Mahendra Lal Jaini

Vs

The State of Uttar Pradesh and Others

Petition No. 59 of 1962

(CJI B. P. Sinha, P. B. Gajendragadkar, K. N. Wanchoo K. C. Das Gupta, J. C. Shah JJ)

07.11.1962

JUDGMENT

WANCHOO, J. –

This petition under Art. 32 of the Constitution challenges the constitutionality of U.P. Land Tenures (Regulation of Transfers) Act 1952, (U.P. XV of 1952), (hereinafter called the Transfer Act) and the Indian Forest (U.P. Amendment) Act 1958, (U.P. V of 1956), (hereinafter referred to as the Forest Amendment Act). The case of the petitioner is that he obtained a permanent lease from the Maharaja Bahadur of Nahan of certain land known as "asarori" land, situate in the district of Dehra Dun, in Uttar Pradesh. The area leased out to him was 1069.68 acres in Khewat No. 1, Mahal No. 8, Khasra Nos. 1 A, 1-B and 2. This land was originally a Crown grant and had been free from revenue since 1866. Initially, it belonged to Major P. Innes but was subsequently transferred to the Maharaja Bahadur of Nahan. On January 25, 1951, an agreement was executed by the Maharaja Bahadur in favour of the petitioner and one Virendra Goyal for lease of this land for a consideration of an annual rent of Rs. 2,200/- and a premium of Rs. 64,000/-. The petitioner's case further is that the possession of the land in dispute was delivered to him at the time the agreement to lease was executed. It appears that at that time a large number of trees were standing on this land and the Maharaja Bahadur had given a contract for the removal of the trees to another person with a view to making the land culturable, and the intention of the lessor was to demise the land to the petitioner after the trees were removed, so that the petitioner may carry on agricultural operations thereon. On June 14, 1952, a registered lease was executed by the Maharaja Bahadur in favour of the petitioner and Virendra Goyal and it was recited therein that the entire land had been cleared of the trees and had been in possession of the lessees from the date of the agreement referred to above. Therefore, in fulfilment of the agreement, the lease was executed demising to the lessees the land in question on an annual rent of Rs. 2,200/-. The lease was permanent, heritable and transferable. The lease also provided that the lessor had given the right of hereditary tenancy within the meaning of the U.P. Tenancy Act, 1939 to the lessees. The lessees were also given the right to put the land to any other use whatsoever besides agriculture and subterranean rights were also conferred. They had also the right to sub-let and assign the land.

The petitioner's case further is that Virendra Goyal is merely a benamidar and has no right, title or interest in the land in dispute and that a suit for declaration in that behalf is pending in the Civil Court at Dehra Dun between the petitioner and Virendra Goyal. A day after the agreement of lease was executed, the U.P. Zamindari Abolition and Land Reforms Act. No. 1 of 1951, (hereinafter referred to as the Abolition Act), came into force on January 26, 1951, and the land in dispute is land within the meaning of this Act. The Abolition Act was actually applied to this area by a notification issued under s. 4 thereof from July 1, 1952, shortly after the registered lease in favour

of the petitioner and another had been made. The contention of the petitioner is that in consequence of the application of the Abolition Act to this area, the petitioner became a bhumidhari of the land under s. 18(d)(iii) of the Abolition Act and that his bhumidhari rights still subsist. On July 5, 1952, the petitioner and his employees went to the land to carry on agricultural operations, but they were stopped from doing so by the City Magistrate, Dehra Dun along with the Divisional Forest Officer and the Tehsildar, Dehra Dun. He was ordered to desist from clearing the land until further orders. The matter was then referred to the Government of Uttar Pradesh, and the petitioner was ordered to desist from doing anything, which was contrary to the U.P. Private Forests Act, 1948 (U.P. VI of 1949). It may be mentioned that in the meantime the Transfer Act which was passed on June 23, 1952, came into force with retrospective effect from May 21, 1952. By this Act all transfers made by intermediaries after May 21, 1952, were declared void. The petitioner was therefore asked by the City Magistrate not to do anything contrary to the Transfer Act until the orders of the Government were received or the matter was decided by a court of law. The petitioner's case is that the land was no longer forest land when the registered lease in his favour was made in June 1952. The petitioner then took up the matter with the Government but his representation in that behalf was rejected in September 1952.

Thereupon in November 1952, the petitioner filed a writ petition in the High Court at Allahabad challenging the applicability of the U.P. Private Forests Act to the land in dispute and also challenging the constitutionality of the Transfer Act. An ad interim order was passed by the High Court in December 1952 restraining the respondents from interfering with the possession of the petitioner over the land in dispute and directing that the parties should maintain the status quo. In February 1955, the petitioner withdrew the petition filed in the High Court for various reasons into which it is unnecessary to go. Thereafter the petitioner requested the Collector, Dehra Dun, to allow him to carry out agricultural operations over the land in dispute and he supported this prayer by a further allegation that he had at any rate become a sirdar within the meaning of s. 210 of the Abolition Act and was thus entitled to retain the land in dispute. The Collector again informed the petitioner that the matter had been referred to the Government and in the meantime the status quo should be maintained. In his present petition also, the petitioner in the alternative raises the plea that he has become a sirdar of the land in dispute and as no steps were taken by the State to eject him within two years of the date of vesting, namely, July 1, 1952, he was entitled to retain the possession of the land as sirdar.

On March 23, 1955, the Government of Uttar Pradesh issued a notification under s. 4 of the Indian Forest Act, 1927, (XVI of 1927), (hereinafter referred to as the Forest Act.), declaring that it had been decided to constitute Asarori village including the land in dispute a "reserved forest", and appointing the Forest Settlement Officer Dehra Dun to call for objections from claimants under Chap. II of that Act. On April 26, 1955, a proclamation was issued under s. 6 of the Fortest Act, calling for objections from claimants. The petitioner, however, has made no claim so far in persuance of the proclamation issued under s. 6 of the Forest Act, and his reason for this is that his matter was still under the consideration of the Government as intimated to him by the Collector of Dehra Dun, and no orders had been passed by the Government thereon.

On December 3, 1955, the Governor of Uttar Pradesh promulgated an Ordinance, named as "The Indian Forest (U.P. Amendment) Ordinance, 1955" adding Chap. V-A to the Forest Act, and a notification was issued thereunder restraining the claimants as defined in s. 38-A from doing acts prohibited under s. 38-B. This Ordinance was made into an Act in March 1956, namely, the Indian Forest (U.P. Amendment) Act, 1956 (U.P. V of 1956) by which Chap. V-A was introduced into the Forest Act, and a fresh notification was issued under the Act prohibiting various acts mentioned in

s. 38-B thereof. This is one of the Acts which the petitioner challenges as unconstitutional. The petitioner asserts that the notification of March 17, 1956, was cancelled on December 19, 1956, and thereupon he applied to the Collector again to allow him to reclaim the land. The Collector told him in reply that the orders of the Government were awaited in that connection. The petitioner further alleges that in November 1957 the State of Uttar Pradesh released over 293 acres out of the land in dispute in favour of Virendra Goyal, his benamidar. The petitioner then made a representation to the Government in that behalf protesting against the release of land in favour of Virendra Goyal, and was informed that order had been cancelled on August 14, 1958. In May 1959, the legislature of Uttar Pradesh passed another Act known as the Government Grants (U.P. Amendment) Act, No. IX of 1959, and the petitioner contends that by virtue of this Act all other laws ceased to apply to the land in dispute but as this Act was admittedly repealed by the Government Grants (U.P. Amendment) Act, No. XIII of 1960, with retrospective effect, nothing turns on this Act now, though the petitioner approached the Collector of Dehra Dun immediately after U.P. Act No. IX of 1959 was passed to be allowed to carry on reclamation operations. The Collector however told him that he should do nothing till specific orders were received from the Government or the matter was decided by a court of law.

