Jayantilal Amrit Lal Shodhan

Vs

F. N. Rana and Others

Civil Appeal No. 104 of 1963

(P. B. Gajendragadkar, J. C. Shah, K. Subh Rao, Raghubar Dayal JJ)

05.11.1963

JUDGMENT

SHAH J. –

By notification published on September 1, 1960 under s. 4(1) of the Land Acquisition Act I of 1894, the Commissioner, Baroda Division, State of Gujarat, exercising functions entrusted to him under a notification dated July 24, 1959, issued by the President, under Art. 258(1) of the Constitution, notified that a piece of land Part of Final Plot No. 686, Ellis Bridge Town Planning Scheme, belonging to the appellant was likely to be needed for a public purpose viz., construction of a Telephone Exchange Building in Ellis Bridge, Ahmedabad.

Notice was thereafter served by the Additional Special Land Acquisition Officer, Ahmedabad (who was appointed by the order of the Commissioner to perform the functions of a Collector), upon the appellant under s. 5A of the Act inviting objections to the acquisition of the land. The appellant filed objections to the proposed acquisition. The Additional Special Land Acquisition Officer submitted his report to the Commissioner, who issued a notification dated January 11, 1961, under s. 6(1) of the Land Acquisition Act, declaring that the land notified under the earlier notification was required for the public purpose specified in col. 4 of the schedule and that the Additional Special Land Acquisition Officer, Ahmedabad, was appointed under cl. (e) of s. 3 to perform the functions of the Collector for all proceedings to be taken in respect of the land and to take order under s. 7 of the Act for acquisition of the land.

The appellant then moved the High Court of Gujarat under Arts. 226 and 227 of the Constitution for a writ of mandamus or other appropriate write setting aside the notifications dated September 1, 1960, and January 11, 1961, and the proceedings under s. 5A of the Land Acquisition Act, I of 1894, held in respect of the land of the appellant and the decision of the Commissioner, Baroda Division, and for a writ setting aside the notification dated January 19, 1961, under s. 6(1) of the Land Acquisition Act and for interim relief. This petition was dismissed by the High Court. With certificate of fitness under Arts. 132(1) and 133(1)(c) of the Constitution granted by the High Court, this appeal has been preferred.

In this appeal counsel for the appellant has raised two contentions :-

> (1) That the Commissioner had in the events that had happened no power to issue the notifications under ss. 4 and 6 of the Land Acquisition Act, I of 1894, purporting to act upon the notification issued by the President on July 24, 1959, under Art. 258(1) of the Constitution entrusting the functions of the Union Government relating to

acquisition of land to the Commissioners of Divisions in the State of Bombay, because those functions could not be performed after the State of Gujarat came into existence, and the consent of the Government of the latter State to the entrustment of functions to its officers had not been obtained; and

(2) that the proceeding under s. 5A of the Land Acquisition Act being quasi-judicial, authority to make a report under that section could not be delegated by the Commissioner, and that the report made by the Additional Special Land Acquisition Officer could not in any even be considered by the Commissioner.

