JUSTICE T.L.V.
– HIS VERDICT & VISION

MONOGRAPH by Aishwarya Shankar

MADRAS HIGH COURT JUDGE: - 1953
SUPREME COURT JUDGE : 4.1.1954 – 24.11.1958
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AT THE LOTUS FEET OF

PROF.S.A.R.P.V.CHATURVEDI

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PREFACE

On 20th February 1947, the British Government declared that their rule in would end in June 1948and if there was no agreement in India about the transfer of power, they would decide to whom the power should be transferred. Subsequentlyon 26th July 1946 the governer general announced setting up of a separate constituent assembly for Pakistan. Later the british parliament passed the Indian Independence act which was to come to force from 15th august 1947. On 9th December 1946 a constituent assembly was formed as a sovereign body for passing the Indian independence act. However even while subsequent committees were formed to draft proposals for the constitution of India, India still had some unresolved situations: (ref: http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/)

1. Position regarding Indian states was still uncertain as the process of integration was still not over. In the intial draft, article 217, covered distribution of powers applicable to governers provincesand chief commissioners provinces.
2. There had to be a federal government to decide on matters of national interest. The state legislature needed to be vested with powers and jurisdiction. They took the example of the Australian and American constitution to demarcate the powers between the state and union. However for matters concerning mix and clash of both, they termed it as residuary and had to draft proposals for that.
3. Though the law makers were deriving references from the British Privy council, American and Australian constitutions, there was a clear diffrenece in the culture,heritage and economies of the land and hence a number of reforms and clauses had to formulated. It may not be out of place to mention that India is a land of rich of culture and social justice. (Ref: The Indian Judicial System.docx)
4. Being the largest democratic country in the world (ref: http://en.wikiversity.org/wiki/Topic:Indian_law) , the constitution had to postulate free and fair elections laws. At the time of framing the constitution, there were a number of independent kings and traditional dynasties.(ref: http://www.legalindia.in/evolution-of-law-%E2%80%9Ca-short-history-of-indian-legal-theory%E2%80%9D/) Though many had conceded in joining the Union of India, Rights and protection of democracy without infringing on the fundamental rights and culture of the land had to be taken into account.

   This was also the time in the world when the world war was coming to a close and there were many new countries struggling for liberaliastion, freedom and human rights. India being a principle british colony had to clearly establish its constitution and also maintain friendly ties with the newly formed Pakistan and other neighbours.

The Constitution was adopted by the India Constituent Assembly on 26 November 1949, and came into effect on 26 January 1950. (ref: http://supremecourtofindia.nic.in/constitution.html)

The period of the said Justice (from 1954 to 1958) is significant in terms of the constitutional changes and establishment of Indian law. This was the period when Indian Judicial system was in its formative years and had to tackle the above mentioned issues in addition to a number of regional issues.

A complete list of the Cases and the Judgements pronounced by Justice T.L. Venkatarama Iyer during his tenure in the Supreme Court may be found here: list of TLV judgements.docx

A few judgements of the Justice are discussed here that may be of significance:

PETITIONER: THAKUR AMAR SINGHJI Vs. RESPONDENT: STATE OF RAJASTHAN(AND OTHER PETITIONS)

DATE OF JUDGMENT: 15/04/1955

BENCH: AIYYAR, T.L. VENKATARAMA

BENCH: AIYYAR, T.L. VENKATARAMA, MUKHERJEE, BIJAN KR. (CJ), DAS, SUDHI RANJAN, BHAGWATI, NATWARLAL H., IMAM, SYED JAFFER

CITATION:

1955 AIR 504 1955 SCR (2) 303

THE BACKGROUND

This is a classic case of understanding the state legislative powers and the powers of the union. Article X(3) highlights the powers of the head of the state (Rajpramukh), which is applicable in the united state of rajastan.

This judgement clarifies the following points of the Indian Penal code:

- Rajasthan Land Reforms and Resumption of Jagirs Act(Rajasthan Act VI of 1952)Validity
- Rajpramukh-Competence to enact the law
- Covenant of the United State of Rajasthan,
- arts. VII (3), X (3)
- "Ordinance", meaning of-Bill, whether prepared by the Rajpramukh as required by the Constitution
- Resumption of jagir lands
- Legislative competence
- Pith and substance of legislation
- Acquisition or resumption
- Jagir, meaning of
- Legislative practice
- Implied grant
- Legislative grants

- Constitution of India, Arts. 14,31-A, 31(2), 212- A(2), 385, Sch. VII, List II, entries 18, 36
- Marwar Land Revenue Act , (XL of 1949), s. 169
- Mewar Government Kanoon Mal Act (V of 1947), s106
- Bhomicharas,Bhomias,Tikanadars,Subeguzars,Mansubdars,holders of other tenures.

THE CASE HISTORY

On 15-8-1947 India became independent, and the paramountcy of the British Crown over the States ceased. The question then arose as to the status of the ruling Chiefs. It was soon realised by them that in the larger interests of the country and in their own, they could not afford to keep out of the Indian Union and must throw in their lot with it. The problem of fitting them within the framework of the Indian Constitution was beset with considerable difficulties.The number of States which had been recognised as independent prior to 15-8-1947 was 552 excluding Hyderabad, Junagadh and Kashmir.

While a few of them were sufficiently large to be able to function as separate States, many of them were too small to be administered as distinct units. While some of them had representative forms of Government others had not, the rulers being the sole authority: executive,legislative and judicial.The solution which was adopted by the Government of India was that while the bigger States were continued as independent units of the Union, the smaller States were, where they formed islets within a Province, merged within that Province, and where they were contiguous, integrated together so as to form a new State called the Union.

One of the Unions thus newly formed was Rajasthan. There were at that time 18 independent rulers functioning over different parts of Rajasthan. Nine of them, rulers of Banswara, Bundi, Dungarpur, Jhalawar, Kishengarh, Kotah, Pratapgarh, Shahpura and Tonk-entered into an agreement in March -1948 merging their States in a single unit called the United State of Rajasthan.

The ruler of Mewar joined this Union on 18-4-1948, and the rulers of Jaipur, Jodhpur, Bikaner and Jaisalmere on 30-3-1949. The rulers of Alwar, Bharatpur, Dholpur and Karauli who bad formed themselves on 18-3-1948 as Matsya Union dissolved that Union and acceded to the Rajasthan Union on 15-5-1949. With that, the full strength of the State of Rajasthan was made up. The constitution of the United State of Rajasthan as it finally emerged is to be found in the Covenant entered into by the 14 rulers on 30-3-1949. As the authority of the Rajpramukh to enact the impugned legislation was founded on this Covenant, it is necessary to refer to the material provisions thereof bearing on the question. Under Article II, the Covenanting States agreed "to unite and integrate their territories in one State with a common executive legislature and judiciary, by the name of the United State of Rajasthan".

Article VI(2) provided that the ruler of each Covenanting State shall "make over the administration of his State to the Rajpramukh, and thereupon all rights, authority and

jurisdiction belonging to the ruler which appertain or are incidental to the Government of the Covenanting States shall vest in the United State and shall thereafter be exercisable only as provided by this Covenant or by the Constitution to be framed thereunder.

Article VII(3) provides:

"Unless other provision is made by the Act of the Legislature of the United State, the right to resume Jagirs or to recognise succession, according to law and custom, to the rights and titles of the jagirdars shall vest exclusively in the Rajpramukh". Then comes article X(3) which is as follows:

"Until a Constitution so framed comes into operation after receiving the assent of the Rajpramukh, the legislative authority of the United State shall vest in the Rajpramukh, who may make and promulgate Ordinances for the peace and good Government of the State or any part thereof, and any Ordinance so made shall have the like force of law as an Act passed by the legislature of the United State".

Article X(3) was subsequently modified by substituting for the words "Until a Constitution so framed comes into operation after receiving the assent of the Rajpramukh", the words "Until the Legislative Assembly of Rajasthan has been duly constituted and summoned to meet for the first session under the provisions of the Constitution of India". This modification was necessitated by the fact that the idea of convening a Constituent Assembly for framing a Constitution for the State as contemplated in article X (1) was dropped, and the Constitution as enacted for the Union of India was adopted. This amendment, however, is of a formal character, and does not affect the substance of the matter.

Then, there is article XIX under which the Rajasthan Government was to act "under the general control of and comply with such particular directions, if any, as may from time to time, be given by the Government of India".

These are the material provisions of the Constitution which was in force in the United State of Rajasthan before the Constitution of India came into operation on 26-11-1950.

THE JUDGEMENT

The Judgment of the Court was delivered by VENKATARAMA AYYAR J.-These are applications under Article 32 of the Constitution impugning the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act No. VI of 1952, hereinafter referred to as the Act. The history of this legislation may be briefly stated. On 20-8-1949 the Government of India appointed a Committee presided over by Sri C. S. Venkatachar to examine and report on the jagirdari and land tenures in Rajputana and Madhya Bharat, the object avowedly being to effect land reforms so as to establish direct relationship between the State and the tillers of the soil and to eliminate all intermediaries between them. By its report dated 18-12-1949 the Committee recommended inter alia the

resumption of jagirs and payment of rehabilitation grants in certain cases. (Vide report, page 62). The question of legislation on the subject was taken up by the Government of Rajasthan in 1951, and eventually a Bill called the Rajasthan Land Reforms and Resumption of Jagirs Bill was prepared, and on 31-12-1951 it was approved by the Rajpramukh and reserved for the consideration of the President. On 21-1-1952 the President with held his assent from the Bill, and in communicating this decision, the Deputy Secretary to the Government of India informed the Rajasthan Government that if certain amendments were made in the Bill as presented and a fresh Bill submitted, the President would be willing to reconsider the matter.In accordance with these suggestions, a fresh Bill was prepared in the Ministerial Department incorporating certain amendments, and it was approved by the Rajpramukh on 8-2- 1952, and reserved for the consideration of the President, who gave his assent to it on 13-2-1952. By notification issued on 16-2-1952 the Act came into force on18-2-1952. Section 21 (1) of the Act provides that:"As soon as may be after the commencement of this Act, the Government may by notification in the Rajasthan Gazette, appointa date for the resumption of any class of jagir lands and different dates may be appointed for different classes of jagir lands".

Acting under this provision, the State of Rajasthan issued notifications resuming the jagirs specified therein, whereupon petitions under Article 226 of the Constitution were filed by the persons aggrieved challenging the validity of the Act. These petitions were heard by a Full Bench of the Rajasthan High Court, which held overruling the contentions of the petitioners, that the Act was valid. (Vide Amarsingh v. State of Rajasthan(1). The present applications have been filed under article 32 impugning the Act on the following grounds: I.The Rajpramukh had no competence to enact law, and the Act in question is therefore not a valid piece of legislation. II. The Bill was not prepared by the Rajpramukh as required by article 212-A(2), and therefore the law was not validly enacted.

III. Resumption is not one of the topics of legislation enumerated either in the State list or in the Concurrent List in the Seventh Schedule of the Constitution, and the Act is therefore ultra vires the powers of the State. IV. The Act does not provide for adequate compensation; nor is there any public purpose involved in it, and so it contravenes article 31(2) It is discriminatory,and therefore contravenes article 14. And the legislation is not saved by article 31-A, because the lands resumedare neither estates nor jagirs nor grants similar to jagirs, inams or muafi This contention is special to some of the petitioners, and has reference to the specific properties held by them.

V. The properties sought to be resumed are not jagirs as defined in the Act, and the notifications under section 21 in so far as they relate to them are illegal. This again is a special contention urged in some of the petitions. These contentions will now be considered seriatim.

1. On the first question as to the competence of the Rajpramukh to enact the law, it is necessary to notice the events which led up to the formation of the State of Rajasthan and the constitution of the Rajpramukh as its head. During the 12th and 13th Centuries, the Rajput rulers who were then reigning (1) A.I.R. 1954 Rajasthan 291.

over various parts of Hindusthan were compelled by pressure from the victorious Muhammadan invaders to retreat to the regions to the southwest guarded by the Aravali Hills and interspersed with deserts which if less hospitable were also less vulnerable, and there established several independent kingdoms. The period which followed the foundation of these States was marked by incessant wars, the powerful Sultans of Delhi making determined efforts to subjugate the Rajput princes and the latter offering stubborn and more or less successful resistance thereto. The annals of Rajputana especially of this period, present a S tory of heroic deeds of men and women and are among the most inspiring and fascinating chapters in the history of this country.The Moghul Emperors who established themselves later saw the wisdom of conciliating the Rajput rulers, and recognised their position as Chiefs getting in return an acknowledgment of their suzerainty from them, and a promise to send troops in support of the Imperial arms whenever required. When the power of the great Moghul waned and the British established themselves as masters of this country, they in their turn recognised the Rajput princes as Sovereigns, and entered into treaties with them during the Period between 1803 to 1818. (Vide Aitchison's Treaties, Volume III). By these treaties, the British Government accepted their status as independent rulers reserving to themselves Defence, External Relations and Communications and such other matters as might be agreed upon.The relationship thus created was oneof "subordinate union" as it was termed by Mr. Lee Warner, the princes being recognised as Sovereigns and they acknowledging the suzerainty of the British. (Vide Protected Princes of India,, Chapter VI).

On 15-8-1947 India became independent, and the paramountcy of the British Crown over the States ceased. The question then arose as to the status of the ruling Chiefs. It was soon realised by them that in the larger interests ofthe country and in their own, they could not afford to keep out of the Indian Union and must throw in their lot with it. The problem of fitting them within the framework of the Indian Constitution was beset with considerable difficulties. The number of States which had been recognised as independent prior to 15-8-1947 was 552 excluding Hyderabad, Junagadh and Kashmir. While a few of them were sufficiently large to be able to function as separate States, many of them were too small to be administered as distinct units. While some of them had representative forms of Government others had not, the rulers being the sole authority: executive, legislative and judicial.The solution which was adopted by the Government of India was that while the bigger States were continued as independent units of the Union, the smaller States were, where they formed islets within a Province, merged within that Province, and where they were contiguous, integrated together so as to form a new State called the Union.

One of the Unions thus newly formed was Rajasthan. There were at that time 18 independent rule[=rs functioning over different parts of Rajasthan. Nine of them, rulers of Banswara, Bundi, Dungarpur, Jhalawar, Kishengarh, Kotah, Pratapgarh, Shahpura and Tonk-entered into an agreement in March -1948 merging their States in a single unit called the United State of Rajasthan. The ruler of Mewar joined this Union on 18-4-1948, and the rulers of Jaipur, Jodhpur, Bikaner and Jaisalmere on 30-3-1949. The rulers of Alwar, Bharatpur, Dholpur and Karauli who bad formed themselves on 18-3-1948 as

Matsya Union dissolved that Union and acceded to the Rajasthan Union on 15-5-1949. With that, the full strength of the State of Rajasthan was made up. The constitution of the United State of Rajasthan as it finally emerged is to be found in the Covenant entered into by the 14 rulers on 30-3-1949. As the authority of the Rajpramukh to enact the impugned legislation was founded on this Covenant,it is necessary to refer to the material provisions thereof bearing on the question. Under Article II, the Covenanting States agreed "to unite and integrate their territories in one State with a common executive legislature and judiciary, by the name of the United State of Rajasthan". Article VI(2) provides that the ruler of each Covenanting State shall "make over the administration of his State to the Rajpramukh, and thereupon all rights, authority and jurisdiction belonging to the ruler which appertain or are incidental to the Government of the Covenanting States shall vest in the United State and shall thereafter be ex- ercisable only as provided by this Covenant or by the Constitution to be framed thereunder. Article VII (3) provides:"Unless other provision is made by the Act of the Legislature of the United State, the right to resume Jagirs or to recognise succession, according to law and custom, to the rights an a Constitution so framed comes into operation after receiving the assent of the Rajpramukh, the legislative authority of the United State shall vest in theRajpramukh, who may make and promulgate Ordinances for the peace and good Government of the State or any part thereof, and any Ordinance so made shall have the like force of law as an Act passed by the legislature of the United State". Article X(3) was subsequently modified by substituting for the words "Until a Constitution so framed comes into operation after receiving the assent of the Rajpramukh", the words "Until the Legislative Assembly of Rajasthan has been duly constituted and summoned to meet for the first session under the provisions of the Constitution of India". This modifi- cation was necessitated by the fact that the idea of convening a Constituent Assembly for framing a Constitution for the State as contemplated in article X (1) was dropped, and the Constitution as enacted for the Union of India was adopted. This amendment, however, is of a formal character, and does not affect the substance of the matter. Then, there is article XIX under which the Rajasthan Government was to act "under the general control of and comply with such particular directions, if any, as may from time to time, be given by the Government of India". These are the material provisions of the Constitution which was in force in the United State of Rajasthan before the Constitution of India came into operation on 26-11-1950.

Article 385 of the Constitution enacts:

"Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the legislature of the corresponding Indian States shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified".

It is the contention of the respondent that the Rajpramukh was by reason of article X(3) of the Covenant "the authority functioning immediately before the commencement of the Constitution as the Legislature" of Rajasthan, and that he could under article 385

exercise the powers which the Legislature of the State could. It is conceded by the petitioners that at the time of the impugned legislation. no House of Legislature had been constituted and summoned, and that to that extent the requirements of that Article are satisfied; but their contention is that on a true construction of the articles of the Covenant the Rajpramukh was not an authority functioning as Legislature within the meaning of article 385, and further that article VII(3) of the Covenant imposed a prohibition on his power to enact a law of the kind now under challenge, and that the prohibition had not been abrogated by the Constitution. The question then is which was the body or authority which was functioning as the Legislature of the United State of Rajasthan under the terms of the Covenant. Article X(3) expressly provides that the legislative authority of the State shall vest in the Rajpramukh. The meaning of this provision is clear and unambiguous; but it is argued for the petitioners that it is con- trolled and cut down by the expression "Ordinance" in article X(3) and by the terms of article VII(3) and of article XIX. It is contended by Mr. N. C. Chatterjee that the legislative authority of the Rajpramukh was only to "make and promulgate Ordinance" that it is a limited power conferred on him to be exercised in case of emergency pending the constitution of popular legislature, and that accordingly he was not a "legislative authority" for the purpose of article 385. But this is to import into the word "Ordinance" what it connotes under the Government of India Act, 1935 or the Constitution of India. Sections 42 and 88 of the Government of India Act conferred onthe Governor-General and the Governor respectively power to promulgate ordinances when the Legislature was not in session. Similar power is conferred on the President and the Governors by articles 123 and 213 of the Constitution. That is a legislative power exercisable by the head of the State, when it is not possible for the Legislature to exercise it. But the United State of Rajasthan had then no Legislature, which had yet to be constituted, and therefore in its context, the word "Ordinance" in article X (3) cannot bear the meaning which it has under the Government of India Act or the Constitution. It should be remembered that before the formation of the United State, the Covenanting rulers enjoyed sovereign rights of legislation in their respective territories; and under article VI (2) (a), they agreed to surrender those rights and vest them in the United State. It was therefore plainly intended that the Stateof Rajasthan should have plenary. legislative authority such as was formerly exercised by the rulers; and where was it lodged, if not in the Rajpramukh?

If we are to construe article X(3) in the manner contended for by the petitioners, then the anomalous result will follow that there was in that State no authority in which the legislative power was vested. This anomaly would disappear if we are to construe "Ordinance" as meaning law. That indeed is its etymological meaning. According to the Concise Ox-

ford Dictionary, "to ordain" means "to decree, enact"; and "Ordinance" would therefore mean "decree, enactment". In Halsbury's Laws of England, Volume XI, page 183, para 327

it is stated that when the Governor of a colony which has no representative assembly enacts legislation with the advice and consent of the State council, it is designated ordinance or law.

That clearly is the sense in which the word is used in article X(3), and that is placed beyond doubt by the words which follow, that the Ordinance is to have "the like force of law as an Act passed by the Legislature of the United State".

It was next urged that under article VII(3) the Rajpramukh was given authority to resume jagirs only in accordance with law and custom, that he had no authority to enact a law for the resumptionof jagirs on grounds other than those recognised by law and custom, that section 22 of the Act provided that the resumption was to take effect notwithstanding any jagir law which as defined in section 2(d) includes also custom, that such a law was directly opposed to what was authorised by article VII(3), that the legislative powers conferred under article X (3) must be exercised subject to the restrictions under article VII(3), and that the Act was therefore beyond his competence. This contention is, in our opinion, untenable. The words "according to law and custom" cannot be held to qualify the words "right to resume jagirs", because they are wedgedin between the words "right to recognise succession" and the words "to the rights and titles of Jagirdars", and must be construed as qualifying only "the right to recognise succession to the rights and titles of Jagirdars". But this may not, by itself, be of much consequence, as the power to resume provided in this article is what the grantor possesses under law and custom. The real difficulty in the way of the petitioners is that article VII(3) has reference to the power which rulers of States had as rulers to resume jagirs, and what it provides is that it should thereafter be exercised by the Rajpramukh. That power is purely an executive one, and has nothing to do with the legislative power of the ruler, which is specially provided for in article X(3). The fields covered by the two articles are distinct and separate, and there can be no question of article VII(3) operating as a restriction on the legislative power under article X(3). Indeed, article VII(3) expressly provides that it is subject to any legislation on the subject, whereas article X(3) is not made subject to article VII(3).

Even if the petitioners are right in their contention that article VII(3) imposes a limitation on the powers of the Rajpramukh, that would not, in view of article 385, derogate from the power of the Rajpramukh to enact the present law. The scope of that article is that the body or authority which was functioning before the commencement of the Consti- tution as the Legislature of the State has first to be ascertained, and when once that has been done and the body or authority identified, the Constitution confides to that body or authority all the powers conferred by the provisions of the Constitution on the House or Houses of Legislature of the State. These powers might be wider than what the body or authority previously possessed or they might be narrower. But they are the powers which are allowed to it under article 385, and the extent of the previous authority is wholly immaterial. The contention that the Act is incompetent by reason of article VII(3) of the Covenant must accordingly fail.

It was next argued that the powers of the Rajpramukh under article X(3) were subject to the general control of the Government of India under article XIX, and that he could not therefore be regarded as legislative authority for the purpose of article 385. We see no force in this contention. Article 385 provides that the authority which was to exercise legislative powers in the interim period under that Article should be the authority which was functioning as the Legislature of the State before the commencement of the Constitution. It does not further require that that authority should have possessed absolute and unlimited powers of legislation.It could not be, and it was not, contended that the effect of article XIX was to vest the legislative authority of the State in the Government of India, and that being so, the Rajpramukh was the legislative authority of the State, whatever the limitations on that authority.

it was finally contended that article 385 has no application to the present case, because under article 168 the Legislature is to consist of both the Governor and one or more Houses, that article 238(7) extends article 168 to Part B States substituting the Rajpramukh in the place of the Governor, that accordingly the Rajpramukh cannot by himself constitute the Legislature, and that when article 385 refers to the body or authority functioning as Legislature, it could only refer to both the Rajpramukh and the House functioning in conjunction. Support for this contention was sought in the terms of article 212-A(1) of the Constitution (Removal of Difficulties) Order No. 11, which excluded in relation to Part B States only the first proviso to article 200, but not the body of it. If this contention is sound, then article 385 must be treated as a dead letter as regards such of the Part B States as had no House of Legislature. But, in our opinion, this contention is untenable, because article 385 refers not to Legislatures under the Constitution but to the body or authority which was functioning as the Legislature of the State before the commencement of the Constitution., and article 238(7) is, under the Constitution (Removal of Difficulties) Order sub- ject to article 385. Nor can any argument be founded on the exclusion of the first proviso to article 200 but not of the body of that article under article 212-A (1), because it lays down the procedure to be followed when a Bill has been passed by a Legislative Assembly or Legislative Council of a State, and is by its very terms inapplicable when there is no House of Legislature. The contention of Mr. Frank Anthony that the non-inclusion of the body of article 200 among the articles excluded from application to Part B States under article 212-A(1) imposes by implication a limi- tation on the power of the Rajpramukh to enact laws unless they are passed by Legislative Assemblies is not supported by anything in the article, and must be rejected. We must accordingly bold that the Rajpramukh had legislative competence to enact the law under challenge. II.The second contention that has been pressed by the petitioners is that the Rajasthan Land Reforms and Resumption of Jagirs Bill was not prepared by the Rajpramukh as required by article 212-A(2), and that the Act was therefore not validly enacted. The facts material for the purpose of this contention are that the Bill was first prepared in the Ministerial Department in accordance with the rules

framed under article 166(3) for the "convenient transaction of the business of the State". It was approved by the Council of Ministers on 27-12-1951 and sent to the Rajpramukh with the following note by the Secretary: "The Bill is submitted for gracious approval and signature and for reserving it for the consideration of the President".

Then there is firstly an endorsement "approved" signed by the Rajpramukh and dated 31-12-1951, and then follows another endorsement, "I hereby reserve this Bill for the consideration of the President" similarly signed and dated. On 21-1-1952 the President endorsed on the Bill, "I withhold my assent from the Bill". Thereafter, a fresh Bill was prepared and submitted to the Rajpramukh on 6-2-1952 with the following note by the Chief Secretary: "The Bill as finally agreed to is now submitted to His Highness the Rajpramukh for his approval and for reserving the same for the consideration of the President". The Rajpramukh gave his approval on 8-2-1952, and by a further order he reserved the Bill for the consideration of the President who gave his assent on 13-2-1952. Now, the question is whether on these facts the requirements of article 212-A(2) have been complied with. Article 212-A(2) was enacted by the Constitution (Removal of Difficulties) Order No. 11, and is as follows:

"The Rajpramukh or other authority exercising the legislative powers in any such State as aforesaid under article 385 shall prepare such Bills as may be deemed necessary, and the Rajpramukh shall declare as respects any Bill so prepared either that he assents to the Bill or that he withholds assent therefrom or that he reserves it for the consideration of the President".

The contention of the petitioners is that as the Bill was prepared by the Ministers and not the Rajpramukh, article 212-A(2) had been contravened, and that, in consequence, the law had not been properly enacted. It is conceded that under this article the Rajpramukh has not himself to draft the Bill, and that be might delegate that work to others. But they insist-and in our opinion, rightly-that questions of policy which are of the essence of the legislation should at least be decided by him, and that even that had not been done in the present case. They rely strongly on the statements in the affidavit of Sri Joshi, the Jagir Commissioner, that the Bill was drafted in the Ministerial Department in accordance with the rules framed under article 166(3), approved by the Council of Ministers and sent on to the Rajpramukh for his assent. These allegations, they con- tend, preclude any supposition that the Rajpramukh had any part or lot in the settlement of the policies underlying the Act, and the Bill must be held therefore not to have been prepared by him.

Taking it that such are the facts, what follows? Only that at the inception the Bill was not prepared by the Rajpramukh. But that does not conclude the question whether there bad been compliance with article 212-A(2), unless we hold that it was not open to the

Rajpramukh to adopt a Bill prepared by the Ministers as his own, or if it was open, he did not, in fact, do so. It cannot be disputed that whether a Bill is in the first instance prepared by the Rajpramukh or whether he adopts what had been prepared by the Ministers as his own, the position in law is the same. That has not been disputed by the petitioners. Their contention is that such adoption should be clearly and unequivocally established, and that the records do not establish it. It was argued that when the Bill was sent to the Rajpramukh, he was not called upon to apply his legislative mind to it but to merely assent to it on the executive side; that when the Rajpramukh endorsed his approval he was, as admitted by Sri Joshi, merely assenting to it, that assent implied that the Act assented to was not that of the person assenting, and that therefore there was nothing to indicate that the Rajpramukh had adopted the Bill prepared by the Ministers as his own. It was argued by Mr. Agarwala that when the word " approve" was used in the Constitution as in articles 146 and 147, it signified that there were two authorities, one of which was authorised to confirm or sanction what the other had authority to do, and that when the latter was not authorised to do the act, there could be no approval of it by the former; and he also relied on the statement of the law in Corpus Juris, Volume I, page 1365 that the word 'approve' does not mean the same thing as 'adopt'.

The fallacy in this argument lies in isolating the word "approved" from out of its setting and contextand interpreting it narrowly. It will be noticed that under article 212-A (2) the Rajpramukh has to do two distinct acts: Firstly he has to prepare the Bill, and secondly-leaving out of consideration the first two alternatives, namely, assenting to, or with holding assent from, the Bill as not material for the present discussion-he has to reserve it for the consideration of the President. When he himself prepares the Bill, he has, in order to comply with article 212-A(2) merely to reserve it for the consideration of the President. In such a case, no question of approval to the Bill by him can arise, but when the Bill has not been prepared by him, he has firstly, if he thinks fit, to adopt it before he could pass on to the second stage and reserve the Bill for the consideration of the President; and the very purpose of his endorsing his approval on the Bill is to show that he has thought fit to adopt it. There is no provision in article 212-A(2) for the Rajpramukh approving of a Bill, and in the context, therefore, an endorsement of approval on the Bill must signify its adoption by him. We are unable to follow the subtle distinction sought to be made by Mr. Frank Anthony between the Legislative mind of the Rajpramukh and his executive mind. If it is open to the Rajpramukh to adopt a Bill prepared by his Ministers, the only matter that will have to be considered is whether, in fact, he did so. And when the Bill is produced with an endorsementof approval under his signature, the question must be held to be concluded, and any further discussion about the legislative or executive state of mind of the Rajpramukh must be ruled out as inadmissible.

It must be mentioned in this connection that Mr. Pathak for the respondent took up the position that the function of the Rajpramukh at the stage of preparation of the Bill was purely

executive, and that it became legislative only when he had to decide whether he would assent to the Bill or withhold his assent therefrom, or reserve it for the consideration of the President, and that by leaving it to the Ministers to prepare the Bill there had been no violation of article 212-A(2). We are unable to agree with this contention. When a Bill has been passed by the Legislative Assembly of a State, article 200 enacts that it shall be presented to the Governor who is to declare whether he assents to it or withholds his assent therefrom, or reserves it for the consideration of the President. When there is no Legislative Assembly in a State, the matter is governed by article 212-A(2), and there is substituted under that article in the place of the passing of the Bill by the Legislature, the preparation thereof by the Rajpramukh, and then follows the provision that he has to declare whether he assents to or withholds his assent from the Bill or reserves it for the consideration of the President. The position under article 212-A(2) has thus been assimilated to that under article 200, the preparation of the Bill by the Rajpramukh taking the place of the passing of the Bill by the Legislative Assembly, and the one is as much a legislative function as the other.

One other contention attacking the Act on the ground of procedural defect may now be considered. It was argued by Mr. Trivedi that under the proviso to article 201, the President bad no power to return a Money Bill for further consideration by a House of Legislature, that his order dated 21-1-1952 returning the Rajasthan Land Reforms and Resumption of Jagirs Bill for further consideration was ultra vires as it was a Money Bill, that thesubsequent presentation of the Bill to him on 8-2-1952 was unauthorised, and that the impugned Act had therefore not been duly passed. This argument is clearly erroneous. Under article 212-A(1), the proviso to article 201 has no application to those Part B States where there was no House of the Legislature; and we are unable to follow the argument of the learned counsel that even so, the limitation imposed by the proviso is implicit in the body of the article itself. Moreover, the order of the President dated 21-1- 1952 is not one returning the Bill for further consideration by the House but one refusing assent. It is true that the Deputy Secretary sent a communication to the Rajasthan Government suggesting some amendments. But this does not alter the character of the order of the President as one withholding assent. And finally the Bill which was submitted again to the President for consideration on 6-2- 1952 was a fresh Bill, the previous Bill having been modified as regards the scales of compensation. The contention, therefore, that the Act is bad for non- compliance with article 212-A(2) or for other procedural defects must be rejected.