Thereupon the petitioner filed a writ petition in this Court under Art. 32 which was admitted in February 1960. When this writ petition came up for hearing on October 25, 1961, this Court was informed that certain notifications had been issued under s. 38-B and 38-C of the Forest Amendment Act. The petitioner was therefore allowed on March 19, 1962 to withdraw that petition with liberty to present a fresh writ petition and thereupon the present petition was filed in April 1962.

The main contentions of the petitioner with respect to the two Acts, the constitutionality of which he challenges, are these. He contends that the Transfer Act is unconstitutional, as it deprives the lessees of their lease-hold rights without any provision for payment of compensation in violation of Art. 31(2) of the Constitution as it stood before the Fourth Amendment to the Constitution. In the alternative, he claims that even if the Transfer Act is valid, he has become a sirdar under s. 210 of the Abolition Act. As to the Forest Amendment Act, it is contended that it is unconstitutional as it imposes unreasonable restrictions on the fundamental right of the petitioner enshrined in Art. 19(1)(f) of the Constitution. Besides these two main objections, the petitioner further contends that the notification under s. 4 of the Forest Act dated March 23, 1955, was cancelled so far as the land in dispute was concerned and therefore would not affect the petitioner's case. It is also urged that as no notification under s. 20 of the Forest Act has been issued, it must be held that the purpose of the notification under s. 4 had been abandoned. As to the notification under s. 38-B of the Forest Amendment Act, it may be mentioned that the petitioner made no objections as required under that Act; but he claims that he could not do so because before the time within which he had to file objections had expired, U.P. Act IX of 1959 had come into force and it was not necessary for him to file any objection in view of that Act. The petitioner therefore prays that the Transfer Act and the Forest Amendment Act be declared ultra vires and all actions taken thereunder be held to be void as against the petitioner. He further prays that he may be declared a bhumidhar or in the alternative a sirdar under the provisions of the Abolition Act and the respondents be restrained from interfering with his possession of the land. He also prays that in case it is found that he has been dispossessed, a writ in the nature of mandamus or any other appropriate direction be issued against the respondents directing them to withdraw from possession of the land in dispute and to permit the petitioner to enjoy such rights to which he may be found entitled.

The petition has been opposed on behalf of the State of Uttar Pradesh and it is maintained in the

first place that the Transfer Act is valid and constitutional. If that is held in favour of the respondent, nothing else will survive, for no rights would then arise in favour of the petitioner under the registered lease of June 1952. Further, it has been strenuously contended on behalf of the state that the petitioner never obtained possession over the land in dispute. It has also been contended that the land in dispute was never denuded of trees and that it is still forest land on which a large number of trees are standing. The petitioner's claim that he has become a bhumidhar under the Abolition Act is also denied. His further claim that he has become a sirdar is also repelled. The case of the State is that the petitioner acquired no rights under the registered lease of June 1952 and has no right to maintain the present petition consequence, irrespective of whether the Transfer Act is valid and constitutional or not. It is also contended that the Forest Amendment Act is a valid and constitutional piece of legislation and the various notifications issued under the Forest Act and the Forest Amendment Act are perfectly good. Lastly it is contended that the notification under s. 4 of the Forest Act has never been withdrawn though no notification under s. 20 has yet been issued in deference to the fact that the writ petitions filed by the petitioner one after the other were pending either in the High Court or in this Court. The three main points therefore which arise for decision in the present petition are these :-

(1) Has the petitioner no right whatsoever to any property by virtue of the registered lease deed of June 1952 in his favour irrespective of whether the Transfer Act is valid and constitutional or not, and therefore has no locus standi to maintain the present petition ?

(2) Is the Transfer Act, 1952, valid and constitutional ?

(3) Is the Forest Amendment Act of 1956 valid and constitutional ?

There are some subsidiary points with respect to the notifications issued which also arise for consideration with which we shall deal when considering the three main points mentioned above.

Re. (1).

The petitioner bases his right to move this Court to protect his fundamental right on the basis of the registered lease in his favour of June 14, 1952. There can be no doubt after a perusal of that lease which is not said to be a fictitious document, that if various laws had not been passed and had not come into force that might have affected this land, it would have conferred a right of property on the petitioner, and he would be entitled at least to be a permanent lessee of the land in dispute with such rights as the lease confers upon him. It is therefore difficult to understand how it can be said in the face of this lease that the petitioner has no right to maintain the present petition. It may be that the lease may be of no force and effect, if the Transfer Act is held valid - which is a question we shall consider later -; but once it is conceded that the lease is not fictitious, it does confer rights in the land affected by it on the petitioner. We cannot see how the petitioner would have no right to maintain the present petition irrespective of whether the Transfer Act is valid and constitutional or not. What rights are conferred on the petitioner by this registered lease is a different matter. The petitioner claims that he has become a bhumidhar under the Abolition Act by virtue of this lease; in the alternative he claims that he has become a sirdar, as he is in possession. The State however denies that the petitioner has become a bhumidhar under the Abolition Act; it also denies that the petitioner is in possession and in consequence has become a sirdar, under the Abolition Act. The petitioner prays that his rights as a bhumidhar or a sirdar, may be decided in the present petition. We are however of opinion that it will not be fair to either party to decide the question whether or not

the petitioner is either bhumidhar or sirdar by virtue of the registered lease or the possession of the land demised which he claims, in view of the provisions of the 'Abolition Act. The petitioner's status as bhumidhar or sirdar will depend upon the decision of various questions of fact, and we do not think that it will be fair to either party to decide those questions of fact merely on the scanty documentary evidence available on this record, in particular as the question of possession is also seriously disputed and further there is a serious dispute as to whether any trees stand on this land even now or whether trees had been cleared as recited in the registered lease, before that lease was registered; these are all questions of fact on which oral evidence will be necessary. There is a provision in the Abolition Act, s. 229-B, which allows a person claiming to be a bhumidhar or sirdar under it to file a suit to establish that right. We think, considering the serious dispute as to facts which exists in this case between the parties both as to the nature of the land and as to the possession of the petitioner, that the petitioner should be left to establish his rights as bhumidhar or as sirdar by suit, or it may also be possible for him to establish that right by filing objections in response to the proclamation under s. 6 of the Forest Act with which we shall deal in detail later. Therefore even though we are not prepared to decide the question whether the petitioner is a bhumidhar or a sirdar, it seems to us that in the face of the deed of lease in favour of the petitioner, it cannot be said that he has no right to maintain the present petition (irrespective of whether the Transfer Act is valid or not). As we have already indicated, if the Transfer Act is valid, then the lease in favour of the petitioner will confer no right on him and in that case his petition must fail. But if the Transfer Act is not a valid piece of legislation, the lease will stand and so long as it stands, the petitioner would in our opinion be competent to maintain the present petition, though we make it clear that we do not decide in this petition what right is conferred on the petitioner by the lease and whether he is a bhumidhar or a sirdar by virtue of the lease and his alleged possession over the land demised therein. We are therefore of opinion that so long as the lease stands, the petitioner would have a right to maintain the present petition, though we express no opinion as to the nature of that right and leave it to the petitioner to have that determined in a proper forum.