It may be useful to set out certain statutory provision in the context of the relevant constitutional set up. By the Constitution as amended by the Seventh Constitutional Amendment Act, 1956, legislative power in respect of acquisition and requisitioning of property is vested under entry 42 in the Concurrent List in the Union Parliament and the State Legislatures. But by virtue of Art. 372, the Land Acquisition Act I of 1894 relating to compulsory acquisition of land for public purposes continues to remain in force. The Land Acquisition Act, I of 1894, authorises the appropriate Government by s. 4(1) to publish the preliminary notification that land in any locality is likely to be needed for any public purpose, and upon the publication of such a notification the officers either generally or specially authorised by the appropriate Government in that behalf are clothed with authority, among other, to enter upon and survey the land and to do all acts necessary to ascertain whether the land is adapted for the purpose, to set out the boundaries by placing marks and cutting trenches etc. The expression "appropriate Government" is defined by cl. (ee) of s. 3 in relation to acquisition of land for the purposes of the Union, the Central Government, and in relation to acquisition of land for any other purposes, the State Government. Any person interested in any land notified under s. 4(1) may within thirty days after the issue of the notification object in writing to the acquisition of the land or of any land in the locality, as the case may be. The Collector must give to the objector an opportunity to be heard and after hearing such objection and making such further inquiry, if any, as he thinks necessary, he has to submit the case to the appropriate Government with a report containing his recommendations on the objections. The decision of the appropriate Government on the report is made final by sub-s. (2) of s. 5A. The expression "Collector" is defined in s. 3(c) as meaning the Collector of a district, and includes a Deputy Commissioner and any officer specially appointed by the appropriate Government to perform the functions of a Collector under the act. By s. 6 the appropriate Government is authorised to make a declaration, if the appropriate Government is satisfied after considering the report under s. 5A sub-s. (2) that any particular land is needed for a public purpose. The declaration so made is by sub-s. (3) of s. 6 conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be. By s. 7 the appropriate Government or an officer appointed by the appropriate Government in that behalf, may direct the Collector to take order for the acquisition of the land declared to be needed and the Collector then causes pubic notice to be given informing the parties concerned that the Government intends to take possession of the land and that claims to compensation for all interests in such land may be made to him. He then holds an inquiry into the nature of the interest of the person claiming compensation, and the objections to the measurement of the land to be acquired and to make an award setting out the true area of the land, the compensation which in his opinion should be allowed for the land, and the apportionment of compensation among persons known or believed to be interested of whose claims he has information : (ss. 9 & 11). It is clear from this brief resume that where land is acquired for the purposes of the Central Government, notification under ss. 4 and 6 may be issued by the Central Government and inquiries may be made under ss. 5A and 9 and compensation awarded by an Officer designated by the Act as the Collector, who in the case of acquisition for the purposes of the Union would normally be an officer specially appointed in that

behalf by that Government.

In exercise of the powers conferred by Art. 258 of the Constitution the President of India on July 24, 1959, issued a notification entrusting with the consent of the State Government of Bombay, to the Commissioners of Divisions in the State of Bombay, the functions of the Central Government under the Land Acquisition Act I of 1894, in relation to acquisition of land for the purpose of the Union within the limits of the territorial jurisdiction of the said Commissioners subject to the same control by the Government of Bombay as is from time to time exercisable by that Government in relation to acquisition of land for the purpose of the State. At the date of the notification the territory which now forms the State of Gujarat and in which the land in dispute is situate was part of the State of Bombay, but on May 1, 1960, - called the appointed day - as a result of the reorganisation of the State of Bombay under the Bombay Reorganisation Act, 1960, out of the territory of that State, two States were carved out - the State of Maharashtra and the State of Gujarat, and the territory covering the Baroda Division was allotted to the State of Gujarat. To ensure a smooth bifurcation of the State of Bombay, provisions relating to the continuance in office of the officers in the same posts which they occupied before the appointed day, and maintaining the territorial extent of laws were enacted. Section 82 of the Bombay Reorganisation Act, 1960, enacted that every person who, immediately before the appointed day, is holding or discharging the duties of any post or office in connection with the affairs of the State of Bombay in any area which on that day falls within the State of Maharashtra or Gujarat shall, subject to an order by the competent authority, continue to hold the same post or office in that State and shall be deemed, as from that day, to have been duly appointed to the post or office by the Government of, or other appropriate authority in that State. By s. 87 provision was made for maintaining the territorial extent of the laws even after the appointed day. It was enacted that provisions of Part II (i.e. provisions relating to the reorganisation of Bombay State into two States) shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of bombay shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that state immediately before the appointed day. By s. 2(d) of the Bombay Reorganisation Act, 1960, the expression "law" includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay.

