allegations before us we cannot reach such a conclusion. And, it is not for Courts to formulate, and, much less, to enforce a convention however necessary or just and proper a convention to regulate the exercise of such an executive power may be. That is a matter entirely within the executive field, of operations.

66. It was argued that the only authority empowered to dissolve a legislative assembly under Article 174(2) (6) of the Constitution was the Governor of a State who had to act on the advice of the Council of Minister in the State. It was submitted that the Union Government could not either advise, or, in the form of advice, direct the State Government to ask the Governor to dissolve the State Assembly under any circumstances. Apparently, the principle of construction relied upon was a much used and easily misused principle: "expression units set exclusion alterius". We do not think that such a principle could help the plaintiffs before us at all inasmuch as Article 356 of the Constitution very clearly provides for the assumption by the President "to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor". Article 174(2) (6) of the Constitution expressly vests the power of dissolving the legislative assembly in the Governor even if that had to be on the advice of the Council of Ministers in the State, but the power to give such advice would automatically, be taken over by the Union Government for the purposes of dissolution of the State Assembly when the President assumes governmental powers by a proclamation under Article 356(1) of the Constitution. A dissolution by the President after the proclamation would be as good as a dissolution by the Governor of a State whose powers are taken over.

67. The position of the Governor as the constitutional head of a State as a unit of the Indian Union as well as the formal channel of communication between the Union and the State Government, who is appointed under Article 155 of the Constitution "by the President by warrant under his hand and seal", was also touched in the course of arguments before us. On the one hand, as the constitutional head of the State, he is ordinarily bound, by reason of a constitutional convention, by the advice of his Council of Ministers conveyed to him through the Chief Minister barring very exceptional circumstances among which may be as pointed out by my learned brothers Bhagwati and Krishna lyer, JJ., in ***Samsher Singh*** case, a situation in which an appeal to the electorate by a dissolution is called for. On the other hand, as the defender of "the Constitution and the law" and the watch-dog of the interests of the whole country and well-being of the people of his State in particular, the Governor is vested with certain discretionary, powers in the exercise of which he can act independently. One of his independent functions is the making of the report to the Union Government on the strength of which Presidential power under Article 356(1) of the Constitution could be exercised. In so far as he acts in the larger interests of the people, appointed by the President "to defend the Constitution and the Law" he acts as an observer on behalf of the Union and has to keep a watch on how the administrative machinery and each organ of constitutional Government is working in the State. Unless he keeps such a watch over all governmental activities and the state of public feelings about them he cannot satisfactorily discharge his function of making the report which may form the basis of the Presidential satisfaction under Article 356(1) of

the Constitution. Indeed, the usual practice is that the President acts under Article 356(1) of the Constitution only on the Governor report. But, the use of the words "or otherwise" (in Article 356) shows that Presidential satisfaction could be based on other material as well. This feature of our Constitution indicates most strikingly the extent to which inroads have been made by it on the federal principles of Government.

68. Mr Setalvad in his Tagore Law Lectures, 1974, on "***Union and State Relations***" has observed, while dealing with Governor role (at p. 164-165):

> The powers of the President under Article 356 have been frequently exercised since the commencement of the Constitution. The occasions for its exercise emphasise not only the importance of the power in maintaining stable governments in the State, but also the vital role which the Governor has to play in enabling the Union Executive to exercise the powers vested in it under Article 356. The constitutional machinery in a State may fail to function in numerous ways. There may be a political deadlock; for example, where a Ministry having resigned, the Governor finds it impossible to form an alternative government; or, where for some reason, the party having a majority in the Assembly declines to form a Ministry and the Governor's attempts to find a coalition Ministry able to command a majority have failed.
>
> The Government of a State can also' be regarded as not being carried on in accordance with the Constitution in cases where a Ministry, although properly constituted, acts contrary to the provisions of the Constitution or seeks to use its powers for purposes not authorised by the Constitution and the Governor's attempts to call the Ministry to order have failed. There could also be a failure of the constitutional machinery where the Ministry fails to carry out the directives issued to it validly by the Union Executive in the exercise of its powers under the Constitution. The very statement of some of the situations, which may bring about the use of the machinery provided by Article 356 shows the pivotal position which the Governor occupies in respect of these situations and the grave responsibility of his duties in the matter of reporting to the President under Articles 355 and 356 of the Constitution.

69. The question was then mooted whether what was being done under Article 356 of the Constitution did not amount to taking over by the President, acting on the advice of the Union Council of Ministers, of powers for dissolving the State Assemblies upon facts and circumstances which, in the judgment of the Union Council of Ministers, constituted sufficient grounds for a dissolution of the State Assembly, whereas the Constitution provides that this had to be done by the State Government on the advice of the Council of Ministers in a State. Such an argument is really an argument in a circle. It assumes that the taking over by the President, advised by the Union Council of Ministers, of the functions of the Governor, advised by the State Council of Ministers, on this "matter, was outside the purview of Article 356(1). A situation in which, according to the view of the Union Government, the State Council of Ministers had wrongly failed to advise the State Governor to dissolve the State Legislative Assembly, so that action under Article 356(1) has to be taken, would be exceptional in which articles governing the exercise of functions normally are suspended and do not operate at all. If Article 356(1) of the Constitution or any other article contained any provision which amounted to a prohibition against assumption of powers of dissolution of State Assemblies by the President of India, it would be a different matter, but that, as we have repeatedly pointed out, is not the position here. Indeed, such a provision,, had it been there, would have completely nullified Article 356(1). Obviously, a proclamation under Article 356(1) to be effective must suspend the operation of Article 174. It is evident that one of the

reasons, perhaps the main reason for bringing about this exceptional situation in the cases now before us, is the refusal of the State Chief Ministers to comply with the advice sent to them which they equate with a 'direction' given in exercise of the executive powers of the Union Government.

75. It may be that, if the need to an appeal to the electorate is put forward only as a thin disguise for punishing a State Government by repeated dissolutions within short periods, the use of Article 356(1) for such a purpose may appear to be plainly outrageous and extraneous. In such hypothetical and very exceptional circumstances the action of the Union Government may appear to be mala fide and in excess of the power under Article 356(1) of the Constitution. But, nothing like that is alleged in any of the plaints or petitions. On the other hand, it seems that the advice given to the Chief Ministers of different States is based on a matter of a uniform general policy resulting from an estimate of what, in the opinion of the Union Government, is a critical juncture in the history of the whole nation so that the people in the States must be given an opportunity of showing whether the party in power in the States should or should not pursue policies which may be at variance with those of the Union Government. No fact is alleged showing any personal animus of any member of the Union Government against a State Government or a State Assembly. As the question of the proper time for a dissolution of the State Assembly is not a matter extraneous to Article 356(1) of the Constitution, the most that can be said is that questions raised do not go beyond sufficiency of grounds for resorting to Article 356(1) of the Constitution.

78. As we have tried to indicate above, attempts to secure political victories, by appeals to the electorate, are parts of the recognised rules of a democratic system of government permitting contests between rival parties so as to achieve certain other objectives. If such a contest with the desire for achieving a political victory in order to enforce certain programmes, believed by the members of a party to be beneficial for the people in a State, as a method of achieving the objects set out in the Preamble, is not only legal and permissible under the Constitution, but, obviously, constitute the only possible legitimate and legal means of attaining the power to enforce policies believed to be correct by various parties, according to their own lights, it could not possibly be asserted that procuring the dissolution of a State Legislative Assembly, with the object of gaining a political victory, is, in itself, an extraneous object which could not fall at all under Article 356 of the Constitution. In order to apply the doctrine that something cannot be done indirectly because it could not be done directly, it must first be established either that the object or the means are legally prohibited. In the cases before us, it does not appear to us that the object of gaining a political victory, set out in the plaints is, by itself, legally prohibited. Nor is there anything in law to prohibit a recourse to the means adopted. There is no assertion in the plaints or the petitions that anything is being done or attempted by legally prohibited means for a legally prohibited purpose. All that is suggested is that it is morally reprehensible to try to obtain an electoral victory in the States by dissolving the Assemblies so as to get rid of the Congress Governments in power there. On such a question of moral worth of either the ends or the means adopted, this Court cannot possibly sit in judgment. It is enough for our purposes that the plaints and the petitions do not disclose anything extraneous to the purpose of Article 356(1) of the Constitution in the eyes

of law. The sufficiency or adequacy of the grounds for action under Article 356(1) of the Constitution is quite another matter. We do not think that we can go into that at all here.

80. Whenever the exercise of power to issue a proclamation under Article 356(1) of the Constitution has been challenged in a High Court it has been held that sufficiency of grounds on which the order is based could not be questioned. Some of the dicta found there seem to lay down that the exercise of power to issue proclamations is not justiciable at all under any circumstances. This Court has not gone so far as that. If it is actually stated on behalf of the Union Government that an action was taken on a particular ground which really falls completely outside the purview of Article 356(1), the proclamation will be vitiated, not because the satisfaction was challenged or called in question on any ground but because it was admitted to be on matters outside Article 356(1).

87. Courts have consistently held issues raising questions of mere sufficiency of grounds of executive action, such as the one under Article 356 (1) no doubt is to be non-justiciable. The amended Article 356 (5) of the Constitution indicates that the Constitution-makers did not want such an issue raising a mere question of sufficiency of grounds to be justiciable. To the same effect are the provisions contained in Articles 352 (5), 360 (5). Similarly, Articles 123 (4), 213 (4), 239 B (4) bar the jurisdiction of courts to examine matters which lie within the executive discretion. Such discretion is governed by a large element of policy which is not amenable to the jurisdiction of courts except in cases of patent or indubitable mala fides or excess of power. Its exercise rests on materials which are not examinable by courts. Indeed, it is difficult to imagine how the grounds of action under Article 356 (1) could be examined when Article 74 (2) lays down that "the question whether any, and if so, what advice was tendered by the Ministers to the President, shall not be inquired into in any Court".

88. It is true that, as indicated above, the advice tendered by the Ministers to the President cannot be inquired into. It is also clear beyond doubt that the amended Article 74 (1) of the Constitution, whose validity has not been challenged before us by any party, makes it obligatory on the President to act in accordance with the advice tendered by the Union Council of Ministers, to him through the Prime Minister. Nevertheless, if all the grounds of action taken under Article 356 (1) of the Constitution are disclosed to the public by the Union Government and its own disclosure of grounds reveals that a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved by a proclamation under Article 356 of the Constitution, this Court will not shirk its duty to act in the manner in which the law may then oblige it to act. But, when we find that allegations made in the plaints and in the petitions before us relate, in substance, only to the sufficiency of the grounds of action under Article 356 (1) of the Constitution, and go no further, we cannot proceed further with the consideration of the plaints under Article 131 or the petitions under Article 32 of the Constitution.