It is also urged that no present tenancy right was conferred by the lease on the petitioner though cl. (2) of the lease purports to confer hereditary tenancy rights within the meaning of U.P. Tenancy Act, as the land was at the time covered by trees and was not fit for cultivation. This again raises the same question of fact, namely, the nature of land at the time of the execution of the lease. It may be that no tenancy rights may be created in favour of the petitioner by the lease, if it is found that the land in dispute was not land within the meaning of the U.P. Tenancy Act. But that again is a question which will have to be decided in the proper forum as indicated above by us. There can however be no doubt that the lease did create some right, whatsoever be its nature, in presenti and though the nature of that right may be disputed, it is not a case where only some future right is conferred. In the circumstances, it cannot be said that no right whatever in presenti was created by the lease, and therefore the petitioner is not entitled to maintain the present petition.

Lastly, it is urged that the lease was in favour of two persons, namely, the petitioner and Virendra Goyal, and the present petition has been filed only by the petitioner and Virendra Goyal has not been made a party to it, even as respondent. It is urged therefore that the present petition is not maintainable that ground also, and reliance in this connection is placed on the analogy of suits, where all co-owners must join in a suit to recover property unless the law otherwise provides, and if some co-owners refuse to sue, the proper course to adopt as to the rest is to make them defendants in the suit. It is enough to say that this principle applicable to suits for possession can have no application to a petition under Art. 32, which is not a suit for possession. Besides the case of the petitioner is that the other lessee was a mere benamidar and if that case is right (on which again we express no opinion, as the matter is sub judice in a civil court at Dehra Dun), it would be

unnecessary to make Virendra Goyal even a respondent. If the petitioner has a right to maintain the present petition, the fact that he has not made another person who would have equal right with him to maintain the petition, even a party to the petition, would not in our opinion entail that his petition should be thrown out on that ground alone and he should not be granted any relief in the matter of enforcing his fundamental right. We are therefore of opinion that the petitioner has a right to maintain the present petition, though we express no opinion as to the nature of that right.

Re. (2).

The Transfer Act is a short Act of three sections. The preamble to the Act says that as the Abolition Act has come into force and it is expedient for the avoidance of transitional difficulties consequent upon the said enforcement to regulate certain transfers of land by intermediaries, the Act was enacted. Section 1 gives the short title, the extent to which the Act extends and the date from which it came into force, namely, May 21, 1952, though it was actually published on June 23, 1952. Section 2 is the definition section. Section 3 is the main section, which lays down that notwithstanding anything contained in any law or contract to the contrary, a lease of land by an intermediary either granted or registered on or after May 21, 1952 shall be and is hereby declared null and void from the date of the execution and the lessee shall for purposes of s. 180 of the U.P. Tenancy Act and s. 209 of he Abolition Act be deemed to be a person in possession of the land otherwise than in accordance with the provisions of the law for the time being in force. It is further provided that a transaction between an intermediary and a tenant conferring on the tenant a right to transfer by sale his holding or any part thereof either made or entered into or registered on or after May 21, 1952 shall be and in hereby declared null and void from the date of execution. It will thus be seen that the Transfer Act makes two kinds of transfers made on or after May 21, 1952 null and void and thus deprives the transferee of the right which he would otherwise acquire under the transfer. The contention of the petitioner is that the Transfer Act contravenes Art. 31 of the Constitution, as it was at the time the Act was passed, and therefore is unconstitutional, for though the transferee is deprived of his property, no compensation is provided in the Act as required by Art. 31(2) of the Constitution. Reliance in this connection is placed on the State of West Bengal v. Subodh Gopal Bose [[1954] S.C.R. 587], where dealing with Art. 31, the majority of the Court held that Art. 31 protects the right to property by defining the limits on the power of the State to take away private property. It was further held that clause (1) and (2) of Art. 31 were not mutually exclusive in scope and content, but should be read together and understood as dealing with the same subject, namely, the protection of the right to property by means of the limitations on the State power referred to above, the deprivation contemplated in cl. (1) being no other than the acquisition or taking possession of property referred to in cl. (2). The decision in Subodh Gopal's case [[1954] S.C.R. 587] was refered to in Saghir Ahmad v. The State of U.P. [[1955] 1 S.C.R. 707], and it was pointed out that in view of the majority decision in that case, it must be taken to be settled that "clause (1) and (2) of article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2)". Soon after the decision in Subodh Gopal's case [[1954] S.C.R. 587], Art. 31(2) was amended by the Constitution (Fourth Amendment) Act, 1955, and cl. (2A) was introduced in Art. 31, the amendment being prospective. The new cl. (2-A) of Art. 31 lays down that "where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property, notwithstanding that it deprives any person of his property." This amendment thus accepted the minority view of Das, J., as he then was, in Subodh Gopal's case [[1954] S.C.R. 587]

and made it clear that mere deprivation of property, without the ownership or right to possession being transferred to the State, would not attract the provisions of Art. 31(2). The contention on behalf of the petitioner is that the amendment to Art. 31 being not retrospective would not apply to the consideration of the constitutionality of the Transfer Act, which would have to be considered on the basis of the Constitution as it stood in 1952. It is not seriously disputed on behalf of the respondents that if the Constitution as it stood in 1952 has to be applied to judge the constitutionality of the Transfer Act, the case would be completely covered by the decision in Subodh Gopal's case [[1954] S.C.R. 587], and the Transfer Act not having provided for payment of compensation, as required by Art. 31(2), as it stood in 1952, would be unconstitutional. We are unable to agree with the view taken by the High Court at Allahabad in Karam Singh v. Nihal Khan [A.I.R. (1957) All. 549] insofar as it upholds the validity of the Transfer Act.