III. We may now consider the third contention of the petitioners that the Act in so far as it provides for resumption of jagir lands is ultra vires the powers of the State Legislature, as it is not one of the topics mentioned either in List II or List III of the Seventh Schedule to the Constitution. The contention of the respondent is that the Act is in substance a law relating to acquisition, and is covered by Entry No. 36 in the State List. On the other hand, the petitioners maintain that the subject-matter of the legislation is what it avows itself to be, viz., resumption of jagirs, that resumption is in law

totally different from acquisition, and that the Act is therefore not covered by Entry No. 36.

We agree with the petitioners that resumption and acquisition connote two different legal concepts. While resumption implies that the person or authority which resumes the property has pre-existing rights over it, acquisition carries no such implication, and in general, while the effect of resumption is to extinguish the interests of the person whose property is resumed, that of acquisition is to vest that interest in the acquirer. But the question still remains whether the impugned Act is one for acquisition of jagirs or for their resumption; and to determine that, we must see what the pith and substance of the legislation is, the name given to it by the Legislature not being decisive of the matter.

The provisions of the Act relating to resumption may now be noticed. Chapter V deals with resumption of jagir lands. Section 21 authorises the State to issue notifications for resumption of jagirs, and section 22(1) enacts: "As from the date ofresumption of any jagir lands, notwithstanding anything contained in any existing jagir legislation applicable thereto but save as otherwise provided in this Act,-

(a) the right, title and interest of the jagirdar and of every other person claiming through him .... in his jagir lands including forests, etc .... shall stand resumed to the Government free from all encumbrances".

Section 22(1)(g) is as follows:

"the right, title and interest of the jagirdar in all buildings on jagir lands used for schools and hospitals not within residential compounds shall stand extinguished, and such buildings shall be deemed to have been transferred to the Government".

Section 23 exempts certain properties from the operation of section 22, and provides that they are to continue to belong to the jagirdars or to be held by them. Chapter VI deals with compensation. Section 26(1) enacts:

"Subject to the other provisions of this Act, the Government shall be liable to pay every jagirdar whose Jagir lands are resumed under section 21 such compensation as shall be determined in accordance with the principles laid down in the second schedule".

Chapter VII prescribes the procedure for the determination of compensationand for payment of the same. The second Schedule to the Act contains the principles on which compensation is to be determined. That was the scope of the Act as it was passed in 1952. In 1954 certain amendments were introduced by Act No. XIII of 1954, the most important of which was the provision for payment of rehabilitation grant in accordance with the principles enacted in Schedule III to the Act.

Now, the contention of the petitioners is that the basic assumption on which the Act is framed is that jagirdars have no right of property in the lands themselves, but that they possess some ancillary rights in relation thereto, that the State is therefore entitled to resume the lands without compensation, and that it is sufficient to pay for the ancillary rights. These, it is argued, were the views expressed by the Venkatachar Committee in its Report on Land Tenures in Rajasthan, and they formed the basis of the impugned Act. Thus, it is pointed out that the Committee had held that "jagirs are not the property of the jagirdars" (vide page 47, para 5), that '-'if the jagir system is abolished, jagirdars would not be entitled to any compensation on the ground of the jagirs being private property", and that "even though jagirs are not pro- perty..... those rights which have in many cases been enjoyed for centuries have acquired around them an accretion of rights by long custom and -prescription which are entitled to due recognition", and that a rehabilitation grant might be given to the jagirdars. (Page 47, para 6). It is contended that it is these views that have been adopted in section 22 of the Act, and that when section 22 (1) (a) declares that the right, title and interest of the jagirdars shall stand resumed, it could not mean that these rights are acquired by the State, because acquisition implies that the properties acquired belong to the person from whom they are acquired, whereas the basis of the legislation was that the jagirdars bad no property in the lands, and there could be no acquisition of what did not belong to them. Reference is made by way of contrast to the language of section 22(1) (g) under which certain buildings standing on jagir lands presumably constructed by jagirdars should stand transferred to the Government and not resumed as under section 22 (1)

(a).This argument proceeds on an inadequate appreciation of the true nature and scope of the right of resumption under the general law and of the power of resumption which is conferred on the State by the impugned Act. Under the law, a jagir could be resumed only under certain circumstances. It can be resumed for breach of the terms of the grant, such as failure to render services or perform the obligations imposed by the grant. It can be resumed for rebellion or disloyalty or for the commission of serious crimes. And again, jagir was originally only a life grant and when the holder died., it reverted back to the State and succession to the estate was under a fresh grant from the State and not by inheritance, even when the successor was the heir of the deceased holder. The right to resume jagirs within the limits aforesaid was founded on grant and regulated by general law. To exercise that right, there was no need to enact any legislation. It was a right which every ruler of the Covenanting State had as a grantor, and that right had become vested in the Rajpramukh under article VII(3) of the Covenant. The contention of the petitioners that resumption was not an acquisition would strictly be accurate, if the resumption was in exercise of the power conferred by that article.

But the resumption for which the Act provides is something different from the resumption which is authorised by article VII(3). It was a resumption not in accordance with the terms of the grant or the law applicable to jagirs but contrary to it, or in the words of section 21 "notwithstanding anything contained in any existing jagir law applicable thereto".It was a resumption made not in enforcement of the rights which the rulers had as grantors but in

exercise of the sovereign rights of eminent domain possessed by the State. The taking of properties is under the circumstances, in substance, acquisition notwithstanding that it is labelled as resumption. And this conclusion becomes irresistible when regard is had to the provisions for payment of compensation. Section 26(1) imposes on the Government a liability to pay compensation in accordance with the principles laid down in the second Schedule, and as will be presently shown, it is not illusory. The award of compensation is consistent only with the taking being- an acquisition and not with its being a resumption in accordance with the terms of the grant or the law applicable to it, for in such cases, there is no question of any liability to pay compensation. It was argued for the petitioners that the provision for the payment of rehabilitation grant was an indication that what was paid as compensation was in reality ex gratia. But the rehabilitation grant was in addition to the compensation amount, and it was provided by the amendment Act No. XIII of 1954. Nor are we impressed by the contention that the Act had adopted the findings of the Venkatachar Committee that the jagirs were not the properties of the jagirdars, and that no compensation need be paid for them. Under section 22(1)(a), what is resumed is expressly the right, title and interest of the jagirdar in his jagir lands, and provision is made for payment of compensation therefor. Moreover, the opinions in the report of the Venkatachar Committee on the rights of the jagirdars are clearly inadmissible for the purpose of deciding what the pith and substance of the impugned legislation is. That must be decided on an interpretation of the provisions of the statute, and that decision cannot be controlled or guided by the opinions expressed in the report. Reading the provisions of the Act as, a whole, it is abundantly plain that what was meant by resumption was only acquisition. Indeed, if the Act purported to be one for acquisition of jagirs, its provisions could not have been different from what they are.

Such being the true character of the legislation, not much significance could be attached to the use of the word "resumption" in the Act. It should be remembered that the State has a reversion in jagir lands, and when it takes them back in accordance with the terms of the grant or the law applicable thereto, its action is properly termed resumption. When the statute enacted a law authorising the taking of jagir lands, it is natural that it should have adopted the same term, though the resumption was not made on any of the grounds previously recognised as valid. In view of the peculiar relationship between the jagirdar and the State, it cannot be said that the word "resumption" is inadmissible to signify acquisition. Section 22(1)(a) further enacts that the lands shall stand resumed "to the Government", which words are more appropriate for acquisition by the Government than resumption simpliciter. It was also contended for the respondent that the Act is one relating to land and land tenures, and that it would fall under Entry No. 18 in the State List:

"Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization".

It was argued that the heads of legislation mentioned in the Entries should receive a liberal construction, and the decision in The United Provinces v. Atiqa Begum(1) was quoted in support of it. The position -is well settled and in accordance therewith, it could rightly be held that the legislation falls also under Entry No. 18. But there being an Entry No. 36 specifically dealing with acquisition, and in view of our conclusion as to the nature of the legislation, we hold that it falls under that Entry. IV.Now we come to the contentions special to some of the petitioners that with reference to the (1) [1940] F.C.R. 110, 134, properties held by them the impugned Act is not saved by article 31-A, and that it is void as being in contravention of articles 14 and 31(2) of the Constitution. On this contention, two questions arise for determination: (A) Is the impugned Act in so far as it relates to the properties of the petitioners within the protection afforded by article 31-A? (B) And is the Act bad as infringing articles 14 and 31(2) of the Constitution?

IV(A). On the first question, the contention of the petitioners is that the properties held by them are neither `estates'nor'Jagirs' nor 'other similar grants,' within article 31-A, and that therefore the impugned Act falls, quoad hoc, outside the ambit of that article. At the threshold of the discussion lies the question as to the precise connotation of the words "jagir or other similar grant" in article 31-A, and to determine it, it is necessary to trace in broad outline the origin and evolution of the jagir tenure in Rajasthan. It has been already mentioned that during the period of the Muhammadan invasion the Rajput princes of Hindusthan migrated to Rajputana and founded new kingdoms. The system of land tenure adopted by them was that they divided the conquered territories into two parts, reserved one for themselves and distributed the other in blocks or estates among their followers. In general, the grantees were the leaders of the clan which had followed the King and assisted him in the establishment of the kingdom or his Ministers. Sometimes, the grant was made as a reward for past services. The lands reserved for the King were called Khalsa, and the revenue therefrom was collected by him directly through his officials. The lands distributed among his followers were called jagirs and they were generally granted on condition that the grantee should render military service to the rulers such as maintaining militia of the specified strength or guarding the passes or the marches and the like. The extent of the grant would depend on the extent of the obligations imposed on the grantee, and it would be such as would enable the grantee to maintain himself and the troops from out of the revenues from the jagir. It was stated by Mr. Pathak that the grants would in general specify the amount of revenue that was expected to be received from the jagir, and that if the jagirdar received more, he was under an obligation to account to the State for the excess. And he quoted the following passage in BadenPowell on Land Systems of

British India, Volume 1, page 257 as supporting him: "While a strict control lasted, the jagirdar was bound to take no more than the sum assigned; and if more came into his hands, he had rigidly to account for the surplus to the State treasury".

This statement has value only as throwing light on the jural relationship between the State and the jagirdar, for it does not appear that it was ever observed in practice. It may be deduced from the foregoing that all the lands of the State must fall within one or the other of the two categories, Khalsa or jagir, and that the essential features of a jagir are that it is held under a grant from the ruler, and that the grant is of the land revenue.

Some of the incidents of the jagir tenure have been already touchedupon. It was a life grant and succession to it depended on recognition by the ruler. It was impartible, and inalienable. But in course of time, however, grants came to be made with incidents annexed to them different from those of the jagirs, Some of them wereheritable, though impartible; a few of them were both heritable and partible. While originally the jagirs were granted to the Rajput clansmen for military service the later grants were made even to non-Rajputs and for religious and charitable purposes. These grants were also known as jagirs. "The term 'jagir' is used", it is observed in the Report of the Venia-tachar Committee, page 18, para 2, "both in a generic and specific sense. In its generic sense it connotes all non-khalsa area". The stand taken by the petitioners in their argument was also that the word 'jagir' bad both a wider and a narrower connotation. Thus, after quoting from the Rajputana Gazetteer the passage that "the rest of the territory is held on one of the following tenures, viz, Jagir, Jivka, Sansan, Doli, Bhum, Inam, Pasaita and Nankar" (Vide Erskine's Rajputana Gazetteers, Volume III-A, Chapter XIII Land Revenue and Tenures), Sri Amar Singh who

-presented the case of his father Zorawar Singh, a leading Bhoomichara of Mallani, with conspicuous ability, argued that jagir was used in the passage in its specific sense, and that in its generic sense, it would comprise all the other tenures mentioned above. In the impugned Act also, jagir land is defined in section 2(h) as meaning "any land in which or in relation to which a jagirdar has rights in respect of land revenue or any other kind of revenue and- includes any land held on any of the tenures specified in the First Schedule", and in the Schedule' jagir is mentioned as the first of the items. It also appears that in the laws enacted in the States of Rajputana to which our attention has been drawn, the word `jagir'is generally used in its extended meaning. Thus, both in its popular sense and legislative practice, the word 'jagir' is used as connoting State grants which conferred on the grantees rights "in respect of land revenue". (See section 2(h) of the Act.) It was argued that though the extended definition of jagirs in section 2(h) of the impugned Act might govern questions arising under that Act, the word 'jagir' in article 31-A must be construed as limited to its original and primary meaning of a grant made for

military service rendered or to be rendered, and that accordingly other grants such as maintenance grants made in favour of near relations and dependents would not be covered by it. We do not find any sufficient ground for putting a restricted meaning on the word 'jagir' in article 31-A. At the time of the enactment of that article, the word had acquired both in popular usage and legislative practice a wide connotation, and it will be in accord with sound canons of interpretation to ascribe that - connotation to that word rather than an archaic meaning to be gathered from a study of ancient tenures. Moreover, the object of article 31-A was to save legislation which was directed to the abolition of intermediaries so as to establish direct relationship between the State and the tillers of the soil, and construing the word in that sense which would achieve that object in a full measure, we must hold that jagir was meant to cover all grant under which the grantees bad only rights in respect of revenue and were not the tillers of the soil. Maintenance grants in favour of persons who were not cultivators such as members of the ruling family would be jagirs for purposes of article 31-A. We may now proceed to consider the contentions of the several petitioners with reference to the specific properties held by them, and they may be grouped under two categories: (1) those relating to the tenures on which the properties are held, and (2) those relating to particular properties. Under category (1) fall the estates held by (a) Bhomicharas of Marwar, (b) Bhomats of Mewar, (c) Tikanadars of Shekhwati, and (d) Subeguzars of Jaipur. (1)(a) Bhomicharas: This is the subject-matter of Petitions Nos. 462, 579, 630, 638 and 654,of 1954. The Bhomichara tenure is to be found in Jaisalmere, in Shekhawati in Jaipur and in Marwar. (Vide Report of the Venkatachar Committee, page 19, para 13). But we are concerned here only with the Bhomichara tenure in the State of Marwar. Its history goes back to the year 1212 A.D. when the clan of Rathors led by Rao Siaji, grandson of King Jayachander of Kanouj invaded Rajputana, subjugated the territories now known as Mallani, Yeshwantpura and Sanchora and established itself there. Some two centuries later, a section of the Rathors beaded by Biram Deo who was the younger brother of Mallinath, the ruling prince of Mallani, expanded eastwards, and established the kingdom of Jodhpur. The elder branch which continued in Mallani, Yeshwantpura and Sanchora gradually sank in power The descendants of Mallinath went on partitioning the lands treating them as their personal properties and the principality thus came to be broken up into fragments, and its holders became weak and disunited. Their internecine disputes led to the intervention of Jodhpur which had grown to be a powerful kingdom, and they were compelled to accept its ruler as their suzerain and to pay him an annual tribute of Rs. 10,000 called "Foujbal". Thereafter, they continued to hold lands subject to the payment of this tribute, and came to be known as Bhomicharas. The area continued to be distracted by disputes and dissensions among its leaders, and -fell into so much anarchy and confusion that in 1835 the British had to intervene to restore order. It should be remembered that they had entered into a treaty of alliance with Jodhpur in 1818, and their intervention was presumably by virtue of their obligations under the treaty. Thereafter, the territory was put under the charge of a British superintendent and latterly of the Resident at Jodhpur. The annual tribute was, during this period, collected by the British and paid to the Jodhpur State. Writing on the status of the Bhomicharas during this period, Major Malcolm remarked in his report dated 1849 thus: "..... though the British Government had established a claim to the

District themselves, consequent on having reduced them to order and obedience, it was willing, out of kindness and consideration to His Highness, towaive its just rights and to acknowledge His Highness as entitled to sovereignty over those districts, and the tribute they might yield.....

In 1891 the British withdrew from the administration of the Province, and handed it over to the Maharajah of Jodhpur who thereafter continued to govern it as part of his Dominions. On these facts, it is contended by Mr. N. C. Chatterjee and Shri Amar Singh that Bhomicharas are not holders of jagirs or other similar grants within the meaning of article 31-A, because a jagir could be created only by grant by the ruler, and that the petitioners could not be said to hold under a grant from Jodhpur, because they had obtained the territory by right of conquest long before Jodhpur established its suzerainty, and even prior to its foundation as a State, and that though they lost their political independence when Jodhpur established its overlord-

ship, they had not lost their right to property, that their status was that of semi-independent chiefs, not jagirdars, and that "Foujbal" was paid by them not on account of land revenue but by way of tribute.

We agree with the petitioners that a jagir can be created only by a grant, and that if it is established that Bhomichara tenure is not held under a grant, it cannot be classed as a jagir. We do not base this conclusion on the ground put forward by Mr. Achhru Ram that the word 'jagir' in article 31-A should be read ejusdem generis with 'other similar grants' because the true scope of the rule of ejusdem generis is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow. But we are of opinion that it is inherent in the very conception of jagir that it should have been granted by the ruling power, and that where there is no grant, there could be no jagir. This, however, does not mean that the grant must be express. It may be implied, and the question for decision is whether on the facts of this case a grant could be impiled. What then are the facts? We start with this that the ancestors of the petitioners acquired the lands in question by conquest and held them as sovereigns.

Then Jodhpur came on the scene, imposed its sovereignty over them,and exacted annual payments from them, what was their status thereafter? In Vajesingji Joravar Singji and others v. Secretary of State(1) Lord Dunedin observed: "When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it

may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the, result is the same. Any inhabitant of (1) [1924] L.R. 51 I.A. 357, 360.

the territory can make good in the municipal Courts established by the new sovereign only such rights, as that sovereign has, through his officers recognised. Such rights as he had under the rule of predecessors avail him nothing". Vide also the judgment of the Privy Council in Secretary of State v. Sardar Rustam Khan(1). Applying these principles when Jodhpur as a sovereign State imposed its sovereignty over the territory, and permitted the ex-rulers to continue in possession of their lands on payment of an annual sum, the position is that there was, in effect, a conquest of the territory and a re-grant of the same to the ex-rulers, whose title to the lands should thereafter be held to rest on the recognition of it by the ruler of Jodhpur. It may be noted that both in Vajesingji Joravar Singji and others v. Secretary of State(1) and Secretary of State v. Sardar Rustam Khan(1) the question was whether a subject of the former State could enforce against the new sovereign the right which he had against the former ruler, and it was held that he could not. But here, the claimants are the representatives of the former rulers themselves, and as against them, he above conclusion must follow a fortiori. As already stated, it is as if the Maharajah of Jodhpur annexed all the territories and re-granted them to the former rulers. They must accordingly be held to derive their title under an implied grant.

It is argued that notwithstanding that the Bhomicharas had acknowledged the sovereignty of the ruler of Jodhpur, his hold over the country was slight and ineffective, and even the payment of "Foujbal" was irregular, and that in substance therefore they enjoyed semi-sovereign status, and that their relationship to the Jodhpur ruler resembled that of the rulers of Native States to the British Crown. We are unable to accept this argument. The status of a person must be either that of a sovereign or a subject. There is no tertium quid. The law does not recognise an intermediate status of a person being partly a sovereign (1) [1941] L.R. 68 I.A. 109.

(2) [1924] L.R. 51 I.A. 357,360. and partly a subject, and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject: A subject might occupy an exalted position and enjoy special privileges, but he is nonetheless a subject; and even if the status of Bhomicharas might be considered superior to that of ordinary jagirdars, they were also subjects. The contention that the relationship between Bhomicharas and Jodhpur was of the same kind as that which subsisted between the rulers of Native States and the British Crown is untenable. Whether those States could be recognised as sovereign on the well accepted principles of international law was itself a question on which juristic opinion was adverse to such recognition. (See Mr. Lee Warner, Protected Princes of India, 1894 Edn., Chapter XIII, sec. 150, pages 373-376). But those States at least had each a distinct persona with a ruler who possessed executive, legislative and judicial power of a sovereign character; but the Bhomicharas had

ceased to have a distinct person. There was no State with a ruler acknowledged as its head, but a number of persons holding lands independently of each other. This is what Major Malcolm remarked of them in his report in 1849:

"It is uncertain how long the Rawats of Kher continued to exercise any control over the rest of the Chiefs, or to be considered as the head of a principality; but at the period when we first become acquainted with them, all traces of such power had long ceased and each Chief of the principal families into which the tribe is divided, claimed to be independent".

When the British handed over the administration of the territory to the State of -Jodhpur in 1891, it was in recognition of its rights as sovereign, and on the footing that Bhomicharas were its subjects. It is true that in the agreement by which the British handed over the administration they inserted a condition that the appointment of the chief officers for Mallani and imposition of any new tax or cess other than Foujbal by the State of Jodhpur should be made with the approval of the Resident or Agent to the Governor- General of Rajputana, but that was a matter between the high contracting parties, and did not affect the status of the Bhomicharas. On the other hand, it emphasises that they were themselves without any semblance of independence. That the status of the Bhomicharas was that of subjects will also be clear from the subsequent course of legislation in Marwar. In 1922 an Excise Act was passed for the whole of Marwar including this area. On 24-11-1922 "The Marwar Court of Wards Act, 1923" was passed, and that applied to the estates of Bhomicharas. In 1937 rules were framed forthe maintenance of the wives of jagirdars, and Bhomicharas also were subject to that Act. In 1938 the Marwar Customs Act was passed, and that applied to these territories. In 1947 rules for assessment of rents on jagir estates were passed and they applied to lands held on Bhomichara tenure. There was again a Customs Act in 1948, and it applied to the whole of Marwar including this area. In 1949 a Tenancy Act was passed, and that applied to the Bhomicharas. It is thus plain that the State of Marwar was exercising full legislative control over the Bhomichara area. This alone is sufficient to differentiate the position of the petitioners from that of the rulers of the Native States. The British Government never exercised legislative authority over those States.

In the argument before us, Sri Amar Singh conceded the authority of the State of Marwar to legislate for Mallani. But he contended that the definition of jagirdars as including Bhomicharas in the several Acts .referred to above was only for the purpose of those Acts, and bad no bearing on their true status, and referred to the provisions of the Marwar Encumbered Estates Act, 1922, where the word 'jagir' is defined as excluding Bhomicharas. But the question is not whether the petitioners are jagirdars by force of the definition in those Acts, but whether their status is that of subjects of Jodhpur, and the only inference that could be drawn from the course of legislation above noticed is that their status Was that of subjects, and if that is their position, and if they are allowed to continue in possession of lands held by their ancestors as sovereigns, it could only be on the

basis of an implied grant, and that is sufficient to attract the operation of article 31-A to their estates. It was also contended for the respondent that even if on the facts aforesaid a grant from the State could not be implied and the status of the petitioners was different from that of jagirdars, that status had at least been modified by section 169 of the Marwar Land Revenue Act No. XL of 1949, which had the effect of putting them in the same position as State grantees, and that therefore their tenure fell within the operation of article 31-A either as a jagir or other similar grant. Section 169 runs as follows:

"The ownership of all land vests in His Highness and all Jagirs, Bhoms, Sasans, Dolis or similar proprietary interests are held and shall be deemed to be held as grants from His Highness".

Under this section, all lands in the State vest in the Maharajah and all proprietary interests therein are deemed to be held under a grant from him. It cannot be disputed that it is within the competence of the Legislature in the exercise of its sovereign powers to alter and abridge rights of its subjects in such manner as it may decide, subject of course to any constitutional prohibition. In Thakur Jagannath Baksh Singh v. United Provinces(1) which was cited by Mr. Pathak as authority in support of the above propo- sition, it was held by the Privy Council that a law of the State curtailing the rights which a talukdar held under a sanad from the Crown was intra vires. This decision was followed by this Court in Raja Suriya Pal Singh v. The State of U. P. and Another(1). But these cases are not exactly in point, because the present contention of the respondent arises only on the hypothesis that the petitioners did not hold under a Crown grant express or implied. But the proposition for which Mr. Pathak contends is itself not open to exception, and it must be held that it was competent (1) [1945] F.C.R, 111.

(2) [1952] S.C.R. 1056, for the legislative authority of Marwar to define and limit the rights which the petitioners possessed in Bhomichara lands. It was also contended by Mr. Pathak that if the effect of the legislation was to impress on the tenure the character of a grant, that would be sufficient to attract article 31-A, the argument being that a grant like a contract could be not merely express or implied but also constructive. He quoted the following statement of the law in Halsbury's Laws of England, Volume VII, page 261, para 361:

"Contracts may be either express or implied, and of the latter there are two broad divisions, the term 'implied contract' in English law being applied not only to contracts which are inferred from the conduct or presumed intention of the parties, of which examples have already been given, but also to obligations imposed by implication of law, quite apart from and without regard to the probable intention of the parties, and sometimes even in opposition to their ex- pressed or presumed intention. Strictly

speaking, the latter class, or constructive contracts, as they are sometimes called, are not true contracts at all, since the element of consent is absent, but by a fiction of law, invented for the purposes of pleading, they are regarded as contracts, and will be treated here as such". It must be observed that the Indian law does not recognise constructive contracts,and what are classed under that category in the statement of the law in Halsbury's Laws of England would be known as quasicontracts under the Indian Contract Act. It will be more appropriate to term grants which are the creatures of statutes as legislative grants. We, however, agree with the respondent that for the purpose of article 3 1 -A, it would make no difference Whether the grant is made by the sovereign in the exercise of his prerogative right or by the Legislature in the exercise of its sovereign rights. They were both of them equally within the operation of that article. The question then is, assuming that the Bhomicharas did not prior to the enactment of Marwar Act No. XL of 1949 hold the lands as grantees from the State, whether they must be deemed to hold as State grantees by force of section 169 of that Act; and that will depend on whether they fall within the purview of that section. The language of the section, it will be admitted, is general and unqualified in its terms, and would in its natural sense include them. But it is argued for the petitioners that they are outside its scope, because 'jagir' in that article must be interpreted in a specific sense as otherwise there was no need to mention tenures like Bhom, Sasan and Dolis, which would be jagirs in a generic sense, and that -further Bhomicharas could not be brought within the category of similar proprietary interests, because in the context 'similar interests' must mean interests held under a grant. Having considered the matter carefully, we are not satisfied that there is any ground for cutting down the scope of the section in the manner contended for by the petitioners. We are of opinion that by long usage and recognition and by the legislative practice of the State Bhomicharas had come to be regarded as jagirdars, and that their tenure is a jagir within the intendment of section 169. In the Gazetteer of Mallani by Major Walter published prior to 1891 the Bhomi- charas are referred to as jagirdars. (Vide page 94). In the official publication called Brief Account of Mallani, the title given to the history of Bhomicharas is "Brief history of the jagirdars". In Sir Drake Brockman's Report of the Settlement Operations, 1921 to 1924, he refers to the Bhomichara jagir as "survival from a time antecedent to the establishment of the Raj". Turning next to legislation in Marwar, its general trend was to include Bhomicharas in the definition of jagirdars. Vide section 3(1) of the Marwar Court of Wards Act, 1923; rule 4 of rules regulating claims for maintenance by ladies against jagirdars, 1937. In the Customs Act, 1938, section 64 and Appendix E refer to the Bhomicharas as jagirdars of Mallani. In Marwar Tenancy Act No. XXXIX of 1949, section 3(9) defines landlord as including a "Bhomichara jagirdai,", and in view of the fact that both this Act and Act No. XL of 1949 werepart of a comprehensive scheme of legislation, that both of them came into force on 6-4-1949 and that section 4 (I 1) of Act No. XL of 1949 enacts that the words and expressions used therein are to have the same meaning as in Act No. XXXIX of 1949, it would be safe to assume that the word 'jagir' was used in section 169 as including Bhomichara tenures. It was argued that section 171 classifies jagirs as listed jagirs and scheduled jagirs, that there is an enumeration thereof in schedules I and 11 of the Act, and that no estate held on Bhomichara tenure was mentioned therein, and

that that was an indication that it was not intended to be included in section 169. But section 171 does not exhaust all the jagirs or similar proprietary interests falling within section 169. The scheme of the Act is that for purposes of succession and partition, jagirs are divided into three groups, scheduled jagirs, listed jagirs and other jagirs. Scheduled jagirs are those which are governed by the rule of primogeniture. Section 188 and the following sections lay down the procedure for settling succession to them. Listed jagirs are those which are held by co-heirs but are impartible, and section 131 provides that they should not be partitioned but that the income therefrom should be divided among the co-sharers. Then there is the third category of jagirs which devolve on heirs under the ordinary Hindu law, and are partible. Section 172 applies to these jagirs. As the Bhomichara tenure descends like personal property and is divisible among the heirs, it will be governed by section 172, and cannot find a place in the schedule of listed or scheduled jagirs.

It was contended that the Act was one to declare and consolidate the law, and that such an Act should not be construed as altering the existing law; further that clear and unambiguous language was necessary before a subject could be deprived of his vested rights, and that in caseof doubt the statute should be construed so as not to interfere with the existing rights; and the statements of law from Maxwell on Interpretation of Statutes, 10th Edition, pages 20 and 24 and Craies on Statute Law, 5th Edition, pages 106, 107 and Ill were quoted in support of the above propositions. These rules of construction are well settled, but recourse to them would be necessary only when a statute is capable of two interpretations. But where, as here, the language is clear and the meaning plain, effect must be given to it. It must also be added that the Act is one not merely to consolidate the law on the subject but also to amend it. On the language of the section, therefore, we must hold that Bhomichara tenure is comprehended within the term 'jagir' in section 169.

We are also of opinion that it will, in any event, be "similar proprietary interests" within the language ofthe section. It is argued that the only feature common to jagirs, Bhoms, Sasan and Dolis is that they are held under grant, and that therefore "similar proprietary interests" must mean interests acquired under a grant. It is true that Bhom, Sasan and Doli are held under grant from the State. (Vide Rajasthan Gazetteer, Volume III-A, Chapter XIII); but section 169 enacts that the proprietary interests to which it applies, shall be held or deemed to be held as grant from His Highness. The word "deemed" imports that in fact there was no grant, and therefore interests which were held otherwise than under a grant were obviously intended to be included. Therefore, if Bhomichara is a proprietary interest, it cannot be taken out of the section because its origin was not in grant. In the result, it must be held to fall within section 169, and therefore within the operation of article 31-A.

The respondent further contended that Bhomichara tenure was also an estate as defined in section 4(iii) of Act No. XL of 1949 and thattherefore it fell within the purview of article 31-A. Under section 4(iii), "estate" means a mahal or mahals held by the same

landlord. Section 4(v) defines mahal as any area not being a survey number which has been separately assessed to land revenue; and 'land revenue' is defined in section 4(iv) as "any sum payable to the Government on account of an estate or survey number and includes rekh, chakri and bhombab". It is common ground that the -annual payment which is made by the Bhomicharas to the estate is the sum of Rs. 10,000 called "Foujpal". The petitioners contend that this amount is really in the nature of tribute and not land tax. If it is a military cess, it is difficult to say that it is revenue paid on account of land. It is argued for the respondent that Bhomicharas are allowed to continue in possession of the land only on condition that they pay this amount annually and that it is therefore payment made in respect of lands held by them. If this contention is right, every tribute must per se be held to be land revenue, and that appears to us to be too wide a proposition. Mr. Pathak relied on the description of this amount in the Administration Report of 1883-1884 in Hindi as "Kar" "Tax' but that is not decisive of the true character of the payment.