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P.B. SAWANT, J. (*on behalf of Kuldip Singh, J. and himself*) - 57. From these authorities, one of the conclusions which may safely be drawn is that the exercise of power by the President under Article 356(1) to issue Proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. Needless to emphasise that it is not any material but material which would lead to the conclusion that the Government of the State cannot be carried on in accordance with the provisions of the Constitution which is relevant for the purpose. It has further to be remembered that the article requires that the President "has to be satisfied" that the situation in question has arisen. Hence the material in question has to be such as would induce a reasonable man to come to the conclusion in question. The expression used in the article is "if the President ... is satisfied". The word "satisfied" has been defined in *Shorter Oxford English Dictionary* (3rd Edn., p. 1792) as "4. To furnish with sufficient proof or information, to set free from doubt or uncertainty, to convince; 5. To answer sufficiently (an objection, question); to fulfil or comply with (a request); to solve (a doubt, difficulty); 6. To answer the requirements of (a state of things, hypothesis, etc.); to accord with (conditions)." Hence, it is not the personal whim, wish, view or opinion or the *ipse dixit* of the President dehors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review.

It has also to be remembered in this connection that the power exercised by the President under Article 356(1) is on the advice of the Council of Ministers tendered under Article 74(1) of the Constitution. The Council of Ministers under our system would always belong to one or the other political party. In view of the pluralist democracy and the federal structure that we have accepted under our Constitution, the party or parties in power (in case of coalition Government) at the Centre and in the States may not be the same. Hence there is a need to confine the exercise of power under Article 356(1) strictly to the situation mentioned therein which is a condition precedent to the said exercise. That is why the Framers of the Constitution have taken pains to specify the situation which alone would enable the exercise of the said power. The situation is no less than one in which "the Government of the State *cannot* be carried on in accordance with the provisions of this Constitution". A situation short of the same does not empower the issuance of the Proclamation. The word "cannot" emphatically connotes a situation of impasse. In *Shorter Oxford Dictionary*, 3rd Edn., at page 255, the word "can" is defined as "to be able; to have power or capacity". The word "cannot", therefore, would mean "not to be able" or "not to have the power or capacity". In *Stroud's*

Judicial Dictionary, 5th Edn., the word "cannot" is defined to include a legal inability as well as physical impossibility. Hence situations which can be remedied or do not create an impasse, or do not disable or interfere with the governance of the State according to the Constitution, would not merit the issuance of the Proclamation under the article.

It has also to be remembered that a situation contemplated under the article is one where the Government of the State cannot be carried on "in accordance with the provisions of this Constitution". The expression indeed envisages varied situations. Article 365 which is in Part XIX entitled "Miscellaneous", has contemplated one such situation. It states that:

> "Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution."

The failure to comply with or to give effect to the directions given by the Union under any of the provisions of the Constitution, is of course, not the only situation contemplated by the expression "Government of the State cannot be carried on in accordance with the provisions of this Constitution". Article 365 is more in the nature of a deeming provision. However, the situations other than those mentioned in Article 365 must be such where the governance of the State is not possible to be carried on in accordance with the provisions of the Constitution.

As pointed out earlier, more or less similar expression occurs in Article 58(2)(*b*) of the Pakistani Constitution. The expression there is that the "Government of the Federation cannot be carried on in accordance with provisions of the Constitution and an appeal to the electorate is necessary".

The expression and its implication have also been the subject of elaborate discussion in the Report of the Sarkaria Commission on Centre-State relations. It will be advantageous to refer to the relevant part of the said discussion, which is quite illuminating:

> "6.3.23 In Article 356, the expression 'the Government of the State cannot be carried on in accordance with the provisions of the Constitution', is couched in wide terms. It is, therefore, necessary to understand its true import and ambit. In the day-to-day administration of the State, its various functionaries in the discharge of their multifarious responsibilities take decisions or actions which may not, in some particular or the other, be strictly in accord with all the provisions of the Constitution. Should every such breach or infraction of a constitutional provision, irrespective of its significance, extent and effect, be taken to constitute a 'failure of the constitutional machinery' within the contemplation of Article 356. In our opinion, the answer to the question must be in the negative. We have already noted that by virtue of Article 355 it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Article 356, on the other hand, provides the remedy when there has been an actual breakdown of the constitutional machinery of the State. Any abuse or misuse of this drastic power damages the fabric of the Constitution, whereas the object of this article is to enable the Union to take remedial action consequent upon breakdown of the constitutional machinery, so that that governance of the State in accordance with the

provisions of the Constitution, is restored. A wide literal construction of Article 356(1), will reduce the constitutional distribution of the powers between the Union and the States to a licence dependent on the pleasure of the Union Executive. Further it will enable the Union Executive to cut at the root of the democratic parliamentary form of Government in the State. It must, therefore, be rejected in favour of a construction which will preserve that form of Government. Hence, the exercise of the power under Article 356 must be limited to rectifying a 'failure of the constitutional machinery in the State'. The marginal heading of Article 356 also points to the same construction.

6.3.24 Another point for consideration is, whether 'external aggression' or 'internal disturbance' is to be read as an indispensable element of the situation of failure of the constitutional machinery in a State, the existence of which is a prerequisite for the exercise of the power under Article 356. We are clear in our mind that the answer to this question should be in the negative. On the one hand, 'external aggression' or 'internal disturbance' may not necessarily create a situation where Government of the State cannot be carried on in accordance with the Constitution. On the other, a failure of the constitutional machinery in the State may occur, without there being a situation of 'external aggression' or 'internal disturbance'. * * * * *

6.4.01 A failure of constitutional machinery may occur in a number of ways. Factors which contribute to such a situation are diverse and imponderable. It is, therefore, difficult to give an exhaustive catalogue of all situations which would fall within the sweep of the phrase, 'the Government of the State cannot be carried on in accordance with the provisions of this Constitution'. Even so, some instances of what does and what does not constitute a constitutional failure within the contemplation of this article, may be grouped and discussed under the following heads:

(*a*) Political crises.
(*b*) Internal subversion.
(*c*) Physical breakdown.
(*d*) Non-compliance with constitutional directions of the Union Executive.

It is not claimed that this categorisation is comprehensive or perfect. There can be no watertight compartmentalisation, as many situations of constitutional failure will have elements of more than one type. Nonetheless, it will help determine whether or not, in a given situation it will be proper to invoke this last-resort power under Article 356."

The Report then goes on to discuss the various occasions on which the political crisis, internal subversion, physical breakdown and non-compliance with constitutional directions of the Union Executive may or can be said to, occur. It is not necessary here to refer to the said elaborate discussion. Suffice it to say that we are in broad agreement with the above interpretation given in the Report, of the expression "the Government of the State cannot be carried on in accordance with the provisions of this Constitution", and are of the view that except in such and similar other circumstances, the provisions of Article 356 cannot be pressed into service.

58. It will be convenient at this stage itself, also to illustrate the situations which may not amount to failure of the constitutional machinery in the State inviting the Presidential power

under Article 356(1) and where the use of the said power will be improper. The examples of such situations are given in the Report in paragraph 6.5.01. They are:

> *"(i)* A situation of maladministration in a State where a duly constituted Ministry enjoying majority support in the Assembly, is in office. Imposition of President's rule in such a situation will be extraneous to the purpose for which the power under Article 356 has been conferred. It was made indubitably clear by the Constitution-framers that this power is not meant to be exercised for the purpose of securing good Government.
>
> *(ii)* Where a Ministry resigns or is dismissed on losing its majority support in the Assembly and the Governor recommends, imposition of President's rule without exploring the possibility of installing an alternative Government enjoying such support or ordering fresh elections.
>
> *(iii)* Where, despite the advice of a duly constituted Ministry which has not been defeated on the floor of the House, the Governor declines to dissolve the Assembly and without giving the Ministry an opportunity to demonstrate its majority support through the 'floor test', recommends its supersession and imposition of President's rule merely on his subjective assessment that the Ministry no longer commands the confidence of the Assembly.
>
> *(iv)* Where Article 356 is sought to be invoked for superseding the duly constituted Ministry and dissolving the State Legislative Assembly on the sole ground that, in the General Elections to the Lok Sabha, the ruling party in the State, has suffered a massive defeat.
>
> *(v)* Where in a situation of 'internal disturbance', not amounting to or verging on abdication of its governmental powers by the State Government, all possible measures to contain the situation by the Union in the discharge of its duty, under Article 355, have not been exhausted.
>
> *(vi)* The use of the power under Article 356 will be improper if, in the illustrations given in the preceding paragraphs 6.4.10, 6.4.11 and 6.4.12, the President gives no prior warning or opportunity to the State Government to correct itself. Such a warning can be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action, under Article 356, will lead to disastrous consequences.
>
> *(vii)* Where in response to the prior warning or notice or to an informal or formal direction under Articles 256, 257, etc., the State Government either applies the corrective and thus complies with the direction, or satisfies the Union Executive that the warning or direction was based on incorrect facts, it shall not be proper for the President to hold that 'a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution'. Hence, in such a situation, also, Article 356 cannot be properly invoked.
>
> *(viii)* The use of this power to sort out internal differences or intra-party problems of the ruling party would not be constitutionally correct.
>
> *(ix)* This power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.
>
> *(x)* This power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry.
>
> *(xi)* The exercise of this power, for a purpose extraneous or irrelevant to the one for which it has been conferred by the Constitution, would be vitiated by legal mala fides."

We have no hesitation in concurring broadly with the above illustrative occasions where the exercise of power under Article 356(1) would be improper and uncalled for.

59. It was contended on behalf of the Union of India that since the Proclamation under Article 356(1) would be issued by the President on the advice of the Council of Ministers given under Article 74(1) of the Constitution and since clause (2) of the said article bars enquiry into the question whether any, and if so, what advice was tendered by Ministers to the President, judicial review of the reasons which led to the issuance of the Proclamation also stands barred. This contention is fallacious for reasons more than one. In the first instance, it is based on a misconception of the purpose of Article 74(2). As has been rightly pointed out by Shri Shanti Bhushan, the object of Article 74(2) was not to exclude any material or documents from the scrutiny of the courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was only to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the court.

A good deal of light on the said purpose of the provision is thrown by its history. Identical provisions were contained in Sections 10(4) and 51(4) of the Government of India Act, 1935. However, in the Government of India Act, 1915, as amended by the Act of 1919 it was provided under Section 52(3) as follows:

> "In relation to the transferred subjects, the Governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice:"

The relations of the Governor-General and the Governor with the Ministers were not regulated by the Act but were left to be governed by an Instrument of Instructions issued by the Crown. It was considered undesirable to define these relations in the Act or to impose an obligation on the Governor-General or Governor to be guided by the advice of their Ministers, since such a course might convert a constitutional convention into a rule of law and thus bring it within the cognisance of the court. Prior to the Constitution (42nd Amendment) Act, 1976, under the constitutional convention, the President was bound to act in accordance with the advice of the Council of Ministers By the 42nd Amendment, it was expressly so provided in Article 74(1). The object of Article 74(2) was thus not to exclude any material or document from the scrutiny of the courts. This is not to say that the rule of exclusion laid down in Section 123 of the Indian Evidence Act is given a go-by. However, it only emphasises that the said rule can be invoked in appropriate cases.