The contention on behalf of the respondents in support of the constitutionality of the Transfer Act is, however, two-fold. In the first place, it is urged that the constitutionality of the Transfer Act must be judged on the basis of the Constitution as it stood on the date of the present petition and not as it stood on the date of the Transfer Act. Reliance in this connection is placed on Bombay Dyeing and Manufacturing Co. Ltd. v. The State of Bombay [[1958] S.C.R. 1122], where it was observed at p. 1131, that it was not disputed that the Constitution Fourth Amendment Act which introduced cl. (2-A) in Art. 31 was not retrospective, and that the rights of the parties must be decided in accordance with the law as on the date of the writ petition. It is urged that this observation is an authority for the proposition that in every case the constitutionality of an Act has to be judged by the Constitution as it stood on the date of the writ petition. We are of opinion that this observation is not capable of this interpretation and could not have intended to lay down any such proposition. The judgment in the Bombay Dyeing case [[1958] S.C.R. 1122] nowhere considers the question whether the constitutionality of an Act has to be judged on the basis of the Constitution as it stood on the date on which the Act was passed or on the basis of the Constitution as it stood on the date the writ petition was made. In that case it made no difference whether the Constitution as it stood on the date the Act was passed or on the date when the writ petition was filed, was applied, for the writ petition was filed long before the Constitution Fourth Amendment was enacted. The observation therefore in that case that the constitutionality of an Act has to be judged on the basis of the Constitution as it stood on the date of the writ petition, cannot be given the meaning which the learned counsel for the respondents put on it, particularly, as the context shows that the amendment of the Article by the Constitution (Fourth Amendment) Act was not retrospective. Now, if the constitutionality was to be judged by the date of the writ petition, the result would be that sometime the Fourth Amendment of Art. 31 would become retrospective and sometimes it would not, depending upon whether the writ petition was filed before the Fourth Amendment Act was passed or after the said amendment. If the writ petition was filed before the Constitution (Fourth Amendment) Act, the same provision of an Act would be unconstitutional while if it was filed after the Fourth Amendment Act, it may be constitutional. Such a result is obviously impossible to accept and could not have been meant by the observation in Bombay Dyeing case [[1958] S.C.R. 1122]. It is in our opinion absolutely elementary that the constitutionality of an Act must be judged on the basis of the Constitution as it was on the date the Act was passed, subject to any retrospective amendment of the Constitution. Therefore, the argument that the constitutionality of the Transfer Act must be judged on the basis of the Constitution as it stood on the date of the present writ petition has no force and must be rejected. We have already indicated that if the constitutionality is to be judged on the basis of the Constitution as it stood when the Transfer Act was passed, it is not seriously disputed that the Transfer Act would be unconstitutional, in view of the decision of this Court in Subodh Gopal's case [[1954] S.C.R. 587].

The second contention on behalf of the respondents is that even if the Transfer Act was unconstitutional, when it was passed, the inconsistency having been removed on the enactment of the Constitution (Fourth Amendment) Act by which Art. 31 was amended, the Transfer Act revived and became effective, at any rate from the date the Fourth Amendment Act came into force. This brings us to a consideration of the doctrine of eclipse, on which the contention is based. This doctrine first came to be considered in Behram Khurshed Pesikaka v. The State of Bombay [[1955] 1 S.C.R. 613] where Venkatarama Aiyar, J. drew a distinction between the invalidity arising out of lack of legislative competence and that arising by reason of a check imposed upon the legislature by the provisions contained in the Chapter on Fundamental Rights. He relied on an earlier decision of this Court in Keshavan Madhava Menon v. The State of Bombay [[1951] S.C.R. 228] and was of the view that the word "void" in Art. 13(1) should be construed as meaning in the language of the American Jurists as "relatively void". It may however be observed that the laws under consideration in Keshavan Madhava Menon's case [[1955] 1 S.C.R. 613] as well as in Behram Khurshed Pasikaka [[1955] 1 S.C.R. 613] were both pre-Constitution laws, and the effect of Art. 13(1) had to be considered with respect to their constitutionality. Behram Khurshed Pasikaka's [[1955] 1 S.C.R. 613] case was later referred to a larger Bench in view of the constitutional questions involved and in the majority judgment of the Constitution Bench, Mahajan, C.J., pointed out that there was no scope for introducing terms like "relatively void", coined by American Jurists in construing a Constitution which is not drawn up in similar language. The majority also observed that they were not able to endorse the opinion expressed by Venkatarama Aiyar, J., that a declaration of unconstitutionality brought about by lack of legislative power stood on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights, and that it was not correct to say that constitutional provisions in Part III of the Constitution merely operated as a check on the exercise of legislative power. It was also observed that when the law-making power of a State is restricted by a written fundamental law, then any law enacted which is opposed to the fundamental law was in excess of the legislative authority and was thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there was no real distinction between them and they represent two aspects of want of legislative power. Finally, it was added that a mere reference to the provisions of Art. 13(2) and Art. 245 and 246 was sufficient to indicate that there was no competency in Parliament or a State legislature to make a law which comes into clash with part III of the Constitution after the coming into force of the Constitution.

Then came the decision in Saghir Ahmad's case [[1955] 1 S.C.R. 707]. In that case the law under consideration had been passed after the coming into force of the Constitution, and the judgment of the Constitution Bench was unanimous. The question there to be considered was the effect of the Constitution (First Amendment) Act, which was passed shortly after the Act under challenge there was passed. It was observed that "amendment of the Constitution which came later cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed", and the observation of Prof. Cooley in his work on Constitutional Limitations to the effect that "a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted" was accepted as sound, and the Court therefore came to the conclusion that the legislation in question which violated the fundamental right of the appellants under Art. 19(1)(g) of the Constitution and was not shown to be protected by cl. 6 of the Article, as it stood at the time of the enactment must be held to be void under Art. 13(2) of the Constitution. The Court further held that the Act then under consideration also violated Art. 31(2) of the Constitution, and thus was invalid. It will be seen therefore that the doctrine of eclipse was not applied to the case of a post-Constitution law, which was unconstitutional as it was in violation of the Art. 17(1)(g) and was not protected by Art. 19(6)

and also because it was in violation of Art. 31(2). Saghir Ahmad's case [[1955] 1 S.C.R. 707] in effect completely demolishes the argument raised on behalf of the respondents that a post-Constitution law which is void under Arts. 19(1) and 31(2) of the Constitution and is thus void from birth can be revived the doctrine of eclipse.

The respondents, however, rely on the next case in this seriet, namely, Bhikaji Narain Dhakaras v. The State of Madhya Pradesh [[1955] 2 S.C.R. 589]. That case was however dealing with a pre-Constitution law and not with a post-Constitution law. In that case an argument was put forward that Saghir Ahmad's case [[1955] 1 S.C.R. 707] would apply. But it was held that that would not be so far the simple reason that Saghir Ahmad's case [[1955] 1 S.C.R. 707] was dealing with a post-Constitution law, while that case was concerned with a pre-Constitution law. It was in that connection that Art. 13(1) came to be considered, and it was observed that the true effect of the Article is to render an Act, inconsistent with a fundamental right, inoperative to the extent of the inconsistency. It was further observed that "it is overshadowed by the fundamental right and remains dormant but is not dead". With the amendment made in the Constitution, it was pointed out, the provisions of the particular Act were no longer inconsistent therewith and the result was that the impugned Act began to operate once again from the date of such amendment. In that connection, it was observed at p. 599 that "the true position is that the impugned law became, as it were eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment), Act, 1951, was to remove the shadow and to make the impugned Act free from all blemish or infirmity". It was further pointed out that "the American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still-born as it were. The American authorities therefore cannot fully apply to pre-Constitution laws which were perfectly valid before the Constitution". The respondents, however, rely on the following passage at p. 599 :-

> "But apart from this distinction between pre-Constitution and post-Constitution laws on which, however, we need not rest our decision, it must be held that these American authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article 13, rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes. They existed for the purpose of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non citizens. It is only as against the citizens that they remained in a dormant or moribund condition".