The petitioners also contend that even if Foujbal is revenue, there has been no separate assessment of the mahals to it, as what is paid is a consolidated sum of Rs. 10,000 for an area of the extent of 36,000 sq. miles comprised in 550 villages and held by different holders. It appears from the Gazetteer of Mallani by Major Walter at page 94 that the Foujbal amount has been apportioned among the several holders, and it is contended for the respondent that as this apportionment has been communicated to the Jodhpur Durbar and accepted by it and acted upon, there has been separate assessment of revenue. In the view taken by us that Bhomichara is a jagir or other similar grant within the meaning of article 31-A, we do not think it necessary to express any opinion on the above contentions, especially as the materials placed before us are meagre. In the result, it must be held that the legislation in so far as it relates to Bhomichara tenure is protected by article 31-A. (1)(b) Bhomats: This tenure is to be found in Mewar, and of this, the Report of the Venkatachar Committee has the following:

"In Mewar those holding on the Bhom tenure may be classed under two groups, namely, the Bhomats who pay a small tribute to the State and are liable to be called for local service and Bhumias who pay a normal quit-rent (Bhum- Barar) and perform such services as watch and ward of their villages, guarding the roads, etc." (vide page 19, para 10). Earlier, the Report had stated that Bbom tenure was to be found in Jodhpur, Mewar and Bundi, and that its holders were always Rajputs. The origin of Bhom tenure is thus stated by Tod in his Annals and Antiquities of Rajasthan: "It is stated in the historical annals of this country that the ancient clans had ceased on the rising greatness of the subsequent new divisions of clans, to hold the higher grades of rank; and had, in fact, merged into the general military landed proprietors of this country under the term bhumia, a most expressive and comprehensive name, importing absolute identity with the soil: bhum meaning 'land These Bhumias, the scions of the earliest princes, are to be met with in various parts of Mewar These, the allodial tenantry of our feudal system, form a considerable body in many districts, armed with matchlock, sword, and shield All this feudal militia pay a quit-rent to the crown, and perform local but limited service on the frontier garrison; and upon invasion, when

the Kher is called out, the whole are at the disposal of the prince on furnishing rations only. They assert that they ought not to pay this quit-rent and perform service also; but this may be doubted, since the sum is so small". (Vol. I, pp. 195-197).

It would appear from this account that the position of the Bhumias in Mewar is in many respects similar to that of Bhomicharas in Marwar. They represent presumably a section which had occupied the territory by conquest at an earlier stage and when later the rulers of Chittoor and Udaipur established their sovereignty over Mewar, they were allowed to continue in possession of their lands as subjects of the new State. Their position is not even as strong as that of the Bhomicharas of Marwar, because it was a condition of the tenure under which they held that they had to render military service when called upon and also to pay quit rent. Their title to the lands is thus referable to an implied grant from the State, and their tenure would be jagir even in its stricter connotation. It was further contended by Mr. Pathak that whatever status the Bhomats might have had prior to the Mewar Government Kanoon Mal Act No. V of 1947, the effect of that enactment was to modify it and to reduce them to the position of grantees from the State in respect of those tenures, and that article 31-A would accordingly apply. The relevant provisions of this Act are sections 27, 106 and 116. Section 27 enacts that all lands belong to His Highness, and that no person has authority to take possession of any land unless the right is granted by His Highness. Section 106 (1) occurs in Chapter XI which is headed: "The rights of jagirdars, Muafidar, and Bhumias in Tikana jagir, muafi and Bhom lands", and enacts that a "Tikanadar jagirdar, muafidar or Bhumia shall have all such revenue rights in the lands comprised in his jagir, muafi or Bhom under this Act, as are grantedto him by His Highness". Then follow provisions relating to succession and transfer of their tenures by jagirdars, muafidars or Bhumias. Section 116 provides that the jagir or bhom is liable to be forfeited in the events specified therein. The argument of the respondent is that under these provisions the ownership of the lands vests in the Maharajah and the tenures mentioned therein including the Bhom are held as grants under him. It was argued by Mr. Frank Anthony that under section 4(2) of the Act the lands are divided into two categories, one category comprising jagirs, muafi and Bhom and the other Khalsa lands, that section 27 applies only to Khalsa lands, and that section 106(1) applies to grants which may thereafter be made by the State, and that the rights of the persons who held jagirs, muafi or Bhom before this Act were unaffected by it. We are unable to accede to this contention. No statute was needed to declare the rights of the sovereign over Khalsa lands, Nor was resort to legis-

lation necessary to define the rights of the future grantees of those lands, because that could be done by inserting appropriate terms in the grants. The language of the enactment read as a whole leaves no doubt in our mind as to what the legislature intended to do. It declared the State ownership of lands, both Khalsa and non-Khalsa lands and defined the rights of the holders of the non-Khalsa lands; and the result of that law was clearly to impress

on the Bhom tenure the characteristics of grant. It must accordingly fall within the operation of article 31 -A either as jagir or as other similar grant.

It was next contended by the petitioners that the Kanoon Mal Act No. V of 1947 was void, because on 23-5-1947 a Constitution had been established in Mewar which provided that "no person shall be deprived of his life, liberty, or property without due process of law, nor shall any person be denied equality before the law within the territories of Mewar". (Article XIII, Clause 1), and that Act No. V of 1947 which came into force on 15-11-1947 was void as being repugnant thereto. Article 11(1) of the Constitution itself provides that the Maharajah shall exercise "all rights, authority and jurisdiction which appertain to or are incidental to such sovereignty except in so far as may be otherwise provided for by or under this Constitution or as may be otherwise be directed by Shriji", and when Shriji (the Maharajah) enacted Act No. V of 1947, it must be taken that he had in the exercise of sovereign authority abrogated the Constitutional provisions enacted earlier. The authority which enacted the Constitution on 23-5-1947 being His Highness himself, any Act passed subsequently by the same authority must be taken to have repealed or modified the earlier enactment to the extent that it is inconsistent with the later. It does not also appear that the Constitution was ever put into force. It is not known whether any Legislature was constituted under the Constitution, or any other step taken pursuant thereto; and though acquiescence is not a ground for giving effect to a law which is ultra vires, it is not without significance that the validity of Act No. V of 1947 was not challenged on the ground that it was repugnant to the Constitution dated 23-5-1947 until the present petitions were filed. There is no substance in this belated contention, and it must be rejected. Mr. Frank Anthony appearing for some of the Mewar petitioners contended that their status was that of Chiefs with semi-sovereign powers, and that it could not be said that they held the lands under grants from the State. He referred to certain kowls and agreements brought about by the British Government between their ancestors described therein as Chiefs and the Maharajah of Udaipur, providing for their jointly drawing up a code of law subject to ap- proval by the Political Agent and for the settlement in future of all civil and criminal cases in accordance therewith, (vide Aitchison's Treaties, Vol. III, pp. 33 and

35) and for compensation being awarded to them for taking over their right to manufacture salt (vide Aitchison's Treaties, Vol. III, pp. 38 to 42). He argued that the payments made by them to the State were not revenue but their contribution for purposes of common defence, and that that had not the effect of reducing their status as feudatory chiefs to that of subordinate tenure holders. Certain observations in Biswambhar Singh v. The State of Orissa and others(1) were relied on as supporting this contention.

We have had considerable difficulty in following this argument, as it was general in character and unrelated to specific tenures or the claims of individual petitioners. The kowls which were relied on as showing that their status was not that of subordinates are not conclusive of the matter, because the value to be attached to them would depend on the previous status of the Chiefs with whom they were entered into, and no materials have been placed before us as to what that was. Two hypotheses are possible: they were the successors, either of the conquerors who had occu- pied the territory earlier than thefoundation of the Udaipur Raj in which case they would be Bhoms and their rights would be identical with those of (1) [1954] S C.R. 842,870.Bhomats, or of the Rajput clansmen who followed the ruling dynasty of Mewar and obtained estates as rewards for their service in the establishment of the kingdom, in which case the grants would clearly be jagirs. The facts forming the background of the agreements as narrated in Aitchison's Treaties, Vol. III, pp. 10 to 13 are that for sometime prior to the treaty which was entered into by the Maharajah of Udaipur with the British in 1818, the authority of the Government of Mewar was rather low. Taking advantage of it, tile neighbouring States had occupied most of its territories, and the Chiefs had also become lax in the performance of their obligations to the Durbar. This led to considerable friction between the Maharajah and the Chiefs and after the conclusion of the treaty in 1818, the Political Agent Mr. Tod, with a view to restore good relationship between the Maharajah and his Chiefs, prevailed upon them to settle their differences, and the kowls relied on by Mr. Anthony are the outcome of his efforts. These kowls read in the background of the facts stated above unmistakably establish that the position of the Chiefs had previously been that of grantees from the State, subject to certain obligations. If so, the agreements did not bring about a change in that status. They merely provided for the carrying out of the obligations arising out of that status. On this basis, the properties held by them would be jagirs even according to the original and narrow sense of that word; and in fact, they are so described in the very kowls relied on by Mr. Frank Anthony. (Vide Aitchison's Treaties, Volume III, page 35, article 29). They are clearly within article 31-A. The respondent also contended that the pro- perties held by the Chiefs would be estates as definedin article 31-A. That would prima facie appear to be so; but it is unnecessary to express any opinion on the question, as the resumption would be protected by article 31-A on the ground that it related to jagirs or other similar grants. (1)(c) Tikanadars of Shekhwati: The northern section of Jaipur forming the trans-Aravali region of the State is known as Shekhwati. It consists of large estates known as Panchpana Singhana, Sikar, Udaipurwati, Khandela and others. These estates are known as Tikanas and their holders as Tikanadars. The petitioner in Petition No. 424 of 1954 is one of them, his estate being the Tikana of Malsisar and Mandrela in Panchpana Singhana. His contention is that he is a ruler with semi-sovereign status subject only to the obligation to render military service and to pay tribute called Maumla to the State of Jaipur, that be is accordingly a Maumlaguzar and not jagirdar, and that he is not a grantee from the State.

The history of these estates is narrated in great detail by Mr. Wills in his report on "The Land Tenures and Special Powers of Certain Tikanadars of Jaipur State, 1933". To state it briefly, these estates originally formed part of the Khalsa lands of the Moghuls. During the period of their decline, King Sawai Jai Singh who ruled over Jaipur from 1700-1743 with great distinction acquired them from the Moghul Emperors on izara, and in his turn granted them on sub-leases or izaras to various persons mostly his clansmen, on condition that in addition to the payment of izara amount fixed they should render military service to the rulers. Subject to these obligations they were entitled to collect revenues from the villages comprised in the izara and maintain themselves. In course of time, when the hold of the Moghul Empire on the outlying territories became weak, the Jaipur rulers assumed practically sovereign powers over the izara lands, which came to be regarded as part of the royal domain. There was a corresponding rise in the status of the sub-lessees who continued in possession of the estate as permanent grantees. Towards the end of the 18th Century when the power of Jaipur waned and its authority weakened, the holders of these estates in Shekhwati attempted in their turn to shake off their allegiance to Jaipur, asserted an independent status in themselves, and began to seize the territories belonging to the State.Before their plan succeeded, Jaipur concluded a treaty with the British which recognised its position as sovereign of the whole State including Shekhwati. "The first duty urged on the Maharaja after the conclusion of the treaty was the resumption of the lands usurped by the nobles, and the reduction of the nobles to their proper relation of subordination to the Maharaja. Through the mediation of Sir David Ochterlony Agreements were entered into in 1819 similar to those made at Udaipur. The usurped lands were restored to the Maharajah and the nobles were guaranteed in their legitimate rights and possession". (Aitchison's Treaties, Vol. III, p. 55). Even after the conclusion of the agreement of 1819 there were disputes between the Maharajah and the Chiefs in respect of various matters, such as the right of the ruler to revise the amount payable by the Tikanadars and the right of the latter to minerals and to customs; but this didnot affect the nature of the relationship established between them under the agreement of 1819. Thus, the true position of the Tikanadars is that they got into possession of the properties as izaradars under the rulers of Jaipur, improved that position latterly and became permanent holders of the estates and were eventually recognised as chiefs subordinate to the Maharajah. They were not like the Bhomicharas of Marwar or the Bhumias of Mewar the previous conquerors and occupants of the territory before they were subjugated by Jaipur, as erroneously supposed by Col. Tod; nor were they the clansmen of the ruling dynasty who assisted in the establishment of the Raj. They derived their title to the properties only under grants made by the rulers of Jaipur, and even if their estates could not be considered, as they shaped themselves, as jagirs, they were at least " other similar grants" within article 31 _A. That was the view which the State took of their position. Section 4(15) of the Jaipur State-Grants Land Tenures Act No. I of 1947 defines "State grant" as including a jagir, muamla, etc. Muamla is, as already stated, the amount payable by the Tikanadars of Shekhwati to the ruler of Jaipur. Section 4 (7) defines an estate as meaning "land comprised in a State grant".

According to this definition, the properties in question would be 'estate' as definedin article 31-A of the Constitution. The Matmi Rules of 1945 provide for recognising succession to State grants, and they include Muamlaguzars. (Vide Part III in Appendix A). Describing the tenures in the non-Khalsa area, the Administration Report of Jaipur 1947-1948 states that "Muamla is the grant of an interest in land for which a fixed amount is payable under a settlement arrived at with the State". (Vide page 35). The position taken up by the petitioner both in the petition and in the opening argument that his status is that of an independent Chieftain holding the properties by right of conquest and not under grant cannot therefore be maintained. In his reply, however Mr. Achhru Ram shifted the ground, and contended that the ancestors of the petitioner having come in as izaradars, the impugned Act had no application to him, as izara is not one of the tenures mentioned in the first schedule to the Act. But Muamla is mentioned as item 6 in the schedule, and that is the name under which the tenure of the petitioner is known. It must accordingly be held that his lands are within the purview of article 31-A. (1) (d) Subeguzars: The question as to the status of subeguzar is raised in Petitions Nos. 471, 472 and 473 of 1954. The petitioner in Petition No. 473 of 1954 is the holder of the estate of Isarda in Jaipur. It is stated that in the beginning ofthe 18th Century his ancestor Mohansinghji migrated from Bagri, settled in the hilly regions at Sarsop, built a fortress at Isarda and established an independent principality. In 17-51 the ruler of Isarda acknowledged the suzerainty of the Maharaja of Jaipur who, in turn, "recognised the ancestor of the petitioner as Subeguzar", subject to a liability to pay tribute every year to Jaipur. (Vide para 2 of the petition). The result of this arrangement was, as in the case of Bhomicharas, to put the Chieftain in the position of a grantee from the State, and that is also the position under the Jaipur State-Grants Land Tenures Act No. I of 1947 Section 4(15) includes within the definition of 'grant " suba" tenure, and the Matmi Rules of 1945 also apply to this tenure. (Vide Appendix A, Part III). While the tenure is called 'Sube', its holder is called not Subedar which has a different meaning but Subeguzar. In the Administration Report of Jaipur 1947-48, Sube is described as follows: "Suba is a tenure peculiar to Nizamat Sawai Madhopur. It is analogous to the istimrar tenure in other parts of the State. The subeguzars pay a fixed annual amount for the grant held by them". (Vide p. 35).

The position therefore is that the petitioner who is admittedly a subeguzar holds under a grant from the State and falls within article 31-A. It was argued that the family of the petitioners had alwaysenjoyed a special distinction inthat the adoption of the ruling house of Jaipur was always made from among the members in this family. That, however, would not affect thestatus of subeguzars who must be held to be grantees from the State. A special contention was raised with reference to 12 villages which are stated to have been purchased in 1730 by Raja Jaisingh the then holder of Isarda for a sum of Rs. 20,000; and it was argued that these villages at least could not be treated as held under grant from the State. Isarda was a new State founded by Mohansinghji, and its area was extended from time to time by incorporation of fresh villages, and when in 1751 the Chief acknowledged the suzerainty of Jaipur and held the estate as subeguzar under him,

that title must have related to the entire estate including these villages, and there is therefore no ground for treating them differently from the rest. It must be mentioned that this contention was raised only in the reply statement. It must be overruled.

Petitions Nos. 471 and 472 of 1954: The petitioner in Petition No. 471 of '1954 is the Tikanadar of Jhalai. In para 2 he admits that he is styled as a subaguzar, and for the reasons given in Petition No. 473 of 1954 his estate must be held to fall within article 31-A. But it is argued that the Tikana- consists of 18 villages, and that only two of them are held as 'Sube'.

But what is the case put forward in the petitions as regards the other villages? The schedule to the petition mentions that four of them are held as maintenance grants, and two as muafi. They are clearly within article 31-A. As regards the others, there is no specific case put forward as to the nature of their tenure. But it is admitted that the Tikana is a permanently settled estate paying a fixed annual reve- nue of Rs. 1,681, and it is therefore an estate both under section 4(7) of the Jaipur State-Grants Land Tenures Act No. I of 1947 and article 31-A. This decision will also govern Petition No. 472 of 1954 in which the petitioner owns the village of Bagina as "subeguzar" and the village of Siras as jagirdar.

(2)We now come to the second category of cases wherein the contention is that the particular properties held by the petitioners do not fall within the purview of article 31-A.

(a)Petitions Nos. 391 and 417 of 1954: Petition No. 391 of 1954 relates to the estate of Yeshwantgarh in the State of Alwar. It was settled on 11-8-1941 by its then ruler on his son for maintenance. The grant is described in the deed as jagir, and the Gazette Notification dated 25-8-1941 publishing it states:

We are also faced with the problem of arranging for our second Maharaj Kumar, a Jagir, which, in the matter of size and powers, should be on a much higher footing than the existing Jagirs. Accordingly with the object of creating a new Jagir for him, we have today gifted to him in perpetuity and from generation to generation, all the villages included in the Thikana of Thana together with all other properties enjoyed by the deceased Raja Sahib during his lifetime. This new Jagir shall remain free from liability for rates and cesses for all time, and shall also never be required to maintain any horses".

In 1944 some more villages were added to this grant, and the resumption relates to all these properties. The contention of Mr. Achhru Ram for the petitioner is that the grant is not an estate under the law relating to land tenures in Alwar, and that it is outside article 31-A. Under section 2(a) of the Alwar State Revenue Code, `estate' means "an area for which there

is a separate record of rights or which is treated as such under orders of His Highness' Government". It is stated by the petitioners that there has been no separate record of rights in the State of Alwar, and that therefore there could not be an estate as defined in the Code. The respondent, however, does not admit this, and contends that, in any event, the grants are jagirs and are therefore within article 31-A. The question is whether the grant is a jagir. The deed dated 11-8-1941 describes it as a jagir, and so does the Gazette Notification publishing it; and that is also how the estate is described by the petitioner himself Section 3(3) of the Alwar State Jagir Rules, 1939 defines jagir as meaning "grant of land or money granted is such by His Highness or recognised as such by His Highness". Section 2(k) of the Alwar Revenue Code defines "assignee of land revenue" as meaning "a Muafidar or a Jagirdar". Thus, all the requirements of a Jagir are satisfied, and the grant would fall within the scope of article 31-A. It was next argued that even if the grant was a jagir within article 31-A, the rights of the petitioner in it could not be resumed under section 22(1)(a) of the Act, inasmuch as what could be resumed under that section was not the jagir lands, but the right, title and interest of the jagirdars therein, and that the petitioner was not a jagirdar as defined in section 2(g) of the Act, as be had not been recognised as a jagirdar as required therein. This contention was also raised by the petitioners, whose properties would not be jagirs in the specific sense of the word, but would fall within the extended definition of that word under section 2(h) as including the several tenures mentioned in the first schedule to the Act. The contention is that while their estates would be jagirs within the inclusive portion of the definition, they themselves would not be jagirdars as defined in the Act, because they were recognised not as jagirdars but as holders of the specific tenures enumerated in that schedule, and that therefore their interests could not be resumed under section 22(1) (a) even though their estates might be notified as jagirs. In other words, for the section to apply, there must not merely be an estate which is a jagir but also a holder who is a jagirdar. It is conceded that this contention, if accepted, would render Chapter V providing for resumption inoperative except as regards jagirs in the specific sense and mentioned as item I in the first schedule to the Act. But it is argued that it is a case of casus omissus, and that it is not within the province of this Court to supply it. But the definition of jagir in section 2(h) is, as provided therein, subject to any contrary intention which the context might disclose; and when section 22 (1) (a) enacts that on the resumption of jagir lands the rights of the jagirdar in the lands should cease, it clearly means that the holders of jagirs are jagirdars for the purpose of the section. There cannot be jagirs without there being jagirdars, and there- fore the word 'jagirdar' in section 22 (1) (a) must mean all holders of jagirs including the tenures mentioned in the schedule to the Act. Section 20 exempts from the operation of the Chapter properties whose incomes are utilised for religious purposes. Those properties would be held on tenures such as Sasan, Doli and so forth which are enumerated in the schedule. There was no need for exempting them under section 20 if the Legislature did not understand them as falling within the operation of section 22(1)(a), and they would fall under that section only if the word 'jagirdar' is interpreted as meaning all persons who hold properties which are jagirs as defined in the Act. In the result, the resumption must be held to be valid. Petition No. 417 of 1954 relates to properties in Alwar, and the contention raised therein is the same as in Petition No. 391 of 1954, that they are not an estate within

article 31- A. But the petitioner describes himself in the petition as the "proprietor jagirdar of the jagir known as Garhi", and states in para (9) that his jagir is unsettled and pays neither revenue nor tribute, and the prayer in para 21(3) is that the State should be restrained by an injunction from interfering with the rights of the petitioner. as jagirdar.

In view of these allegations, it is idle for him now to contend that the properties do not fall within article 31-A.

(b) Petitions Nos. 401, 414, 518, 535 and 539 of 1954: The properties comprised in these petitions are situated wholly or in part in the former State of Bikaner, and the contention raised with reference to them is that they are not estates according to the law of Bikaner, and are therefore outside article 31-A. Section 3(1) of the Bikaner State Land Revenue Act No. IV of 1945 defines 'estate' as meaning an area (a) for which a separate record of rights has been made, or (b) which has been separately assessed to land revenue or would have been assessed if the land revenue bad not been released, compounded for or redeemed. Section 28 of the Act provides for record of rights, and section 45 enacts that "all land, to whatever purposes applied and wherever situated, is liable to the payment of land revenue to His Highness' Government". Then there are provisions for assessment of land revenue. It is argued for the petitioners that the record of rights as contemplated by section 28 has not been made, and that the lands have not been assessed to revenue, nor has it been released, com- pounded for or redeemed, and that therefore the properties are not estates within section 3(1) of the Bikaner Act No. IV of 1945. The contention of the respondent is that they are, at any rate, jagirs, and so fall within article 31-A. The preamble to the Act proceeds on the basis that whatever is not Khalsa is jagir land. In three of the Petitions Nos. 414, 518 and 535 of 1954 the properties are described in the schedule as jagirs and the petitioners as jagirdars. In Petitions Nos.401 and 539 of 1954 there are no such admissions, there being no schedules to the petitions.But in the petitions for stay of notification -filed in all the above petitions, it is alleged that "notification under the impugned Act with respect to the jagir of the petitioners has not yet been made". (Vide para 16). ID view of these admissions, we are unable to accept the contention of Mr. Frank Anthony based on the narration in Tod's Annals of Rajasthan, Volume II, pp. 25, 26, 140 and 141 that the properties of the petitioners are not jagirs.

(c)Petition No. 634 of 1954: In this petition there are 192 petitioners, some of whom are from Kishangarh. The special contention urged as regards the petitioners from Kishangarh is that their properties are not estates according to the law of Kishangarh, and that they are therefore outside article 31-A. Rule 4(1) of the Jagir Rules for the Kishangarh State, 1945, defines a 'jagirdar' as a person who has been granted a village or land as jagir by the Durbar in consideration of his past and future services, and Rule 5 classifies jagirdars into five categories. The argument of the petitioners is that they have not been

shown to fall within any of these categories. Not merely is this contention not distinctly raised in the petitions, but it is admitted in para 1 that "the petitioners' properties are known as Jagirs, Bhoms, Muafi, etc." which will clearly bring them within the operation of article 31-A. In the schedule to the petition also, the petitioners are described as jagirdars, and the particular villages held by them are noted as jagir villages. The contention that they do not fall within article 31-A must be rejected. It is stated that the 128th petitioner, Pratap Singh, does not make any payment in respect of his estate, and that it is not a jagir. If that is so, then on the admission extracted above, it must be muafi, and will be within article 31-A.

(d)Petition No. 536 of 1954: The petitioner is the holder of an estate in Mewar known as Bhaisrodgarh Tikana, and he alleges that there was a dispute between Rawat Himmat Singhji the then holder of the estate, and the Maharajah of Udaipur, and that it was settled in March 1855 through the mediation of the then Agent to the Government, Sir M. Montgomery, and that under the terms of the settlement, the Tikana was recognised as the exclusive property of the holder. The agreement itself has not been produced, and it could not, even on the allegations in the petition, have had the effect of destroying the character of the estate as a jagir grant. Moreover, this estate is mentioned as item 8 in the list of jagirs mentioned in the schedule under section 117 in Mewar Act No. V of 1947, and that by itself is sufficient to bring it within article 31-A.

(e)Petition No.672 of 1954: The petitioner is a Bhumia holding an estate called "Jawas". Its history is given in "Chiefs and Leading Families of Rajputana", page 36, and the argument of Mr, Trivedi based on it is that the Chiefs of Jawas occupied a special position as feudatories, and that they could not be considered as grantees. But their position is not different from that of the other Bhomats, and indeed it is admitted in para 14 that the lands are comprised in the Bhomat area. This estate is expressly included in the schedule under section 117 in Mewar Government Kanoon Mal Act No. V of 1947 being item No.25 and is within article 31-A.

(f)Petitions Nos. 483, 527, 528 and 675 of 1954 and 1 and 61 of 1955: The question that is raised in these petitions is whether grants made for maintenance are 'jagirs or other similar grants' falling within the purview of article 31-A. In Petition No. 483 of 1954 the grant was made by the ruler of Uniaara, and in Petition No. 528 of 1954 by the then ruler of Katauli before it was merged in the State of Kotah. We have held that maintenance grants would be jagirs according to their extended connotation, and they are therefore within article 31-A.

In Petition No. 527 of 1954 the grant was made in favour of certain members of the Ruling House of Jaipur. According to the respondent, they were illegitimate issue called Laljis, and the grants were made for Lawazma and Kothrikharch, which expressions mean maintenance of paraphernalia and household expenses. (Vide the Administration Report of Jaipur 1947-1948, page 36). The grant in favour of the 33rd petitioner in Petition No. I of 1955 and the 17th petitioner in Petition No. 61 of 1955 are similar in character. Apart from the general contention that maintenance grants are not within article 31-A, the

further argument of Mr. Dadachanji on behalf of these 46 petitioners is that Lawazma and Kothrikharch are tenures not mentioned in the first schedule to the Act, and that the resumption of these lands was therefore without the authority of law. But these expressions meaning maintenance expenses are indicative of the purpose of the grant and are not descriptive of the tenure. A grant can both be a jagir and a maintenance grant, and the fact that it was granted for Lawazma and Kothrikharch does not militate against its being a jagir. It was suggested that the question whether Lawazma and Kothrikharch are tenures different from those mentioned in the schedule to the Act might be left open and that the right of the petitioners to establish their contention in other proceedings may be reserved. That would undoubtedly be the proper course to adopt when the point for determination is not whether the Act itself is uncon- stitutional and void, but whether the action taken under it was authorised by its provisions. But then, there are no allegations in the petition that the properties were held under a tenure, which is outside the schedule to the Act. On the other hand, some at least of the petitions proceed on the footing that the estates are jagirs.

In Petition No. 675 of 1954 the petitioner is the Raj Mata of the ruler of Tonk. She was receiving a monthly allowance of Rs.762/- for her maintenance and in lieu of it, the village of Bagri with its hamlets, Anwarpura and Ismailpura, was granted to her by resolution dated 6-3-1948. Being a maintenance grant it will be a jagir, and that is the footing on which the petition is drafted. Mr. S. K. Kapur who appeared for the petitioner put forward a special con- tention that the Government was estopped from resuming the lands. The facts on which this plea is founded are that on 28-11-1953 the Secretary to the Government wrote to the Collector of Tonk that the petitioner was not to be disturbed in her enjoyment of the jagir for her lifetime. In a later communication dated 24-11-1954, however, addressed to the petitioner, the Government expressed its inability to stay resumption, and the argument is that the respondent is estopped from going back on the assurance and undertaking given in the letter dated 28-11-1953. We are unable on these facts to see any basis for a plea of estoppel. The letter dated 28-11-1953 was not addressed to the petitioner; nor does it amount to an assurance or 8undertaking not to resume the jagir.

And even if such assurance had been given, it would certainly not have been binding on the Government, because its powers of resumption are regulated by the statute, and must be exercised in accordance with its provisions. The Act confers no authority on the Government to grant exemption from resumption, and an undertaking not to resume will be invalid, and there can be no estoppel against a statute. One other contention advanced with reference to this petition might be noticed. It was argued that under rule 2(f) in schedule II, no compensation is awarded in respect of the abadi lands, which remain in the possession of the jagirdar, whereas, if they are sold, the income from the sale proceeds is taken into account. This, it was argued, is discriminatory. The principle underlying this provision is that compensation is to be fixed on the basis of the income which the properties produce, and that while abadi lands in the hands of the jagirdar yield no income, if they are sold the sale proceeds are income-producing assets. Whether this principle of assessing compensation is open to attack is another question, and that will be considered in its due place.

(g)Petitions Nos. 371, 375, 379, 416) 455 and 461 of 1954: These petitions raise in general terms the contention that the properties to which they relate are not estates as defined in article 31-A.

Petition No. 371 of 1954 relates to the estate of Doongri in Jaipur, and it is contended that it is not an estate because the liability of the holder is only to pay Naqdirazan, and it is argued that this is not revenue. Naqdirazan is money commutation for the obligation of maintaining a specified number of horses. This is clearly a grant for military service, and will be a jagir, and that is admitted in para I where the petitioner is described as the jagirdar of Doongri and in para 9 where it is stated that the jagir is unsettled. The prayer is that an injunction might be issued restraining the State from interfering with the rights of the petitioner as jagirdar. It is also alleged in para 19 of the stay petition that "the whole family is to be supported from this jagir". Article 31-A clearly applies.

Petition No. 375 of 1954 relates to the estate of Renwal, and the special contention raised is that the petitioner pays no revenue but only Naqdirazan. But he describes himselfin para 1 as jagirdar of Renwal, admits in para 9 that it is a jagir, and claims relief in para 21(3) on that footing. The properties are clearly jagirs within article 31-A.

The petitioner in Petition No. 379 of 1954 is also stated to be holding the estate on payment of Naqdirazan. He describes himself as owner of the properties in Khera as jagirdar, admits in paras 9, 14, 16 and 19 that the estate is a jagir, and prays for an injunction restraining the State from interfering with his rights as jagirdar. His estate is clearly within article 31-A.

Petition No. 416 of 1954 relates to an estate called Sanderao. The payment made by the holder is called Rekchakri, and the contention is that this is not revenue. But itis admitted in paras 1, 2, 9 and 21(3) of the petition that the properties are jagir lands. Petition No. 455 of 1954 relates to properties in Mewar. There are 13 petitioners, and it is argued that the payments made by them called chakri chatund and Bhom-barad are not revenue, and their properties are not estates. But they admit that they are "owners as petty jagirdars" of the properties mentioned in the schedule, and this statement is followed by others which also contain clear admissions that the estates are jagirs. (Vide paras 12, 17(e), 19 and 21(3) of the petition and paras 16 and 19 of the stay petition). In Petition No. 461 of 1954 the petitioner admits that he holds ten villages as jagirs, seventeen as istimrar and two as muafi. Istimrar is one of the tenures mentioned in the first schedule to the Act, and is item No. 2 therein, and that would be "other similar grant" within article 31-A, while jagir and muafi are expressly included therein. In conclusion, we must hold that the petitioners have failed to establish that the impugned Act, in so far as it relates to properties held by them, is not within the protection of,' article 31-A.