60. What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the courts undertake an enquiry into the existence of such material, the prohibition contained in Article

74(2) does not negate their right to know about the factual existence of any such material. This is not to say that the Union Government cannot raise the plea of privilege under Section 123 of the Evidence Act. As and when such privilege against disclosure is claimed, the courts will examine such claim within the parameters of the said section on its merits. In this connection, we may quote Justice Mathew, who in the case of ***State of U.P.* v. *Raj Narain*** observed as follows:

> "To justify a privilege, secrecy must be indispensable to induce freedom of official communication or efficiency in the transaction of official business and it must be further a secrecy which has remained or would have remained inviolable but for the compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined on its merits."

61. Since further the Proclamation issued under Article 356(1) is required by clause (3) of that article to be laid before each House of Parliament and ceases to operate on the expiration of two months unless it has been approved by resolutions by both the Houses of Parliament before the expiration of that period, it is evident that the question as to whether a Proclamation should or should not have been made, has to be discussed on the floor of each House and the two Houses would be entitled to go into the material on the basis of which the Council of Ministers had tendered the advice to the President for issuance of the Proclamation. Hence the secrecy claimed in respect of the material in question cannot remain inviolable, and the plea of non-disclosure of the material can hardly be pressed. When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government.

62. A further question which has been raised in this connection is whether the validity of the Proclamation issued under Article 356(1) can be challenged even after it has been approved by both Houses of Parliament under clause (3) of Article 356. There is no reason to make a distinction between the Proclamation so approved and a legislation enacted by Parliament. If the Proclamation is invalid, it does not stand validated merely because it is approved of by Parliament. The grounds for challenging the validity of the Proclamation may be different from those challenging the validity of a legislation. However, that does not make any difference to the vulnerability of the Proclamation on the limited grounds available. As has been stated by Prof. H.W.R. Wade in *Administrative Law,* 6th Edn.:

> "There are many cases where some administrative order or regulation is required by statute to be approved by resolutions of the Houses. But this procedure in no way protects the order or regulation from being condemned by the court, under the doctrine of ultra vires, if it is not strictly in accordance with the Act. Whether the challenge is made before or after the Houses have given their approval is immaterial. (p. 29) * * * * *
>
> in accordance with constitutional principle, parliamentary approval does not affect the normal operation of judicial review. (p. 411) * * * * *

> As these cases show, judicial review is in no way inhibited by the fact that rules or regulations have been laid before Parliament and approved, despite the ruling of the House of Lords that the test of unreasonableness should not then operate in its normal way. The Court of Appeal has emphasised that in the case of subordinate legislation such as an Order in Council approved in draft by both Houses, 'the courts would without doubt be competent to consider whether or not the Order was properly made in the sense of being intra vires'."

In this connection a reference may also be made to ***R* v. *H.M. Treasury ex p Smedley*** from which decision the learned author has extracted the aforesaid observations.

72. An allied question which arises in this connection is whether, notwithstanding the fact that a situation has arisen where there is a breakdown of the constitutional machinery in the State, it is always necessary to resort to the power of issuing Proclamation under Article 356(1). The contention is that since under Article 355, it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution and since further the issuance of the Proclamation under Article 356(1) is admittedly a drastic step, there is a corresponding obligation on the President to resort to other measures before the step is taken under Article 356(1). This is all the more necessary considering the principles of federal and democratic polity embedded in our Constitution. In this connection, we may refer again to what Dr Ambedkar himself had to say on the subject. We have quoted the relevant extract from his speech in paragraph 77 above. He has expressed the hope there that resort to Article 356(1) would be only as a last measure and before the article is brought into operation, the President would take proper precaution. He hoped that the first thing the President would do would be to issue a mere warning. If the warning failed, he would order an election and it is only when the said two remedies fail that he would resort to the article. We must admit that we are unable to appreciate the second measure to which Dr Ambedkar referred as a preliminary to the resort to Article 356(1). We should have thought that the elections to the Legislative Assembly are a last resort and if they are held, there is nothing further to be done by exercising power under Article 356(1). We may, therefore, ignore the said suggestion made by him. But we respectively endorse the first measure viz. of warning to which the President should resort before rushing to exercise the power under Article 356(1). In addition to warning, the President will always have the power to issue the necessary directives. We are of the view that except in situations where urgent steps are imperative and exercise of the drastic power under the article cannot brook delay, the President should use all other measures to restore the constitutional machinery in the State. The Sarkaria Commission has also made recommendations in that behalf in paragraphs 6.8.01 to 6.8.04 of its Report. It is not necessary to quote them here. We endorse the said recommendations.

73. The next important question to be considered is of the nature and effect of the action to be taken by the President pursuant to the Proclamation issued by him. The question has to be considered with reference to three different situations. Since clause (3) of Article 356 requires every Proclamation issued under clause (1) thereof, to be laid before each House of Parliament and also states that it shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of

Parliament, the question which emerges is what is the legal consequence of the actions taken by the President, (*a*) if the Proclamation is valid, yet, it is approved by both Houses of Parliament; (*b*) if the Proclamation is invalid and not approved by either or both Houses of Parliament; and (*c*) if the Proclamation is valid but not approved by either or both Houses of Parliament. The other question that arises in this connection is, whether the legal consequences differ in these three classes of cases, depending upon the nature of the action taken by the President.

The Proclamation falling under classes (*a*) and (*b*) will not make any difference to the legal status of the actions taken by the President under them. The actions will undoubtedly be illegal. However, the court by suitably moulding the relief, and Parliament and the State Legislature by legislation, may validate those acts of the President which are capable of being validated. As far as Parliament is concerned, such acts will not include the removal of the Council of Ministers and the dissolution of the Legislative Assembly since there is no provision in the Constitution which gives such power to Parliament. That power is given exclusively to the Governor under Articles 164(1) and 174(2)(*b*) respectively. It is this power, among others, which the President is entitled to assume under Article 356(1)(*a*). Parliament can only approve or disapprove of the removal of the Council of Ministers and the dissolution of the Legislative Assembly under clause (3) of that article, if such action is taken by the President. The question then arises is whether the Council of Ministers and the Legislative Assembly can be restored by the Court when it declares the Proclamation invalid. There is no reason why the Council of Ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the Proclamation, the same being the normal legal effect of the invalid action. In the context of the constitutional provisions which we have discussed and in view of the power of the judicial review vested in the court, such a consequence is also a necessary constitutional fall out. Unless such result is read, the power of judicial review vested in the judiciary is rendered nugatory and meaningless. To hold otherwise is also tantamount to holding that the Proclamation issued under Article 356(1) is beyond the scope of judicial review. For when the validity of the Proclamation is challenged, the court will be powerless to give relief and would always be met with the *fait accompli*. Article 356 would then have to be read as an exception to judicial review. Such an interpretation is neither possible nor permissible. Hence the necessary consequence of the invalidation of the Proclamation would be the restoration of the Ministry as well as the Legislative Assembly in the State. In this connection, we may refer to the decision of the Supreme Court of Pakistan in ***Mian Muhammad Nawaz Sharif* v. *President of Pakistan***. The Court there held that the impugned order of dissolution of National Assembly and the dismissal of the Federal Cabinet were without lawful authority and, therefore, of no legal effect. As a consequence of the said declaration, the Court declared that the National Assembly, Prime Minister and the Cabinet stood restored and entitled to function as immediately before the impugned order was passed. The Court further declared that all steps taken pursuant to the impugned order including the appointment of caretaker Cabinet and caretaker Prime Minister were also of no legal effect. The Court, however, added that all orders passed, acts done and measures taken in the meanwhile, by the caretaker Government which had been done, taken and given effect to in accordance with the terms of the

Constitution and were required to be done or taken for the ordinary and orderly running of the State, shall be deemed to have been validly and legally done.

As regards the third class of cases where the Proclamation is held valid but is not approved by either or both Houses of Parliament, the consequence of the same would be the same as where the Proclamation is revoked subsequently or is not laid before each House of Parliament before the expiration of two months or where it is revoked after its approval by Parliament or ceases to operate on the expiration of a period of six months from the date of its issue, or of the further permissible period under clause (4) of Article 356. It does not, however, appear from the provisions of Article 356 or any other provision of the Constitution, that mere non-approval of a valid Proclamation by Parliament or its revocation or cessation, will have the effect either of restoring the Council of Ministers or the Legislative Assembly. The inevitable consequence in such a situation is fresh elections and the constitution of the new Legislative Assembly and the Ministry in the State. The law made in exercise of the power of the Legislature of the State by Parliament or the President or any other authority during the period the valid Proclamation subsists before it is revoked or disapproved, or before it expires, is protected by clause (2) of Article 357.

It is therefore, necessary to interpret clauses (1) and (3) of Article 356 harmoniously since the provisions of clause (3) are obviously meant to be a check by Parliament (which also consist of members from the States concerned) on the powers of the President under clause (1). The check would become meaningless and rendered ineffective if the President takes irreversible actions while exercising his powers under sub-clauses (*a*), (*b*) and (*c*) of clause (1) of the said article. The dissolution of the Assembly by exercising the powers of the Governor under Article 174(2)(*b*) will be one such irreversible action. Hence, it will have to be held that in no case, the President shall exercise the Governor's power of dissolving the Legislative Assembly till at least both the Houses of Parliament have approved of the Proclamation issued by him under clause (1) of the said article. The dissolution of the assembly prior to the approval of the Proclamation by Parliament under clause (3) of the said article will be per se invalid. The President may, however, have the power of suspending the Legislature under sub-clause (*c*) of clause (1) of the said article.

Summary of conclusions **:**

91. Our conclusions, therefore, may be summarised as under:

I. The validity of the Proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the Proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist, such material may be either the report of the Governor or other than the report.

II. Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.

III. When the President issues Proclamation under Article 356(1), he may exercise all or any of the powers under sub-clauses (*a*), (*b*) and (*c*) thereof. It is for him to decide which of the said powers he will exercise, and at what stage, taking into consideration the exigencies of the situation.

IV. Since the provisions contained in clause (3) of Article 356 are intended to be a check on the powers of the President under clause (1) thereof, it will not be permissible for the President to exercise powers under sub-clauses (*a*), (*b*) and (*c*) of the latter clause, to take irreversible actions till at least both the Houses of Parliament have approved of the Proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under Article 174(2)(*b*) read with Article 356(1)(*a*) till at least both the Houses of Parliament approve of the Proclamation.

V. If the Proclamation issued is held invalid, then notwithstanding the fact that it is approved by both Houses of Parliament, it will be open to the court to restore the *status quo ante* to the issuance of the Proclamation and hence to restore the Legislative Assembly and the Ministry.