It is true that the learned Judges did say that they need not rest their decision on the distinction between pre-Constitution and post-Constitution laws; but the later part of these observations where the learned Judges say that such laws are not dead for all purposes shows that they had in mind pre-Constitution laws, for otherwise they could not have said that they existed for the purpose of pre-Constitution rights and liabilities and they remained operative even after the Constitution as against non-citizens. We are therefore of opinion that the decision in Bhikaji Narain's case [[1959] 2 S.C.R. 589] must be confined to pre-Constitution laws to which the doctrine of eclipse would apply. We are fortified in this opinion by the fact that the learned Judges in Bhikaji Narain's case [[1959] 2 S.C.R. 589] themselves distinguished the earlier decision in Saghir Ahmad's case [[1955] 1 S.C.R. 707], to which Das Acting C.J., who delivered the judgment in Bhikaji Narain's case [[1959] 2 S.C.R. 589] was also a party.

Next we come to the last case on the point, namely, Deep Chand v. The State of Uttar Pradesh

[[1959] Supp. 2 S.C.R. 8]. In that case, the majority after referring to all these cases pointed out the distinction between Arts. 13(1) and 13(2), and further held that the limitations imposed by Chap. III on legislative power were on the same level as the competence of the legislature to make laws. The following observations at p. 20 will bring out the position clearly :-

> "Parliament and the Legislatures of States have power to make laws in respect of any of the matters enumerated in the relevant Lists in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution, including Art. 13, i.e., the power is made subject to the limitations imposed by Part III of the Constitution. The general power to that extent is limited. The Legislature, therefore, has no power to make any law in derogation of the injunction contained in Art. 13. Art. 13(1) deals with laws in force in the territory of India before the commencement of the Constitution and such laws insofar as they are inconsistent with the provisions of Part, III shall to the extent of such inconsistency be void. The clause, therefore, recognises the validity of the pre-Constitution laws and only declares that said laws would be void thereafter to the extent of their inconsistency with Part III; whereas clause (2) of that Article imposes a prohibition on the State making laws taking away or abridging the rights conferred by Part III, and declares that laws made in contravention of this clause shall to the extent of the contravention be void. There is a clear distinction between the two clauses. Under clause (1) a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III, whereas no post-Constitution law can be made contravening the provisions of Part III and therefore the law to that extent, though made, is a nullity from its inception". The minority however thought that it was not necessary to decide this question in that case, and therefore did not finally express its views.

A review of these authorities therefore in our opinion clearly shows that the doctrine of eclipse will apply to pre-Constitution laws which are governed by Art. 13(1) and would not apply to post-Constitution laws which are governed by Art. 13(2). It is, however, urged on behalf of the respondents that on the language of Art. 13(1) and (2) there should be no difference in the matter of the application of the doctrine of eclipse. It is said that Art. 13(1) prescribes that insofar as the existing laws are inconsistent with the provisions of Part III, they shall to the extent of such inconsistency be void. Similarly, Art. 13(2) provides that any law made in contravention of this clause shall to the extent of the contravention be void. The argument is two-fold. In the first place, it is urged that the words "to the extent of the inconsistency" or "to the extent of the contravention" mean "so long as the inconsistency continues or so long as the contravention continues." We are of opinion that this is not the meaning of these words in Art. 13(1) and (2). Obviously, the Constitution makers when they used the words "to the extent of " in both clauses intended that the pre-existing law or the post-Constitution law should only be void as far as the inconsistency or the contravention went i.e. if only a part of the law was inconsistent or contravened the constitutional prohibition, that part alone would be void and not the entire law. The obvious intention behind the use of the words 'to the extent of " was to save such parts of a law as were not inconsistent with or in making which the State did not contravene the prohibition against infringement of fundamental rights and that distinction may conceivably introduce considerations of severability; it has in our opinion no reference to the time for which the voidness is to continue. Where the Constitution makers intended to refer to time they have used specific words for that purpose; as, for instance, in Art. 251. That Article deals with "inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the Legislatures of States", and provides that "..... the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the

law made by the Legislature of the State shall to the extent of the repugnancy but so long only as the law made by Parliament continues to have effect, be in-operative." If therefore the Constitution makers intended that the provisions in Art. 13(1) and (2) would only affect laws so long as inconsistency continued or contravention lasted, they could have provided specifically for it. On a plain construction of the clause, the element of time must be excluded. We cannot therefore accept the contention that the words "to the extent of " import any idea of time. In our opinion, they only import the idea that the law may be void either wholly or in part and that only such portions will be void as are inconsistent with Part III or have contravened Part III and no more.

We may in this connection also refer to the difference in the language and scope of Art. 13(1) and 13(2). Art. 13(1) clearly recognises the existence of pre-existing laws in force in the territory of India immediately before the commencement of the Constitution and then lays down that in so far as they are inconsistent with the provisions of Part III, they shall be void to the extent of such inconsistency. The pre-Constitution laws which were perfectly valid when they were passed and the existence of which is recognised in the opening words of Art. 13(1) revive by the removal of the inconsistency in question. This in effect is the doctrine of eclipse, which if we may say so with respect, was applied in Bhikaji Narain's case. [[1955] 2 S.C.R. 589]

Art. 13(2) on the other hand begins with an injunction to the State not to make a law which takes away or abridges the rights conferred by Part III. There is thus a constitutional prohibition to the State against making laws taking away or abridging fundamental rights. The legislative power of Parliament and the Legislatures of States under Art. 245 is subject to the other provisions of the Constitution and therefore subject to Art. 13(2), which specifically prohibits the State from making any law taking away or abridging the fundamental rights. Therefore, it seems to us that the prohibition contained in Art. 13(2) makes the State as much incompetent to make a law taking away or abridging the fundamental rights as it would be where law is made against the distribution of powers contained in the Seventh Schedule to the Constitution between Parliament and the Legislature of a State. Further, Art. 13(2) provides that the law shall be void to the extent of the contravention. Now contravention in the context takes place only once when the law is made, for the contravention is of the prohibition to make any law which takes away or abridges the fundamental rights. There is no question of the contravention of Art. 13(2) being a continuing matter. Therefore, where there is a question of a post-Constitution law, there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Art. 13(1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse. A plain reading therefore of the words in Art. 13(1) and Art. 13(2) brings out a clear distinction between the two. Art. 13(1) declares such pre-Constitution laws as are inconsistent with fundamental rights void. Art. 13(2) consists of two parts; the first part imposes an inhibition on the power of the State to make a law contravening fundamental rights, and the second part, which is merely a consequential one, mentions the effect of the breach. Now what the doctrine of eclipse can revive is the operation of a law which was operative until the Constitution came into force and had since then become inoperative either wholly or partially; it cannot confer power on the State to enact a law in breach of Art. 13(2) which would be the effect of the application of the doctrine of eclipse to pose-Constitution laws. Therefore, in the case of Art. 13(1) which applies to existing law, the doctrine of eclipse is applicable as laid down in Bhikuji Narain's case [[1955] 1 S.C.R. 589], but in the case of a law made after the Constitution came into force, it is Art. 13(2) which applies and the effect of that is what we have already

indicated and which was indicated by this Court as far back as Saghir Ahmvd's case [[1955] 1 S.C.R. 707].