IV. (B) We may now consider the contention of the petitioners that the Act is bad on the ground that the compensation provided therein is inadequate. The provisions of the Act bearing on this matter may now be reviewed. The . second schedule to the Act lays down the principles on which compensation has to be assessed. Rule 2 enacts how the gross income is to be ascertained, and enumerates the several heads of income which are to be included therein, and rule 4 mentions the deductions which are admissible. Rule 4(3) provides that 25 per cent. of the gross income may be deducted for "administrative charges inclusive of the cost of collection, maintenance of land records, management of jagir lands and irrecoverable arrears of rent"; and there is a proviso to that rule that "in no case shall the net income be computed at a figure less than 50 per cent. of the gross income". Under rule 5 compensation payable is seven times the net income calculated under rule 4. Rule 6 provides that any compensation paid to the jagirdar for customs duties during the basic year shall continue to be payable. Under section 26(2) the compensation amount carries interest at 21 per cent. from the date of resumption, and under section 35 it is payable in instalments. Under section 35(A) the payment may be made in cash or in bond or partly in cash and partly in bond. In addition to this, there is provision for the payment of rehabilitation grant on the scale mentioned in schedule III. The complaint of the petitioner is that the compensation provided by the rules is inadequate, being far less than the market value of the estate, that rule 2 takes into account only the income which was being actually received from the properties and omits altogether potential income which might arise in future, as for example, from vacant house sites and unopened mines; and reliance was placed on the decision of this Court in State of West Bengal v. Bela Banerjea(1) where it was held that the compensation guaranteed under article 31(2) was just compensation, equivalent of what the owner had been deprived of. But we have held that the impugned Act is protected by article 31-A, and that article enacts that no law providing for acquisition of properties falling within its purview is open to attack on the ground that it violates any of the provisions of Part III. It was held by this Court in State of Bihar v. Maharajadhiraja Sir Kameshwar Singh(1) and Visveshwar Rao v. The State of Madhya Pradesh(1) that an objection to the validity of an Act relating to acquisition of property on the ground that it did not provide for payment of compensation was an objection based on article 31(2), and that it was barred when the impugned legislation fell within articles 31(4), 31-A and 31-B. It was further held in Raja Suriya Pal Singh v. The State of Uttar Pradesh(1) that when the acquisition was of the whole estate, it was not a valid objection to it that the compensation was awarded on the basis of the income actually received, and that nothing was paid on account of properties which did not yield an income.

It is argued that the compensation payable under the rules is so inadequate as to be illusory, and that the Act must be held to amount to a fraud on the Constitution. We are unable to agree with this contention. Under the Act, the jagirdar is entitled to compensation equal to seven years' net income, and in addition to it he is awarded rehabilitation grant which may vary from 2 to 11 times the net income. Under section 18 of the Act he will also be

allotted a portion of the khudkhast lands in the jagir, the extent of the allotment being proportionate to the total extent thereof. He is also to get compensation for loss of customs. The utmost that can be said of these provisions is that the compensation provided thereunder is inadequate, if that is calculated on the basis of the market value of the properties. But that (1) [1954] S.C.R. 558. (3) [1952] S.C.R. 1020. (2) [1952] S.C.R. 889. (4) [1952] S.C.R. 1056. is not a ground on which an Act protected by article 31-A could be impugned. Before such an Act could be struck down, it must be shown that the true intention of the law was to take properties without making any payment, that the provisions relating to,' compensation are merely veils concealing that intention, and that the compensation payable is so illusory as to be no compensation at all. (Vide State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and others(1). We are clear that this cannot be said of the provisions of the impugned Act, and the contention that it is a fraud on the Constitution must, in consequence, fail. It was argued by Mr. Achhru Ram that the impugned Act suffered from a fundamental defect in that it treated all the 41 tenures classed as jagirs in the schedule as ofthe same character, and on that basis laid down the same principles of compensation for all of them. It is argued that these tenures differ widely from one another as regards several incidents such as heritability, partibility and alienability, and that different scales of compensation should have been provided suitably to the nature and quality of the tenure. There is considerable force in this con- tention. But this is an objection to the quantum of compensation, and that is not justiciable under article 31- A. We may add that even if it was open to the petitioners to go behind article 31-A and to assail the legislation on the ground that the compensation awarded was not just, they have failed to place any materials before us for substantiating that contention, and on this ground also, the objection must fail.

It was also argued that there was no public purpose involved in the resumption, and that therefore article 31(2) had been contravened. This again is an objection which is barred by article 31-A; and even on the merits, the question is concluded against the petitioners by the decision of this Court in State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga (1) [1952] S.C.R. 889, 946-948.and others(1) that legislation of the character of the present is supported by public purpose.

It was next urged that the provisions of the Act offend article 14 and are therefore bad. Even apart from article 31-A which renders such an objection inadmissible, we are satisfied that it is without substance. The contention of the petitioners is that the Act according to its title is one to provide for resumption of jagir lands, not all of them; that section 21 provides that the Government "may appoint a date for the resumption of any class of jagir lands", which means that under this section it is not obligatory on it to resume all jagirs, and that it would be within its powers in resuming some of them while leaving others untouched, and thus the Act is discriminatory. The provisions of this Act bearing on this question are sections 20 and 4. Section 20 enacts that "the provisions of this Chapter apply to all jagirs except jagirs the income of which is utilised for the maintenance of any place of religious worship or for the performance of any religious service". We have held that the Act confers no power on the Government to grant exemption.

All the jagirs therefore are liable to be resumed under section 20, no option being left with the Government in the matter. Section 4 of the Act enacts that all jagir lands become liable to pay assessment from the commencement of the Act, and the liability of the jagirdar to pay tribute also ceases as from that date. There cannot therefore be any doubt that it was the intention of the Legislature that all jagir lands should be resumed under section 21.

It was also urged that under section 21 the State is authorised to resume different classes of jagir lands on different dates, and that must result in the law operating unequally. This provision was obviously dictated by practical considerations such as administrativeconvenience and facilities for payment of compensation' andcannot be held to be discriminatory. It was held by this Court in Biswambhar Singh v. The State of Orissa and others(1) that a similar (1) [1952] S.C.R. 889.

(2) [1954] S.C.R. 842, 855.provision in the Orissa Estates Abolition Act No. I of 1952 was not obnoxious to article 14. The objection must accordingly be overruled.

Petitions Nos. 629 and 643 of 1954: These are petitions by jagirdars of Mewar, and the special contention urged on their behalf by Mr. Trivedi is that their jagirs had been taken possession of by the State in 1949 under section 8(A) of the Rajasthan Ordinance No. 27 of 1948, that by its judgment dated 11-12-1951 the High Court of Rajasthan had held that that enactment was void under article 14, that that judgment had been affirmed by this court in The State of Rajasthan v. Rao Manohar Singhji(1), that the present Act came into force on 8-2-1952, and that the Government having wrongly taken possession of the jagirs in 1949 under the provisions of the Ordinance, instead of returning them to the petitioners notified them first under section 21 of the Act, and thus managed to continue in possession, and that in the result, these jagirdars had been treated differently from the jagirdars in other States of Rajputana to whom sec- tion 8(A) did not apply and article 14 had been contravened. There is no substance in this contention. The Mewar jagirdars having lost possession under a legislation which has been held to be void, the rights which they had over the jagirs until the date of the present notifications would remain unaffected, and no unequal treatment could result therefrom. And, moreover, the present Act makes no discrimination in the matter, as it applies to all the jagirs in Rajasthan. There is no ground, therefore, for holding that the Act in any manner contravenes article 14. V. It now remains to deal with the contention of some of the petitioners that even if the impugned Act is valid, their estates do not fall within its mischief, and that their resumption is therefore unauthorised

(a) Petition No.392 of 1954 The subject-matter of this petition is the estate of Khandela in the former State of Jaipur. By a deed of the year 1836, it (1) [1954] S.C.R. 996.was settled by the Maharajah of Jaipur on Raja Abayasingh and Raja Lakshmansingh on izara istimrar on an annual assessment of Rs. 80,001. The present petitioner is the successor-in-interest of Raja Abayasingh, and is entitled to three-fifths share in the estate.

The contention that is urged on his behalf by Mr. Isaacs is that the Act does not apply to him, because be is neither a Jagirdar nor a holder of any of the tenures mentioned in schedule I to the Act. The history of this estate is set out in Mr. Wills's Report at pp. 75-79. Khandela was an ancient principality held by the members of the Raisalot family as Mansubdars under the Moghul Emperor. In 1725 Sawai Jaisingh of Amber obtained an izara of Khandela from the Moghul Emperor, and the Raisalot- holders became subordinate to him. In 1797 the Raisalot family lost possession of the estate, which became incorporated in the Khalsa lands of Jaipur, and administered as such till 1812. Thereafter, it was leased to the Chieftain of Sikar and others on short Term leases till 1836 when the grant under which the petitioner claims was made. The occasion -for the grant was that there were negotiations for marrying a princess of the Bikaner royal family to the ruler of Jaipur, and the Bikaner Durbar insisted that the Khandela estate should be restored to the Raisalot family. Though the marriage itself did not eventually materialise, the princess having in the meantime died, the negotiations which had been going on with the Jaipur State for the handing over of the Khandela estate to its old holders resulted in the izara of 1836. Now the question is whether the grant of 1836 was that of a jagir. It was clearly not a grant for services rendered- or to be rendered, nor was there an assignment of any right to collect revenue. The grantees -were to enjoy the income from the lands and pay a fixed annual amount to the Durbar. It is true that the estate had some of the incidents of a jagir tenure attached to it. It was impartible, it was inalienable, and in matters of succession it was governed by the Matmi Rules. All this did not affect the true character of the grant which was both in name and in 369, substance a permanent lease and not a jagir. Mr. Pathak contends that even if what was granted under the deed was not a jagir, it was at least a grant of istimrari tenure, which is item 2 in schedule I to the Act. This argument is mainly founded on certain,' proceedings which were taken with reference to the Khandela estate during the years 1932 to 1939. The occasion for these proceedings was a dispute between the Thikanadars of Shekhwati and the Durbar with reference to their respective rights, and the status of the Izaradars of Khandela also came up for investigation. There was an enquiry and report by Mr. Wills in 1933, and on that report the matter was again in- vestigated by a Committee which submitted its report in 1935. Therein, it was held on an examination of all the materials that the status of the holders of Khandela differed from that of other Thikanadars, who paid Muamla and claimed semi-independent status as "Muamlaguzars", that they held merely as istimrar Izaradars under a "-permanent and specific izar" and not as istimrar Muamlaguzars, that the grant of Mal, Sayer, Bhom and Kuli habubayat under the deed did not add to their status as Izaradars. (Vide para 5). This report was accepted by the Maharajah of Jaipur on 14-4- 1939.

Mr. Pathak contends that the effect of the finding of the Committee that the grantees held as istimrar Izaradars was to bring them within item 2 of schedule I to the Act, and that therefore the resumption is within the Act. But the report emphasises that the grantee held as "istimrar Izaradar" and not as "istimrar Muamlaguzar", and in the context the word "istimrar" has reference not to the character of the tenure but its duration as permanent.The precise nature of the tenure called 'istimrari' is thus set out in Venkatachar's Report:-

"Permanently quit-rented estates and lands-These are denoted by various terms as Dumba, Chukota, Suba and Istimrari. Of these the Istimrari tenure merits some attention. The largest number of Istimrari estates in Rajasthan lies in Ajmer-Merwara which area is outside the scope of this report. The original tenure of the Istimrari estate in Ajmer is exactly like the Jagirs in Rajasthan. None of the Ajmer estates ever paid revenue till 1755, but were held on condition of military service..... Under British rule, the estate holders were made liable to pay an annual fixed and permanent quit-rent and were converted into Istimrari tenure holders". (Page 22, para 24).

"This quit rent or fixed revenue is a nominal assessment, not related to the income from the holding, but with the condition of confirmation of grant; the amountis invariable. This class of persons are known as 'Istimrardars'". (Page 24, para 36).

It is clear from the above that the essential features of istimrari tenure are that the lands are assessed to a nominal quit rent and that is permanent. The amount of Rs. 80,001 fixed as assessment under the deed of 1836 cannot be said to be a nominal amount, and as found in the report of the 1933 Committee, it was not a permanent assessment. It cannot therefore be held that what was created by the deed of 1836 was istimrari tenure.

It was argued for the respondent that Khandela was clearly an estate as defined in article 31-A, that the policy of the law was to abolish all intermediaries, and that section 2(h) should be so construed as to comprehend all holders of intermediate tenures. The answer to this is that whatever the legislature intended, effect can be given only to its expressed intention, and that the definition of "jagir" in section 2(h) is not sufficiently wide to catch the petitioner. The notification under section 21 in so far as it relates to the properties held by the petitioner under the izara of 1836 must be held to be not within the purview of the Act and therefore unauthorised.

(b)Petition No. 427 of 1954: Three villages, Haripura, Khata and Niradun, are comprised in this petition. Lands in Haripura belonged to certain Bhumias of Jaipur. The petitioner acquired them under a number of purchases, the last of them being in 1915. Bhom tenure is item 17 in schedule I to the Act, and these lands would therefore be within the purview of the Act. It is argued by Mr. Rastogi that as the petitioner had acquired lands from the Bhomias long prior to the Acthis rights in them could not retrospectively be affected by subsequent legislation. We are unable to see where the question of retrospective operation comes in. If Bhom is a tenure--and that is what it is under the first schedule to the Act, and if the intention of the Legislature was to bring it within the operation of the Act, then the only question to be considered is whether the particular properties notified under the Act are held under that tenure. And if that is answered in the affirmative, the Act would clearly apply, and it would make no difference in the result that the holder derived title to them by purchase and not by inheritance. On the admission of the petitioner that the lands notified belonged to his vendors as Bhom, the Act will clearly apply.

With referenceto the lands in the village of Khata, the contention of the petitioner is that it is held on izara tenure, and that it is therefore outside schedule I to the Act. This village is a Thikana in Shekhwati, and though the estates in that area were originally held on izara, they had, as already stated, risen to the status of jagirs and had been recognised as such. This village is stated to have been granted for maintaining horses, and is really a Mansab jagir and must be held to be covered by item 1 in schedule I.

The village of Niradun is stated to be held as Javad, and the contention is that it is not one of the tenures mentioned in schedule I to the Act. The respondent contends that Javad is not the name of any tenure, and that it means only a sub-grant. In the petition it is not stated that Javad is a tenure; nor is there a mention of its incidents. The word 'javad' is not noticed either in Wilson's Glossary or in Ramanatha Iyer's Law Lexicon. In the Jagir Rules of Kishangarh, section 4(xiii) defines 'javad' as "a jagir con- fiscated by or reverted to the State", and that has reference to the practice of making a grant of a small portion of the jagir to the 'jagirdar when it is confiscated or to the members of the family when it reverts back to the State. We are satisfied that there is no tenure called Javad, and it will not assist the petitioner whether Javad is a sub-grant or a grant of jagir of the nature mentioned in section 4(xiii) of the Kishangarh Rules. We may add that this contention was raised by the petitioner in a supplemental statement.

(c) Petition No. 468 of 1954: The petitioner is the holder of an estate known as Jobner. He contends that he is a Mansubdar and not a jagirdar, and that his tenure is not included in schedule I to the Act. During the Moghul administration persons to whom assignments of land revenue were made subject to an obligation to maintain horses for Imperial service were called Mansubdars. The petitioner states that Akbar the Great grantedthree paraganas, Narayana, Kolak and Jobner, to his ancestors as Mansub for maintaining 1000 horses, that in 1727 they came under "the subordination of the Amber Durbar"-which was the name of the State prior to the foundation of Jaipur in 1728, and that they had continued to hold the estate thereafter as Mansubdars and not as jagirdars. But the grant will clearly be a jagir as there is an assignment of land revenue for the rendering of military service, and Mansub is only another name for a jagir. It is classified as a jagir in the Jaipur Administration Report 1947-1948, page 35, and even though the Report has not the force of legislation, it is valuable as showing that Mansub is recognised as a jagir. The estate is therefore covered by item I in schedule 1. With reference to one of the villages forming part of this estate, Jorpura, a special contention was put forward by Mr. Naunit Lal that it was dedicated for worship of the Devi, and was therefore within the exemption enacted in section

20. A document is also produced in support of this claim. The respondent claims that under this deed the grant is not in its entirety in favour of the Deity, but the petitioner disputes it. This is not a question which can be determined in this petition. It will be open to

the petitioner to establish in appropriate proceedings that the village or any portion thereof is within the exemption of section 20 of the Act.

(d) Petitions Nos. 474 and 475 of 1954: In 1948 the Maharajah of Jaipur granted to the petitioners, who are his sons, the Thikanas of Bhagwatgarh and Mangarh consisting of 20 villages revenue-free. Now, the contention that has been urged before us in these and other similar petitions is that in the first schedule to the Act., only Thikanas of Dholpur are mentioned, being item 11, and that therefore Thikanas in other States are excluded. But the expression 'Thikanadar' is a honorific and 'Thikana' does not, except in Dholpur, mean anything more than an estate and that estate can as well be a jagir. The petitioners, in fact,, admit in their petitions that they are jagirdars. The grant is clearly a jagir, and falls within item I in the schedule.

(e) Petition No. 488 of 1954: The petitioners are interested in two of the villages, Dadia Rampur and Tapiplya comprised in the izara of Khandela of the year 1836, which forms the subject-matter of Petition No. 392 of 1954, and their title rests on Chhut Bhayas or sub-grant from the izaradar. Their rights are therefore precisely those of the izaradars, and for the reasons given in Petition No. 392 of 1954 these petitioners must succeed.

(f) Petition No. 36 of 1955: The properties to which this petition relates are held as "Sansan" which is one of the tenures mentioned in the first schedule being item 25, and would therefore fall within the operation of section 21. The contention of the petitioner is that they are dedicated for the worship of Lord Shiva and Goddess Shakti, and that he is a Brahmacharan utilising the income from the lands for the above religious service. The properties comprised in the grant are said to be of a small extent, and the dedication is not improbable. There has been no denial by the respondent of the allegation in the petition, and on the materials placed before us, we have come to the conclusion that the dedication pleaded by the petitioner has been established, and that the properties are within the exemption enacted in section 20. To sum up: The impugned Act is not open to attack either on the ground that the Rajpramukh had no legislative competence to enact it, or that the procedure prescribed in article 212-A for enactment of laws had not been followed. The Act is, in substance, one for acquisition of property, and is within the legislative competence of the State, and it is protected by article 31-A. But the notification is bad as regards properties comprised in Petitions Nos.392 and 488 of 1954, as izaras are not within the impugned Act. The properties mentioned in Petition No. 36 of 1955 are dedicated for religious services, and are exempt under section 20 of the Act. Appropriate writs will issue in these three petitions.

In Petition No. 468 of 1954 the right of the petitioner to claim exemption under section 20 for the village of Jorpura on the ground that it is dedicated for worship of the Deity is reserved, and the petition is otherwise dismissed. All the other petitions will stand dismissed. The parties will bear their own costs in all the petitions.

IMPLICATIONS

Unifying India

During the formation of the country, provincial rulers, kings and dynasties had to surrender their lands, estates and properties to the Federal Government. However at this time, the Rajpramukh (governor) was the head of the united state and this gave rise to problems related to

- Authority and status of the kings
- Taxation policies and rehabilitation grants
- Culture and heritage of the land.

The various articles,schedules and sections of the law discussed above took into effect the above problems and aimed at harmonizing the environment of the newly formed India.

While a lumpsum amount was charged while procurement of some of the lands and estates[1], some others were asked to pay regular taxes. Assets of the kings which had a legendary hierarchy behind them were retained with the rulers themselves to be passed on to their subsequent generations.[2] The taxation scheme of assets again were evaluated on the basis of

[1] Excerpts from the judgement: It was a resumption made not in enforcement of the rights which the rulers had as grantors but in exercise of the sovereign rights of eminent domain possessed by the State.The taking of properties is under the circumstances, in substance, acquisition notwithstanding that it is labeled as resumption. And this conclusion becomes irresistible when regard is had to the provisions for payment of compensation. Section 26(1) imposes on the Government a liability to pay compensation in accordance with the principles laid down in the second Schedule, and as will be presently shown, it is not illusory. The award of compensation is consistent only with the taking being- an acquisition and not with its being a resumption in accordance with the terms of the grant or the law applicable to it, for in such cases, there is no question of any liability to pay compensation. It was argued for the petitioners that the provision for the payment of rehabilitation grant was an indication that what was paid as compensation was in reality ex gratia. But the rehabilitation grant was in addition to the compensation amount, and it was provided by the amendment Act No. XIII of 1954. Nor are we impressed by the contention that the Act had adopted the findings of the Venkatachar Committee that the jagirs were not the properties of the jagirdars, and that no compensation need be paid for them. Under section 22(1)(a), what is resumed is expressly the right, title and interest of the jagirdar in his jagir lands, and provision is made for payment of compensation therefor.

[2] Excerpts from Judgement:Thus, it is pointed out that the Committee had held that "jagirs are not the property of the jagirdars" (vide page 47,para 5), that '-'if the jagir system is abolished, jagirdars would not be entitled to any compensation on the ground of the jagirs being private property", and that "even though jagirs are not property..... those rights which have in many cases been enjoyed for centuries have acquired around theman accretion of rights by long custom and -prescription which are entitled to due recognition", and that a rehabilitation grant might be given to the jagirdars. (Page 47, para6). It is contended that it is these views that have been adopted in section 22 of the Act, and that when section 22 (1) (a) declares that the right, title and interest of the jagi rdars shall stand resumed, it could not mean that these rights are acquired by the State, because acquisition implies that the properties acquired belong to the person from whom they are acquired, whereas the basis of the legislation was that the jagirdars bad no property in the lands, and there could be no acquisition of what did not belong to them.

the hierarchy and historic significance. For this the judges had to go into great detail into the history of the case, which was sometimes traced to a century.[3]

It is only due to such judicial decisions provided in the constitution, that India even today boasts of Royal families preserving the vintage and legendary grandeur of yesteryears.

In para 40, the Court said :

"The status of a person must be either that of a sovereign or a subject. There is no tertium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject ..."

This stand has been quoted in many cases thereafter including the famous Ram janma Bhumi – Babri Masjid case, when the Sunni Board claimed that the entire territory which came in the control of Babar after defeating Ibrahim Lodhi and others became his land since king was the owner of the land and no system of private ownership was recognized and therefore, he was at liberty to direct for any kind of construction on such land and the land could not have been treated to be owned by any private individual or anyone else.[4]

It may not be out of place to mention that the judgment of this case was taken into account while forming the Union states of Hyderabad,Kashmir and Junagadh (Gujarat).

Rule of Ejusdem Generis:

It is an ancient doctrine, commonly called Lord Tenterden's Rule, dating back to Archbishop of Canterbury's Case in 1596. Singer 47:17, at 272-73. It provides that when general words follow specific words in a statute, the general words are read to embrace only objects similar

[3] Excerpts from the judgement: On the first question as to the competence of the Rajpramukh to enact the law, it is necessary to notice the events which led up to the formation of the State of Rajasthan and the constitution of the Rajpramukh as its head. During the 12th and 13th Centuries, the Rajput rulers who were then reigning over various parts of Hindusthan were compelled by pressure from the victorious Muhammadan invaders to retreat to the regions to the southwest guarded by the Aravali Hills and interspersed with deserts which if less hospitable were also less vulnerable, and there established several independent kingdoms. The period which followed the foundation of these States was marked by incessant wars, the powerful Sultans of Delhi making determined efforts to subjugate the Rajput princes and the latter offering stubborn and more or less successful resistance thereto. The annals of Rajputana especially of this period, present a story of heroic deeds of men and women and are among the most inspiring and fascinating chapters in the history of this country.The Moghul Emperors who established themselves later saw the wisdom of conciliating the Rajput rulers, and recognised their position as Chiefs getting in return an acknowledgment of their suzerainty from them, and a promise to send troops in support of the Imperial arms whenever required. When the power of the great Moghul waned and the British established themselves as masters of this country, they in their turn recognised the Rajput princes as Sovereigns, and entered into treaties with them during the Period between 1803 to 1818…..

[4] http://elegalix.allahabadhighcourt.in/elegalix/ayodhyafiles/honsaj-vol-21-corrected.pdf

to those objects of the specific words. The rule recognizes and gives effect to both the specific and general words by using the class indicated by the specific words to extend the scope of the statute with the general words to include additional terms or objects within the class. In using the doctrine as an interpretative aid, it is important to keep in mind that it is not applied in a vacuum, and disputes cannot be resolved by merely tying the issue to the procrustean bed of Ejusdem Generis. In fact, there are several conditions that have been identified for the doctrine to apply, but none more important than the identification of the class. There are five conditions that have been identified:

(1) The statute contains an enumeration by specific words;

(2) The members of the enumeration suggest a class;

(3) The class is not exhausted by the enumeration;

(4) A general reference supplementing the enumeration, usually following it; and

(5) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

Classes can be defined in a vast number of ways, but the key to unlocking the true value of the doctrine is to ensure that the identified class has some objective relationship to the aim of the statute. In other words, the basis for determining, which among various semantically correct definitions of the class should be given effect is found in the purpose and subject of the statute as revealed in the legislative intent.

In this case,the heads of legislation should not be construed in a narrow and pedantic sense but should be given a large and liberal interpretation. Quoting words from the judgement: “The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider, that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon words so that the same may have effect in their widest amplitude”. When particular words pertaining to a class of genus are followed by general words, the latter, namely, the general words are construed as limited to things of the same kind as those specified.This is known as the rule of ejusdem generis reflecting an attempt to reconcile incompatibility between the specific and general words.

It is noteworthy to mention that the applicability of this rule was made for the first time in the Indian Judicial System in this case. The rule of Ejusdem Generis must be applied with great caution, because, it implies a departure from the natural meaning of words, in order to give them a meaning on a supposed intention of the legislature. The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished. The rule requires that the specific words are all of one genus, in which case, the general words may be presumed to be restricted to that genus. For example, the words 'or otherwise' are generally used as ancillary to the specific proposition which precedes them.

In the said case , the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952 was impugned. One of the tenures was known as Bhomichar tenure and it was contended that its holders were not jagirdars. It was held: We agree with the petitioners that a jagir can be created only by a grant, and that if it is established that Bhomichara tenure is not held under a grant, it cannot be classed as a jagir. We do not base this conclusion on the ground put forward that the word 'Jagir' in Article 31-A of the Constitution should be read Ejusdem Generis with 'other similar grants', because, the true scope of the rule of 'Ejusdem Generis' is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow.

The above case and the said rule have been consistently quoted and applied in many cases thereafter. The rule is of special significance in the Indian Penal Code.

Pith and Substance of legislation:

This doctrine was initially used in very few countries across the globe – started in britain and followed in Canada and later was followed in common wealth nations only. The doctrine has been applied in India also to provide a degree of flexibility in the otherwise rigid scheme of distribution of powers. The reason for adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

This case clearly describes the powers of the State governor (Rajpramukh) and the President. Also it clearly establishes the difference between Article 226 and article 32 of the constitution. It may be noted that while both the articles discuss about the powers of the high Courts and Supreme courts respectively, both these articles are formulated for the establishment and protection of Human Rights. It may be noted that the era of discussion had witnessing the evil effects of World war II and there was a constant upsurge among the oppressed for social justice and harmony. The first “Universal Declaration of Human Rights” was first adopted by United Nations against the barbarism of World war II in 1948.

Promulgation and establishment of Article 226 and 32 of the Indian Constitution Act, is a clear and definite step towards establishment of Social Justice and Human rights. It may be noted that the era discussed was recovering with the period of the Raj Dynasty and the evolution of Democratic India was initiating. The above referred two articles are a promise to the democratic citizens of the country, that the Judiciary can halt and modify any atrocity or wrong committed to them.

The legal connotation of Acquisition and resumption has been explained in detail in the judgement. This point is of legal importance during the infrastructure development projects that are handled by the government today. [5]

[5] But the resumption for which the Act provides is something different from the resumption which is authorised by article VII(3). It was a resumption not in accordance with the terms of the grant or the law applicable to jagirs but contrary to it, or in the words of section 21 "notwithstanding anything contained in any existing jagir law applicable thereto".It was a resumption made not in enforcement of the rights which the rulers had as

PETITIONER: NARESH CHARAN DAS GUPTA Vs. RESPONDENT: PARESH CHARAN DAS GUPTA

DATE OF JUDGMENT:
02/12/1954

BENCH:
AIYYAR, T.L. VENKATARAMA

BENCH:

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MAHAJAN, MEHAR CHAND (CJ)

BHAGWATI, NATWARLAL H.

JAGANNADHADAS, B.

CITATION:

1955 AIR 363 1955 SCR (1)1035

ACT:

Will-Executed with due solemnities by a person of competent understanding-Onus of proving undue influence-Undue influence -Meaning of-Indian Succession Act, 1925 (XXXIX of 1925), s. 63-Due attestation-Proof of.

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grantors but in exercise of the sovereign rights of eminent domain possessed by the State. The taking of properties is under the circumstances, in substance, acquisition notwithstanding that it is labeled as resumption. And this conclusion becomes irresistible when regard is had to the provisions for payment of compensation. Section 26(1) imposes on the Government a liability to pay compensation in accordance with the principles laid down in the second Schedule, and as will be presently shown, it is not illusory. The award of compensation is consistent only with the taking being- an acquisition and not with its being a resumption in accordance with the terms of the grant or the law applicable to it, for in such cases, there is no question of any liability to pay compensation. It was argued for the petitioners that the provision for the payment of rehabilitation grant was an indication that what was paid as compensation was in reality ex gratia. But the rehabilitation grant was in addition to the compensation amount, and it was provided by the amendment Act No. XIII of 1954.

THE BACKGROUND:

When once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the person who alleges it. It is well-settled that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his cause before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity and there is no element of fraud or coercion, the will cannot be attacked on the ground of undue influence. All influences are not unlawful. Persuasion, appeals to the affections or ties of mankind, to a sentiment of gratitude for past services or pity for future destitution, or the like,-these are all legitimate and may be fairly pressed on a testator. On the other hand pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. It cannot be laid down as a matter of law that because the attesting witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation as required by s. 63 of the Indian Succession Act. It is a pure question of fact depending on the appreciation of evidence and the circumstances of each case whether the attesting witnesses signed in the presence of the testator. Boyse v. Rossborough ([1857] 6 H.L.C. 2; 10 E.R. 1192),

THE JUDGEMENT:

-This appeal arises out of an application filed by the first respondent for probate of a will dated 28-11-1943 executed by one Bhabesh Charan Das Gupta. The testator died on 27-10-1944 leaving him surviving two sons, Paresh Charan Das (the first respondent), Naresh Charan Das (the appellant), and a daughter, Indira (the second respondent. The estate Consisted of a sixth share in some ancestral lands at Matta in the District of Dacca, and a house No. 50, South End Park, Calcutta, built by the testator on a site purchased by him. By his will) he directed that a legacy of Rs. 10 per mensem should be paid to his younger son, the appellant, for the period of his life; that his daughter should be entitled to a life estate in five specified rooms in the house to be enjoyed either personally by her and the members of the family, or by leasing them to others; that a legacy of Rs. 10 per mensem should be paid to one or the other of two hospitals named, and that subject to the legacies aforesaid, the first respondent should take the estate, perform the sraddha, and pay one-sixth of the expenses for the worship of the deity installed in the ancestral house. The first respondent who was the sole executor under the will, applied in due course for probate thereof. The appellant entered caveat, and thereupon, the application was registered as a suit. He then filed a written Statement, and on that, the following issues were framed:

(1)"Was the Will in question lawfully and validly executed and attested?

(2)Had the testator testamentary capacity at the time of the execution of the Will?

(3)Was the Will in question executed under undue influence and pressure exerted by Paresh Charan Das Gupta?"

The Additional District Judge of the 24-Parganas who tried the suit held in favour of the first respondent on issues 1 and 2, but against him on issue 3, and in the result, probate was refused. The first respondent took the matter in appeal to the High Court, and that was heard by G. N. Das and S. C. Lahiri, JJ. Before them, the appellant did not contest the correctness of the finding of the Additional District Judge that the testator had testamentary capacity when he executed the will. The two contentions that were pressed by him were that the will in question was executed by the testator

Under undue influence of the first respondent, and (2) that it was not validly attested, and was therefore invalid. On both the questions, the learned Judges held in favour of the first respondent, and accordingly allowed the appeal, and directed the grant of probate. Against this judgment, the caveator prefers this appeal, and contends that the findings of the Court below on both the points are erroneous. The main question that arises for our decision is whether the will in question was executed under the undue influence of the first respondent. "When once it has been proved", observed Lord Cranworth in Boyse v. Rossborough(1) "that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it". Vide also Craig v. Lamoureux(2). In the present case, it is not in dispute that the testator executed the will in question, and that he had the requisite mental capacity at that time. The burden, therefore, is on the appellant to establish that the will was the result of undue influence brought to bear on him by the first respondent.