VI. In appropriate cases, the court will have power by an interim injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the Proclamation to avoid the *fait accompli* and the remedy of judicial review being rendered fruitless. However, the court will not interdict the issuance of the Proclamation or the exercise of any other power under the Proclamation.

VII. While restoring the *status quo ante*, it will be open for the court to mould the relief suitably and declare as valid actions taken by the President till that date. It will also be open for Parliament and the Legislature of the State to validate the said actions of the President.

VIII. Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

IX. The Proclamations dated April 21, 1989 and October 11, 1991 and the action taken by the President in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya challenged in Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 & 7 of 1992 respectively are unconstitutional. The Proclamation dated August 7, 1988 in respect of State of Nagaland is also held unconstitutional. However, in view of the fact that fresh elections have since taken place and the new Legislative Assemblies and Ministries have been constituted in all the three States, no relief is granted consequent upon the above declarations. However, it is declared that all actions which might have been taken during the period the Proclamation operated, are valid. The Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 and 7 of 1992 are allowed accordingly with no order as to costs. Civil Appeal Nos. 193-94 of 1989 are disposed of by allowing the writ petitions filed in the Gauhati High Court accordingly but without costs.

X. The Proclamations dated December 15, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the said Proclamations are not

unconstitutional. Civil Appeal Nos. 1692, 1692-A-1692-C, 4627-30 of 1993 are accordingly allowed and Transfer Case Nos. 8 and 9 of 1993 are dismissed with no order as to costs.

K. RAMASWAMY, J. - ***"CANNOT BE CARRIED ON" — MEANING AND SCOPE***

153. We are to remind ourselves that application of "principle of the source" from Part XVIII, the family of emergency provisions conveniently employed or the grammarian's rule would stultify the operation of Article 356 wisely incorporated in the Constitution. Instead placing it in the spectrum of "purposive operation" with prognosis would yield its efficacy for succeeding generations to meet diverse situations that may arise in its operation. The phrase "cannot be carried on" in clause (1) of Article 356 does not mean that it is impossible to carry on the Government of the State. It only means that a situation has so arisen that the Government of the State cannot be carried on its administration in accordance with the provisions of the Constitution. It is not the violation of one provision or another of the Constitution which bears no nexus to the object of the action under Article 356. The key word in the marginal note of Article 356 that "the failure of constitutional machinery" open up its mind of the operational area of Article 356(1). Suppose after general elections held, no political party or coalition of parties or groups is able to secure absolute majority in the legislative assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be a case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the legislature. It would be a case of failure of constitutional machinery. After formation of the Ministry, suppose due to internal dissensions, a deliberate deadlock was created by a party or a group of parties or members and the Governor recommends to the President to dissolve the Assembly, situation may be founded on imponderable variable opinions and if the President is satisfied that the Government of the State cannot be carried on and dissolves the Assembly by Proclamation under Article 356, would it be judicially discoverable and based on manageable standard to decide the issue? Or a Ministry is voted down by motion of no confidence but the Chief Minister refuses to resign or he resigns due to loss of support and no other political party is in a position to form an alternative Government or a party having majority refuses to form the Ministry would not a constitutional deadlock be created? When in such situations the Governor reported to the President, and President issued Proclamation could it be said that it would be unreasonable or mala fide exercise of power? Take another instance where the Government of a State, although enjoying the majority support in the Assembly, it has deliberately conducted, over a period of time, its administration in disregard of the Constitution and the law and while ostensibly acting within the constitutional form, inherently flouts the constitutional principles and conventions as a responsible Government or in secret collaboration with the foreign powers or agencies creates subvertive situation, in all the cases each is a case of failure of the constitutional machinery.

154. While it is not possible to exhaustively catalogue diverse situation when the constitutional breakdown may justifiably be inferred from, for instance (*i*) large-scale breakdown of the law and order or public order situation; (*ii*) gross mismanagement of affairs by a State Government; (*iii*) corruption or abuse of its power; (*iv*) danger to national integration or security of the State or aiding or abetting national disintegration or a claim for

independent sovereign status and (*v*) subversion of the Constitution while professing to work under the Constitution or creating disunity or disaffection among the people to disintegrate democratic social fabric.

B.P. JEEVAN REDDY, J. (*for himself and on behalf of S.C. Agrawal, J.*)

Article 356 - Is it confined only to cases where the state government fails or refuses to abide by the directions issued by the Central Government?

314. It was submitted by Shri Jethmalani, the learned counsel for some of the petitioners that in view of Article 365 of the Constitution, the only situation in which the power under Article 356 can be invoked by the President is the failure of the State Government to comply with or to give effect to the directions given in exercise of the executive power of the Union under any of the provisions of the Constitution and not in any other case. Reference is made in this connection to Articles 256 and 257.

315. In our opinion, the contention urged is unacceptable. Article 256 merely states that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament whether existing or to be made in future. It is stated therein that the executive power of the Union shall extend to giving of such directions to a State as may appear to the Government of India to be necessary for the said purpose. This article is confined to proper and due implementation of the parliamentary enactments and the power to give directions for that purpose. Article 257 says that executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union; for ensuring the same, the Union Government is empowered to give appropriate directions. Clauses (2), (3) and (4) illustrate and elaborate the power contained in clause (1). Article 365, which incidentally does not occur in Part XVIII, but in Part XIX (Miscellaneous) merely says that where any State has failed to comply with or give effect to any directions given by the Union of India in exercise of its executive power under any of the provisions of the Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The article merely sets out one instance in which the President may hold that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It cannot be read as exhaustive of the situation where the President may form the said satisfaction. Suffice it to say that the directions given must be lawful and their disobedience must give rise to a situation contemplated by Article 356(1). Article 365 merely says that in case of failure to comply with the directions given, "it shall be lawful" for the President to hold that the requisite type of situation [contemplated by Article 356(1)] has arisen. It is not as if each and every failure *ipso facto* gives rise to the requisite situation. The President has to judge in each case whether it has so arisen. Article 365 says it is permissible for him to say so in such a case. The discretion is still there and has to be exercised fairly.

365. We may summarise our conclusions now:

(1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State *cannot* be carried on in accordance with the provisions of the Constitution. Under our Constitution,

the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature.

(2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or include the report(s) of the Governor - is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving of the Legislative Assembly can be said to be implicit in clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it *only after* the Proclamation is approved by both Houses of Parliament under clause (3) *and not before*. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (*c*) of clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the Proclamation.

(4) The Proclamation under clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the Government has to go. There is no room for holding that the President can take over some of the functions and powers of the State Government while keeping the State Government in office. There cannot be two Governments in one sphere.

(5)(*a*) Clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two-month period. In such a case, Government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation gets reactivated. Since the Proclamation lapses — and is not retrospectively invalidated - the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, subject to review, repeal or modification by the Government/Legislative Assembly or other competent authority.

(*b*) However, if the Proclamation is approved by both the Houses within two months, the Government (which was dismissed) does not revive on the expiry of period of the proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under clause (3), the Legislative Assembly does not revive on the expiry of the period of Proclamation or on its revocation.

(6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the Proclamation, the Minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.

(7) The Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) [which was introduced by the 38th (Amendment) Act] by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken.

(8) If the Court strikes down the proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the Court has the power to declare that acts done, orders passed and laws made during the period the Proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/Legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws.

(9) The Constitution of India has created a federation but with a bias in favour of the Centre. Within the sphere allotted to the States, they are supreme.

(10) Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the State, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State Government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356.

(11) The Proclamation dated April 21, 1989 in respect of Karnataka (Civil Appeal No. 3645 of 1989) and the Proclamation dated October 11, 1991 in respect of Meghalaya (Transferred Case Nos. 5 and 7 of 1992) are unconstitutional). But for the fact that fresh elections have since taken place in both the States - and new Legislative Assemblies and Governments have come into existence - we would have formally struck down the Proclamations and directed the revival and restoration of the respective Governments and Legislative Assemblies. The Civil Appeal No. 3645 of 1989 and Transferred Cases Nos. 5 and 7 of 1992 are allowed accordingly. Civil Appeal Nos. 193 and 194 of 1989 relating to Nagaland are disposed of in terms of the opinion expressed by us on the meaning and purport of Article 74(2) of the Constitution.

(12) The Proclamations dated January 15, 1993 in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh concerned in Civil Appeal Nos. 1692, 1692-A to 1692-C of 1993, 4627-4630 of 1993, Transferred Case (C) No. 9 of 1993 and Transferred Case No. 8 of 1993 respectively are not unconstitutional. The Civil Appeals are allowed and the judgment of the High Court of Madhya Pradesh in M.P. (C) No. 237 of 1993 is set aside.

* * * * *

Rameshwar Prasad **v.** *Union of India*

AIR 2006 SC 980

[*Can dissolution of Assembly under Article 356(1) of the Constitution of India be ordered to prevent the staking of claim by a political party on the ground that the majority was obtained by illegal means*.]

The challenge in these petitions was to the constitutional validity of Notification dated 23rd May, 2005 ordering dissolution of the Legislative Assembly of the State of Bihar. The present case is of its own kind where before even the first meeting of the Legislative Assembly, its dissolution was ordered on the ground that attempts were being made to cobble a majority by illegal means and laid claim to form the Government in the State and if these attempts continued, it would amount to tampering with constitutional provisions.

Bihar Legislative Assembly comprises of 243 members and to secure an absolute majority support of 122 Members of Legislative Assembly, was required. National Democratic Alliance ('NDA'), comprising of the Bharatiya Janata Party ('BJP') and the Janata Dal (United) ('JD(U)') was the largest pre-poll combination having the support of 92 MLAs. The party-wise strength in the Assembly was as under : NDA : 92, RJD : 75, LJP : 29, Congress (I) : 10, CPI (ML) : 07, Samajwadi Party : 04, NCP : 03, Bahujan Samaj Party : 02, Independents : 17 and Others : 09.

Report dated 6th March, 2005 was sent by the Governor to the President, recommending newly constituted Assembly to be kept in suspended animation for the present. It read as under:

"Respected Rashtrapati Jee,

The present Bihar Legislative Assembly has come to an end on 6th March, 2005. The Election Commission's notification with reference to the recent elections in regard to constitution of the new Assembly issued vide No. 308/B.R.-L.A./2005 dated 4th March 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005 is enclosed (Annexure-I)

2. Based on the results that have come up, the following is the party-wise position (omitted)

3. The present C.M., Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation along with her Council of Ministers. I have accepted the same and asked her to continue till an alternative arrangement is made.

4. A delegation of members of LJP met me in the afternoon of 28.2.2005 and they submitted a letter (Annexure II) signed by Shri Ram Vilas Paswan, President of the Party, stating therein that they will neither support the RJD nor the BJP in the formation of Government. The State President of Congress Party, Shri Ram Jatan Sinha, also met in the evening of 28.2.2005.