The notification issued by the President of India on July, 24, 1959, under Art,. 258(1) in terms entrusted certain functions under the Land Acquisition Act to the Commissioners of Divisions in the State of Bombay and it was recited therein that the consent to such entrustment of the State Government of Bombay had been obtained. It is common ground that before the date of the notification issued by the Commissioner, Baroda Division, who was then functioning as an officer of the State of Gujarat, under s. 4 of the Land Acquisition Act no order expressly entrusting the functions of the Union Government under the Land Acquisition Act to any officer in the State of Gujarat was issued by the President, and the authority of the Commissioner to notify for acquisition of the land of the appellant was sought to be derived solely from ss. 82 and 87 of the Bombay Reorganisation Act.

The appellant contended that the power exercisable by the President being executive in character, the functions which may be entrusted to a State Government or to an officer of that State under Art. 258(1) are executive, and entrustment of such executive authority not being "law" within the meaning of s. 87 of the Bombay Reorganisation Act, the Commissioners of the new State of Gujarat after May 1, 1960, were incompetent, by virtue of the Presidential notification, to exercise the

functions of the Union Government under the Land Acquisition Act. Support to this plea was sought to be derived from the division of Part XI of the Constitution into Ch. I containing Arts. 245 to 255 dealing with distribution of legislative powers and Ch. II containing Arts. 256 to 261 dealing with "administrative relations between the States", and it was submitted that Art. 258, occurring as it does in Ch. II of Part XI, must be deemed to deal with matters administrative or executive and not legislative. Founding the argument upon the title of Ch. II and the character of the two preceding Arts. 256 and 257 dealing with the exercise of the executive power of the State so as to ensure compliance with the laws made by Parliament, and in a manner so as not to impede or prejudice the exercise of the executive power of the Union which extends to the giving to the State Governments directions as may be necessary for that purpose, it was claimed that Art. 258 deals with the netrustment of executive functions and that entrustment of executive functions by notification issued by the President cannot amount to law, within the meaning of s. 87 of the Bombay Reorganisation Act.

The plea about the placing of Art. 258 in Ch. II and the character of the two preceding Articles as indicative of the character of the powers conferred by Art. 258(1) is not at all decisive : for cl. (2) of Art. 258, and cl. (3) of Art. 261, which occur in Ch. II, deal with matters legislative and judicial. At this stage Art. 258 may be set out :

> "(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.
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> (2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.
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> (3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any "extra costs of administration incurred by the State in connection with the exercise of those powers and duties."

By the first clause, the President is authorised to entrust with the consent of the State Government, to that Government or its officers functions in relation to any matter to which the executive power of the Union extends. Clause (2) deals with the exercise of legislative authority of Parliament in matters exclusively within its competence to confer powers and impose duties upon the State or officers and authorities thereof. Clause (3) provides for payment of sums determined in the manner prescribed by the Union for the burden of extra costs incurred by the State in connection with the performance of duties and exercise of powers conferred or imposed by virtue of Art. 258.

The High Court held that the entrustment of functions under Art. 258(1) did not fall within the executive power of the Union. In the view of the High Court functions which were not judicial or legislative would not necessarily be regarded as executive, and that certain functions which did not fall within the three recognised categories - legislative, judicial and executive, may be placed in the category of miscellaneous functions. But it is now well settled that functions which do not fall

strictly within the field legislative or judicial, fall in the residuary class and must be regarded as executive.

In Halsbury's Laws of England, 3rd Edn. Vol. 7, Art. 409 p. 192 it is observed :

> "Executive Functions are incapable of Comprehensive definition, for they are merely the residue of the functions of government after legislative and judicial functions have been taken away. They include, in addition to the execution of the laws, the maintenance "of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and state assistance and insurance."

Similarly in Wade and Phillips, Constitutional Law, 6th Edn, at p. 16 it is observed :

> "It is customary to divide functions of government into three classes, legislative, executive (or administrative) and judicial."