The facts so far as they are material for this issue, may now be stated, The testator was a police officer and retired in 1927 as Deputy Superintendent of Police. Paresh Charan, the elder son, was married in 1925, and lived all along with his parents with his wife and children. Nirmala, the wife of the testator, died in 1929, and thereafter it was the wife of Paresh Charan that was maintaining the home. Naresh Charan studied up to I.A., but in 1920 discontinued his studies and got into employment in the workshop of Tata &Co., at Jamshedpur on a petty salary; and the evidence is that thereafter he was practically living apart from the family. In 1928 he married one Shantimayi, who was a widow having some children by her first husband. She belonged to the Kayastha caste, whereas Naresh Charan belonged to the Baid caste. The testator was strongly opposed to this intercaste marriage, and did his best to stop it but without success. The correspondence that followed between the appellant and his father during this period clearly shows that the father felt very sore over this alliance, and wrote that it could not pain him even if his son died. With this background, we may turn to the will. The relevant recitals therein are as follows: "My younger son Sri Naresh Charan Das Gupta is behaving badly with me and without ray knowledge and consent be has married a girl of a different caste and she has given birth to two female children and one male child. In these circumstances my said son Sri Naresh Charan Das Gupta and his son Sreeman Arun Gupta and the two daughters or any other son or daughter who may be born to him, will not be entitled to perform my sradh or to offer me Pindas. For all these reasons I deprive my

second son Sri Naresh Charan and his son Sreeman Arun Gupta and his two daughters and any other sons or daughters who may be born to him as well as Naresh's wife Sreemati Santi of inheritance from me and from all my movable and immovable properties, ancestral as well as self-acquired. They shall not get any share or interest or possession in any of my aforesaid properties". It is not disputed that these recitals accord with what the testator had expressed in the correspondence at the time of the marriage and for some years thereafter. But it is argued that since then, more than a decade had passed before under undue influence of the first respondent, and (2) that it was not validly attested, and was therefore invalid. On both the questions, the learned Judges held in favour of the first respondent, and accordingly allowed the appeal, and directed the grant of probate. Against this judgment, the caveator prefers this appeal, and contends that the findings of the Court below on both the points are erroneous. The main question that arises for our decision is whether the will in question was executed under the undue influence of the first respondent. "When once it has been proved", observed Lord Cranworth in Boyse v. Rossborough(1) "that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the

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With this background, we may turn to the will. The relevant recitals therein are as follows: "My younger son Sri Naresh Charan Das Gupta is behaving badly with me and without ray knowledge and consent be has married a girl of a different caste and she has given birth to two female children and one male child. In these circumstances my said son Sri Naresh Charan Das Gupta and his son Sreeman Arun Gupta and the two daughters or any other son or daughter who may be born to him, will not be entitled to perform my sradh or to offer me Pindas. For all these reasons I deprive my second son Sri Naresh Charan and his son Sreeman Arun Gupta and his two daughters and any other sons or daughters who may be born to him as well as Naresh's wife Sreemati Santi of inheritance from me and from all my movable and

immovable properties, ancestral as well as self-acquired. They shall not get any share or I Interest or possession in any of my aforesaid properties".

It is not disputed that these recitals accord with what the testator had expressed in the correspondence at the time of the marriage and for some years thereafter. But it is argued that since then, more than a decade had passed before the part of the first respondent. Having regard to the character of the testator and his feelings in the matter it is not a matter for surprise that he should have cut off the appellant with a small legacy. It must also be mentioned that the net value of the assets as given in the probate petition is Rs. 23,865-10-9, and if the other legacies and charges are deducted, what was bequeathed to the first respondent cannot be said to be very considerable. It also appears that at that time his salary was Rs. 60 per mensem and that he had a number of children, whereas the appellant is stated to have had a basic salary of Rs. 250 per mensem then. The first respondent, his wife and children have all along been dependents of the testat or, whereas the appellant had lived apart from him from 1920. And it is not unnatural for the testator so to order the distribution of his estate as to secure the continuance of the existing state of affairs. The terms of the will, therefore, cannot be relied on as intrinsic evidence of undue influence, as contended for by the appellant. Then there is the evidence of Indira, the daughter of the testator, which was aken on commission. She deposed that the testator bad told her that there were troubles in the house, that the elder son had objection to stay with the younger one, "because if they live together, there will be social trouble regarding his daughters marriage", and that he therefore wanted to make a will. She went on to add. that the father subsequently wanted to alter the will and sent for her repeatedly for discussions, but that she generally excused herself, because she did not like to intervene in the matter, and that on those occasions, he told her, "At present this will stand, but I want to modify it in future". Indira also deposed that the first respondent and his wife used to tell the testator that there was no change in the conduct of the appellant, that he was extravagant in his habits and incurred debts, and that he had taken away some articles. We do not consider that it is safe to act on this evidence. It is clear from Exhibit I that Indira and her husband had taken sides with the appellant as against the first respondent, and wrote to him that in spite of the will the appellant "should have his share as early as possible in order to avoid further complication", though it may be noted that they insisted on their rights under the will. Stripped of all its embellishments, the evidence of Indira, if true, comes only to this that the first respondent told his father that he could not live under the same roof with his brother, and that in view of that attitude, the testator gave no share to the appellant in the house. We are unable to see any undue influence in this. The first respondent was entitled to put forward his views in the matter, and so long as the ultimate decision lay with the testator and his mental capacity was unimpaired, there can be no question of undue influence.It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion-it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories-the will cannot be attacked on the ground of undue nfluence. The law was thus stated by Lord Penzance in Hall v. Hall(1): "But all influences are

not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,-these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort,-these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's". Section 61 of the Indian Succession Act (Act XXXIX of 1925) enacts that, "A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void". Illustration (vii) to the section is very instructive. And is as follows:"A, being in such a state of health as to be capable of exercising his own judgment and volition B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion but in the free exercise of his judgment and volition makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B".

Even if we accept the evidence of Indira, the case would, on the facts, fall within this Illustration, It is not disputed that the testator was in full possession of his mental faculties. There is no proof that the first respondent did or said anything which would have affected the free exercise by the testator of his volition. On the other hand, it is proved that. the first respondent had no act or part in the preparation, execution, or registration of the will. It is a holograph will, and the evidence of P. Ws. I and 2 is that it was the testator himself who made all the arrangements for its execution, and that it was actually executed at the residence of P.W. 1. The document was presented for registration by the testator, and be kept it with himself, and it was taken Out of his cash box after his death. He lived for nearly a year after the execution of the will, and even on the evidence of Indira, be was often thinking of it, and discussing it, but declared that it should stand. The cumulative effect of the evidence is clearly to establish that the will represents the free volition of the testator, and that it is not the result of undue influence by the first respondent or his relations.

It should be mentioned that Indira herself sought to enforce her rights under the will shortly after the death of the testator, and that the appellant also obtained payment of legacy under the will for a period of 15 months. No ground has been established for our differing from the High Court in its appreciation of the evidence, and we agree with its conclusion that the will is not open to question on the in Hall v. Hall(1):

"But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,-these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be

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IMPLICATIONS OF THE JUDGEMENT:

This was a constitution bench case and is of particular significance in execution of will as defined under Section 2(h) of the Indian Succession Act 1925 means 'the legal declaration of the testator with respect to his property which he desires to be carried into effect after his death'. The essential characteristic of a will, as is well known, is that it is a mere declaration

of an intention so long as the testator is alive, a declaration which may be revoked or varied by the testator during his lifetime; it is a disposition that requires the testator's death for its consummation and is but ambulatory or without fixed effect until the happening of this event. The document is a will if it contains specific words of bequest to come into effect after the death of the testator.

The rules governing the propounding of a will are two.

- First, the onus probandi lies in every case upon the party propounding the will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of the testator.
- Second, if a party actively participates in the execution of a will under which he takes a benefit, it is a circumstance to excite the suspicion of the Court and calls upon the court to be vigilant and zealous in examining the evidence on record.

The highlights of the said case:

It was observed that it is elementary that law does not regard or charactize every interest which is brought to bear upon a testator as undue. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favor and if the testator retains his mental capacity and there is no element of fraud or coercion, the will cannot be attacked on the ground of undue influence. Not all importunities are undue influence. While making said observation, the Hon'ble Supreme Court in Naresh Charan Das Gupta's case (supra) quoted the observation of Lord Penzance in the decision reported as Hall v. Hall 1868 (1) P & D 481 "but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like - these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.... In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's".

This golden rule in interpreting a will is to give effect to the testator's intention as ascertained from the language, which he has used. The overriding duty of a Court is to construe the language which the testator has in fact employed giving due weight to all the words and rejecting none to which a meaning can reasonably be assigned. The Court is entitled to put itself into the testator's arm chair to construe a will and to form an opinion apart from the decided cases and then, to see whether those decisions require any modification of that opinion and not to beckon by considering as to how far the will in question resemble other will upon which the decisions have been given.

Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from

the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given.

The proposition that the will has to be read as a whole cannot be disputed. Whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see first whether prima facie, the document constituted a will.

PETITIONER: THE KERALA EDUCATION BILL

VS

RESPONDENT: UNKNOWN (ADVISORY JURISDICTION OF THE SUPREME COURT OF INDIA)

DATE OF JUDGEMENT
22 May, 1958

CITATIONS
Equivalent citations: 1959 1 SCR 995

BENCH:

S Das (CJ), B S Kapur, Bhagwati, S Das, J Imam, Venkatarama Aiyar

BACKGROUND:
Facts: The reference had been made by the then President of India under Article 143(1) of the Constitution of India for the opinion of the Supreme Court on certain questions of law of considerable public importance that had arisen out of or touching certain provisions of The Kerala Education Bill, 1957 which had been passed by the Legislative Assembly of the State of Kerala on 2 nd September,1957 and was under Article 200 reserved by the then Governor of Kerala for consideration of the then President of India. After reciting the fact of the passing of Kerala and of the reservation thereof by its Governor for the consideration of the

President and after setting out some of the clauses of the said Bill and specifying the doubts that may be said to have arisen out of or touching the said clauses, the then President of India referred to the Supreme Court certain questions for consideration and report. It was also the fact that the said Bill not having yet received the assent of the President the doubts, leading upto such reference could not obviously be said to have arisen out of the actual application of any specified section of an Act on the facts of any particular case and accordingly the questions that had been referred to Supreme Court for its consideration were necessary of an abstract or hypothetical nature and were not like specific issues raised in particular case brought before a court by a party aggrieved by the operation of a particular law which he impugns.

Issue: The legislative power conferred upon a State Legislative Assembly by Articles 245 and 246 is to be exercised under Article 245 subject to the provisions and whether it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon that, the Court has a discretion in the matter and may in a proper case and for good reasons decline to express any opinion on the questions submitted to it.

JUDGEMENT

this was a case of split judgement and Justice Venkatarama Iyer put forth a different view point of judgement. However, since the majority of the bench went with the judgement of Chief Justice Das.

Excerpts of judgement of Justice Das: "…The long title of the said Bill describes it as "A Bill to provide for the better organisation and development of educational institutions in the State." Its preamble recites thus : "Whereas it is deemed necessary to provide for the better organisation and development educational institutions in the State providing a varied and comprehensive educational service throughout the State." We must, therefore, approach the substantive provisions of the said Bill in the light of the policy and purpose deducible from the terms of the aforesaid long title and the preamble and so construe the clauses of the said Bill as will subserve the said policy and purpose. Sub-clause (3) of clause 1 provides that the Bill shall come into force on such date as the Government may, by notification in the Gazette, appoint and different dates may be appointed for different provisions of this Bill - a fact which is said to indicate that Government will study the situation and bring into force such of the provisions of the said Bill which will best subserve the real needs of its people….

….Christians form the second largest community in Kerala State; they form, however, a majority community in certain area of the State. Muslims form the third largest community in the State, about one-seventh of the total population. They also, however, form the majority community in certain other areas of the State. (In I.L.R. (1951) 3 Assam 384, it was held that persons who are alleged to be a minority must be a minority in the particular region in which the institution involved is situated)."

39. The State of Kerala, therefore, contends that in order to constitute a minority which may claim the fundamental rights guaranteed to minorities by Art. 29(1) and 30(1) persons must numerically be a minority in the particular region in which the educational institution in question is or is intended to be situate. A little reflection will at once show that this is not a satisfactory test. Where is the line to be drawn and which is the unit which will have to be taken ? Are we to take as our unit a district, or a sub-division or a taluk or a town or its suburbs or a municipality or its wards ? It is well known that in many towns persons belonging to a particular community flock together in a suburb of the town or a ward of the municipality. Thus Anglo-Indians or Christians or Muslims may congregate in one particular suburb of a town or one particular ward of a municipality and they may be in a majority there. According to the argument of learned counsel for the State of Kerala the Anglo-Indians or Christians or Muslims of that locality, taken as a unit, will not be a "minority" within the meaning of the Articles under consideration and will not, therefore, be entitled to establish and maintain educational institutions of their choice in that locality, but if some of the members belonging to the Anglo-Indian or Christian community happen to reside in another suburb of the same town or another ward of the same municipality and their number be less than that of the members of other communities residing there, then those members of the Anglo-Indian or Christian community will be a minority within the meaning of Arts. 29 and 30 and will be entitled to establish and maintain educational institutions of their choice in that locality….. It is said that an educational institution established by a minority community which does not seek any aid from the funds of the State need not admit a single scholar belonging to a community other than that for whose benefit it was established but that as soon as such an educational institution seeks and gets aid from the State coffers Art. 29(2) will preclude it from denying admission to members of the other communities on grounds only of religion, race, caste, language or any of them and consequently it will cease to be an educational institution of the choice of the minority community which established it. This argument does not appear to us to be warranted by the language of the Article itself. There is no such limitation in Art. 30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community" in the Article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Art. 29(2) was to deprive minority educational institutions of the aid they receive from the State. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admits such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid….We have already observed that Art. 30(1) gives two rights to the minorities, (1) to establish and (2) to administer, educational institutions of their choice. The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the

scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Learned Attorney-General concedes that reasonable regulations may certainly be imposed by the State as a condition for aid or even for recognition. There is no right in any minority, other than Anglo-Indians, to get aid, but, he contends, that if the State chooses to grant aid then it must not say - "I have money and I shall distribute aid but I shall not give you any aid unless you surrender to me your right of administration." The State must not grant aid in such manner as will take away the fundamental right of the minority community under Art. 30(1)……

POINT OF VIEW OF JUSTICE IYER:

Excerpts: "…Considering the question, therefore, both on the language of Art. 30(1) and on the principle laid down in Art. 45, I find myself unable to accept the contention that the right of the minorities is not merely to establish educational institutions of their choice but to have them recognised by the State. That must be sufficient to conclude this question….

.. it is argued that the right of the minorities to establish their own educational institutions will be rendered illusory, if the students who pass out of them cannot sit for public examinations held by the State or be eligible for recruitment to State services, and that, it is said, is the effect of the non-recognition of the institutions. It is accordingly contended that for the effective exercise of the rights under Art. 30(1), it is necessary to imply therein a right in the minorities to have those institutions recognised by the State. That is the crucial question that has to be determined. If there is no right in the minorities to have their institutions recognised by the State, then the question whether Clause (20) is an invasion of that right would not arise for decision. It is only if we hold that such right is to be implied in Art. 30(1) that the further question will have to be considered whether Clause (20) infringes that right….

…Article 28(1) provides that no religious instruction shall be provided in any educational institution maintained wholly out of State funds. Article 28(3) enacts that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in religious instruction. Under Art. 29(2), no person is to be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. In Art. 30(2), there is express provision that in granting aid no discrimination should be made against any educational institution on the ground that it is under the management of a minority based on religion or language. It is clear from the above catena of provisions that the Constitution makes a clear distinction between State-maintained, State-aided and State-recognised educational institutions, and provides for different rights and obligations in relation to them. If it intended that the minorities mentioned in Art. 30(1) should have a fundamental right in the matter of the recognition of their educational institutions by the State, nothing would have been easier than to have said so. On the other hand, there is good reason to infer that it has deliberately abstained from imposing on the State such an obligation. The educational institutions protected by Art. 30(1) might impart purely religious instruction. Indeed, it seems

likely that it is such institutions that are primarily intended to be protected by Art. 30(1). Now, to compel the State to recognise those institutions would conflict with the fundamental concept on which the Constitution is framed that the State should be secular in character. If institutions which give only religious education can have no right to compel recognition by the State under Art. 30(1), how could educational institutions established by minorities and imparting secular education be held to possess that right ? The contents of Art. 30(1) must be the same as regards all institutions falling within its ambit….

…Art. 30(2) provides that a State shall not, when it chooses to grant aid to educational institutions, discriminate against institutions of minorities based on language or religion. Likewise, if the State frames regulations for recognition of educational institutions, it has to treat all of them alike, without discriminating against any institution on the ground of language or religion. The result of the constitutional provisions bearing on the question may thus be summed up :

(1) The State is under a positive obligation to give equal treatment in the matter of aid or recognition to all educational institutions, including those of the minorities, religious or linguistic.

(2) The State is under a negative obligation as regards those institutions, not to prohibit their establishment or to interfere with their administration.

Clause (20) of the Bill violates neither of these two obligations. On the other hand, it is the contention of the minorities that must, if accepted, result in discrimination by the State. While recognised institutions of the majority communities will be subject to clause (20), similar institutions of minority communities falling within Art. 30(1) will not be subject to it. The former cannot collect fees, while the latter can. This surely is discrimination. It may be stated that learned counsel for the minorities, when pressed with the question that on their contention Art. 45 must become a dead letter, answered that the situation could be met by the State paying compensation to the minority institutions to make up for the loss of fees. That serves clearly to reveal that what the minorities fight for is what has not been granted to them under Art. 30(2) of the Constitution, viz., aid to them on the ground of religion or language. In my opinion, there is no justification for putting on Art. 30(1) a construction which would put the minorities in a more favoured position than the majority communities….

…As regards schools of the Anglo-Indian Communities, Art. 337 provides for aid being given to them on the conditions and to the extent specified therein. That is outside Art. 30(1) and independent of it, and I agree with My Lord, the Chief Justice, that the provisions of the Bill are, to the extent they affect or interfere with the rights conferred by that Article, bad…”

IMPLICATIONS OF THE JUDGEMENT:

This bill(asper the judgment of SC) was aimed at eradicating the malpractices prevalent in the private sector educational institutions, and attempted to regulate the educational institutions' function, including standardizing syllabi and pay structures. The religious organizations, along with opposition parties, including Indian National Congress, started the liberation struggle to overthrow the E. M. S. Namboodiripad government. This bill, along with Land Reforms Ordinance and other agricultural legislation, imparted drastic changes in Kerala society, and paved the way for the natural death of feudalistic society in Kerala.

The Education Bill sought to regulate appointments and conditions of teachers. Salaries of teachers were to be paid through the treasury. There was a provision of takeover of management of educational institutions, which arguably violated the constitution.Nevertheless, the Supreme Court rejected the appeal and the bill received the assent of the president of India.

Even though the Education Bill failed to pass through the Assembly, many of its provisions were later implemented by subsequent governments with amendments.

However the view points of Justice Iyer were never implemented in the amendments or bill. Two of his view points are significant here:

1) If a minority institution claims aid for its functioning from the state, it needs to comply with the regulations of the state. Imparting a non secular education model and receiving aid from a secular state may prove to be injustice to majority institutions.
2) Recognition of an institution is vital for the welfare of the students. When a minority institution demands recognition, it must comply with the norms of the state, which are common for minority and majority institutions.
3) Regulation of majority and minority institutions must be considered at par and the state should have a right to interefere with the fee structure and audit the financials of the institutions demanding grant and recognition from State

The above points are not ultravires to Sec 29 and Sec 30 of Minorities Act.

It must be clearly understood here, the clear motive of the constitution makers, that protection of minorities and their rights means that the statute should protect them from an over indulgent majority who might exploit them or neglect them.

However, the provision of the act never gives the minorities an edge over the majorities in the eyes of law, which would be discrimination and ultra vires to Art. 19 of Fundamental rights.While upholding these rights, the concept that there should be no reverse discrimination is a vital point which was later quoted in many of SC’s verdicts.

In TMA Pai case, SC pointed out that “the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions”

The unfortunate Aspect of this ruling:

Instances:

1) The most significant case on this point is the D.A.V College, Bhatinada v. State of Punjab[24]. By a notification, the Punjab Government compulsorily affiliated certain colleges to the Punjab University which prescribed Punjabi in the Gurumukhi script as the sole and exclusive medium of instruction and examination for certain courses. The Supreme Court declared that it violated the right of the Arya Samajists to use their own script in the colleges run by them and compulsorily affiliated to the University.

2) Based on a number of rulings of the high courts and Supreme court, the National Commission for Minority Educational Institutions Act, 2004 was formed. This act was passed in year 2004 for giving more teeth to minority education in India. This act allows direct affiliation of minority educational institutes to central universities. This act was enacted in order to provide quality education in minority institutes.

According to this bill, any minority educational institutes seeking affiliation to a central university will be granted such affiliation. The various central universities named for the purpose, in the schedule of the bill, are: University of Delhi, Pondicherry University, North Eastern Hill University, Assam University, Nagaland University and Mizoram University. If a university named in the schedule denies affiliation to an institute, a three-member commission (with all the three belonging to the minority community) would give the final and binding ruling. This committee will be headed by a High Court judge and vested with all relevant executive and judicial powers. This commission can advise the central and state governments on any question relating to the minorities' education, which are referred to it. According to the bill, the commission can "look into specific complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice and any dispute relating affiliation to a scheduled university and report its findings to the central government for its implementation." Only the central government shall have the powers to overrule the decisions of the commission.

But various lacunas are being observed since the birth of these rights and acts. It has been observed that these articles and acts are unable to clear various facets like

- Is there any right to create educational institutes for minorities and if so under which provision?

  It may not be out of place to mention that there is a mushroom growth of minority institutions. The extent of positive impact on the growth and development of the said communities is still a matter of question and research.

- In order to determine the existence of a religious or linguistic minority in relation to article 30, what is to be the unit, the State or the country as a whole?

It may be worthwhile to note that in India, a country with myriad communities and cultures, people conglomerate into living in packets and divisions. What may be a majority in an area is minority in another.

- To what extent can the rights of aided private minority institutions to administer be regulated?

Still answers to these questions are illusionary and ambiguous in nature. Even National Commission for Minority Educational Institutions Act, 2004 defines a minority institute as "a college or institution (other than a university) established or maintained by a person or group of persons from amongst the minorities." Thus, just on account of the minority identity of the management, an institute is to be accorded the minority status, irrespective of whether or not that particular institute is serving the interests of the minority community in its entirety. It is a well known fact that majority of the institutes established in the name of minorities are not serving the real interests of the minorities, especially those of the socially and economically underprivileged sections. Students are admitted on the basis of their money power and not on the basis of their merit or minority identity. That will further fasten this process and will serve the interests of the economic minority instead of the religious and linguistic minorities. So, in order to make these articles and acts free from ambiguity and illusionary nature help from Court should be taken in a view to remove this ambiguity. It is very important as development, equality, unity of our country relies on these articles and acts.[6]

[6] Ref: http://www.legalserviceindia.com/article/l93-minorities-rights.html
http://www.eurac.edu/Press/Publications/Monographs/0059701.htm
http://www.sabrang.com/cc/archive/2005/sep05/edu3.html - 14k
http://www.hinduonnet.com/2002/12/17/stories/2002121700891000.htm - 20k
http://pd.cpim.org/2004/1226/12262004_ragesh.htm

PETITIONER: R. M. D. CHAMARBAUGWALLA

Vs.

RESPONDENTTHE UNION OF INDIA(with connected petitions)

DATE OF JUDGMENT:
09/04/1957

BENCH:
AIYYAR, T.L. VENKATARAMA

BENCH:
AIYYAR, T.L. VENKATARAMA

DAS, SUDHI RANJAN (CJ)

SINHA, BHUVNESHWAR P.

DAS, S.K.

GAJENDRAGADKAR, P.B.

CITATION:
1957 AIR 628 1957 SCR 930

ACT:
Prize Competitions--State enactment for control and tax on such competitions--Central enactment for control and regulation of such competitions, adopted by State--Subsequent amendment of State enactment by State Legislature--Constitutional validity--Mysore Lotteries and Prize Competitions Control and Tax Act, 1951 (Mysore 27 of 1951), as amended by Act 26 of 1957, ss. 8, 12(1) (b), 15 Proviso--Prize Competitions Act, 1955 (42 of 1955), ss. 4,5 -Constitution of India, Arts. 252, 254, Seventh Schedule, List II, entries 34, 62.

Background

The petitioners, who were promoting 'and conducting prize competitions in the different States of India, challenged the constitutionality Of ss. 4 and 5 Of the Prize Competitions Act (42 of 955) and rr. xi and 12 framed under S. 20 Of the Act.

Their contention wasthat 'prize competition' as defined in S. 2(d) of the Act included not merely competitions that were of a gambling nature butalso those in which success depended to a substantial degree on skill and the sections and the rules violated their fundamental right to carry on business, and were unsupportable under Art. 19(6) of the Constitution, that they constituted a single inseverable enactment and, consequently, must fail entirely. On behalf of the Union of India this was controverted and it was contended that the definition, properly construed, meant and included only such competitions as were of a gambling nature, and even if that was not so,

the impugned provisions, being severable in their application, were valid as regards gambling competitions. Held, that the validity of the restrictions imposed by SS. 4

and 5 and rr. ii and 12 of the Act as regards gambling competitions was no longer open to challenge under Art. 19(6) of the Constitution in view of the, decision of this Court that gambling did not fall within the purview of Art. 19(i) (g) of the Constitution. The State of Bombay v. R. M. D. Chamarbaugwala, (1957) S.C.R. 874, followed.

On a proper construction there could be no doubt that the Prize Competitions Act (42 Of 1955), in defining the word 'prize competition' as it did in S. 2(d), had in view only such competitions as were of a gambling nature and no others. In interpreting an enactment the Court should ascertain the intention of the legislature not merely from a literal meaning of the words used but also from such matters as the history of the legislation, its purpose and the mischief it seeks to suppress. The Bengal Immunity Company Limited v. The State of Bihar and others, (1955) 2 S.C.R. 603, referred to. 931

Even assuming that prize competition as defined by S. 2(d) of the Act included not merely gambling competitions but also others in which success depended to a considerable degree on skill, the restrictions imposed by ss. 4 and 5 and rr. ii and 12 of the Act were clearly severable in their application to the two, distinct and separate ategories of competitions and, consequently, could not be void as regards gambling competitions.

The principle of severability is applicable to laws enacted by legislatures with limited powers of legislation, such as those in a Federal Union, which fall partly within and partly outside their legislative competence, where the question arises as to whether the valid can be separated from the invalid parts and that is a question which has to be decided by the Court on a consideration of the entire provisions of the Act. There is, however, no basis for the contention that the principle applies only when the legislature exceeds its powers as regards the subject-matter of legislation and not when it contravenes any constitutional prohibitions.

JUDGEMENT

ORIGINAL JURISDICTION :Writ Petitions Nos. 78-80, 93 and 152 of 1956.

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

Sir N. P. Engineer, N. A. Palkhivala, R. A. Gagrat and G. Gopalakrishnan, for the petitioners in Petitions Nos. 78, 79 and 80 of 1956.

Ganpat Rai, for the petitioner in petition No. 93 of 1956. K. C. Jain and B. P. Maheshwari, for the petitioner in Petition No. 152 of 1956.

C. K. Daphtary, Solicitor-General of India, Porus A. Mehta and R. H. Dhebar, for the respondent No. 1 in Petitions Nos. 78/56 and 152/56 and Respondents in Petitions Nos. 79, 80 and 93 of 1956.

G. R. Ethirajulu Naidu, Advocate-General, Mysore, Porus A. Mehta and T. M. Sen, for respondent No. 2 in Petition No. 78 of 1956.

April 9. 1957. The Judgment of the Court was delivered by VENKATARAMA AIYAR J.- Pursuant to resolutions passed by the' legislatures of several States under Art. 252, el. (1) of the Constitution, Parliament enacted Prize Competitions Act, (42 of 1955), hereinafter referred to as the Act, and by a notification issued on March 31, 1956, the Central Government brought it into force on April 1, 1956. The petitioners before us are engaged in promoting and conducting prize competitions in different States of India, and they have filed the present petitions under Art. 32 questioning the validity of some of the provisions of the Act and the rules framed thereunder.

It will be convenient first to refer to the provisions of the Act and of the rules, so far as they are material for the purpose of the present petitions. The object of the legislation is, as stated in the short title and in the preamble, " to provide for the control and regulation of prize competitions ". Section 2(d) of the Act defines "prize competition" as meaning "any competition (whether called a cross-word prize competition, a missing-word prize competition, a picture prize competition or by any other name), in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation of letters, words or figures ". Sections 4 and 5 of the Act are-. the provisions which are impugned as unconstitutional, and they are as follows:

4. "No person shall promote or conduct any prize competition or competitions in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month exceeds one thousand rupees; and in every prize competition, the number of entries shall not exceed two thousand.

5. Subject to the provisions of section 4, no person shall promote any prize competition or competitions in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month does not exceed one thousand rupees unless he has obtained in this behalf a licence granted in accordance with the provisions of this Act and the rules made thereunder. "

Then follow provisions as to licensing, maintaining of accounts and penalties for violation thereof. Section 20 confers power on the State Governments to frame rules for carrying out the purpose of the Act. In exercise of the powers conferred by this section, the Central Government has framed rules for Part C States, and they have been, in general, adopted by all the States. Two of these rules, namely, rules 11 and 12 are impugned by the petitioners as unconstitutional, and they are as follows:

11. " Entry fee-(1) Where an entry fee is charged in respect of a prize competition, such fee shall be paid in money only and not in any other manner.

(2) The maximum amount of an entry fee shall not exceed Re. I where the total value of the prize or prizes to be offered is rupees one thousand but not less than rupees five hundred; and in all other cases the maximum amount of an entry fee shall be at the following rates, namely-

(a) as 8 where the total value of the prize or prizes to be offered is less than rupees five hundred but not less than rupees two hundred and fifty; and

(b) as. 4 where the total value of the prize or prizes to be offered is less than rupees two hundred and fifty.