5. The State President of BJP, Shri Gopal Narayan Singh along with supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance strength of 92 (BJP & JD(U) they have support of another 10 to 12 Independents. The request in the letter is not to allow the RJD to form a Government.

6. Shri Dadan Singh, State President of Samajwadi Party, has sent a letter (Annexure IV) indicating their decision not to support the RJD or NDA in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the CPI (ML-Lib.), Legislature Party along with 4 others met me and submitted a letter (AnnexureV) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of LJP, along with 15 others met me and submitted another letter (Annexure VI). They have reiterated their earlier stand.

9. The RJD met me on 5.3.2005 in the forenoon and they staked claim to form a Government indicating the support from the following parties : Cong (I) : 10, NCP : 03, CPI (M) : 01 and BSP : 02 The RJD with the above will have only 91.They have further claimed that some of the Independent members may support the RJD. However, it has not been disclosed as to the number of Independent MLAs from whom they expect support nor their names. Even if we assume the entire Independents totalling 17 to extend support to RJD alliance, which has a combined strength of 91, the total would be 108, which is still short of the minimum requirement of 122 in a House
of 243.

10. The NDA delegation led by Shri Sushil Kumar Modi, MP, met me in the evening of 5.3.2005. They have not submitted any further letter. However, they stated that apart from their pre-election alliance of 92, another 10 Independents will also support them and they further stated that they would be submitting letters separately. This has not been received so far. Even assuming that they have support of 10 Independents, their strength will be only 102, which is short of the minimum requirement of 122.

11. Six Independent MLAs met me on 5.3.2005 and submitted a letter in which they have claimed that they may be called to form a Government and they will be able to get support of others (Annexure VIII). They have not submitted any authorization letter supporting their claim.

12. I have also consulted the Legal experts and the case ….

13. I explored all possibilities and from the facts stated above, I am fully satisfied that no political party or coalition of parties or groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independents MLAs, a situation has emerged in which no political party or groups appears to be able to form a Government commanding a majority in the House. Thus, it is a case of complete inability of any political party to form a stable Government commanding the confidence of the majority members. This is a case of failure of constitutional machinery.

14. I, as Governor of Bihar, am not able to form a popular Government in Bihar, because of the situation created by the election results mentioned above.

15. I, therefore, recommend that the present newly constituted Assembly be kept in suspended animation for the present, and the President of India is requested to take such appropriate action/decision, as required.

Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's rule over the State of Bihar and the Assembly was kept in suspended animation….
Governor of Bihar sent a report to the President on 27th April, 2005 reproduced below:

"Respected Rashtrapati Jee,

I invite a reference to my D.O. No.33/GB dated the 6th March, 2005 through which a detailed analysis of the results of the Assembly elections were made and a recommendation was also made to keep the newly constituted Assembly (constituted vide Election Commission's notification No.308/BR-L.A./2005 dated the 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005) in a suspended animation and also to issue appropriate direction/decision. In the light of the same, the President was pleased to issue a proclamation under Article 356 of the Constitution of India vide notification NO.G.S.R. 162(E), dated 7th March, 2005, and the proclamation has been approved and assented by the Parliament.

2. As none of the parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government

wherein they could claim a support of a simple majority of 122 in a House of 243, I had no alternative but to send the above mentioned report with the said recommendation

3. I am given to understand that serious attempts are being made by JD-U and BJP to cobble a majority and lay claim to form the Government in the State. Contacts in JD-U and BJP have informed that 16-17 LJP MLAs have been won over by various means and attempt is being made to win over others. The JD-U is also targetting Congress for creating a split. It is felt in JD-U circle that in case LJP does not split then it can still form the Government with the support of Independent, NCP, BSP and SP MLAs and two-third of Congres MLAs after it splits from the main Congress party. The JD-U and BJP MLAs are quite convinced that by the end of this month or latest by the first week of May JD-U will be in a position to form the Government. The high pressure moves of JD-U/BJP is also affecting the RJD MLAs who have become restive. According to a report there is a lot of pressure by the RJD MLAs on Lalu Pd. Yadav to either form the Government in Bihar on UPA pattern in the centre, with the support of Congress, LJP and others or he should at least ensure the continuance of President's rule in the State.

4. The National Commission to review the working of the Constitution has also noticed that the reasons for increasing instability of elected Governments was attributable to unprincipled and opportunistic political realignment from time to time. A reasonable degree of stability of Government and a strong Government is important. It has also noticed that the changing alignment of the members of political parties so openly really makes a mockery of our democracy.

Under the Constitutional Scheme a political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programmes. The 10th Schedule of the Constitution was introduced on the premise that political propriety and morality demands that if such persons after the elections changes his affiliation, that should be discouraged. This is on the basis that the loyalty to a party is a norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate.

5. Newspaper reports in the recent time and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received by me, indicate a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which is a disturbing feature. This would affect the constitutional provisions and safeguards built therein. Any such move may also distort the verdict of the people as shown by results of the recent elections. If these attempts are allowed to continue then it would be amounting to tampering with constitutional provisions.

6. Keeping in view the above mentioned circumstances the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.

7. I am submitting these facts before the Hon'ble President for taking such action as deemed appropriate."

The report dated 21st May, 2005:

"Respected Rashtrapati Jee,

I invite a reference to my D.O. letter No.52/GB dated 27th April, 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed

that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JD-U.As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. ┬ GSR ┬ 162 (E) dated 7th March, 2005 and the Assembly was kept in suspended animation.The reports received by me in the recent past through the media and also through meeting with various political functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having resigned today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is very disturbing and alarming feature.Any move by the break away faction to align with any other party to cobble a majority and stake claim to form a Government would positively affect the Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions.Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course."

The report of the Governor was received by Union of India on 22nd May, 2005 and on the same day, the Union cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent the fax message to the President of India, who had already left for Moscow, recommending the dissolution of the Legislative Assembly of Bihar. This message was received by the President of India at his Camp office in Moscow at 0152 hrs. (IST). President of India accorded his approval and sent the same through the fax message which was received at 0350 hrs. (IST) on 23rd May, 2005. After due process the notification was issued formally at 1430 hrs. (IST) on 23rd May, 2005 dissolving the Bihar Assembly which has been impugned in these writ petitions.

After hearing elaborate arguments, by a brief order dated 7th October, 2005, the notification dated 23rd May, 2005 was held by the Supreme Court to be unconstitutional but having regard to the facts and circumstances of the case, relief directing status quo ante to restore the Legislative Assembly as it stood on 7th March, 2005, was declined. The Order dated 7th October read as under :

The General Elections to the Legislative Assembly of Bihar were held in the month of February 2005. The Election Commission of India, in pursuance of Section 73 of the Representation of the People Act, 1951 in terms of Notification dated 4th March, 2005 notified the names of the elected members. As no party or coalition of the parties was in a position to secure 122 seats so as to have majority in the Assembly, the Governor of Bihar made a report dated 6th March, 2005 to the President of India, whereupon in terms of Notification G.S.R.162(E) dated 7th March, 2005, issued in exercise of powers under Article 356 of the Constitution of India, the State was brought under President's Rule and the Assembly was kept in suspended animation. By another Notification G.S.R.163(E) of the same date, 7th March, 2005, it was notified that all powers which have been assumed by the President of India, shall, subject to the superintendence direction and control of the President,

be exercisable also by the Governor of the State. The Home Minister in a speech made on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in the Rajya Sabha said that the Government was not happy to impose President's Rule in Bihar and would have been happy if Government would have been formed by the elected representatives after the election. That was, however, not possible and, therefore, President's Rule was imposed. It was also said that the Government would not like to see that President's Rule is continued for a long time but it is for elected representatives to take steps in this respect; the Governor can ask them and request them and he would also request that the elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. The Presidential Proclamation dated 7th March, 2005 was approved by the Lok Sabha at its sitting held on 19th March, 2005 and Rajya Sabha at its sitting held on 21st March, 2005.

Keeping in view the questions involved, the pronouncement of judgment with detailed reasons is likely to take some time and, therefore, at this stage, we are pronouncing this brief order as the order of the court to be followed by detailed reasons later.Accordingly, as per majority opinion, this court orders as under:

1. The Proclamation dated 23rd May, 2005 dissolving the Legislative Assembly of the State of Bihar is unconstitutional.

2. Despite unconstitutionality of the impugned Proclamation, but having regard to the facts and circumstances of the case, the present is not a case where in exercise of discretionary jurisdiction the status quo ante deserves to be ordered to restore the Legislative Assembly as it stood on the date of Proclamation dated 7th March, 2005 whereunder it was kept under suspended animation.

Y.K. SABHARWAL, CJI. - 20. (T)he points that fall for our determination are :

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May,2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

(3) If the answer to the aforesaid question is in affirmative, is it necessary to direct *status quo ante* as on 7th March, 2005 or 4th March, 2005?

(4) What is the scope of Article 361 granting immunity to the Governor?

POINT NO.1 - *Omitted*

POINT NO.2: Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

40. This point is the heart of the matter. The answer to the constitutional validity of the impugned notification depends upon the scope and extent of judicial review in such matters as determined by a Nine Judge Bench decision in ***Bommai*** case. Learned counsel appearing for both sides have made elaborate submissions on the question as to what is the *ratio decidendi* of ***Bommai*** case.

41. According to the petitioners, the notification dissolving the Assembly is illegal as it is based on the reports of the Governor which suffered from serious legal and factual infirmities and are tainted with pervasive mala fides which is evident from the record. It is contended that the object of the reports of the Governor was to prevent political party led by Mr. Nitish

Kumar to form the Government. The submission is that such being the object, the consequent notification of dissolution accepting the recommendation deserves to be annulled.

42. Under Article 356 of the Constitution, the dissolution of an Assembly can be ordered on the satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. Such a satisfaction can be reached by the President on receipt of report from the Governor of a State or otherwise. It is permissible to arrive at the satisfaction on receipt of the report from Governor and on other material. Such a satisfaction can also be reached only on the report of the Governor. It is also permissible to reach such a conclusion even without the report of the Governor in case the President has other relevant material for reaching the satisfaction contemplated by Article 356. The expression 'or otherwise' is of wide amplitude.

43. In the present case, it is not in dispute that the satisfaction that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution has been arrived at only on the basis of the reports of the Governor. It is not the case of the Union of India that it has relied upon any material other than the reports of the Governor which have been earlier reproduced in extenso.

Defections - 73. At this stage, we may consider another side issue, namely, defections being a great evil. Undoubtedly, defection is a great evil.

74. It was contended for the Government that the unprincipled defections induced by allurements of office, monetary consideration, pressure, etc. were destroying the democratic fabric. With a view to control this evil, Tenth Schedule was added by the Constitution (Fifty-Second Amendment) Act, 1985. Since the desired goal to check defection by the legislative measure could not be achieved, law was further strengthened by the Constitution (Ninety-first Amendment) Act, 2003. The contention is that the Governor's action was directed to check this evil, so that a Government based on such defections is not formed.