It is however urged on behalf of the respondents that this would give a different meaning to the word "void" in Art. 13(1), as compared to Art. 13(2). We do not think so. The meaning of the word "void" in Art. 13(1) was considered in Keshava Madhava Menon's case [[1951] S.C.R. 288] and again in Behram Khurshed Pesikaka's case [[1955] 1 S.C.R. 613]. In the later case, Mahajan, C.J., pointed out that the majority in Keshava Madhava Menon's case [[1951] S.C.R. 288] clearly held that the word "void" in Art. 13(1) did not mean that the statute stood repealed and therefore obliterated from the statute book; nor did it mean that the said statute was void ab initio. This, in our opinion, if we may say so with respect, follows clearly from the language of Art. 13(1), which pre-supposes that the existing laws are good except to the extent of the inconsistency with the fundamental rights. Besides there could not be any question of an existing law being void ab initio on account of the inconsistency with Art. 13(1), as they were passed by competent legislatures at the time when they were enacted. Therefore, it was pointed out that the effect of Art. 13(1) with respect to existing laws insofar as they were unconstitutional was only that it nullified them, and made them "ineffectual and nugatory and devoid of any legal force or binding effect". The meaning of the word "void" for all practical purposes is the same in Art. 13(1) as in Art. 13(2), namely, that the laws which were void were ineffectual and nugatory and devoid of any legal force or binding effect. But the pre-Constitution laws could not become void from their inception on account of the application of Art. 13(1). The meaning of the word "void" in Art. 13(2) is also the same viz., that the laws are ineffectual and nugatory and devoid of any legal force on binding effect, if they contravene Art. 13(2). But there is one vital difference between pre-Constitution an post-Constitution laws in this matter. The voidness of the pre-Constitution laws is not from inception. Such voidness supervened when the Constitution came into force; and so they existed and operated for sometime and for certain purposes; the voidness of post-Constitution laws is from their very inception and they cannot therefore continue to exist for any purpose. This distinction between the voidness in one case and the voidness in the other arises from the circumstance that one is a pre-Constitution law and the other is a post-Constitution law; but the meaning of the word "void" is the same in either case, namely, that the law is ineffectual and nugatory and devoid of any legal force or binding effect.

Then comes the question asto what is the effect of an amendment of the Constitution in the two types of cases. So far as pre-Constitution laws are concerned, the amendment of the Constitution which removes the inconsistency will result in the revival of such laws by virtue of the doctrine of eclipse, as laid down in Bhikaji Narain's case [[1955] 2 S.C.R. 589] for the pre-existing laws were not still-born and would still exist though eclipsed on account of the inconsistency to govern pre-existing matters. But in the case of post-Constitution laws, they would be still born to the extent of the centravention. And it is this distinction which results in the impossibility of applying the doctrine of eclipse to post-Constitution laws, for nothing can be revived which never had any valid existence. We are therefore of opinion that the meaning of the word "void" is the same both in Art. 13(1) and Art. 13(2), and that the application of the doctrine of eclipse in one case and not in the other case does not depend upon giving a different meaning to the word "void" in the two parts of Art. 13; it arises from the inherent difference between Art. 13(1) and Art. 13(2) arising from the fact that one is dealing with pre-Constitution laws, and the other is dealing with post-Constitution laws, with the result that in one case the laws being not still-born the doctrine of eclipse will apply while in the other case the laws being still-born-there will be no scope for the application of the doctrine of eclipse. Though the two clauses form part of the same Article, there is a vital difference in the language employed in them as also in their content and scope. By the first clause the Constitution recognises the existence of certain operating laws and they are declared void, to the extend of their

inconsistency with fundamental rights. Had there been no such declaration, these laws would have continued to operate. Therefore, in the case of pre-Constitution laws what an amendment to the Constitution does is to remove the shadow cast on it by this declaration. The law thus revives. However, in the case of the second clause, applicable to post-Constitution laws, the Constitution does not recognise their existence, having been made in defiance of a prohibition to make them. Such defiance makes the law enacted void. In their case therefore there can be no revival by an amendment of the Constitution, though the bar to make the law is removed, so far as the period after the amendment is concerned. In the case of post-Constitution laws, it would be hardly appropriate to distinguish between laws which are wholly void - as for instance, those which contravene Art. 31 - and those which are substantially void but partly valid, - as for instance, laws contravening Art. 19. Theoretically, the laws falling under the latter category may be valid qua non-citizens; but that is a wholly unrealistic consideration and it seems to us that such notionally partial valid existence of the said laws on the strength of hypothetical and pendantic considerations cannot justify the application of the doctrine of eclipse to them. All post-Constitution laws which contravene the mandatory injunction contained in the first part of Art. 13(2) are void, as void as are the laws passed without legislative competence, and the doctrine of eclipse does not apply to them. We are therefore of opinion that the Constitution (Fourth Amendment) Act cannot be applied to the Transfer Act in this case by virtue of the doctrine of eclipse. It follows therefore that the Transfer Act is unconstitutional because it did not comply with Art. 31(2), as it stood at the time it was passed. It will therefore have to be struck down, and the petitioner given a declaration in his favour accordingly.

Re. (3).

We now come to the constitutionality of the Forest Amendment Act. By this Act, Chap. V-A was added to the Forest Act, and the main provision of it which has been attacked is s. 38-B. It lays down that the State Government may by notification regulate or prohibit in any forest situate in or upon any land of a claimant the doing of certain acts where such regulation or prohibition appears necessary. Claimant is defined in s. 38-A as meaning a person claiming to be entitled to the land or any interest therein acquired, owned, settled or possessed or purported to have been acquired, owned, settled or possessed whether under, through or by any lease or license executed prior to the commencement of the Abolition Act or under and in accordance with any provision of any enactment, including the Abolition Act. It may be added that in 1960 there was an amendment to this Act by which certain other sections have been added in Chap. V-A. We shall deal with the effect of that amendment later; for the present we are dealing with the attack on s. 38-B. It is contended that the regulation or prohibition contemplated in s. 38-B is of a permanent nature and interferes even with forestry operations. It is also contended that it takes away rights without any provision for compensation. In short, the attack on Chap. V-A, as originally enacted, is based on a contrast of its provision with Chap. V of the Forest Act. Now if this is really so, there may be something in favour of the petitioner's contention that certain parts of Chap. V-A, as originally enacted, are unconstitutional. But the contention on behalf of the respondents is that Chap. V-A, as originally enacted (i.e. ss. 38-A to 38-G) is not supplementary to Chap. V, but is supplementary to Chap. II of the Forest Act, and is thus intended to serve as a temporary provision for protection of forests while proceedings under Chap. II are going on. If this contention on behalf of the respondents is correct, the attack of the petitioner on Chap. V-A, as originally enacted, would lose all force because that attack is based on the assumption that Chap. V-A, as originally enacted, allows the State to make permanent orders under it and then the contrast between Chap. V-A as originally enacted and Chap. V would bring out the infirmities in Chap. V-A.