12. Maintenance of Register.-Every licensee shall maintain in respect of each prize competition for which a licence has been granted a register in Form C and shall, for the purpose of ensuring that not more than two thousand entries are received for scrutiny for each such competition, take the following steps, that is to say,shall-

(a) arrange to receive all the entries only at the place of business mentioned in the license;

(b) serially number the entries according to their order of receipt;

(c) post the relevant particulars of such entries in the register in Form C as and when the entries are received and in any case not later than the close of business on each day; and

(d) accept for scrutiny only the first two thousand. entries as they appear in the register in Form C and ignore the remaining entries, if any, in cases where no entry fee is charged and refund the entry fee received in respect of the entries in excess of the first two thousand to the respective senders thereof in cases where an entry fee has been charged after deducting the, cost (if any) of refund." Now, the contention of Mr. Palkhiwala, who addressed the main argument in support of the petitions, is that prize competition as defined in s. 2(d) would include not only competitions in which success depends on chance but also those in which it would depend to a substantial degree on skill; that the conditions laid down in ss. 4 and 5 and rr. II and 12 are wholly unworkable and would render it impossible to run the competition, and that they seriously encroached on the fundamental right of the petitioners to carry on business; that they could not be supported under Art. 19(6) of the Constitution as they were unreasonable

-and amounted, in effect, to a prohibition and not merely a regulation of the business; that even if the provisions could be regarded as reasonable restrictions as regards competitions which are in the nature of gambling, they could not be supported as regards competitions wherein success depended to a substantial extent on skill, and that as the impugned law constituted a single inseverable enactment, it must fail in its entirety in respect of both classes of competitions. Mr. Seervai who appeared for the respondent, disputes the correctness of these contentions. He argues that 'prize competition' as defined in s. 2(d) of the Act, properly construed, means and includes only competitions in which success does not depend to any substantial degree on skill and are essentially gambling in their character; that gambling activities are not trade or business within the meaning of that expression in Art. 19(1)(g), and that accordingly the petitioners are not entitled to invoke the protection of Art. 19(6); and that even if the definition of 'prize competition' in s. 2(d) is wide enough to include competitions in which success depends to a substantial degree on skill and ss. 4 and 5 of the Act and rr. 11 and 12 are to be struck down in respect of such competitions as unreasonable restrictions not protected by Art. 19(6), that would not affect the validity of the enactment as regards the competitions which are in the nature of gambling, the Act being severable in its application to such competitions.

These petitions were heard along with Civil Appeal No. 134 of 1956, wherein the validity of the Bombay Lotteries and Prize Competitions Control and Tax Act, 1948 was impugned on grounds some of which are raised in the present petitions. In our judgment in that appeal, we have held that trade and commerce protected by Art. 19(1)(g) and Art. 301 are only those activities which could be regarded as lawful trading activities, that gambling is not trade but res extra commercium, and that it does not fall within the purview of those Articles. Following that decision, we must hold that as regards gambling competitions, the petitioners before us cannot seek the protection of Art. 19(1)(g), and that the question whether the restrictions enacted in ss. 4 and 5 and rr. 11 and 12 are reasonable and in the interest of the public within Art. 19(6) does not therefore arise for consideration.

As regards competitions which involve substantial skill, however, different considerations arise. They are business activities, the protection of which is guaranteed by Art. 19(1)(g), and the question would have to be determined with reference to those competitions whether ss. 4 and 5 and rr. 1 1 and 12 are reasonable restrictions enacted in public interest. But Mr. Seervai has fairly conceded before us that on the materials on record in these proceedings, he could not maintain that the restrictions contained in those provisions are saved by Art. 19(6) as being reasonable and in the public interest. The ground being thus cleared, the only questions that survive for our decision are (1) whether, on the definition of 'prize competition' in s.2(d), the Act applies to competitions which involve substantial skill and are not in the nature of gambling; and (2) if it does, whether the provisions of ss. 4 and 5 and rr. II and 12 which are, ex concessi void, as regards such competitions, can on the principle of severability be enforced against competitions which are in the nature of gambling.

1. If the question whether the Act applies also to prize competitions in which success depends to a sub stantial degree on skill is to be answered solely on a literal construction of s. 2(d), it will be difficult to resist the contention of the petitioners that it does. The definition of 'prize competition' in s. 2(d) is wide and unqualified in its terms. There is nothing in the wording, of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance. It is argued by Mr. Palkhiwala that the language of the enactment being clear and unambiguous, it is not open to us to read into it a limitation which is not there, by reference to other and extraneous considerations. Now, when a question arises as to the interpretation to be put on an enactment, what the court has to do is to ascertain " the intent of them that make it", and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. " The literal construction then", says Maxwell on Interpretation of Statutes, 10th Edn., p. 19, "has, in general, but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider, according to Lord Coke: 1. What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4). The reason of the remedy." The reference here is to Heydon's case (1). These are principles well settled, and were applied by this Court in The Bengal Immunity Company Limited v. The State of Bihar and others (2). To decide the true scope of the present Act, therefore, we must have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the legislation and the purposes thereof, the mischief which it intended to (1) (1584) 3 W. Rep. 16; 76 E.R. 637.

(2) (1955) 2 S.C.R. 603, 633.

suppress and the other provisions of the statute, and construe the language of s. 2(d) in the light of the indications furnished by them.

Turning first to the history of the legislation, its genesis is to be found in the Bombay Lotteries and, Prize Competitions Control and Tax Act (Bom. LIV of 1948). That Act was passed with the object of controlling and taxing lotteries and prize competitions within the Province of Bombay, and as originally enacted, it applied only to competitions conducted within the Province of Bombay. Section 7 of the Act provided that "a prize competition shall be deemed to be an unlawful prize competition unless a licence in respect of such competition has been obtained by the promoter thereof." Section 12 imposed a tax on the amounts received in respect of competitions which had been licensed under the Act. With a view to avoid the operation of the taxing provisions of this enactment, persons who had there to before been conducting prize competitions within the Province of Bombay shifted the venue of their activities to neighbouring States like Mysore, and from there continued to receive entries and remittances of money therefor from the residents of Bombay State. In order to prevent evasion of the Act and for effectually carrying out its object, the legislature of Bombay passed Act XXX of 1952 extending the provisions of the Act of 1948 to competitions conducted outside the State of Bombay but operating inside it, the tax however being limited to the amounts remitted or due on the entries sent from the State of Bombay. The validity of this enactment was impugned by a number of promoters of prize competitions in proceedings by way of writ in the High Court of Bombay, and dealing with the contentions raised by them, Chagla C.J. and Dixit J. who heard the appeals arising from those proceedings, held that the competitions in question were gambling in character, and that the licensing provisions were according valid but that the taxes imposed by ss. 12 and 12-A of the Act were really taxes on the carrying on of the business of running prize competitions, and were hit by Art. 301 of the Constitution, and were therefore bad. it is against this decision that Civil Appeal No. 134 of 1956, already referred to, was directed.

The position created by this judgment was that though the States could regulate the business of running competitions within their respective borders, to the extent that it had ramifications in other States they could deal with it effectively only by joint and concerted action among themselves. That precisely is the situation for which Art. 252(1) provides. Accordingly, following on the judgment of the Bombay High Court, the States of Andhra, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Patiala and East Punjab States Union and Saurashtra passed resolutions under Art. 252(1) of the Constitution authorising Parliament to enact the requisite legislation for the control and regulation of prize competitions. Typical of such resolutions is the one passed by the legislature of Bombay, which is in these terms:

" This Assembly do resolve that it is desirable that control and regulation of -prize puzzle competitions and all other matters consequential and incidental thereto in so far as these matters are concerned with respect ,to which Parliament has no power to make laws for the States, should be regulated by Parliament by law." It was to give effect to these resolutions that Parliament passed the Act now under consideration, and that fact is recited in the preamble to the Act.

Having regard to the circumstances under which the resolutions came to be passed, there cannot be any reasonable doubt that the law which the State legislatures moved Parliament to enact under Art. 252(1) was one to control and -regulate prize competitions of a gambling character. Competitions in which success depended substantially on skill could not have been

in the minds of the legislatures which passed those resolutions. Those competitions had not been the subject of any controversy in court. They had done no harm to the public and bad presented no problems to the States, and at no time had there been any legislation directed to regulating them. And if the State legislatures felt that there was any need to regulate even those competitions, they could have themselves effectively done so without resort to the special jurisdiction under Art. 252(1). It should further be observed that the language of the resolutions is that it is desirable to control com- petitions. If it was intended that Parliament should legislate also on competitions involving skill, the word, ,control' would seem to be not appropriate. While control and regulation would be requisite in the case of gambling, mere regulation would have been sufficient as regards competitions involving skill. The use of the word control' which is to be found not only in the resolution but also in the short title and the preamble to the Act appears to us to clearly indicate that it was only competitions of the character dealt with in the Bombay judgment, that were within the contemplation of the legislature. Our attention was invited by Mr. Seervai to the statement of objects and reasons in the Bill introducing the enactment. It is therein stated that the proposed legislation falls under Entry 34 of the State List, viz., "Betting and gambling". If we could legitimately rely on this, that would be conclusive against the petitioners. But Mr. Palkhiwala contends, and rightly, that the Parliamentary history of the enactment is not admissible to construe its meaning, and Mr. seervai also disclaims any intention on his part to use the statement of objects and reasons to explain s. 2(d). We must accordingly exclude it from our consideration. But even apart from it, having regard to the history of the legislation, the declared object thereof and the wording of the statute, we are of opinion that the competitions which are sought to be controlled and regulated by the Act are only those competitions in which success does not depend to any substantial degree on skill. (2) Assuming, however, that prize competitions as defined in s. 2(d) include those in which success depends to a substantial degree on skill as well as those in which it does not so depend, the question then arises for determination whether ss. 4 and 5 of the Act and rr. 11 and 12 are void not merely in their application to the former-as to which there is no dispute-, but also the latter. Mr. Palkhiwala contends that they are, because, he argues, the rule as to severability of statutes can apply only when the impugned legislation is in excess of legislative competence as regards subjectmatter and not when it is in violation of constitutional prohibitions, and further because the impugned provisions are one and indivisible. On the other hand, Mr. Seervai for the respondent contends that the principle of severability is applicable when a statute is partially void for whatever reason that might be, and that the impugned provisions are severable and therefore enforceable as against competitions which are of a gambling character. It is on the correctness of these contentions that we have to pronounce. The question whether a statute which is void in part is to be treated as void in toto, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds: It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, ss. 91 and 92 of the Canadian Constitution, and s. 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account

become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act. This is a principle well established in American Jurisprudence, Vide Cooley's Constitutional Limitations, Vol. 1, Chap. VII, Crawford on Statutory Construction, Chap. 16 and Sutherland on Statutory Construction, 3rd Edn, Vol. 2, Chap. 24. It has also been applied 'by the Privy Council in deciding on the validity, of laws enacted by the legislatures of Australia and Canada, Vide Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Company Limited (1) and Attorney- General for Alberta v. Attorney-General for Canada(1). It was approved by the Federal Court in In re Hindu Women's Rights to Property Act (3) and adopted by this Court in The State of Bombay and another v. F. N. Balsara (4) and The State of Bombay v. The United Motors (India) Ltd., and others(1). These decisions are relied on by Mr. Seervai as being decisive in his favour. Mr. Palkhiwala disputes this position, and maintains that on the decision of the Privy Council in Punjab Province v. Daulat Singh and others (6) and of the decisions of this Court in Romesh Thappar v. State of Madras(7) and Chintaman Rao v. State of Madhya Pradesh(8), the question must be answered in his favour. We must now examine the precise scope of these decisions. In In re Hindu Women's Rights to property Act (3), the question arose with reference to the Hindu Women's Rights to Property Act XVIII of 1937. That was an Act passed by the Central Legislature, and had conferred on Hindu widows. certain rights over properties which devolved by intestate succession and survivorship. While the subject of devolution was within the competence of the Centre under Entry 7 in List III, that was limited to property other than agricultural land, which was a subject within the, exclusive competence of the Provinces under Entry 21 in List 11. Act No. XVIII of 1937, dealt generally with property, and the contention raised was that being admittedly incompetent and ultra vires as regards agricultural lands, it was void in its entirety.

(1) [1914] A.C. 237. (5) [1953] S.C.R. 1069. (2) L.R. [1947] A.C. 503. (6) [1946] F.C.R. 1. (3) [1941] F.C.R. 12. (7) [1950] S.C.R. 594. (4) [1951] S.C.R. 682. (8) [1950] S.C.R. 759.

It was held by the Federal Court that the Central Legislature must, on the principle laid down in Macleod v. Attorney-General for New, South Wales (1), be presumed to have known its own limitations and must be held to have intended to enact only laws within its competence, that accordingly the word I property' in Act No. XVIII of 1937 must be construed as property other than agricultural land, and that, in that view, the legislation was wholly intra vires. It is contended by Mr. Palkhiwala that this decision does not proceed on the basis that the Act is in part ultra vires and that the remainder however could be separated therefrom, but on the footing that the Act is in its entirety intra vires, and that thus, no question of severability was decided. That is true; but that the principle of severability had the approval of that Court clearly appears from the following observations of Sir Maurice Gwyer C. J.:

"It should not however be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act hag been held to be bad. If the restriction of thegeneral words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be 'held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense. If the Act -is to be upheld, it'

must remain, even when a narrower meaning is given to the general words, an Act which is complete, intelligible and valid and which can be executed by itself;' Wynes: Legislative and Executive Powers in, Australia, p. 51, citing Presser v. Illinois (2). "

There is nothing in these observations to. support the contention of the petitioners that the doctrine of severability applies only when the legislation is in (1) [1891] A.C. 455. (2) (1886) 116 U.S. 252.

excess of the competence of the legislature quoad its subject-matter, and not when it infringes some constitutional prohibitions.

In The State of Bombay and another v. F. N. Balsara(1) the question was as to the validity of the Bombay Prohibition Act. Sections 12 and 13 of the Act imposed restrictions on the possession, consumption and sale of liquor, which had been defined in s. 2(24) of the Act as including " (a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol, and (b) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act ". Certain medicinal and toilet preparations had been declared liquor by notification issued by the Government under s. 2(24) (b). The Act was attacked in its entirety as violative of the rights protected by Art. 19(1) (f) ; but this Court held that the impugned provisions were unreasonable and therefore void in so far as medicinal and toilet preparations were concerned, but valid as to the rest. Then, the contention was raised that " as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so -far as it may be applied within the constitutional limits, as it is not severable ". In rejecting this contention, the Court observed (at pp. 717-718):

" These items being thus treated separately by the legislature itself and being severable, and it not being contended, in view of the directive principles of State policy regarding prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties are unreasonable, the impugned sections must be held valid so far as these categories are concerned."

This decision is clear authority that the principle of severability is applicable even when the partial (1) [1951] S.C.R. 682.

invalidity of the Act arises by reason of its contravention of constitutional limitations. It is argued for the petitioners that in that case the legislature had through the rules framed under the statute classified medicinal and toilet preparations as a separate category, and had thus evinced an intention to treat them as severable, that no similar classification had been made in the present Act, and that therefore the decision in question does not help the respondent. But this is to take too narrow a view of the decision. The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it. It is a feature usual in latterday legislation in America to enact a clause that the invalidity of any part of the law shall -not render the rest of it void, and it has been held that

such a clause furnishes only prima facie evidence of severability, which must in the last resort be decided on an examination of the provisions of the statute. In discussing the effect of a severability clause, Brandies J. observed in Dorchy v. State of Kansas (1) that it "provides, a rule of construction, which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command". The weight to be attached to a classification of subjects made in the statute itself cannot, in our opinion, be greater than that of a severability clause. If the decision in The State of Bombay and another v. F. N. Balsara(2) is examined in the light of the above discussion, it will be seen that while there is a reference in the judgment to the fact that Medicinal and toilet preparations are treated separately by the legislature, that is followed by an independent finding that they are severable. In other words, the decision as to severability was reached on (1) [1924] 264 U.S. 286; 68 L. Ed. 686, 690.

(2) [1951] S.C.R. 682.

the separability in fact of the subjects dealt with by the legislation and the classification made in the rule merely furnished support to it.

Then, there are the observations of Patanjali Sastri C.J. in The State of Bombay v. The United Motors (India) Ltd.(1). Dealing with the contention that a law authorising the imposition of a tax on sales must be declared to be wholly void because it was bad in part as transgressing constitutional limits, the learned Chief Justice observed (at p. 1099):

"It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country. "

The petitioners contend that the rule of severability in enforcement laid down in the above passage following the decision in Bowman v. Continental Co.(2) is confined in American law to taxing statutes, that it is really in the nature of an exception to the rule against severability of laws which are partially unconstitutional, and that it has no application to the present statute. We are unable to find any basis for this argument in the American authorities. That the decision in Bowman's case (2) related to a taxing statute is no ground for limiting the principle enunciated therein to taxing statutes. On the other hand, the discussion of the law as to severability in the authoritative text-books shows that no distinction is made in American Jurisprudence between taxing statutes and other statutes. Corpus Juris Secundum, Vol. 82, dealing with the subject of severability, states first the principles applicable generally and to all statutes, and then proceeds to consider those principles with reference to different topics, and taxation laws form one of those topics.

We have now to consider the decisions in Punjab Province v. Daulat Singh and others (3),Romesh Thappar v. State of Madras (4) and chintaman Rao v. State of Madhya Pradesh (5) relied on by the petitioners. In Punjab Province v. Daulat Singh and others (3), the (1) [1953] S.C.R. 1069 at 1098-99. (3) [1946] F.C.R. 1. (2) [1921] 256 U.S. 642 ; 65 L. Ed. II37. (4) [1950] S.C.R. 594.

(5)[1950] S.C.R. 759.

challenge was on the validity of s. 13A which had been introduced into the Punjab Alienation of Land Act XIII of 1900 by an Amendment Act X of 1938. That section enacted that an alienation of land by a member of an agricultural tribe in Punjab in favour of another member

of the tribe made either before or after the commencement of the amendment Act was void for all purposes, when the real beneficiary under the transaction was not a member of the tribe. Section 4 of the Act had empowered the local Government to determine by notification the body or group of persons who are to be declared to be agricultural tribes for the purpose of the Act. A notification dated April 18, 1904 issued under that section provided that, " In each district of the Punjab mentioned in column I of the Schedule attached to this notification, all persons either holding land or ordinarily residing in such district and belonging to any one of the tribes mentioned opposite the name of such district, in column 2, shall be deemed to be an 'agricultural tribe' within the district". The question was whether s. 13A was void as contravening s. 298(1) of the Government of India Act, 1935, which provided inter alia that no subject of His Majesty domiciled in India shall on grounds only of descent be prohibited from acquiring, holding or disposing of property. It was held by the Federal Court that s. 13A was void as infringing s. 298(1) to the extent that it prohibited alienation on ground of descent, but that it was valid in so far as it related to a prohibition of the transaction in favour of a person who belonged to the tribe but did not hold land or ordinarily reside in the district, as a prohibition on that ground was not within s. 298(1) and that accordingly an enquiry should be made as to the validity of the impugned alienation with reference to the qualifications of the alienee. (Vide Punjab Province v. Daulat Singh (1).

Before the Privy Council, Mr. Privy, counsel for the appellant, " conceded that membership of a tribe was generally a question of descent ", and the Board accordingly held that s. 13A wag repugnant to a. 298(1) (1) [1942] F.C. R. 67.

and was void. Dealing next with the enquiry which was directed by the Federal Court as to the qualifications of the alienee, the Privy Council observed as follows (at p.

20):

" The majority of the Federal Court appear have contemplated another form of severability namely, by a classification of the particular cases or which the impugned Act may happen to operate, involving an inquiry into the circumstances of each individual case. There are no words in the Act capable of being so construed, and such a course would in effect involve an amendment of the Act by the court, course which is beyond the competency of the court, as has long been well established."

It will be noticed that, in the above case, there was no question of the application of the Act to different categories which were distinct and severable either in fact or under the provisions of the Act. The notification issued under s. 4 on which the judgment of the Federal Court was based did not classify those who did' not belong to the tribe and those who did not hold property or reside in the district as two distinct groups. It described only one category, and that had to satisfy both the conditions. To break up that category into two 'distinct groups was to go against the express language of the enactment and to substitute the word " for "and". The Privy Council held that that could not be done, and it also observed that the severability contemplated in the judgment of the Federal Court was an ad hoc determination with reference to qualifications of each alienee as distinguished from a distinct category with reference to the subject-matter. This is not an authority for the position that if the subject-matter of what is valid is severable from that of what is invalid, even then, the Act must be held to be wholly void. More to the point are the following observations (at pp. 19-20) on a question which was also raised in that case whether s. 13A which avoided the alienations

made both before and after the Act, having been held to be void in so far as it was retrospective, was void in toto:

"....If the retrospective element were not severable from the rest of the provisions, it is established beyond controversy that the whole Act would have to be declared ultra vires and void. But, happily, the retrospective element in the impugned Act is easily Severable and by the deletion of the words 'either before or' from the early part of sub-s. (1) of the new 3. 13A, enacted by s. 5 of the impugned Act, the rest ,if the provisions of the impugned Act may be left to operate validly."

Discussing this decision in The State of Bombay v. The United Motors (India) Ltd.(1), Patanjali Sastri C.J. observed (at p. 1098):

" The subject of the constitutional prohibition was single and indivisible, namely, disposition of property on grounds only of (among other things) descent and if, in its actual operation, the impugned statute was found to transgress the constitutional mandate, the whole Act had to be held void as the words used covered both what was constitutionally permissible and what was not."

That is to say, the notification issued under s. 4 was single and indivisible, and therefore it was not severable. Agreeing with this opinion, we are of opinion that the decision in Punjab Province v. Daulat Singh(2) cannot, in view of the decision of this Court in The State of Bombay v. P. N. Balsara (3), be accepted as authority for the position that there could be no severability, even if the subject- matters are, in fact, distinct and severable. In Romesh Thappar v. State of Madras(4), the question was as to the validity of s. 9 (1-A) of the Madras Maintenance of Public Order Act XXIII of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order". Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Art. 19(2) which saved " existing law in so far as it relates to any matter which undermines the security (1) [1953] S.C.R. 1069. (3) [1951] S.C.R. 682. (2) [1946] F.C.R. 1. (4) [1950] S.C.R. 594.

of or tends to overthrow the State." It was held by this Court that as the purposes mentioned in s. 9(1-A) of the Madras Act were wider in amplitude than those specified in Art. 19(2), and as it was not possible to split up s. 9(1-A) into what was within and what was without the protection of Art. 19(2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in Romesh Thappar v. State of Madras (1) was referred to in The State of Bombay v. F. N. Balsara (2) and The State of Bombay v. The United Motors (India) Ltd. (3) and distinguished. In Chintaman Rao v. State of Madhya Pradesh(4), the question related to the constitutionality of s. 4(2) of the Central Provinces and Berar Regulation of Manufacturers of Bidis (Agricultural Purposes) Act No. LXIV of 1948, which provided that, " No person residing in a village specified in such order shall during the agricultural season engage himself in the manufacture of bidis, and no manufacturer shall during the said season employ any person for the manufacture of bidis ". This Court held that the restrictions imposed by s. 4(2) were in excess of what was requisite for achieving the purpose of the Act, which was "

to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas ", that that purpose could have been achieved by limiting the restrictions to agricultural labour and to defined hours, and that, as it stood, the impugned provision could not be upheld as a reasonable restriction within Art. 19(1) (g). Dealing next with the question of severability, the Court observed (at p. 765) that, " The law even to the extent that it could be said to authorise the imposition of restrictions in regard to (1) [1950] S.C.R. 594. (3) [1953] S.C.R. 1069. (2) [1951] S.C.R. 682. (4) [1950] S.C.R. 759.

agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right." Now, it should be noted that the impugned provision, a. 4(2), is by its very nature inseverable, and it could not be enforced without re-writing it. The observation aforesaid must be read in the context of the particular provision which was under consideration. This really is nothing more than a decision on the severability of the particular provision which was impugned therein, and it is open to the same comment as the decision in Romesh Thappar v. State of Madras (1). That was also one of the decisions distinguished in The, State, of Bombay v. F. N. Balsara (2). The resulting position may thus be stated: When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions. That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of 1 prize competition' in s. 2(d) is wide enough to include also competitions involving skill to a substantial degree, It will be useful for the determination of this question to refer to certain rules of construction laid down by the American Courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows:

1.In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177.

(1) [1950] S.C.R. 594. (2) [1951] S.C.R. 682.

2.If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. 1 at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.

3.Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4.Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5.The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide Cooley's Constitutional Limitations, Vol. 1, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

6.If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.

7.In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide. Sutherland on Statutory Construction, Vol. 2, pp. 177-178. Applying these principles to the present Act, it will not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear-cut as that between commercial and wagering contracts. On the facts, there might be difficulty in deciding whether a given competition falls within one category or not ; but when its true character is determined, it must fall either under the one or the other. The distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask ourselves the question, would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be.

Nor does the restriction of the impugned provisions to competitions of a gambling character affect either the texture or the colour of the Act; nor do the provisions require to be touched and re-written before they could be applied to them. They will squarely apply to them on their own terms and in their true spirit, and form a code complete in themselves with reference to the subject. The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue -of the definition in s. 2(d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill. In the result, both the contentions must be found against the petitioners, and these petitions must be dismissed with costs. There will be only one set of counsel's fee.

Petitions dismissed.

Implications

This judgement is considered to be a landmark judgement and brings to light discussion on t vital doctrines of the constition:

- Doctrine of Res Extra Commercium
- Doctrine of Severability
- Dostrine of Police Power
- Doctrine of Privilege
- Doctrine of Due Process

Res Extra Commercium

This was the first case to bring in the concept of Doctrine of Res Extra Commercium. While the terminology itself may be roman, the Indian constitution is said to have borrowed this concept from Australian constitution. However, in Australia, gambling and betting was not treated as trade or commerce, and was also not classified as " Res extra Commercium".

The plethora of case law pertaining to fundamental rights in India reveal that apart from Article 14 the other two most highly debated rights are those granted under Articles 19 and 21. It is submitted that considerations of morality have been a deciding factor in many cases under these rights. The decisions of the Supreme Court with regard to fundamental right of a citizen to trade in liquor are relevant here. In RMD Chamarbaugwala v. Union of India , the Apex Court held that gambling was an activity res extra commercium, which could not fall under the term 'trade' and therefore, there could be no fundamental right under Article 19(1)(g) in this regard. The doctrine of res extra commercium, had its origins in Roman Law and was understood to include things of the nature which cannot be traded between individuals. The scope of this doctrine was stretched by the Court to identify those activities which subvert public morality and therefore must not be allowed to be traded.

However since in our constitution, Article 19(1)(g) does not apply to noxious substances, it unduly widens the power of the state in two important aspects:

1. Possibility for the state to affect detrimentally the trade in such substances by the mere use of executive power.

2. It is also possible for the state to impose unreasonable restrictions on those employed in distilleries or in lottery agencies since they have no right to be there.

The said doctrine is in subservience since this ruling for the last sixty years. However today it is regarded that professions relating to gambling and betting, trade of liquor are not regarded as criminal or against the law. This goes to prove the paradigm shift of morals and customs of the Indian national. The law has hence viewed things differently. While in the ruling, the learned judge stated ".. if article 19(1)(g)included gambling and betting, there would equally be a guaranteed right to hire goondas to commit assault and even murder, to sell obsene books, and to indulge in trafficking of women". The judge also gave parallels in rig veda and other provisions from scriptures and statutes to show the harmful effects of gambling and betting and then the genesis of application of Res extra commercium.

Change of Morals Today:

This was condemned by Subba Rao, J. subsequently, in K.K.Narula v. State of Jammu and Kashmir[i], in the following words

"..if activity of a dealer in ghee is business then how does it cease to be business if it is liquor?.."

"If the meaning of the trade or business depends and varies upon the general acceptance of standards of morality obtaining at a particular point of time in the country it would lead to incoherence. Standards of morality can provide guidance for imposing restrictions but cannot restrict scope of the right. " (Not clear that this is what was held in the case. Looks more like obiter)

Thus the Court departed from its earlier decision in the case of RMD Chamarbaugwala v. Union of India by holding that a fundamental right to trade in liquor existed and could be regulated by reasonable restrictions. In this maze of inconsistent decisions there was another turn when in the case of Khoday Distilleries v. State of Karnataka[ii] , the Supreme Court reverted back to the earlier conclusion, extending the concept of res extra commercium to liquor by holding that citizens are not entitled to carry on trade or business in immoral activities. It is quite evident that the standards of morality have clearly been given an upper hand in constraining the scope of freedoms under Article 19. Therefore there arises a discrepancy when the Court refuses to take into account the concept of morality as a ground for exercising judicial review.

The view of the Supreme Court in BR Enterprises vs Uttar Pradesh[iii] shows the absurdity of holding that trade in noxious substances is outside the purview of Part XIII. This case is not concerened the constitutional validity of lotteries of the Lotteries (Regulation) Act 1998[7]. One of the contentions taken up was that the state could not have run their own lotteries extra- territorially unless this activity is qualified under " trade and business" under article 298. If lotteries indeed were trade and business under Article 298, then there is no reason to hold them in Article 301-304. Faced with a paradoxical situation, the supreme Court held that "trade and business" as used in Article 298 had a different meaning from, and wider than, the expression," trade, commerce and intercourse" in Article 301. This leads to the absurd result that the State has right to carry on trade in lotteries but no freedom to do so across borders.

Doctrine of Severability

R.M.D. Chamarbaugwalla v. The Union of India is considered to be one of the most important cases on the Doctrine of Severability. In this case, the court observed that:"The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it."

[7] http://www.futuregaming.in/Lotteries_Act_1998.pdf

The court further said that: “When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid.”In the above-mentioned case, it was also said that: “Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional.

The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.”

Doctrine of Police Power:

In United states,(from where the doctrine of police power is recognized), this doctrine is regarded as a distinct and specific legislative power and is taken as the basis for excercising social control and regulation of private rights and freedom for the common good.[8]

However in India, the theory of police power has no place in our constitution. The state can trace its legislative power to reinforce public morality to articles 245 and 246 and the tree Lists in Schedule VII.

However there are three reasons why citizens of the country do not have fundamental rights to carry on trade of noxious substances. First, the police power of the State to enforce public morality to prohibit trades in noxious and dangerous goods. Second, power of state to enforce absolute prohibition in carrying out businesses of gambling or liquor. Third, the State has exclusive right in carrying out trade of liquor or gambling.

Eventhough our constitution has ruled out the Doctrine of police power, and the said ruling discussed above (dated 9th April 1957) has also dismissed the prevailance of the above Doctrine, the judgement in Coverjee Bharucha V Excise Commisioner,Ajmer[9], delivered on January 13,1954, dealt with auction to run a liquor shop. Here the judge had pointed out the harmful effect of alcohol and held that “ the police power of the State” was broad enough to regulate the business of liquor and even suppress it entirely. The court also held that there was no inherent right in the citizen to sell intoxicating liquors.

The Indian Supreme Court fell into error by importing the ambiguous police power doctrine, when the conclusion arrived at by the United States Supreme Court in Crowley V. Christensen[10] could have been arrived at using the specific provisions of our constitution. (The concept of total prohibition of noxious substances can be justifies under article 19(6) read with Article 47, which makes total prohibition a social goal). This example of Supreme

[8] As held by the United States Supreme Court in Branes v Glen Theatre,501U.S 560,569(1991), the traditional police power of the state is the basis for legislative authority to provide for “public health,safety and morals”

[9] Cooverjee B. Bharucha vs The Excise Commissioner And the ... on 13 January, 1954, Equivalent citations: 1954 AIR 220, 1954 SCR 873, Author: M C Mahajan, Bench: Mahajan, Mehar Chand (Cj), Mukherjea, B.K., Bose, Vivian, Hasan, Ghulam, Jagannadhadas, B. http://indiankanoon.org/doc/1029264/

[10] Crowley V Christensen, (1890) 34 L Ed 620 http://www.jstor.org/stable/3305208?seq=1#page_scan_tab_contents

Court in cooverjee Bharucha V. Excise Commissioner, Ajmer resorting to police power has been repeatedly followed in a number of cases.[11]

In P.N. Kaushal V Union, Justice krishan Iyer held that " any Government, with workers' weal and their families' survival at heart, would use its Police Power undr Article 19(6) read with section 59(f)(v) of the Act to forbid alcohol sales on pay days". This observation was watered down in a later paragraph where the learned judge conceded that Police power, as developed in the United States, was inapplicable in terms to Indian Constittuion Law. However, he held that there was a lot in common between this doctrine and the power of regulation contained in 19(6).

It may be be noteworthy to mention here that Police Power Doctrine evolved in United States to vest residuary powers of maintenance of Peace, Law and Order. However in India, Article 19(6) vested the power to impose reasonable restrictions on the right to carry on trade in the Centre and States.