75. Reliance has been placed on the decision in the case of ***Kihoto Hollohan*** **v.** ***Zachillhu*** [1992 Supp. (2) SCC 651] to bring home the point that defections undermine the cherished values of democracy and Tenth Schedule was added to the Constitution to combat this evil. It is also correct that to further strengthen the law in this direction, as the existing provisions of the Tenth Schedule were not able to achieve the desired goal of checking defection, by 91st Amendment, defection was made more difficult by deleting provision which did not treat mass shifting of loyalty by 1/3 as defection and by making the defection, altogether impermissible and only permitting merger of the parties in the manner provided in the Tenth Schedule as amended by 91st Amendment.

76. In ***Kihoto*** case, the challenge was to validity of the Tenth Schedule, as it stood then. Argument was that this law was destructive of the basic structure of the Constitution as it is violative of the fundamental principle of Parliamentary democracy, a basic feature of the Indian Constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions seek to penalize and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of parliamentary democracy. It was also urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the

remedies, graver than the decease itself, are adopted. It was said that the Tenth Schedule seeks to throw away the baby with the bath water.

77. Dealing with aforesaid submissions, the Court noted that, in fact, the real question was whether under the Indian Constitutional Scheme, is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements. It was noted that the points raised in the petition are, indeed, far reaching and of no small importance-invoking the 'sense of relevance and constitutionally stated principles of unfamiliar settings'. On the one hand there was the real and imminent threat to the very fabric of Indian democracy posed by certain level of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil. On the other hand, there may be certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectors. While dealing with the argument that the constitutional remedy was violative of basic features of the Constitution, it was observed that the argument ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The unethical political defections was described as a 'canker' eating into the vitals of those values that make democracy a living and worthwhile faith.

78. It was contended that the Governor was only trying to prevent members from crossing the floor as the concept of the freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but would also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. The contention is based on Para 144 of the judgment in Kihoto's case which reads thus:

> "But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things."
>
> "Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions: one when the Member obtains from

> the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in clause (b) of Paragraph 2(1) whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately."

80. It is contended that the Governor has many sources information wherefrom led him to conclude that the process that was going on in the State of Bihar was destroying the very fabric of democracy and, therefore, such approach cannot be described as outrageous or in defiance of logic, particularly, when proof in such cases is difficult if not impossible as bribery takes place in the cover of darkness and deals are made in secrecy. It is, thus, contended that Governor's view is permissible and legitimate view.

81. Almost similar contention has been rejected in ***Bommai*** case.

82. The other decision of House of Lords in ***Puhlhofer* v. *Hillingdon***, ***London Borough Council*** (1986) 1 All ER 467 at 474] relied upon by the respondents, has been considered by Justice Sawant in ***Bommai*** case. The reliance was to the proposition that where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the 'obvious' to the 'debatable' to the 'just conceivable', it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. But in the present case, the inference sought to be drawn by the Governor without any relevant material, cannot fall in the category of 'debatable' or 'just conceivable', it would fall in the category of 'obviously perverse'. On facts, the inescapable inference is that the sole object of the Governor was to prevent the claim being made to form the Government and the case would fall under the category of 'bad faith'.

83. The question in the present case is not about MLAs voting in violation of provisions of Tenth Schedule as amended by the Constitution (91st Amendment), as we would presently show.

84. Certainly, there can be no quarrel with the principles laid in ***Kihoto*** case about evil effects of defections but the same have no relevance for determination of point in issue. The stage of preventing members to vote against declared policies of the political party to which they belonged had not reached. If MLAs vote in a manner so as to run the risk of getting disqualified, it is for them to face the legal consequences. That stage had not reached. In fact, the reports of the Governor intended to forestall any voting and staking of claim to form the Government.

85. Undisputedly, a Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, has a concomitant duty and obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy. But on facts of the present case, we are unable to accept that the Governor by reports dated 27th April and 21st May, 2005 sought to achieve the aforesaid objective. There was no material, let alone relevant, with the Governor to assume that there were no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means.

86. The report dated 27th April, 2005 refers to (1) serious attempt to cobble a majority; (2) winning over MLAs by various means; (3) targeting parties for a split; (4) high pressure moves; (5) offering various allurements like castes, posts, money etc.; and (6) Horse-trading. Almost similar report was sent by the Governors of Karnataka and Nagaland leading to the dissolution of the Assembly of Karnataka and Nagaland, invalidated in Bommai's case. Further, the contention that the Central Government did not act upon the report dated 27th April, 2005 is of no relevance and cannot be considered in isolation since the question is about the manner in which the Governor moved, very swiftly and with undue haste, finding that one political party may be close to getting majority and the situation had reached where claim may be staked to form the Government which led to the report dated 21st May, 2005. It is in this context that the Governor says that instead of installing a Government based on a majority achieved by a distortion of the system, it would be preferable that the people/electorate could be provided with one more opportunity to seek the mandate of the people. This approach makes it evident that the object was to prevent a particular political party from staking a claim and not the professed object of anxiety not to permit the distortion of the political system, as sought to be urged. Such a course is nothing but wholly illegal and irregular and has to be described as mala fide. The recommendation for dissolution of the Assembly to prevent the staking of claim to form the Government purportedly on the ground that the majority was achieved by distortion of system by allurement, orruption and bribery was based on such general assumptions without any material which are quite easy to be made if any political party not gaining absolute majority is to be kept out of governance. No assumption without any basis whatever could be drawn that the reason for a group to support the claim to form the Government by Nitish Kumar, was only the aforesaid distortions. That stage had not reached. It was not allowed to be reached. If such majority had been presented and the Governor forms a legitimate opinion that the party staking claim would not be able to provide stable Government to the State, that may be a different situation. Under no circumstances, the action of Governor can be held to be bona fide when it is intended to prevent a political party to stake claim for formation of the Government. After elections, every genuine attempt is to be made which helps in installation of a popular Government, whichever be the political party.

Interpretation of a Constitution and Importance of Political Parties

90. In support of the proposition that in Parliament Democracy there is importance of political parties and that interpretation of the constitutional provisions should advance the said basic structure based on political parties, our attention was drawn to write up Designing

Federalism : A Theory of Self-Sustainable Federal Institution and what is said about political parties in a Federal State which is as under:

> "Political parties created democracy and modern democracy is unthinkable save in terms of parties." : *Schattschneide*r 1942 :
>
> Here is a factor in the organisation of federal Government which is of primary importance but which cannot be ensured or provided for in a constitution a good party system : *Wheare* 1953 : 86
>
> Whatever the general social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all instances with which I am familiar. This is the structure of the party system, which may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain. : *Riker* 1964 : 136.
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> In a country which was always to be in need of the cohesive force of institutions, the national parties, for all their faults, were to become at an early hour primary and necessary parts of the machinery of Government, essential vehicles to convey men's loyalties to the state : Hofstander 1969 : 70-1

Morality: 93. We may also deal with the aspect of morality sought to be urged. The question of morality is of course very serious and important matter. It has been engaging the attention of many constitutional experts, legal luminaries, jurists and political leaders. The concept of morality has also been changing from time to time also having regard to the ground realities and the compulsion of the situation including the aspect and relevance of coalition governance as opposed to a single party Government. Even in the economic field, the concept of morality has been a matter of policy and priorities of the Government. The Government may give incentive, which ideally may be considered unethical and immoral, but in so far as Government is concerned, it may become necessary to give incentive to unearth black money. It may be difficult to leave such aspects to be determined by high constitutional functionaries, on case to case basis, depending upon the facts of the case, and personal mould of the constitutional functionaries. With all these imponderables, the constitution does not contemplate the dissolution of Assemblies based on the assumption of such immoralities for formation of the satisfaction that situation has arisen in which the Government cannot be of the Constitution of India.

Article 356 and *Bommai* case. 95. Power under Article 356(1) is an emergency power but it is not an absolute power. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution. The Governor takes the oath, prescribed by Article 159 to preserve, protect and defend the Constitution and the laws to the best of his ability. Power under Article 356 is conditional, condition being formation of satisfaction of the President as contemplated by Article 356(1). The satisfaction of the President is the satisfaction of Council of Ministers. As provided in Article 74(1), the President acts on the aid and advice of Council of Ministers. The plain reading of Article 74(2) stating that the question whether any, and if so what, advice was tendered by Ministers

to the President shall not be inquired into in any Court, may seem to convey that the Court is debarred from inquiring into such advice but Bommai has held that Article 74(2) is not a bar against scrutiny of the material on the basis of which the President has issued the proclamation under Article 356. Justice Sawant, in Para 86 states that :

> "What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material."

96. It was further said that the Parliament would be entitled to go into the material on basis of what the Council of Ministers tendered the advice and, therefore, secrecy in respect of material cannot remain inviolable. It was said that :

> "When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government."

98. The scope of judicial review has been expanded by ***Bommai*** and dissent has been expressed from the view taken in ***State of Rajasthan*** case.The above approach shows objectivity even in subjectivity.

Bommai case

104. The Nine Judge Bench considered the validity of dissolution of Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan. Out of six States, the majority held as unconstitutional the dissolution of Assemblies of Karnataka, Nagaland and Meghalaya as well. Six opinions have been expressed. There is unanimity on some issues, likewise there is diversity amongst several opinions on various issues.

Karnataka Facts

105. In the case of Karnataka, the facts were that the Janta Party being the majority party in the State Legislature had formed the Government under the leadership of Shri S.R. Bommai on August 30, 1988 following the resignation on August 1, 1988 of the earlier Chief Minister Shri Hegde who headed the ministry from March 1985 till his resignation. On 17th April, 1989 one legislator presented a letter to the Governor withdrawing his support to the Ministry. On the next day he presented to the Governor 19 letters allegedly written by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to the BJP which was supporting the ministry, withdrawing their support to the ministry. On

receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the said letters verified. On April 19, 1989, the Governor sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party viz. Janta Dal, there were dissensions and defections. In support, the Governor referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the Chief Minister Shri Bommai did not command a majority in the Assembly and hence it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356(1). The Governor did not ascertain the view of Shri Bommai either after the receipt of the 19 letters or before making his report to the President. On the next day i.e. April 20, 1989, 7 out of the 19 legislators who had allegedly sent the letters to the Governor complained that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e. on April 27, 1989. The Chief Minister and his Law Minister met the Governor on the same day and informed him about the decision to summon the Assembly Session. The Chief Minister offered to prove his majority on the floor of the House, even by pre-poning the Assembly Session, if needed. To the same effect, the Governor however sent yet another report to the President on the same day i.e. April 20, 1989, in particular, referring to the letters of seven Members pledging their support to the Ministry and withdrawing their earlier letters. He however opined in the report that the letters from the 7 legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356(1) of the Constitution. On that very day, the President issued the Proclamation in dissolving the House. The Proclamation was thereafter approved by the Parliament as required by Article 356(3).