It is necessary therefore to look at the scheme of Chap. II of the Forest Act, which contains section

3 to 27 and deals with reserved forests. Section 3 provides that the State Government may constitute any forest land or waste land which is the property of Government or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a reserved forest. Section 4 provides for the issue of a notification declaring the intention of the Government to constitute a reserved forest. Section 5 bars accrual of forest rights in the area covered by notification under s. 4 after the issue of the notification. Section 6 then inter alia gives power to the Forest Settlement Officer to issue a proclamation fixing a period of not less than three months from the date of such proclamation and requiring every person claiming any right mentioned in s. 4 and s. 5 within such period either to present to the Forest Settlement Officer a written notice specifying or to appear before him and state the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof. Section 7 gives power to the Forest Settlement Officer to make investigation himself to discover these rights. Section 8 prescribes the powers of the Forest Settlement Officer, and lays down inter alia that he will have the same powers as a civil court has in the trial of suits. Section 9 inter alia provides for the extinction of rights where no claim has been made under s. 6 on the making of a notification under s. 20. Section 11(1) lays down that "in the case of a claim to a right in or over any land, other than a right-of-way or right of pasture, or a right to forest-produce or a water-course, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part." Section 11(2) lays that "if such claim is admitted in whole or in part, the Forest Settlement Officer shall either (i) exclude such land from the limits of the proposed forest, or (ii) come to an agreement with the owner thereof for the surrender of his rights; or (iii) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894." Sections 12 to 16 provide for the determination of rights other than rights in or over any land, including commutation by the payment of a sum of money or by the grant of land, or in such other manner as he thinks fit. Section 17 provides for appeals from orders passed under ss. 11, 12, 15 and 16, while s. 18(4) provides for revising an appellate order by the State Government. Section 19 permits lawyers to appear before the Forest Settlement Officer or in appeal. When all these proceedings are over, the State Government has to publish a notification under s. 20 specifying definitely the limits of the forest, which is to be reserved and declaring the same to be reserved from the date fixed by the notification, and from such date the forest shall be deemed to be a reserved forest. We need not refer to the remaining sections which provide for ancillary matters after the notification under s. 20.

It is clear from this review of the provisions of Chap. II that it applies inter alia to forest land or waste land which is the property of the Government or over which the Government has proprietary rights. By the notification under s. 4, the Forest Settlement Officer is appointed to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest produce, and to deal with the same as provided in this Chapter. Section 11 then provides for the adjudication of rights in or over land, and provides that if it is held that rights in or over land exists, the land may be excluded from the limits of the proposed forest or there may be some agreement between the owner of that right and the Government with respect to it, or the Forest Settlement Officer may proceed to acquire such land in the manner provided in the Land Acquistion Act. It will be clear therefore that Chap. II contemplates that where forest land or waste land is the property of Government or over which the Government has proprietary rights, the Forest Settlement Officer shall proceed to determine subordinate rights in the land before a notification under s. 20 is issued making the area a reserved forest. In the determination of these rights, the Forest Settlement Officer has the same powers as a civil court has in the trial of suits, and his order is subject to appeal and finally to revision by the State Government. Section 5 also shows that after a notification under s. 4, no further forest rights

can accrue. It appears, however, that after the Abolition Act came into force, it was felt that more powers should be taken to control forests than was possible under s. 5 as under the Abolition Act all lands to which the Abolition Act applied had vested in the State and become its property. That is why, according to the respondents, the Forest Amendment Act was passed in 1956, and though there is no express or specific provision therein to show that as originally enacted it was a mere provision to tide over the difficulties arising during the time proceedings under Chap. II were pending, it appears that there is force in the contention of the respondents that this was a mere interim measure to deal with the situation arising after the Abolition Act came into force while steps were being taken to constitute reserved forests under Chap. II, as all lands had become the property of the State in the area to which the Abolition Act applied. This is in our opinion made clear by the definition of the word "claimant" in s. 38-A, and the rest of the Chapter, as originally enacted, deals with claimants. The heading of the Chapter does appear to be somewhat ambiguous inasmuch as it says "of the Control over Forests of Claimants." The idea one gets prima facie from this heading is that the forests belong to claimants and the intention is to control such forests. This heading is in line with the heading of Chap. V of the Forest Act, which is "Of the control over Forests and Lands not being the property of Government", and so the first impression created on one's mind is that just as Chap. V deals with forests and lands not being the property of Government, Chap. VA also deals with forests which are not the property of Government but of claimants. But the definition of "claimant" in s. 38-A clearly shows that the claimant therein is a person making a claim and not a person whose claim has been recognised. Therefore it would not in our opinion be incorrect to connect Chap. V-A, as originally enacted, with Chap. II of the Forest Act, which clearly deals with claims and has here and there used the word "claimant" (as for instance in s. 11(b)), though the word "claimant" has not been defined in that Chapter. It seems to us therefore that Chap. V-A, as originally enacted (ss. 38-A to 38-G) was only dealing with claimants who were making claims under Chap. II and whose claims would be dealt with thereunder, and so the heading of Chap. V-A really means control of forests in respect of which claims are made by claimants. If these claims are with respect to rights in or over land, they would be dealt with under s. 11 and if they are claims with respect to other matters, they would be dealt with under s. 12 to 16. It seems to us that if the claimant defined in s. 38-A was not the person making a claim under Chap. II, Chap. V-A, as originally enacted, would have little sense, for it provides no machinery for dealing with claims of claimants. Further, it is on this basis that one can understand the use of the word "prohibition" in s. 38-B, which even restricts genuine forestry operations. it seems to us unthinkable that genuine forestry operations should be restricted permanently without any procedure for deciding the claims of claimants. Therefore Chap. V-A, as originally enacted, is ancillary to Chap. II and gives further power of control besides those contained in Chap. II, during the period that proceedings under Chap. II are pending. Looked at in this way Chap. V-A as originally enacted would be constitutional, as it will be in the interest of the general public to provide for interim protection of the forests pending disposal of claims under Chap. II and the declaration of the forest as reserved forest under s. 20 thereof.

But it is urged that the amendment in Chap. V-A by the Indian Forest (U.P. Amendment) Act 1960, (U.P. XXI of 1960) destroys this character of the Forest Amendment Act, as originally enacted. By this amendment, ss. 38-H to 38-M were added to Chap. V-A Section 38-H(1) provides for taking over the management of any particular forest or forest land for a period not exceeding fifteen years. Sub-section (2) thereof says that no notification under sub-s. (1) shall be issued unless notice is issued to a claimant, owner or tenure-holder of the forest or forest land. Obviously, therefore, the provisions of s. 38-H and the subsequent sections are wider than the provisions of ss. 38-A to 38-G, which were originally enacted. We are not actually concerned with the provisions of s. 38-H

onwards, for no action has been taken under those provisions; nor has the petitioner alleged that there is any threat of such action. The argument, however is that this new provision shows that ss. 38-A to 38-G are not connected with Chap. II and really go with this new provision. We cannot accept this argument, for, in the first place, the legislature when it passed ss. 38-A to 38-G never had ss. 38-H to 38-M in mind. In the second place, s. 38-H also deals with the land of claimants though it further deals with the lands of tenure-holders or owners. So far as the claimants are concerned, the position still remains that there must be some provision for deciding their claims and no such provisions are found up to s. 38-M, and we are therefore thrown back on Chap. II so far as the claimants are concerned. It must therefore be held that the enactment of new ss. 38-H to 38-M made no difference to the position that ss. 38-A to 38-G as originally enacted, are supplementary to Chap. II, though s. 38-H onwards may not be so and may stand by themselves, so far as owners or tenure-holders are concerned. There is no doubts, however, that ss. 38-A to 38-G are ancillary to Chap. II and must be read as such and in this view their constitutionality as interim provisions cannot be successfully assailed.