The subsequent cases have blindly accepted this doctrine without deliberating the neccassity of Police Power doctrine in the light of Articles 19(2) to 19(6). Every right is subject to reasonable restrictions and any regulation by the State does not require the support of Police Power. This view has however been accepted by Justice Ayyangar, in a five bench judgement in kameshwar Prasad V. State of Bihar, where he held that American cases, which subjected the freedom of speech to the operation of an imprecise police Power were inappropriate when it came to resolving questions arising under Articles 19(1)(a) and (b) because the grounds of limitation might be placed on these rights were set out with defiteness and precision.

PETITIONER:THE STATE OF MADRAS

Vs.

RESPONDENT: GANNON DUNKERLEY & CO.,(MADRAS) LTD.

DATE OF JUDGMENT:

[11]11111111 Khoday distelleries V Karnataka (1995) 1S.C.C 574 (S.C), Punjab V Devans Modern Breweries, (2004) 11 S.C.C 26 (S.C.), Commissioner of police V Acharya Jagdishwarananda Avadhuta, (2004) 12 S.C.C 809 (S.C) (It was erroneously stated in this case that the police power of the State was founded on the theory that when there was a conflict between the rights of the individual and the interest of the society, the interest of the society must prevail. Based on such observations, police power was considered as authorizing restrictions on freedom of religion), Jilubhai Nanbhai Khachar V Gujarat, (1995) 1 S.C. C596(S.C) (The police power Doctrine was used to authorize acquisition of Property), Friends Colony Dev. Comm V orrissa, (2004) 8 S.C.C 733 (S.C) (" Power To Plan Development Of City And To Regulate Building Activity Therein Flows From The Police Power Of State")

01/04/1958

BENCH:
AIYYAR, T.L. VENKATARAMA

BENCH:
AIYYAR, T.L. VENKATARAMA

BOSE, VIVIAN

DAS, SUDHI RANJAN (CJ)

DAS, S.K.

SARKAR, A.K.

CITATION:
1958 AIR 560 1959 SCR 379

BACKGROUND
The respondent company, doing business, inter alia, in the construction of buildings, roads and other works was assessed to sales tax by the sales tax authorities who sought to include, the value of the materials used in the execution of building contracts within the taxable turnover of the respondent. The validity of the assessment was challenged by the respondent who contended that the power of the Madras Legislature to impose a tax on sales under Entry 48 in List II in Sch. VII of the Government of India Act, 1935, did not extend to imposing a tax on the value of materials used in construction works, as there was no transaction of sale in respect of those goods, and that the provisions introduced in the Madras General Sales Tax Act, 1939, by the Madras General Sales Tax (Amendment) Act, 1947, authorising the imposition of such tax were ultra vires.

The Sales Tax Appellate Tribunal rejected the respondent's contention but, on revision, the High Court took the view that the expression " sale of goods " had the same meaning in Entry 48 which it has in the Indian Sale of Goods Act, 1930, that the construction contracts of the respondent were agreements to execute works to be paid for according to measurements at the rates specified in the schedule thereto, and were not contracts for sale of the materials used therein, and that further, they were entire and indivisible and could not be broken up into a contract for sale of materials and a contract for payment for work done. Accordingly, it held that the impugned provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947, were ultra wires the powers of the provincial Legislature.

On appeal to the Supreme Court: Held, (1) On the true interpretation of the expression " sale of goods " there must be an agreement between the partie sale of the very goods in which eventually property passes. Poppatlal Shah v. The State of Madras, [1953] S.C.R. 677 and

The State of Bombay v. The United Motors (India) Ltd., II9531 S.C.R. 1069, relied on. In a building contract, the agreement between the parties is that the contractor should construct the building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and in such an agreement there is neither a contract to sell the materials:used in the construction, nor does property pass therein as moveables.

(2) The expression " sale of goods" was, at the time when the Government of India Act, 1935, was enacted, a term of well recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and must be interpreted in Entry 48 in List II in Sch. VII of the Act as having the same meaning as in the sale of Goods Act, 1930. The Sales Tax Officeyr Pilibhit v. Messrs. Budh Prakash jai Pyakash, [1955] 1 S.C.R. 243, relied on.

(3)In a building contract which is One, entire and indivisible, there is no sale of goods and it is not within the competence of the Provincial Legislature under Entry 48 in List 11 in Sch. VII of the Government of India Act, 1935, to impose a tax on the supply of the materials used in such a contract treating it as sale.

Pandit Banaysi Das v. State of Madhya Pradesh, (1955) 6 S.T. C. 93, Bhuramal v. State of Rajasthan, A. I. R. 1957 Raj. 104, Mohamad Khasim v. State of Alysoye, A. 1. R. 1955 MYs. 41 and Gannon Dunkeyley & Co. v. Sales Tax officer, A. I. R. 1957 Ker. 146, disapproved. Jubilee Engineeying Co. Ltd. v. Sales Tax Offence . I. R. 1956 Hyd. 79, approved.

(4)The Madras General Sales Tax Act is a law relating not to sale of goods but to tax on sale of goods and consequently the Madras General Sales Tax (Amendment) Act, 1947, is not bad under s. 107 of the Government of India Act, 1935, On the ground that it had not been reserved for the assent of the Governor-General. D. Saykar ' Bros. v. Commercial Tax Officer, A. I. R. 1957 Cal. 283, disapproved.

JUDGEMENT

The Judgment of the Court was delivered by VENKATARAMA AIYAR J.-This appeal arises out of proceedings for assessment of sales tax payable by the respondents for the year 1949-1950, and it raises a question of considerable importance on the construction of Entry 48 in List 11 of Sch. VII to the Government of India Act, 1935, " Taxes on the sale of goods."

The respondents are a private limited company registered under the provisions of the Indian Companies Act, doing business in the construction of buildings, roads and other works and in the sale of sanitary wares and other sundry goods. Before the sales tax authorities, the disputes ranged over a number of items, but we are concerned in this appeal with only two of them. One is with reference to a sum of Rs. 29,51,528-7-4 representing the value of the materials used by the respondents in the execution of their works contracts, calculated in accordance with the statutory provisions applicable thereto, and the other relates to a sum of Rs. 1,98,929-0-3 being the price of foodgrains supplied by the respondents to their workmen. It will be convenient at this stage to refer to the provisions of the Madras

General Sales Tax Act, 1939 (Mad. IX of 1939), in so far as they are relevant for the purpose of the present appeal. Section 2(h) of the Act, as it stood when it was enacted, defined " sale " as meaning " every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration ". In 1947, the Legislature of Madras enacted the Madras General Sales Tax (Amendment) Act No. XXV of 1947 introducing several new provisions in the Act, and it is necessary to refer tothem so far as they are relevant for the purpose of the present appeal. Section 2(c) of the Act had defined " goods " as meaning " all kinds of movable property other than actionable claims, stocks and shares and securities and as including all materials, commodities and articles", and it was amended so as to include materials " used in the construction, fitting out, improvement or repair of immovable property or in the fitting out, improvement or repair of movable property The definition of " sale " in s. 2(h) was enlarged so as to include " a transfer of property in goods involved in the execution of a works contract". In the definition of " turnover " in s. 2(i), the following Explanation (1)(i) was added: " Subject to such conditions and restrictions, if any, as may be prescribed in this behalf the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract."

A new provision was inserted in s. 2(ii) defining "works contract" as meaning "any agreement for carrying out for cash or for deferred payment or other valuable consideration the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any movable property ". Pursuant to the Explanation (1)(i) in s. 2(i), a new rule, r. 4(3), was enacted that " the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue, from time to time for different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentages..... and then follows a scale varying with the nature of the contracts.

It is on the authority of these provisions that the appellant seeks to include in the turnover of the res- pondents the sum of Rs. 29,51,528-7-4 being the value of the materials used in the construction works as determined under r. 4(3). The respondents contest this claim on the ground I that the power of the Madras Legislature to impose a tax on sales under Entry 48in List II in Sch. VII of the Government of India Act, does not extend to imposing a tax on the value of materials used in works, as there is no transaction of sale in respect of those goods, and that the provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947, authorising the imposition of such tax are ultra vires. As regards the sum of Rs. 1,98,929-0-3, the contention of the respondents was that they were not doing business in the sale of foodgrains, that they had supplied them to the workmen when they were engaged inconstruction works in out of the way places, adjusting

the price therefor in the wages due to them and that the amounts so adjusted were not liable to be included in the turnover. The Sales Tax Appellate Tribunal rejected both these contentions, and held that the amounts in question were liable to be included in the taxable turnover of the respondents. Against this decision, the respondents preferred Civil Revision Petition No. 2292 of 1952 to the High Court of Madras. That was heard by Satyanarayana Rao and Rajagopalan JJ. who decided both the points in their favour. They held that the expression "sale of goods" had the same meaning in Entry 48 which it has in the Indian Sale of Goods Act (III of 1930), that the construction contracts of the respondents were agreements to execute works to be paid for according to measurements at the rates specified in the schedule thereto, and were not contracts for sale of the materials used there- in, and that further, they were entire and indivisible and could not be broken up into a contract for sale of materials and a contract for payment for work done. In the result, they held that the impugned provisions introduced by the Amendment Act No. XXV of 1947, were ultra vires the powers of the Provincial Legislature, and that the claim based on those provisions to include Rs. 29,51,528-7-4 in the taxable turnover of the respondents could not be maintained. As regards the item of Rs. 1,98,929-0-3 they held that the sale of foodgrains to the workmen was not in the course of any business of buying or selling those goods, that there was no profit motive behind it, that the respondents were not dealers as defined in s. 2(d) of the Act, and that, therefore, the amount in question was not liable to be taxed under the Act. In the result, both the amounts were directed to be excluded from the taxable turnover of the respondents. Against this decision, the State of Madras has preferred the present appeal on a certificate granted by the High Court under Art. 133(1) of the constitution Before us, the learned Advocate-General of Madras did not press the appeal in so far as it relates to the sum of Rs. 1,98,929-0-3, and the only question, therefore, that survives for our decision is as to whether the provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947 and set out above are ultra vires the powers of the Provincial Legislature under Entry 48 in List II`. As provisions similar to those in the Madras Act now under challenge are to be found in the sales tax laws of other States, some of those States, Bihar, Punjab, Mysore, Kerala and Andhra Pradesh, applied for and obtained leave to intervene in this appeal, and we have heard learned counsel on their behalf. Some of the contractors who are interested in the decision of this question, Gurbax Singh, Messrs. Uttam Singh Duggal and United Engineering Company, were also granted leave to intervene, and learned counsel representing them have also addressed us on the points raised. The sole question for determination in this appeal is whether the provisions of the Madras General Sales Tax Act are ultra vires, in so far as they seek to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor, andthe answer to it must depend on the meaning to be given to the words " sale of goods " in Entry 48 in List II of Sch. VII to the Government of India Act, 1935.

Now, it is to be noted that while s. 311(2) of the Act defines " goods " as including " all materials, commodities and articles ", it contains no definition of the expression " sale of goods ". It wassuggested that the word " materials " in the definition of " goods " is sufficient to take in materials used in a works contract. That is so; but the question still remains whether there is a sale of those materials within the meaning of that word in Entry 48. On that, there has been sharp conflict of opinion among the several High

Courts. In Pandit Banarsi Das v. State of Madhya Pradesh (1), a Bench of the Nagpur High Court held, (1) [1955] 6 S.T.C. 93.

Differing from the view taken by the Madras High Court in the judgment now under appeal, that the provisions of the Act imposing a tax on the value of the materials used in a construction on the footing of a sale thereof were valid, but that they were bad in so far as they enacted an artificial rule for determination of that value by deducting out of the total receipts a fixed percentage on account of labour charges, inasmuch as the tax might, according to that computation, conceivably fall on a portion of the labour charges and that would be ultra vires Entry 48. A similar decision was given by the High Court of Rajasthan in Bhuramal v. State Of Rajasthan(1). In Mohamed Khasim v. State of Mysore (2), the Mysore High Court has held that the provisions of the Act imposing a tax on construction of works are valid, and has further upheld the determination of the value of the materials on a percentage basis underthe rules. In Gannon Dunkerley & Co. v. Sales Tax Officer(3), the Kerala High Court has likewise affirmed the validity of both the provisions imposing tax on construction works and the rules providing for apportionment of value on a percentage basis. In Jubilee Engineering Co., Ltd. v. Sales Tax officer (1) the Hyderabad High Court has followed the decision of the Madras High Court, and held that the taxing provisions in the Act are ultra vires. The entire controversy, it will be seen, hinges on the meaning ofthe words ',sale of goods " in Entry 48, and the point which we have now to decide is as to the correct interpretation to be put on them.

The contention of the appellant and of the States which have intervened is that the provisions of a Constitution which confer legislative powers should receive a liberal construction, and that, accordingly, the expression " sale of goods " in Entry 48 should be interpreted not in the narrow and technical sense in which it is used in the Indian Sale of Goods Act, 1930, but in a broad sense. We shall briefly refer to some of the authorities cited in support of this position. In (1) A.I.R. 1957 Raj. 104. (2) A.I.R. I055 MYS. 41 (3) A.I.R. 1957 Ker. 146. (4) A.I.R. 1956 Hyd. 79.

British Coal Corporation v. King (1), the question was whether s. 17 of the Canadian Statute, 22 & 24, Geo. V, c. 53, which abolished the right of appeal to the Privy Council from any judgment or order of any court in any criminal case, was intra vires its powers under the, Constitution Act of 1867. In answering it inthe affirmative, Viscount Sankey L. C. observed: " Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in Edwards v. A. G. for Canada (2) ". In James v. Commonwealth of Australia (3), Lord Wright observed that a Constitution must not be construed in any narrow and pedantic sense. In In re the Central Provinces and Berar Act No. XIV of 1938 (4), discussing the principles of interpretation of a constitutional provision, Sir Maurice Gwyer C. J. observed: " I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by 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 a Government is a living and organic thing, which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat."

The authority most strongly relied on for the appellant is the decision of this Court in Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City (5), in which the question was as to the meaning of the word " income " in Entry 54 of List 1. The contention was that in the legislative practice of both England and India, that word had been understood as (1) [1935] A.C. 500, 518. (2) [1930] A.C. 124, 136. (3) [1936] A.C. 578, 614. (4) [1939] F.C.R. j8,37. (5) [1955] 1 S.C.R. 829, 833, 836. not including accretion in value to capital, and that it should therefore bear the same meaning in Entry 54.In rejecting this contention, this Court observed that the so- called " legislative practice was nothing but judicial interpretation of the word 'income as appearing in the fiscal statutes", that in " construing an entry in a List conferring legislative powers thewidest possible construction according to their ordinary meaning must be put upon the words used therein ", and that the cardinal rule of interpretation was " that words should be read in their ordinary, natural and grammatical meaning, subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

The learned Advocate-General of Madras also urged in further support of the above conclusion that the provisions of a Constitution Act conferring powers of taxation should be interpreted in a wide sense, and relied on certain observations in Morgan v. Deputy Federal Commissioner of Land Tax, N. S. W. (1) and Broken Hill South Ltd. v. Commissioner of Taxation (N.S. W.)(2) in support of his contention. In Morgan v. Deputy Federal Commissioner of Land Tax, N.S. W. (1), the question was as to the validity of a law which had enacted that lands belonging to a company were deemed to be held by its shareholders as joint owners and imposed a land tax on them in respect of their share therein. In upholding the Act, Griffith C. J. observed : " In my opinion, the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them in re rum nature, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with respect to it."

In Broken Hill South Ltd. v. Commissioner of Taxation, N. S. W. (2), the observations relied on are the following: (I) (19I2) 15 C.L.R. 661, 666. (2) (1937) 56 C.L.R. 337,379. "In any investigation of the constitutional powers of these great Dominion legislatures, it is not proper that a court should deny to such a legislature the right of solving taxation problems unfettered by a priori legal categories which often derive from the, exercise of legislative power in the same constitutional unit."

On these authorities, the contention of the appellant is well-founded that as the words " sale of goods " in Entry 48 occur in a Constitution Act and confer legislative powers on the State Legislature in respect of a topic relating to taxation, they must be interpreted not in a

restricted but broad sense. And that opens up questions as to what that sense is, whether popular or legal, and what its connotation is either in the one sense or the other. Learned counsel appearing for the States and for the assessees have relied in support of their respective contentions on the meaning given to the word " sale " in authoritative text-books, and they will now be referred to. According, to Blackstone, " sale or exchange is a transmutation of property from one man to another, in consideration of some price or recompense in value. " This passage has, however, to be read distributively and so read, sale would mean transfer of property for price. That is also the definition of " sale " in Benjamin on Sale, 1950 Edn., p. 2. In Halsbury's Laws of England, Second Edn., Vol. 29, p. 5, para. I, we have the following:

" Sale is the transfer of the ownership of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods, or some other valuable consideration, not being money, the transaction is called exchange or barter; but in certain circumstances it may be treated as one of sale. The law relating to contracts of exchange or barter is undeveloped, but the courts seem inclined to follow the maxim of civil law, permutatio vicina est emptioni, and to deal with such contracts as analogous to contracts of sale. It is clear, however, that statutes relating to sale would have no application to transactions by way of barter."

In Chaliner's Sale of Goods Act, 12th Edn., it is stated at p. 3 that " the essence of sale is the transfer of the property in a thing from one person to another for a price ", and at p. 6 it is pointed out that " where the consideration for the transfer..... consists of the deli- very of goods, the contract is not a contract of sale but is a contract of exchange or barter ". In Corpus Juris, Vol. 55, p. 36, the law is thus stated:

" Sale " in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well defined " legal signification, and has been said to mean, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold. " It is added that the word "sale" as used by the authorities " is not a word of fixed and invariable meaning, but may be given a narrow. or broad meaning, according to the context. " In Williston on Sales, 1948 Edn., " sale of goods" is defined as " an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price " (p. 2). At p. 4439 the learned author observes that " it has doubtless been generally said that the price must be payable in money ", but expresses his opinion that it may be any personal property. In the Concise Oxford Dictionary, " sale " is defined as " exchange of a commodity for money or other valuable consideration, selling ". It will be seen from the foregoing that there is practical unanimity of opinion as to the import of the word " sale " in its legal sense, there being only some difference of opinion in America as to whether price should be in money or in money's worth, and the dictionary meaning is also to the same effect. Now, it is argued by Mr. Sikri, the learned Advocate-General of Punjab, that the word " sale " is, in its popular sense, of wider import than in its legal sense, and that is the meaning which should be given to that word in Entry 48, and he relies in support of this position on the observations in Nevile Reid and Company Ltd.

v. The Commissioners of Inland Revenue (1). There, an agreement was entered into on April 12, 1918, for the sale of the trading stock in a brewery business and the transaction was actually completed on June 24, 1918. In between the two dates, the Finance Act, 1918, had(imposed excess profits tax, and the question was whether the agreement dated April 12, 1918, amounted to a sale in which case the transaction would fall outside the operation of the Act. The Commissioners had held that as title to the goods passed only on June 24, 1918, the agreement dated April 12, 1918, was only an agreement to sell and not the sale which must be held to have taken place on June 24, 1918, and was therefore liable to be taxed. Sankey J. agreed with this decision, but rested it on the ground that as the agreement left some matters still to be determined and was, in certain respects, modified later, it could not be held to be asale for the purpose of the Act. In the course of the judgment, he observed that " sale " in the Finance Act should not be construed in the light of the provisions of the Sale of Goods Act, but must be understood in a commercial or business sense.

Now, in its popular sense, a sale is said to take place when the bargain is settled between the parties, though property in the goods may not pass at that stage, as where the contract relates to future or unascertained goods, and it is that sense that the learned Judge would appear to have had in his mind when he spoke of a commercial or business sense. But apart from the fact that these observations were obiter, this Court has consistently held that though the word " sale " in its popular sense is not restricted to passing of title, and has a wider connotation as meaning the transaction of sale, and that in that sense an agreement to sell would, as one of the essential ingredients of sale, furnish sufficient nexus for a State to impose a tax, such levy could, nevertheless, be made only when the transaction is one of sale, and it would be a sale only when it has resulted in the passing of property in the goods to the purchaser. Vide Poppatlal Shah v. The State of Madras(2) and The State of Bombay v. (1) (1922) 12 Tax Cas. 545.(2) [1953) S.C R. 677, 683. The United Motors (India) Ltd. (1). It has also been held in The Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash (2) that the sale contemplated by Entry 48 of the Government of India Act was a transaction in which title to the goods passes and a mere executory agreement was not a sale within that Entry. We must accordingly hold that the expression " sale of goods " in Entry 48 cannot be construed in its popular sense, and that it must be interpreted in its legal sense. What its connotation in that sense is, must now be ascertained. For a correct determination thereof, it is necessary to digress somewhat into the evolution of the law relating to sale of goods. The concept of sale, as it now obtains in our jurisprudence, has its roots in the Roman law. Under that law, sale, emptio venditio, is an agreement by which one person agrees to transfer to another the exclusive possession (vacuagn possesionem tradere) of something (merx) for consideration. In the earlier stages of its development, the law was unsettled whether the consideration for sale should be money or anything valuable. By a rescript of the Emperors Diocletian and Maximian of the year 294 A.D., it was finally decided that it should be money, and this law is embodied in the Institutes of Justinian, vide Title XXIII. Emptio venditio is, it may be noted, what is known in Roman law as a consensual contract. That is to say, the contract is complete when the parties agree to it, even without delivery as in contracts re or the

observance of any formalities as in contracts verbis and litteris. The common law of England relating to sales developed very much on the lines of the Roman law in insisting on agreement between parties and price as essential elements of a contract of sale of goods. In his work on " Sale ", Benjamin observes:

" Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz., (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in whichis transferred from the seller to the buyer; and (1) [1953] S.C.R. 1069,1078. (2) [1955] 1 S.C.R. 243. (4)a price in money paid or promised. " (Vide 8th Edn., p. 2).

In 1893 the Sale of Goods Act, 56 & 57 Vict. c. 71 codified the law on the subject, and s. 1 of the Act which embodied the rules of the common law runs as follows: I.-(I) " A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2)A contract of sale may be absolute or conditional. (3)Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4)An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." Coming to the Indian law on the subject, s. 77 of the Indian Contract Act, 1872, defined " sale " as " the exchange of property for a price involving the transfer of ownership of the thing sold from the seller to the buyer ". It was suggested that under this section it was sufficient to constitute a sale that there was a transfer of ownership in the thing for a price and that a bargain between the parties was not an essential element. But the scheme of the Indian Contract Act is that it enacts in ss. I to 75 provisions applicable in general to all contracts, and then deals separately with particular kinds of contract such as sale, guarantee, bailment, agency and partnership, and the scheme necessarily posits that all these transactions are based on agreements. We then come to the Indian Sale of Goods Act, 1930, which repealed Ch. VII of the Indian Contract Act relating to sale of goods, and s. 4 thereof is practically in the same terms as s. I of the English Act. Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or

barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale.

Now, it is the contention of the respondents that as the expression " sale of goods " was atthe time when the Government of India Act was enacted, a term of well- recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic both in England and in India, it must be interpreted in Entry 48 as having the same meaning as in the Indian Sale of Goods Act, 1930, and a number of authorities were relied on in support of this contention. In United States v. Wong Kim Ark (1), it was observed:

" In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. The language of the Constitution, as has been well said, could not be understood without reference to the common law."

In South Carolina v. United States (2), Brewer J. observed: "To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants. "

A more recent pronouncement is that of Taft C. J. who said: (1) (1898) 169 U. S. 649, 654 ; 42 L. Ed. 890, 893. (2) (1905) 199 U-S. 437; 50 L. Ed. 262, 265." The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the, ratification of the Conventions of the thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary" Ex-parte Grossman (1).

In answer to the above line of authorities, the appellant relies on the following observations in Continental Illinois National Bank and Trust Company of Chicago v. Chicago Rock Island & Pacific Railway Company (1):

" Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (Waring v. Clarke (3)), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury."

It should, however, be stated that the law is stated in Weaver on Constitutional Law, 1946 Edn., p. 77 and Crawford on Statutory Construction, p. 258 in the same terms as in South Corolina v. United States (4). But it is unnecessary to examine minutely the precise scope of this rule of interpretation in American law, as the law on the subject has been stated clearly and authoritatively by the Privy Council in construing the scope of the provisions of the British North America Act, 1867. In L'Union St. Jacques De Montreal v. Be Lisle (5), the question was whether a law of Quebec (1) (1925) 267 U.S. 87; 69 L. Ed. 527, 530.(2) (1935) 294 U.S. 648, 669 ; 79 L. Ed. 1110, 1124. (3) (1847) 5 How. 441 ; 12 L. Ed. 226.(4) (1905) 199 U.S. 437 ; 5o L. Ed. 262, 265.(5) (1874) L.R. 6 P.C. 31, 36.providing for relief to a society in a state of financial embarrassment was one with respect to " bankruptcy and insolvency ". In deciding that it should be determined on a consideration of what was understood as included in those words in their legal sense, Lord Selborne observed : " The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation." On this test, it was held that the law in question was not one relating to bankruptcy. In Royal Bank of Canada v. Larue (1), the question was whether s. 11, sub-s. (10), of the Bankruptcy Act of Canada under which a charge created by a judgment on the real assets of a debtor was postponed to an assignment made by the debtor of his properties for the benefit of his creditors was intra vires the powers of the Dominion Legislature, as being one in respect of " bank- ruptcy and insolvency " within s. 91, sub-cl. (21), of the British North America Act. Viscount Cave L. C. applying the test laid down in L'Union St. Jacques De Montreal v. Be Lisle (2), held that the impugned provision was one in respect of bankruptcy.

In The Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. (3), the question arose under s. 96 of the British North America Act, 1867, under which the Governor- General of the Dominion had power to appoint judges of the superior district and county courts. The Province of Saskatchewan enacted the Trade Union Act, 1944, authorising the Governor of the Province to constitute the Labour Relations Board for the determination of labour disputes. The question was whether this provision was invalid as contravening s. 96 of the British North America Act. In holding that it was not, Lord (1) [1928] A.C. 187. (2) (1874) I,.R. 6 P.C. 3I, 36. (3)[1949] A.C. 134.

Simonds observed that the courts contemplated by s. 96 of the Act were those which were generally understood to be courts at the time when the Constitution Act was enacted, that labour courts were then unknown, and that, therefore, the reference to judges, and courts in s. 96 could not be interpreted as comprehending a tribunal of the character of the Labour Relations Board. In Halsbury's Laws 'of England, Vol. 11, para. 157, p. 93, the position is thus summed up: " The existing state of English law in 1867 is relevant for

consideration in determining the meaning of the terms used in conferring power and the extent of that power, e. g. as to customs legislation."

Turning next to the question as to the weight to be attached to legislative practice in interpreting words in the Constitution, in Croft v. Dunphy (1), the question was as to the validity of certain provisions in a Canadian statute providing for the search of vessels beyond territorial waters. These provisions occurred in a customs statute, and were intendedto prevent evasion of its provisions by smugglers. In affirming the validity of these provisions, Lord Macmillan referred to the legislative practice relating to customs, and observed: " When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power."

In Wallace Brothers and Co. Ltd. v. Commissioner of Income- tax, Bombay City and Bombay Suburban District (2), Lord Uthwatt observed:" Where Parliament has conferred a power to legislate on a particular topic itis permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom. The point of the (1) [1933] A.C. 156, 165. (2) (1948) L.R. 75 I.A. 86, 99. reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words in the enabling Act."

In In re The Central Provinces and Berar Act No. XI V of 1938 (1), in considering whether a tax on the sale of goods was a duty of excise within the meaning of Entry 45, in List I of Sch. VII, Sir Maurice Gwyer C. J. observed at p. 53: " 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." In The State of Bombay v. F. N. Balsara (2), in determining the meaning of the word " intoxicating liquor " in Entry 31 of List 11 of Sch. VII to the Government of India Act, 1935, this Court referred to the legislative practice with reference to that topic in India as throwing light on the true scope of the entry. (Vide pp. 704 to 706). On the basis of the above authorities, the respondents contend that the true interpretation to be put on the expression " sale of goods " in Entry 48 is what it means in the Indian Sale of Goods Act, 1930, and what it has always meant in the general law relating to sale of goods. It is contended by the appellants quite rightly-that in interpreting the words of a Constitution the legislative practice relative thereto is not conclusive. But it is certainly valuable and might prove determinative unless there are good reasons for disregarding it, and in The Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash (3), it was relied on for ascertaining the meaning and true scope of the very words

which are now under consideration. There, in deciding that an agreement to sell is not a sale within Entry 48, this Court referred to the provisions (1) [1939] F.C.R. 18, 37. (2) [1951] S.C.R. 682. (3) [1955] 1 S.C.R. 243.

of the English Sale of Goods Act, 1893, the Indian Contract Act, 1872, and the Indian Sale of Goods Act, 1930, for construing the word "sale" in that Entry and observed: "Thus, there having existed at the time of the(enactment of the Government of India Act; 1935, a well-defined and well- established distinction between a sale and an agreement to sell, it would be proper to interpret the expression " sale of goods " in entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title." This decision, though not decisive of the present con- troversy, goes far to support the contention of the respondents that the words " sale of goods " in Entry 48 must be interpreted in the sense which they bear in the Indian Sale of Goods Act, 1930.

The appellant and the intervening States resist this conclusion on the following grounds:

(1) The provisions of the Government of India Act, read as a whole, show that the words " sale of goods " in Entry 48 are not to be interpreted in the sense which they have in the Indian Sale of Goods Act, 1930;

(2) The legislative practice relating to the topic of sales tax does not support the narrow construction sought to be put on the language of Entry 48;

(3) The expression " sale of goods " has in law a wider meaning than what it bears in the Indian Sale of Goods Act, 1930, and that is the meaning which must be put on it in Entry 48; and (4) the language of Entry 48 should be construed liberally so as to take in new concepts of sales tax. We shall examine these contentions seriatim.

(1) As regards the first contention, the argument is that in the Government of India Act, 1935, there are other provisions which give a clear indication that the expression " sale of goods " in Entry 48 is not to be interpreted in the sense which it bears in the Indian Sale of Goods Act, 1930. That is an argument open to the appellant, because rules of interpretation are only aids for ascertaining the true legislative intent and must yield to the context, where the contrary clearly appears. Now, what are the indications contra ? Section 311(2) of the Government of India Act defines " agricultural income " as meaning " agricultural income as defined for the purposes of the enactments relating to Indian income-tax ". It is said that if the words " sale of goods " in Entry 48 were meant to have the same meaning as those words in the Indian Sale of Goods Act, that would have been expressly mentioned as in the case of definition of agricultural income, and that therefore that is not the meaning which should be put on them in that Entry.

In our opinion, that is not the inference to be drawn from the absence of words linking up the meaning of the word " sale " with what it might bear in the Indian Sale of Goods Act. We think that the true legislative intent is that the expression " sale of goods " in Entry 48 should bear the precise and definite meaning it has in law, and that meaning should not be left to fluctuate with the definition of " sale " in laws relating to sale of goods which might be in force for the time being. It was then said that in some of the Entries, for example, Entries 31 and 49, List 11, the word it sale " was used in a wider sense than in the Indian Sale of Goods Act, 1930. Entry 31 is " Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs. ". The argument is that " sale " in the Entry must be interpreted as including barter, as the policy of the law cannot be to prohibit transfers of liquor only when there is money consideration therefor. But this argument proceeds on a misapprehension of the principles on which the Entries are drafted. The scheme of the drafting is that there is in the beginning of the Entry words of general import, and they are followed by words having reference toparticular aspects thereof. The operation of the general words, however, is not cut down by reason of the fact that there are sub-heads dealing with specific aspects. In Manikkasundara v. R. S. Nayudu(1) occur the following observations pertinent to the present question : " The subsequent words and phrases are not intended to limit the ambit of the opening general term or phrase but rather to illustrate the scope and objects of the legislation envisaged as comprised in the opening term or phrase." A law therefore prohibiting any dealing in intoxicating liquor, whether by way of sale or barter or gift, will be intra vires the powers conferred by the opening words without resort to the words " sale and purchase ". Entry 49 in List II. is " Cesses on the entry of goods into a local area for consumption, use or sale therein ". It is argued that the word " sale " here cannot be limited to transfers for money or for even consideration. The answer to this is that the words " for consumption, use or sale therein "are a composite expression meaning octroi duties, and have a precise legal connotation, and the use of the word " sale therein " can throw no light on the meaning of that word in Entry 48. We are of opinion that theprovisions in the Government of India Act, 1935, relied on for the appellant are too inconclusive to support the inference that " sale " in Entry 48 was intended to be used in a sense different from that in the Indian Sale of Goods Act.