106. A writ petition filed in the High Court challenging the validity of dissolution was dismissed by a three Judge Bench inter alia holding that the facts stated in the Governors report cannot be held to be irrelevant and that the Governor's satisfaction that no other party was in a position to form the Government had to be accepted since his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The High Court relied upon the test laid down in the ***State of Rajasthan*** case and held that on the basis of materials disclosed, the satisfaction arrived at by the President could not be faulted.

Factsof Madhya Pradesh, Rajasthan and Himachal Pradesh

110. Insofar as the cases of States of Madhya Pradesh, Rajasthan and Himachal Pradesh are concerned the dismissal of the Governments was a consequence of violent reactions in India and abroad as well as in the neighbouring countries where some temples were destroyed, as a result of demolition of Babri Masjid structure on 6th December, 1992. The

Union of India is said to have tried to cope up the situation by taking several steps including banning of some organizations which had along with BJP given a call for Kar sevaks to march towards Ayodhya on December 6, 1992. The Proclamation in respect of these States was issued on January 15, 1993. The Proclamations dissolving the assemblies were issued on arriving at satisfaction as contemplated by Article 356(1) on the basis of Governor's report. It was held that the Governor's reports are based on relevant materials and are made bona fide and after due verification.

118. Now, let us see the opinion of Justice Sawant, who spoke for himself and Justice Kuldip Singh and with whom Justice Pandian, Justice Jeevan Reddy and Justice Agrawal agreed, to reach the conclusion as to the invalidity of Proclamation dissolving assemblies of Karnataka and Nagaland.

119. Learned Judge has opined that the President's satisfaction has to be based on objective material. That material may be available in the report sent to the President by the Governor or otherwise or both from the report and other sources. Further opines Justice Sawant that the objective material, so available must indicate that the Government of State cannot be carried on in accordance with the provisions of the Constitution. The existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the issue of the Proclamation.

120. Reference has been made to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of Pakistan Constitution is not couched in the same terms. In ***Muhammad Sharif* v. *Federation of Pakistan,*** PLD 1988 (LAH) 725, the question was whether the order of the President dissolving the National Assembly on 29th May, 1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Pakistan Constitution. It was held in that case that it is not quite right to contend that since it was the discretion of the President, on the basis of his opinion, the President could dissolve the National Assembly but he has to have the reasons which are justifiable in the eyes of the people and supportable by law in a court of justice. He could not rely upon the reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects (Emphasis supplied by us). It would be instructive to note as to what was stated by the learned Chief Justice and Justice R.S. Sidhwa, as reproduced in the opinion of Justice Sawant:

> Whether it is ‘subjective’ or ‘objective’ satisfaction of the President or it is his ‘discretion’ or ‘opinion’, this much is quite clear that the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the Courts will have to perform their

duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for.

Dealing with the second argument, the learned Chief Justice held:

> If the argument be correct then the provision 'Notwithstanding anything contained in clause (2) of Article 48' would be rendered redundant as if it was no part of the Constitution. It is obvious and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and unquestionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that
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> > 'Notwithstanding clause (2) of Article 48 the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid expressly stated; otherwise it is presumed to be there in Courts of record.Therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice..... It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects.....
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> Dealing with the same arguments, R.S. Sidhwa, J. stated as follows :
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> I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Arts. 58(2)(b) and 112(2) (b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer.

121. It is well settled that if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. On consideration of these observations made in the case of ***State of Rajasthan*** as also the other decisions, Justice Sawant concluded that the exercise of power to issue proclamation under Article 356(1) is subject to judicial review at least to the extent of examining whether the conditions precedent to the issue of Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. While considering the question of material, it was held that it is not the personal

whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from material is certainly open to judicial review.

122. It has been further held that when the Proclamation is challenged by making a *prima facie* case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government in view of the provisions of Section 106 of the Evidence Act, the burden of proof would be on the Union Government.

123. Thus having reached the aforesaid conclusions as to the parameters of the judicial review that the satisfaction cannot be based on the personal whim, wish, view, opinion or *ipse dixit de hors* the legitimate inference from the relevant material and that the legitimacy of the inference drawn was open to judicial review, the report on basis whereof Proclamation dissolving the Assembly of Karnataka had been issued was subjected to a close scrutiny, as is evident from paragraphs 118, 119 and 120 of the opinion of Justice Sawant which read as under:

> 118. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislators. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislators. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which test the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on April 27, 1989, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all canons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of mala fides. The

Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more firmly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed was, therefore, liable to be struck down

119. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither ompulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356(1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.

120. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional Government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the “facts” stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained

material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid.

124. The view of the High Court that the facts stated in the Governor's report had to be accepted was not upheld despite the fact that the Governor had got the authenticity of the signatures of 19 MLAs on letters verified from the Legislature Secretariat, on the ground that he had not cared to interview the legislators and that there were conflicting letters from the seven legislators. The conclusion drawn by the Governor that those seven legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their own free will was frowned upon, particularly when they had not been interviewed by the Governor. It was further observed that it is not known from where the Governor got the information about the horse-trading going on between the legislators. Further conclusion reached was that the Governor had thrown all cannons of propriety to the winds and showed undue haste in inviting the President to issue Proclamation under Article 356(1) which clearly smacked of mala fides. It was noticed that the facts stated by the Governor in his report were his own opinion based on unascertained material and in the circumstances they could hardly be said to form the objective material on which the President could have acted.

125. When the facts of the present case are examined in light of the scope of the judicial review as is clear from the aforesaid which represents *ratio decidendi* of majority opinion of ***Bommai*** case, it becomes evident that the challenge to the impugned Proclamation must succeed.

The case in hand is squarely covered against the Government by the *dicta* laid down in ***Bommai*** case. There cannot be any presumption of allurement or horse-trading only for the reason that some MLAs, expressed the view which was opposed to the public posture of their leader and decided to support the formation of the Government by the leader of another political party. The minority Governments are not unknown. It is also not unknown that the Governor, in a given circumstance, may not accept the claim to form the Government, if satisfied that the party or the group staking claim would not be able to provide to the State a stable Government. It is also not unknown that despite various differences of perception, the party, group or MLAs may still not opt to take a step which may lead to the fall of the Government for various reasons including their being not prepared to face the elections. These and many other imponderables can result in MLAs belonging to even different political parties to come together. It does not necessarily lead to assumption of allurement and horse-trading.

135. Thus, it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not. The absence of these factors resulted in the majority declaring the dissolution of State Legislatures of Karnataka and Nagaland as invalid.

136. In view of the above, we are unable to accept the contention urged by the ld. Attorney General for India, Solicitor General of India and Additional Solicitor General, appearing for the Government that the report of the Governor itself is the material and that it is not permissible within the scope of judicial review to go into the material on which the report of the Governor may be based and the question whether the same was duly verified by

the Governor or not. In the present case, we have nothing except the reports of the Governor. In absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal *ipse dixit* of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the qui vive. In the facts and circumstances of this case, the Governor may be main player, but Council of Ministers should have verified facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what Governor stated. Clearly, the Governor has mislead the Council of Ministers which lead to aid and advice being given by the Council of Ministers to the President leading to the issue of the impugned Proclamation.

137. Regarding the argument urged on behalf of the Government of lack of judicially manageable standards and, therefore, the court should leave such complex questions to be determined by the President, Union Council of Ministers and the Governor, as the situation like the one in Bihar, is full of many imponderables, nuances, implications and intricacies and there are too many ifs and buts not susceptible of judicial scrutiny, the untenability of the argument becomes evident when it is examined in the light of decision in Bommai' case upholding the challenge made to dissolution of the Assemblies of Karnataka and Nagaland. Similar argument defending the dissolution of these two assemblies having not found favour before a Nine Judge Bench, cannot be accepted by us. There too, argument was that there were no judicially manageable standards for judging Horse-trading, Pressure, Atmosphere being vitiated, wrongful confinement, Allurement by money, contacts with insurgents in Nagaland. The argument was rejected.

138. The position was different when Court considered validity of dissolution of Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh.

139. In paragraphs 432 and 433 of the opinion of Justice Jeevan Reddy in ***Bommai*** case, after noticing the events that led to demolition of Babri Masjid on 6th December, 1992, the assurances that had been given prior to the said date, the extraordinary situation that had arisen after demolition, the prevailing tense communal situation, the learned Judge came to the conclusion that on material placed before the Court including the reports of the Governors, it was not possible to say that the President had no relevant material before him on the basis of which he could form satisfaction that BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot disassociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of structure, cannot be disassociated from the acts and deeds of the leaders of BJP. It was further held that if the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspected in view of the acts and conduct of the party controlling these Governments and that in the volatile situation that developed pursuant to the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, the Court is not able to say that there was no relevant material upon which he could be so satisfied. Under these circumstances, it was observed that the Court cannot question the correctness of the material produced and that even if part of it is not relevant to the action.

The Court cannot interfere so long as there is some relevant material to sustain the action. For appreciating this line of reasoning, it has to be borne in mind that the same learned Judge, while examining the validity of dissolution of Karnataka and Nagaland Assemblies, agreeing with the reasoning and conclusions given in the opinion of Justice Sawant which held that the material relied upon by the Governor was nothing but his ipse dixit came to the conclusion that the said dissolution were illegal. The majority opinion and the correct ratio thereof can only be appreciated if it is kept in view that the majority has declared invalid the dissolution of Assemblies of Karnataka and Nagaland and held as valid the dissolution of the Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh. Once this factor is kept in full focus, it becomes absolutely clear that the plea of perception of the same facts or the argument of lack of any judicially manageable standards would have no legs to stand.

140. In the present case, like in ***Bommai*** case, there is no material whatsoever except the *ipse dixit* of the Governor. The action which results in preventing a political party from staking claim to form a Government after election, on such fanciful assumptions, if allowed to stand, would be destructive of the democratic fabric. It is one thing to come to the conclusion that the majority staking claim to form the Government, would not be able to provide stable Government to the State but it is altogether different thing to say that they have garnered majority by illegal means and, therefore, their claim to form the Government cannot be accepted. In the latter case, the matter may have to be left to the wisdom and will of the people, either in the same House it being taken up by the opposition or left to be determined by the people in the elections to follow. Without highly cogent material, it would be wholly irrational for constitutional authority to deny the claim made by a majority to form the Government only on the ground that the majority has been obtained by offering allurements and bribe which deals have taken place in the cover of darkness but his undisclosed sources have confirmed such deals. The extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material. These are the matters better left to the wisdom of others including opposition and electorate.