It is next urged that even if ss. 38-A to 38-G are ancillary to Chap. II, they would not apply to the petitioner's land, as Chap. II deals inter alia with waste land or forest land, which is the property of the Government and not with that land which is not the property of the Government, which is dealt with under Chap. V. That is so. But unless the petitioner can show that the land in dispute in this case is his property and not the property of the State, Chap. II will apply to it. Now there is no dispute that the land in dispute belonged to the Maharaja Bahadur of Nahan before the Abolition Act and the said Maharaja Bahadur was an intermediary. Therefore, the land in dispute vested in the State under s. 6 of the Abolition Act and became the property of the State. It is however, contended on behalf of the petitioner that if he is held to be a bhumidhar in proper proceedings, the land would be his property and therefore Chap. V-A, as originally enacted, if it is ancillary to Chap. II would not apply to the land in dispute. We are of opinion that there is no force in this contention. We have already pointed out that under s. 6 of the Abolition Act all property of intermediaries including the land in dispute vested in the State Government and became its property. It is true that under s. 18, certain lands were deemed to be settled as bhumidhari lands; but it is clear that after land vests in the State Government under s. 6 of the Abolition Act, there is no provision therein for divesting of what has vested in the State Government. It is however urged on behalf of the petitioner that he claims to be the proprietor of this land as a bhumidhar because of certain provisions in the Act. There was no such proprietary right as bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by s. 129 : bhumidhar, sirdar and asami, which were unknown before. Thus bhumidhar, sirdar and asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under s. 6. It is true that bhumidhars have certain wider rights in their tenures as compared to sirdars; similarly sirdars have wider rights as compared to asamis; but nonetheless all the three are mere tenure-holders - with varying rights - under the State which is the proprietor of the entire land in the State to which the Abolition Act applied. It is not disputed that the Abolition Act applies to the land in dispute and therefore the State is the proprietor of the land in dispute and the petitioner even if he were a bhumidhar would still be a tenure-holder. Further, the land in dispute is either waste land or forest land (for it is so far not converted to agriculture) over which the State has proprietary rights and therefore Chap. II will clearly apply to this land and so would Chap. V-A. It is true that a bhumidhar has got a heritable and transferable right and he can use his holding for any purpose including industrial and residential purposes, and if he does so that part of the holding will be demarcated under s. 143. It is also true that generally speaking, there is no ejectmant of a bhumidhar and no forfeiture of his land. He also pays land

revenue (s. 241) but in that respect he is on the same footing as a sirdar who can hardly be called a proprietor because his interest is not transferable except as expressly permitted by the Act. Therefore, the fact that the payment made by the bhumidhar to the State is called land revenue and not rent would not necessarily make him a proprietor, because sirdar also pays land-revenue, though his rights are very much lower than that of a bhumidhar. It is true that the rights which the bhumidhar has to a certain extent approximate to the rights which a proprietor used to have before the Abolition Act was passed; but it is clear that rights of a bhumidhar are in many respects less and in many other respects restricted as compared to the old proprietor before the Abolition Act. For example, the bhumidhar has to right as such in the minerals under the sub-soil. Section 154 makes a restriction on the power of a bhumidhar to make certain transfers. Section 155 forbids the bhumidhar, from making usufructury mortgages. Section 156 forbids a bhumidhar, sirdar or asami from letting the land to others, unless the case comes under s. 157. Section 189(aa) provides that where a bhumidhar lets out his holding or any part thereof in contravention of the provisions of this Act, his right will be extinguished. It is clear therefore, that though bhumidhar have higher rights than sirdars and asamis, they are still mere tenure-holders under the State which is the proprietor of all lands in the area to which the Abolition Act applies. The petitioner therefore even if he is presumed to be a bhumidhar cannot claim to be a proprietor to whom Chap. II of the Forest Act does not apply, and therefore Chap. V-A, as originally enacted, would not apply; (see in this connection, Mst. Govindi v. The State of Uttar Pradesh) [A.I.R. (1952) All. 88]. As we have already pointed out ss. 4 and 11 give power for determination of all rights subordinate to those of a proprietor, and as the right of the bhumidhar is that of a tenure-holder, subordinate to the State, which is the proprietor, of the land in dispute, it will be open to the Forest Settlement officer to consider the claim made to the land in dispute by the petitioner, if he claims to be a bhumidhar. This is in addition to the provision of s. 229-B of the Abolition Act. The petitioner therefore even if he is a bhumidhar cannot claim that the land in dispute is out of the provisions of Chap. II and therefore Chap. V-A, even if it is ancillary to Chap. II would not apply. We must therefore uphold the constitutionality of Chap. V-A, as originally enacted, in the view we have taken of its being supplementary to Chap. II, and we further hold that Chap. II and Chap. V-A will apply to the land in dispute even if the petitioner is assumed to be the bhumidhar, of that land.

The only other question that remains to be considered is whether the notification under s. 4 is still in force. That notification was issued under Chap. II of the Forest Act on March 23, 1955 and thereafter a proclamation under s. 6 ibid was issued on April 26, 1955. The petitioner contends that the notification under s. 4 was withdrawn so far as his land was concerned by notification dated December 19, 1956. That is however not a notification at all. It is a mere government order issued to all Conservators of Forests, Divisional Forest Officers and District Officers as well as the Secretary, Board of Revenue, and all that it stated there is that a number of representations has been made to the Government by claimants of lands situated in the erstwhile private forests under agreements executed before July 1952 by them with their owners, and the Governor, on careful consideration, had decided that all such lands in respect of which valid legal reclamations leases were executed by the owners should be released in favour of the lessees. It was also pointed out that if such land was included in any of the notifications issued under s. 4 of the Forest Act, it should be deemed to have been excluded from that notification. It may be mentioned that this government order was cancelled by a later government order dated July 7, 1958, which was also not published. Now a notification under s. 4 of the Forest Act is required to be published in the Gazette and unless it is so published, it is of no effect. The notification of March 23, 1956, was published in the Gazette and was therefore a proper notification. It is also not disputed that in view of s. 21 of the U.P. General Clauses Act (No. 1 of 1904) a notification issued under s. 4 could have been cancelled or

modified but it could be done in the like manner and subject to the like sanction and conditions, i.e. by notification in the gazette. The Government order of December 1956 therefore cannot amount to excluding anything from the notification issued under s. 4, for it was never published; it was a mere departmental instruction by Government to its officers which was later withdrawn. The notification therefore stands as it was originally issued and the petitioner cannot claim any benefit of the government order of December 1956, which was later cancelled. Further in view of the fact that we have held that Chap. V-A, as originally enacted, is valid, being a measure supplementary to Chap. II, the notification issued under Chap. V-A must also be upheld.

In the result therefore the petition is allowed to this extent that the Transfer Act No. XV of 1952 is struck down as unconstitutional and of no force and effect. We may add, however, that learned counsel for the respondents has stated before us that if a claim is made even now under Chap. II by the petitioner within thirty days of our judgment, even though it may be time-barred as from the date of the proclamation issued under s. 6, the Forest Settlement Officer will entertain it and consider the claim as required under Chap. II.

We therefore allow the petition in part and strike down the U.P. Land Tenures (Regulation of Transfer) Act, No. XV of 1952 as unconstitutional. The rest of the prayers in the petition are rejected, subject to the petitioner being free to take such steps as may be open to him in law to establish his right whatever it may be under the registered lease of June 1952 and subject to the State having the right to contest the said claim. In the circumstances, the parties will bear their own costs of this petition.

Petition allowed in this part.

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