(2) It is next urged that, for determining the true meaning of the expression " Taxes on the sale of goods " in Entry 48 it would not be very material, to refer to the legislative practice relating to the law in respect of sale of goods. It is argued that " sale of goods " and " taxes on sale of goods " are distinct matters, each having its own incidents, that the scope and object of legislation in respect of the two topics are different, that while the purpose of a law relating to sale of goods is to define the rights of parties to a contract, that of a law relating to tax oil sale of goods is to bring money into the coffers of the State, and that, accordingly, legislative practice with reference to either topic cannot be of much assistance with reference to the other. Now, it is trite that the object and (1) [1946] F.C.R. 67, 84.

scope of the two laws are different, and if there was any difference in the legislative practice with reference to these two topics, we should, in deciding the question that is now before us, refer more appropriately to that relating to sales tax legislation rather than that relating to sale of goods. But there was, at the time when the Government of India Act was enacted, no law relating to sales tax either in England or in India. The first sales tax law to be enacted in India is the Madras General Sales Tax Act, 1939, and that was in exercise of the power conferred by Entry 48. In England, a purchase tax was introduced for the first time only by the Finance Act No. 2 of 1940. The position, therefore, is that Entry 48 introduces a topic of legislation with respect to which there was no legislative practice.

In the absence of legislative practice with reference to sales tax in this country or in England, counsel for the appellant and the States sought support for their contention in the legislative practice of Australia and America relating to that topic. In 1930, the Commonwealth Sales Tax Act was enacted in Australia imposing a tax on retail sales. A question ARose, Whether a contractor who supplied materials in execution of a works contract could be taxed as on a sale of the materials. In Sydney Hydraulic and General Engineering Co. v. Blackwood & Son (1), the Supreme Court of New South Wales held that the agreement between the parties was one to do certain work and to supply certain materials and not an agreement for sale or delivery of the goods. Vide Irving's Commonwealth Sales Tax Law and Practice,1950 Edn., p. 77. In 1932, the Legislature intervened and enacted in the Statute of 1930, a new provision, s. 3(4), in the following terms:

" For the purpose of this Act, a person shall be deemed to have sold goods if, in the performance of any contract (not being a contract for the sale of goods) under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which (whether as goods or in some other form) passes, under the terms of the contract, to some other person."

(1) 8 N.S.W.S.R.

After this, the question arose in M. R. Hornibrook (Pty.) Ltd. v. Federal Commissioner of Taxation(1) whether a contractor who fabricated piles and used them in constructing a bridge was liable to pay sales tax on the value of the piles. The majority of the(Court held that he was. Latham C. J. put his decision on the ground that though there was, in fact, no sale of the piles, in law there was one by reason of s. 3(4) of the Act. Now, the judgment of the learned Chief Justice is really adverse to the appellant in that it decides that under the general law and apart from s. 3(4) there was no sale of the materials and that it was only by reason of the deeming provision of s. 3(4) that it became a taxable sale. The point to be noted is that under the Australian Constitution the power to legislate on the items mentioned in s. 51 of the Con- stitution Act is vested Exclusively in the Commonwealth Parliament. Item (ii) in s. 51 is " Taxation; but so as not to

discriminate between States or parts of States ". Subject to this condition, the power of Parliament is plenaryand absolute, and in exercise of such a power it could impose a tax on the value of the materials used by a contractor in his works contracts; and it could do that whether the transaction amounts in fact to a sale or not. It is no doubt brought under the Sales Tax Act, it being deemed to be a sale; but that is only as a matter of convenience. In fact, two of the learned Judges in M.' R. Hornibrook (Pty.) Ltd. V. Federal Commissioner of Taxation (1) rested their decision on the ground that the use of materials in the construction was itself taxable under the Act. But under the Government of India Act, the Provincial Legislature is competent to enact laws in respect of the matters enumerated in Lists II and III, and though the entries therein are to be construed liberally and in their widest amplitude, the law must, nevertheless, be one with respect to those matters. A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be intra vires, be one relating in fact to sale of goods, and accordingly, the Provincial Legislature cannot, in the purported exercise of its power (1) (1939) 62 C.L.R. 272.

to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales. The position in the American law appears to be the same as in Australia. In Blome Co. v. Ames (1), the Supreme Court of Illinois held that a sales tax was leviable on the value, of materials used by a contractor in the construction of a building or a fixture treating the transaction as one of sale of those materials. But this decision Was overruled by a later decision of the same Court in Herlihy Mid-Continent Co. v. Nudelman wherein it was held that there was no transfer of title to the materials used in construction work as goods, and that the provisions of the Sales Tax Act had accordingly no application. This is in accordance with the Generally accepted notion of sale of goods. This, of course, does not preclude the States in exercise of their sovereign power from imposing tax on construction works in respect of materials used therein. Thus, position is that in 1935 there was no legislative practice relating to sales tax either in England or India, and that in America and Australia, tax on the supply of materials in construction works was imposed but that was in exercise of the sovereign powers of the Legislature by treating the supply as a sale. But apart, from such legislation, the expression "sale of goods " has been construed as having the meaning which it has in the common law of England relating to sale of goods, and it has been held that in that sense the use of materials in construction works is not a sale. This rather supports the conclusion that sale " in Entry, 48 must be construed as having the same meaning which it has in the Indian Sale of Goods Act, 1930.

(3) It is next contended by Mr. Sikri that though the word " sale " has a definite sense in the Indian Sale of Goods Act, 1930, it has a wider sense in law other than that relating to sale of goods, and that, on the principle that words conferring legislative powers should be construed in their broadest amplitude, it would be proper to attribute that sense to it in Entry (1) (1937) 111 A.L.R. 940. (2) (1937) 115 A.L.R. 485.

48.It is argued that in its wider sense the expression " sale of goods " means all transactions resulting in the transfer of title to goods from one person to another, that a, bargain between the parties was not an essential element thereof, and that even involuntary sales, would fall within its connotation. He relied in support of this position on various dicta in Ex Parte Drake In re Ware (1), Great Western Railway Co. v. Commissioners of Inland Revenue (2), The Commissioners of Inland Revenue v. Newcastle Breweries Ltd. (3), Kirkness v. John Hudson & Co. Ld. (4) and Nalukuya v. Director of Lands, Native Land Trust Board of Fiji (5). In Ex Parte Drake In re Ware (1), the question was whether an unsatisfied decree passed in an action on detinue extinguished the title of the decree-holder to the thing detained. In answering it in the negative, Jessel M. R. observed:

" The judgments in Brinsmead v. Harrison and especially that of Mr. Justice Willes, shew that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the Plaintiff's goods to the Defendant." He went on to state that such sale took place when the value of the goods is paid to the owner. In Great Western Railway Co. v. Commissioners of Inland Revenue (2), an Act of Parliament had provided for the dissolution of two companies under a scheme of amalgamation with a third company under which the shareholders were to be given in exchange for their shares in the dissolved companies, in the case of one company, stock in the third company in certain specified proportions, and in the other, discharge of debentures on shares alreadyheld by them in the third company. The question was whether a copy of the Act had to be stamped ad valorem as on conveyance on sale under the first schedule to the Stamp Act, 1891. The contention of the company was that there was no sale by the shareholders of their shares to it, and (1) (1877) 5 Ch. D. 866.(2) (1894) 1 Q.B. 507, 512, 515. (3) (1927) 12 Tax Cas. 927.(4) [1955] A.C. 696. (5) [1957] A.C. 325.(6) (1872) L.R. 7 C.P. 347. that the provision in question had accordingly no application. In rejecting this contention, Esher M. R. observed:

" Turning to the Stamp Act, the words used are ' a conveyance on sale'. Does that expression mean a conveyance where there is a definite contract of purchase and sale preceding it ? Is that the way to construe the Stamp Act, or does it mean a conveyance the same as if it were upon a contract of purchase and sale ? The latter seems to me to be the meaning of the phrase as there used.

Kay L. J. said: " And we must remember that the Stamp Act has nothing to do with contracts or negotiations; it stamps a conveyance upon a sale, which is the instrument by which the property is transferred upon a sale. "

This is a decision on the interpretation of the particular provision of the Stamp Act, and is not relevant in determining the meaning of sale under the general law. And, if anything, the observations above quoted emphasise the contrast between the concept of sale under the general law and that which is embodied in the particular provision of the Stamp Act.

In The Commissioners of Inland Revenue v. Newcastle Breweries Ltd.(1), the point for decision was whether payments made by the Admiralty to the respondent

company which was carrying on business as brewers, on account of stocks of rum taken over by it compulsorily under the Defence of Realm Regulations were liable to be assessed as trade receipts to excess profits duty. The contention of the company was that the acquisition by the Admiralty was not a sale, that the payments made were not price of goods sold but compensation for interference with the carrying on of business by it, and that accordingly the amounts could not be held to have been received in the course of trade or business. In rejecting this contention, Viscount Cave L. C. observed:

"If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the Appellant's profits, and the (1) (1927) 12 Tax Cas. 927.

circumstance that the sale was compulsory and was to the Crown makes no difference in principle. "

In Kirkness v. John Hudson & Co. Ltd. (1), the facts were that railway wagons belonging to the respondent company were taken over by the Transport Commission compulsorily in exercise of the powers conferred by s. 29 of the Transport Act, 1947, and compensation was paid therefor. The question was whether this amount was liable to income-tax on the footing of sale of the wagons by the company. The contention on behalf of the Revenue was that compulsory acquisition being treated as sale under the English law, the taking over of the wagons and payment of compensation therefor must also be regarded as sale for purpose of income-tax. Lord Morton in agreeing with this contention observed:

"..... the question whether it is a correct use of the English language to describe as a 'sale' a transaction from which the element of mutual assent is missing is no doubt an interesting one. I think, however, that this question loses its importance for the purpose of the decision of this appeal when it is realized that for the last 100 years transactions by which the property of A has been transferred to B, Oil payment of compensation to the owner but without the consent of the owner, have been referred to many times, in Acts of Parliament, in opinions delivered in this House, in judgments of the Court of Appeal and the High Court of Justice, and in textbooks as a sale '-generally as a compulsory sale " The case of Newcastle Breweries Ld. v. Inland Revenue Commissioners (2), referred to later, affords a striking modern instance of the use of the word I sale' as applied to compulsory taking of goods '..... " In these circumstances, whether this use of the word 'sale' was originally correct or incorrect, I find it impossible to say that the only construction which can fairly be given to the word ' sold ' in section 17(1) (a) of the Income Tax Act, 1945, is to limit it to a transaction in which the element of mutual assent is present. " (1) [1955] A.C. 696. (2) (1927) 96 L.J.K. B. 735.

But the majority of the House came to a different con- clusion, and held that the element of bargain was essential to constitute a sale, and to describe compulsory taking over of property as a sale was a misuse of that word. In Nalukuya v. Director of Lands, Native Land Trust Board of Fiji, Intervener (1), it was held by the Privy Council that compensation money

payable on the compulsory acquisition of land was covered by the words " the purchase money received in respect of a sale or other disposition of native land " in s. 15 of the Native Land Trust Ordinance, c. 86 of 1945, Fiji. The decision, however, proceeded on the particular terms of the statute, and does not affect the decision in Kirkness v. John Hudson & Co. Ltd. (2) that mutual assent is an element of a transaction of sale.

It should be noted that the main ground on which the decision of Lord Morton rests is that compulsory acquisition of property had been described in the legislative practice of Great Britain as compulsory sales. The legislative practice of this country, however, has been different. The Land Acquisition Act, 1894, refers to the compulsory taking over of immovable property as acquisition. In List 11 of the Government of India Act, this topic is described in Entry 9 as " compulsory acquisition of land". In the Constitution, Entry 42 in List III is " acquisition and requisition of property ". The ratio on which the opinion of Lord Morton is based has no place in the construction of Entry 48, and the law as laid down by the majority is in consonance with the view taken by this Court that bargain is an essential element in a transaction of sale. Vide Poppatlal Shah v. The State of Madras (3) and The State of Bombay v. The United Motors (India) Ltd. (4). It is unnecessary to discuss the other English cases cited above at any length, as the present question did not directly arise for decision therein, and the decision in Kirkness v. John Hudson & Co. Ld. (2) must be held to conclude the matter.

Another contention presented from the same point (1) [1957] A.C- 325.

(3) [1953] S.C.R. 677, 683.

(2) [1955] A.C. 696.

(4) [1953] S.C.R. 1069, 1078.

of view but more limited in its sweep is that urged by the learned Solicitor-General of India, the Advocate General of Madras and the other counsel appearing for the States, that even in the view that an agreement between the parties was necessary to constitute a sale, that agreement need not relate to the goods as such, and that it would be sufficient if there is an agreement between the parties and in the carrying out of that agreement there is transfer of title in movables belonging to one person to another for consideration.

It is argued that Entry 48 only requires that there should be a sale, and that means transfer of title in the goods, and that to attract the operation of that Entry it is not necessary that there should also be an agreement to sell those goods. To hold that there should be an agreement to sell the goods as such is, it is contended, to add to the Entry, words which are not there. We are unable to agree with this contention. If the words " sale of goods " have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the legislature must

be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter.

Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression " sale of goods " there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law.

(4) It was finally contended that the words of a Constitution conferring legislative power should be construed in such manner as to make it flexible and elastic so as to enable that power to be exercised in respect of matters which might be unknown at the time it was enacted but might come into existence with the march of time and progress in science, and that on this principle the expression " sale of goods " in Entry 48 should include not only what was understood as sales at the time of the Government of India Act, 1935, but also whatever might be regarded as sale in the times to come. The decisions in Attorney General v. Edison Telephone Company of London (1), Toronto Corporation v. Bell Telephone Company of Canada (2), The Regulation and Control of Radio Communication in Canada, In re (3) and. The King v. Brislan: Ex Parte Williams (4) were quoted as precedents for adopting such a construction. In Attorney General v. Edison Telephone Company of London (1), the question was whether the Edison Telephone Company, London, had infringed the exclusive privilege of transmitting telegrams granted to the Postmaster General under an Act of 1869 by installation of telephones.

The decision turned on the construction of the definition of the word " telegraph " in the Acts of (1) (1880) L.R. 6 Q.B.D. 244.(2) [1905] A.C. 52.(3) [1932] A.C. 304.(4) (1935) 54 C.L.R. 262.1863 and 1869. It was contended for the Company that telephones were unknown at the time when those Acts were passed and therefore could not fall within the definition of "telegraph". The Court negatived this contention on the ground that the language of the definition was wide enough to include telephones. Toronto Corporation v. Bell Telephone Company of Canada (1) is a decision on s. 92(10)(a) of the British North America Act, 1867, under which the Dominion Parliament had the exclusive competence to pass laws in respectof " lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any

other or others of the provinces or extending beyond the limits of the province". The question was whether a law incorporating a telephone company and conferring on it powers to enter upon streets and highways vested in a municipal corporation was intra vires the powers of the Dominion Parliament under the above provision, and whether in consequence a provision in an Ontario Act requiring the consent of the municipal authorities for the carrying out of those operations was ultra vires. It was held by the Privy Council that the Parliament of Canada was competent to enact the impugned law under s. 92(10)(a) and that, therefore, it prevailed over the Provincial Act. This decision, however, would seem to have been reached on the words " other works and undertakings " in the section.

In The, Regulation and Control of Radio Communication in Canada, In re (2), the question was whether broadcasting was covered by the expression "telegraph and other works and undertakings " in s. 92(10)(a) of the Constitution Act, 1867. The Privy Council answered it in the affirmative on the grounds, firstly, that broadcasting was an " undertaking connecting the province with other provinces and extending beyond the limits of the province and, secondly, that it fell within the description of telegraph ". In The King v. Bristan: Ex Parte Williams (3), the question was whether a law of the Commonwealth (1) [1905] A.C. 52. (2) [1932] A.C. 304.

(3) (1935) 54 C.L.R. 262.

Parliament with respect to radio broadcasting was one with respect to " Postal, telegraphic, telephonic and other like services " under s. 51(5) of the Australian Commonwealth Act, and it was answered in the affirmative. The principle of these decisions is that when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In that situation, " it is not ", as observed by Lord Wright in James v. Commonwealth of Australia (1), " that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning ". The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts. Clearly, this principle has no application to the present case. Sales tax was not a subject which came into vogue after the Government of India Act, 1935. It was known to the framers of that statute and they made express provision for it under Entry 48. Then it becomes merely a question of interpreting the words, and on the principle, already stated, that words having known legal import should be construed in the sense which they had at the time of the enactment, the expression " sale of goods " must be construed in the sense which it has in the Indian Sale of Goods Act.

A contention was also urged on behalf of the respondents that even assuming that the expression " sale of goods " in Entry 48 could be construed as having the wider sense sought to be given to it by the appellant and that the provisions of the Madras General Sales Tax Act imposing a tax on construction contracts could be sustained as within that entry in that sense, the impugned provisions would still be bad under s. 107 of the Government of India Act, and the decision in D. Sarkar & Bros. v. Commercial Tax Officer (2) was relied on in support of this contention. Section 107, so far as is material, runs as follows:

(1) [1936] A.C. 578, 614.

(2) A.1.R. 1957 Cal. 283.

107-(1) " If any provision of a Provincial law is repugnant to any provision of a Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Dominion law, whether passed before or after the Provincial law, or, as the case may be, the existing 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 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."

Now, the argument is that the definition of " sale given in the Madras General Sales Tax Act is in conflict with that given in the Indian Sale of Goods Act, 1930, that the sale of goods is a matter falling within Entry 10 of the Concurrent List, and that, in consequence, as the Madras General Sales Tax (Amendment) Act, 1947, under which the impugned pro-visions had been enacted, had not been reserved for the assent of the Governor-General as provided in s. 107 (2), its provisions are bad to the extent that they are repugnant to the definition of " sale " in the Indian Sale of Goods Act, 1930. The short answer to this contention is that the Madras General Sales Tax Act is a law relating not to sale of goods, but to tax on sale of goods, and that it is not one of the matters enumerated in the Concurrent List or over which the Dominion Legislature is competent to enact a law, but is a matter within the exclusive competence of the Province under Entry 48 in List II. The only question that can arise with reference to such a law is whether it is within the

purview of that Entry. If it is, no question of repugnancy under s. 107 can arise. The decision in D. Sarkar & Bros. v. Commercial Tax Officer(1) on this point cannot beaccepted as sound. It now remains to deal with the contention pressed on us by the States that even if the supply of materials under a building contract cannot be regarded as a sale under the Indian Sale of Goods Act, that contract is nevertheless a composite agreement under which the contractor undertakes to supply materials, contribute labour and produce the construction, and that it is open to the State in execution of its tax laws to split up that agreement intoits constituent parts, single out that which relates to the supply of materials and to impose a tax thereon treating it as a sale. It is said that this is a, power ancillary to the exercise of the substantive power to tax sales, and reliance is placed on the observations in The United Province v. Atiqa Begum (2) and Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City (3) at p. 836. The respondents contend that even if the agreement between the parties could be split up in the manner suggested for the appellant, the resultant will not be a sale in the sense of the Indian Sale of Goods Act, as there isin a works contract neither an agreement to sell materials as such, nor does property in them pass as movables.

The nature and incidents of works contracts have been the subject of consideration in numerous decisions ofthe English courts, and there is a detailed consideration of the points now under discussion, in so far as building contracts, are concerned, in Hudson on Building Contracts, 7th Ed., pp. 386-389 and as regards chattels, in Benjamin on Sale, 8th Ed., pp.' 156-168 and 352-355. It is therefore sufficient to refer to the more important of the cases cited before us. In Tripp v. Armitage (4), one Bennett, a builder, had entered into an agreement with certain trustees to build a hotel. The agreement provided inter alia that (1) A.I.R. 1957 Cal. 283.

(3) [1955] 1 S.C.R. 829, 833, 836.

(2) [1940] F.C.R. 110, 134.

(4) (1839) 4 M & W. 687 ; 15o E.R. 1597.

the articles which were to be used for the structure had to be approved by the trustees. Subsequently, Bennett became bankrupt, and the dispute was between his assignees in bankruptcy, and the trustees as regards title to certain wooden sash-frames which had been approved on behalf of the trustees but had not yet been fitted in the building. The trustees claimed them on the ground that property therein, had passed to them when once they

had approved the same. In negativing this contention, Lord Abinger C. B. observed: ".. ..... this is not a contract for the sale and purchase of goods as movable chattels; it is a contract to make up materials, and to fix them ; and until they are fixed, by the nature of the contract, the property will not pass."

Parke B. observed:

"..... but in this case, there is no contract at all with respect to these particular chattels-it is merely parcel of a larger contract. The contract is, that the bankrupt shall build a house; that he shall make, amongst other things, window-frames for the house, and fix them in the house' subject to the approbation of a surveyor; and it was never intended by this contract, that the articles so to be fixed should become the property of the defendants, until they were fixed to the freehold."

In Clark v. Bulmer (1), the plaintiff entered into a contract with the defendant " to build an engine of 100 horse power for the sum of E. 2,500, to be completed and fixed by the middle or end of December ". Different parts of the engine were constructed at the plaintiff's manufactory and sent in parts to the defendant's colliery where they were fixed piecemeal and were made into an engine. The suit was for the recovery of a sum of E. 3,000 as price for " a main engine and other goods sold and delivered ". The contention of the defendant was that there was no contract of sale, and that the action should have been one for work and labour and material used in the course of that work and not for price of goods (1) (1843) 11 M & W. 243; 152 E- R. 793.

sold and delivered. In upholding this contention, Parke B. observed :

" The engine was not contracted for to be delivered, or delivered, as an engine, in its complete state,and afterwards affixed to the freehold; there was no sale of it, as an entire chattel, and delivery in that character ; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be deemed goods sold and delivered, for there was no contract for the sale of them as moveable goods; the contract was in effect that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself, so as to pump the water out of a mine."

In Seath v. Moore(1), the facts were similar to those in Tripp v. Armitage (2). A firm of engineers, A. Campbell & Son, had entered into five agreements with the appellants, T. B. Seath and Co., who were ship-builders to supply engines, boilers and machinery required for vessels to be built by them. Before the completion of the contracts, A. Campbell & Son became bankrupt, and the dispute was as regards the title to machinery and other articles which were in the possession of the insolvents at the time of their bankruptcy but which had been made for the purpose of being fitted into the ships of the appellants. It was held by the House of Lords approving Tripp v. Armitage(2) that there had been no sale of the machinery and parts as such, and that therefore they vested in the assignee. For the appellant, reliance is placed on the following observations of Lord Watson at p. 380:

The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a, ship, that a particular stage of its construction, the :vessel, so far as then finished, shall be appropriated to (1) (1886) 11 App. Cas. 35o.

(2) (1839) 4 M & W. 687; 15o E.R. 1597.

the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, accessione, become his property. "

It is to be noted that even in this passage the title to the parts is held to pass not under any contract but on the principle of accretion. The respondents rely on the following observations at p. 381 as furnishing the true ground of the decision " There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as ' sold', unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in Wood v. Bell(1). In Woods v. Russell (2) the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel; but that decision was questioned by Lord Chief Justice Jervis, delivering the judgment of the Court in Wood v. Bell(1), who stated the real question to be 'what is the ship, not what is meant for the ship', and that only the things can pass with the ship I which have been fitted to the ship and have once formed part of her, although afterwards removed for convenience I assent to that rule, which

appears to me to be in accordance with the decision of the Court of Exchequer in Tripp v Armitage (3)".

In Reid v. Macbeth & Gray (4), the facts were that a firm of ship-builders who had agreed to build a ship became bankrupt. At the date of the bankruptcy, there was lying at railway stations a quantity of iron 'and steel plates which were intended to be fixed in the (1) (1856) 6 E. & B. 355; 119 E.R. 669. (4) [1904] A.C.

223. (2) (1822) 5 B. & Al. 942 ; 106 E. R. 14 36.

(3) (1839) 4 M & W. 687; 150 E.R. I597.

ship. The dispute was between the assignee in bankruptcy and the shipowners as to the title to these articles. It was held by the House of Lords following Seath v. Moore (1) and in particular the observations of Lord Watson at p. 381 that the contract was one for the purchase of a complete ship, and that under that contract no title to the articles in question passed to the shipowners. The following observations of Lord Davey are particularly appropriate to the present question :

" There is only one contract--a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials separatism ; and unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case." If in a works contract there is no sale of materials as defined in the Sale of Goods Act, and if an action is not maintainable for the value of those materials as for price, of goods sold and delivered, as held in the above authorities, then even a disintegration of the building contract cannot yield any sale such as can be taxed under Entry 48.

The decision in Love v. Norman Wright (Builders) Ld. (2), cited by the appellant does not really militate against this conclusion. There, the defendants to the action had agreed with the Secretary of State to supply blackout curtains and curtain rails, and fix them in a number of police stations. In their turn, the defendants had entered into a contract with the plaintiffs that they should prepare those curtains and rails and erect them. The question was whether the sub- contract was one for sale of goods or for work and services. In deciding that it was the former, Goddard L. J. observed : " If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are involved in the

making and fixing, nor does it matter that ultimately the property was to pass to the War Office, under the head contract. As (1) (1886) 11 App. Cas. 350.

(2) [1944] 1 K.B. 484, 487.

between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office. "

It will be seen that in this case there was no question of an agreement to supply materials as parcel of a contract to deliver a chattel; the goods to be supplied were the curtains and rails which were the subject-matter of the contract itself. Nor was there any question of title to the goods passing as an accretion under the general law, because the buildings where they had to be erected belonged not to the defendants but to the Government, and therefore as between the parties to the contract, title could pass only under their contract.

The contention that a building contract contains within it all the elements constituting a sale of' the materials was sought to be established by reference to the form of the action, when the claim is in quantum meruit. It was argued that if a contractor is prevented by the other party to the contract from completing theconstruction he has, as observed by Lord Blackburn in Appleby v. Myres (1), a claim against that party, that the form of action in such a case is for work done and materials supplied, as appears from Bullen & Leake's Precedents of Pleadings, 10th Ed., at pp. 285-286, and that showed that the concept of sale of goods was latent in a building contract. The answer to this contention is that a claim for quantum, meruit is a claim for damages for breach of contract, and that the value of the materials is a factor relevant only as furnishing a basis for assessing the amount of compensation. That is to say, the claim is not for price of goods sold and delivered but for damages. That is also the position under s. 65 of' the Indian Contract Act.

Another difficulty in the way of accepting the contention of the appellant as to splitting up a building contract is that the property in materials used therein does not pass to the other party to the contract as movable property. It would so pass if that was the agreement between the parties. But if there was no (1) (1867) L.R. 2 C.P. 651.

such agreement and the contract was only to construct a building, then the materials used therein would be come the property of the other party to the contract only on the

theory of accretion. The position is thus stated by Blackburn J. at pp. 659-660 in Appleby v. Myres (1): " It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become a part of the coat or the ship.

When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle quicquid plantatur solo, solo cedit and it vests in the other party not as a result of the contract but as the owner of the land. Vide Hudson on Building Contracts, 7th Edn. p. 386. It is argued that the maxim, what is annexed to the soil goes with the soil, has not been accepted as a correct statement of the law of this country, and reliance is placed on the following observations in the Full Bench decision of the Calcutta High Court in Thakoor Chunder Poramanick v. Ramdhone Bhuttacharjee (2) :

We think it should be laid down is a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title,he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil,-the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building, is not taken down by the builder during the continued ance of any estate he may possess." The statement of the law was quoted with approval (1) (1867) L.R. 2 C.P. 651.

(2) (1866) 6W.R. 228.

by the Privy Council in Beni Ram v. Kundan Lall (1) and in Narayan Das Khettry v. Jatindranath (2). But these decisions are concerned with rights of persons who, not being trespassers, bona fide put up constructions on lands belonging to others, and as to such persons the authorities lay down that the maxim recognised in English law, quicquid plantatur solo, solo cedit has no application, and that they have the right to remove the superstructures, and that the owner of the land should pay compensation if he elects to retain them. That exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contrat. It may be, as was suggested by Mr. Sastri for the respondents, that when the thing to be

produced under the contract is moveable property, then any material incorporated into it might pass as a movable, and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such. But we are concerned here with a building contract, and in the case of such a contract, the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables. To sum up, the expression " sale of goods " in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to

(1) (1899) L. R. 26 1. A. 58.

(2) (1927) L. R. 54 T. A. 218, impose a tax on the supply of the materials used in such a contract treating it as a sale.

This conclusion entails that none of the legislatures constituted under the Government of India Act, 1935, was competent in the exercise of the power conferred by s. 100 to make laws with respect to the matters enumerated inthe Lists, to impose a tax on construction contracts and that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the GovernorGeneral under s. 104 of the Act. And it must be conceded that a construction which leads to such a. result must, if that is possible, be avoided. Vide Manikkasundara v. R. S. Nayudu (1). It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. We have, no doubt, Art. 248 and Entry 97 in List I conferring residual power of legislation on Parliament, but clearly it could not have been intended that the Centre should have the power to tax with respect to works constructed in the States. In view of the fact that the State Legislatures had given to the expression " sale of goods " inEntry 48 a wider meaning than what it has in the Indian Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the Centre, the Constitution might have given an inclusive definition of " sale " in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48, (1) [1946] F.C.R. 67. 84.

To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p.

165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned,and will stand untouched by the present judgment.

In the result, the appeal fails, and is dismissed with costs.

Appeal dismissed.

IMPLICATIONS

In the case of State of Madras vs. Gannon Dunkerley & Company and others, (Madras), reported in 9 STC, 353, Apex Court had a occasion to consider whether in the building contract which was in the nature of composite and indivisible works contract, there was a sale of goods.

Apex Court held that there was no sale of goods. Likewise, the goods provided on lease for use was not liable to tax because it was not sale within the definition of Section 4 of the Sale of Goods Act.

The principle that legislative entries must be given the widest interpretation is subject to the exception that where the entries use legal terms, they must be given their legal meaning: this principle was established in this case, where it was held that in Entry 48 list II, Seventh schedule of Govt. of India Act,1935, the words “sale of goods” had the same meaning which those words have in the Sale of Goods Act,1930. Thus, a legislature cannot extend its taxing power by defining the words “sale of goods” to cover transactions which did not cover “ sale of goods” within Act 1930. It must be further understood that the word “ sale” connotes both contract and a conveyance or transfer of property. In this case it was decided that under the law the supply of goods as a part of works contract was not sale. This means that a composite contract of both goods and services (works contract) cannot be taxed as sale of goods and at the same time severing the contract for the value of goods to be culled out from the same was also not permitted.

As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers, i.e. transfer of goods from head office of a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract, treats the sale of material separately from the cost of the labour, the sale of materials would be taxable but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as movables.

After the decision in the case of State of Madras Vs. Gannon Dunkerley & Company (supra), the matter with regard to taxability of goods involved in the execution of works contract, was examined by the Law Commission, in its 61st report. As a result of the recommendations by the Law' Commission to levy the tax on the goods used in the execution of the works contract and on the leasing transactions, clause (29-A) has been added in Article 366 of the Constitution of India by the 46th Constitutional Amendment, enlarging the definition of sale. As a result of the Constitutional Amendment, States have also amended their Trade Tax laws, and enlarge the definition of sale and levied the tax on the value of the goods involved in the execution of the works contract and transfer of right to use the goods.

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