141. It was also contended that the present is not a case of undue haste. The Governor was concerned to see the trend and could legitimately come to the conclusion that ultimately, people would decide whether there was an 'ideological realignment", then there verdict will prevail and the such realigned group would win elections, to be held as a consequence of dissolution. It is urged that given a choice between going back to the electorate and accepting a majority obtained improperly, only the former is the real alternative. The proposition is too broad and wide to merit acceptance. Acceptance of such a proposition as a relevant consideration to invoke exceptional power under Article 356 may open a floodgate of dissolutions and has far reaching alarming and dangerous consequences. It may also be a handle to reject post-election alignments and realignments on the ground of same being unethical, plunging the country or the State to another election. This aspect assumes great significance in situation of fractured verdicts and in the formation of coalition Governments. If, after polls two or more parties come together, it may be difficult to deny their claim of majority on the stated ground of such illegality. These are the aspects better left to be determined by the political parties which, of course, must set healthy and ethical standards for

themselves, but, in any case, the ultimate judgment has to be left to the electorate and the legislature comprising also of members of opposition.

142. To illustrate the aforesaid point, we may give two examples in a situation where none of the political party was able to secure majority on its own :

1. After polls, two or more political parties come together to form the majority and stake claim on that basis for formation of the Government. There may be reports in the media about bribe having been offered to the elected members of one of the political parties for its consenting to become part of majority. If the contention of the respondents is to be accepted, then the constitutional functionary can decline the formation of the Government by such majority or dissolve the House or recommend its dissolution on the ground that such a group has to be prevented to stake claim to form the Government and, therefore, a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

2 A political party stakes claim to form the Government with the support of independent elected candidates so as to make the deficient number for getting majority. According to the media reports, under cover of darkness, large sums of bribe were paid by the particular party to independent elected candidates to get their support for formation of Government. The acceptance of the contention of the respondents would mean that without any cogent material the constitutional functionary can decline the formation of the Government or recommend its dissolution even before such a claim is made so as to prevent staking of claim to form the Government.

143. We are afraid that resort to action under Article 356(1) under the aforesaid or similar eventualities would be clearly impermissible. These are not the matters of perception or of the inference being drawn and assumptions being made on the basis whereof it could be argued that there are no judicial manageable standards and, therefore, the Court must keep its hands off from examining these matters in its power of judicial review. In fact, these matters, particularly without very cogent material, are outside the purview of the constitutional functionary for coming to the conclusion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

144. The contention that the installation of the Government is different than removal of an existing Government as a consequence of dissolution as was the factual situation before the Nine Judge Bench in Bommai's case and, therefore, same parameters cannot be applied in these different situations, has already been dealt with hereinbefore. Further, it is to be remembered that a political party prima facie having majority has to be permitted to continue with the Government or permitted to form the Government, as the case may be. In both categories, ultimately the majority shall have to be proved on the floor of the House. The contention also overlooks the basic issue. It being that a party even, prima facie, having majority can be prevented to continue to run the Government or claim to form the Government declined on the purported assumption of the said majority having been obtained by illegal means. There is no question of such basic issues allegedly falling in the category of "political thicket" being closed on the ground that there are many imponderables for which there is no judicially manageable standards and, thus, outside the scope of judicial review.

145. The further contention that the expression 'situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution' in Article 356 shows that the power is both preventive and/or curative and, therefore, a constitutional functionary would be well within his rights to deny formation of the Government to a group of parties or elected candidates on the ground of purity of political process is of no avail on the facts and circumstances of this case, in view of what we have already stated. Even if preventive, power cannot be abused.

146. Another contention urged is that the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining the validity of a legislative action alone are required to be considered and in that light of the expressions such as 'mala fide' or 'irrational' or 'extraneous' have to be seen with a view to ultimately find out whether the action is ultra vires or not. The contention is that the concept of malafides as generally understood in the context of executive action is unavailable while deciding the validity of legislative action. The submission is that that the malafides or extraneous consideration cannot be attributed to a legislative act which when challenged the scope of inquiry is very limited.

147. For more than one reason, we are unable to accept the contention of the proclamation of the nature in question being a legislative act. Firstly, if the contention was to be accepted, ***Bommai*** case would not have held the proclamation in case of Karnataka and Nagaland as illegal and invalid. Secondly, the contention was specifically rejected in the majority opinion of Justice Jeevan Reddy in paragraph 377. The contention was that the proclamation of the present nature assumes the character of legislation and that it can be struck down only on the ground on which a legislation can be struck down. Rejecting the contention, it was held that every act of Parliament does not amount to and does not result in legislation and that the Parliament performs many other functions. One of such functions is the approval of the proclamation under clause (3) of Article 356. Such approval can, by no stretch of imagination, be called 'legislation'. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under clause (1) of Article 356. It is a safeguard conceived in the interest of ensuring proper exercise of power under clause (1). It is certainly not legislation nor legislative in character.

148. Mr. Subramaniam, learned Additional Solicitor General, however, contended that ***Bommai*** case proceeded on the assumption that the proclamation under Article 356(1) is not legislative but when that issue is examined in depth with reference to earlier decisions, it would be clear that the conclusion of Justice Reddy in para 377 requires re-look in the light of these decisions. We are unable to accept the contention. The decision of Nine Judge Bench is binding on us.

149. Though ***Bommai*** has widened the scope of judicial review, but going even by principles laid in ***State of Rajasthan*** case, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. Apart from the fact that the narrow minimal area of judicial review as advocated in ***State of Rajasthan*** case is no longer the law of the land in view of its extension in ***Bommai*** case but the present case even when considered by applying limited judicial review, cannot

stand judicial scrutiny as the satisfaction herein is based on wholly extraneous and irrelevant ground. The main ground being to prevent a party to stake claim to form the Government.

151. Referring to the opinion of Justice Reddy, in ***Bommai*** case, it was contended for the respondents that the approach adopted in ***Barium Chemicals Ltd.* v. *Company Law Board*** [(1966) Supl. SCR 311] and other cases where action under challenge is taken by statutory or administrative authorities, is not applicable when testing the validity of the constitutional action like the present one.

154. It is evident from the above that what ultimately determines the scope of judicial review is the facts and circumstances of the given case and it is for this reason that the Proclamations in respect of Karnataka and Nagaland were held to be bad and not those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh.

155. We are not impressed with the argument based on a possible disqualification under Tenth Schedule if the MLAs belonging to LJP party had supported the claim of Nitish Kumar to form the Government. At that stage, it was a wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belong. The intricate question as to whether the case would fall within the permissible category of merger or not could not be taken into consideration. Assuming it did not fall in the permissible arena of merger and the MLAs would earn the risk of disqualification, it is for the MLAs or the appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent staking of claim by recommending dissolution. It is not necessary for us to examine, for the present purpose, para 4 of the Tenth Schedule dealing with merger and/or deemed merger. In this view the question sought to be raised that there cannot be merger of legislative party without the first merger of the original party is not necessary to be examined. The contention sought to be raised was that even if two-third legislators of LJP legislative party had agreed to merge, in law there cannot be any merger without merger of original party and even in that situation those two-third MLAs would have earned disqualification. Presently, it is not necessary to decide this question. It could not have been gone into by the Governor for recommending dissolution.

156. The provision of the Tenth Schedule dealing with defections, those of RP Act of 1951 dealing with corrupt practice, electoral offences and disqualification and the provisions of Prevention of Corruption Act, 1988 are legal safeguards available for ensuring purity of public life in a democracy. But, in so far as the present case is concerned, these had no relevance at the stage when the dissolution of the Assembly was recommended without existence of any material whatsoever. There was no material for the assumption that claim may be staked based not on democratic principles and based on manipulation by breaking political parties.

There cannot be any doubt that the oath prescribed under Article 159 requires the Governor to faithfully perform duties of his office and to the best of his ability preserve, protect and defend the Constitution and the laws. The Governor cannot, in the exercise of his discretion or otherwise, do anything what is prohibited to be done. The Constitution enjoins upon the Governor that after the conclusion of elections, every possible attempt is made for formation of a popular Government representing the will of the people expressed through the

electoral process. If the Governor acts to the contrary by creating a situation whereby a party is prevented even to stake a claim and recommends dissolution to achieve that object, the only inescapable inference to be drawn is that the exercise of jurisdiction is wholly illegal and unconstitutional. We have already referred to the Governor report dated 21st May, 2005, inter alia, stating that 17-18 MLAs belonging to LJP party are moving towards JDU which would mean JDU may be in a position to stake claim to form the Government. The further assumption that the move of the said members was itself indicative of various allurements having been offered to them and on that basis drawing an assumption that the claim that may be staked to form a Government would affect the constitutional provisions and safeguards built therein and distort the verdict of the people would be arbitrary. This shows that the approach was to stall JDU from staking a claim to form the Government. At that stage, such a view cannot be said to be consistent with the provisions of Tenth Schedule. In fact, the provisions of the said Schedule at that stage had no relevance. It is not a case of 'assumption', or 'perception' as to the provisions of Constitution by the Governor. It is a clear case where attempt was to somehow or the other prevent the formation of a Government by a political party - an area wholly prohibited in so far as the functions, duties and obligations of the Governor are concerned. It was thus a wholly unconstitutional act.

157. It is true as has been repeatedly opined in various reports and by various constitutional experts that the defections have been a bane of the Indian Democracy but, at the same time, it is to be remembered that the defections have to be dealt with in the manner permissible in law.

158. If a political party with the support of other political party or other MLA's stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political Ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of mal administration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1). In the same vein, it has to be held that the power under Tenth Schedule for defection lies with the Speaker of the House and not with the Governor. The power exercised by the Speaker under the Tenth Schedule is of judicial nature.

159. The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of Tenth Schedule and use it as a reason for recommending dissolution of assembly.

161. For all the aforesaid reasons, the Proclamation dated 23rd May, 2005 is held to be unconstitutional.

POINT NO.3 : If the answer to the aforesaid questions is in affirmative, is it necessary to direct *status quo ante* as on 7th March, 2005 or 4th March, 2005?

162. As a consequence of the aforesaid view on point no. 2, we could have made an order of status quo ante as prevailing before dissolution of Assembly. However, having regard to the facts and the circumstances of the case, in terms of order of this Court dated 7th October, 2005, such a relief was declined. Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view. As a result of the impugned Proclamation, the Election Commission of India had not only made preparations for the four phase election to be conducted in the State of Bihar but had also issued Notification in regard to first two phases before conclusion of arguments. Further, in regard to these two phases, before 7th October, 2005, even the last date for making nominations and scrutiny thereof was also over. In respect of 1st phase of election, even the last date for withdrawal of nominations also expired and polling was fixed for 18th October, 2005. The election process had been set in motion and was at an advanced stage. Judicial notice could be taken of the fact that considerable amount must have been spent; enormous preparations made and ground works done in the process of election and that too for election in a State like the one under consideration. Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the State in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing status quo ante and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party the Indian electorate possessing utmost intelligence and having risen to the occasion on various such occasions in the past.

In view of the above, while holding the impugned Proclamation dated 23rd May, 2005 unconstitutional, we have moulded the relief and declined to grant *status quo ante* and consequentially permitted the completion of ongoing election process.

T H E E N D