In Rai Sahib Ram Jawaya Kapur v. The State of Punjab ([1955] 2 S.C.R. 225.) in dealing with the question whether publishing, printing and selling of text books for the use of students may be regarded as an executive function of the State Government, Mukherjea C.J., speaking for the Court observed :

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

It cannot however be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial functions by the judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the State. To the executive, exercise of functions legislative or judicial are often entrusted. For instance power to frame rules, regulations and notifications which are essentially legislative in character is frequently entrusted to the executive. Similarly judicial authority is also entrusted by legislation to the executive authority : Harinagar Sugar Mills Ltd. v. Shyamsundar ([1962] 2 S.C.R. 339.). In the performance of the executive functions, public authorities issue orders which are not far removed from legislation and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial, and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In the complexity of problems which modern governments have to face and the plethora of parliamentary business to which it inevitably leads, it becomes necessary that the executive should often exercise powers of subordinate legislation : Halsbury's Laws of England, Vol. 7, Art. 409. It is indeed possible to characterise with precision that an agency of the State is executive, legislative or judicial, but it cannot be predicated that a particular function exercised by any individual agency is necessarily of the character which the agency bears.

But it is not necessary to dilate upon this matter in detail. For the purpose of this case it would serve

no useful purpose to decide whether under Art. 258(1) by an Presidential notification only executive functions of the Central Government may be entrusted to the State or to an officer of the State. By the notification in question only "the functions of the Central Government under the Land Acquisition Act I of 1894, in relation to acquisition of land for the purpose of the Union" have been entrusted to the Commissioners of Divisions. The power exercisable by the appropriate Government under s. 55 of the Land Acquisition Act to frame Rules under the Act has been entrusted to the Commissioner. Whether such a function can be entrusted does not call for examination in this case. An argument advanced at the Bar which proceeded upon an erroneous premise about the field in which Art. 258(1) operates may however be noticed. That clause enables the President to entrust to the State the functions which are vested in the Union, and which are exercisable by the President on behalf of the Union : it does not authorise the President to entrust to any other person or body the powers and functions with which he is by the express provisions of the Constitution as President invested. The power to promulgate Ordinances under Art. 123; to suspend the provisions of Arts. 268 to 279 during an emergency; to declare failure of the Constitutional machinery in States under Art. 356; to declare a financial emergency under Art. 360; to make rules regulating the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Art. 309 - to enumerate a few out of the various powers - are not powers of the Union Government; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Art. 258(1). The plea that the very nature of these powers is such that they could not be intended to be entrusted under Art. 258(1) to the State or officer of the State, and therefore that clause must have a limited content, proceeds upon an obvious fallacy. Those powers cannot be delegated under Art. 258(1) because they are not the powers of the Union, and not because of their special character. There is a vast array of other powers exercisable by the President - to mention only a few - appointment of Judges : Arts. 124 & 217, appointment of Committees of Official Languages Act : Art. 344, appointment of Commissions to investigate conditions of backward classes : Art. 340, appointment of Special Officer for Scheduled Castes and Tribes : Art. 338, exercise of his pleasure to terminate employment : Art. 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Art. 311(2) - these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Art. 258.

The question which must be considered is whether the notification issued by the President is law within the meaning of s. 87 read with s. 2(d) of the Bombay Reorganisation Act, 11 of 1960. It is necessary in the first instance carefully to analyse the three stages of the constitutional process leading to the ultimate exercise of function of the Union Government, by the State or an officer of the State to whom the function is entrusted. The three stages are -

> By Art. 258(1) the President as the head of the Union is competent to entrust functions in relation to any matter to which the executive power of the Union extends to any State Government, or officer of that Government. These are functions of the Union and not of the President. There is no doubt that the investment of power or authority upon the President is part of the Constitution and has necessarily the force of law. There is however controversy between the parties about the true character of the entrustment of the functions by the President. The character of the exercise of the function so entrusted must depend upon the field in which it operates and its impact upon the citizens' rights.

The President is authorised by Art. 258(1) to entrust functions with which the Union Government is invested, provided the functions are in relation to any matter to which the executive power of the Union extends. By virtue of Art. 367, the General Clauses Act, 1897, applies to the interpretation of the Constitution and s. (8) defines "Central Government" by cl. (b) in relation to anything done or to be done after the commencement of the Constitution, as meaning the President and includes in relation to functions entrusted under cl. (1) of Art. 258 of the Constitution to the Government of a State, the State Government acting within the scope of the authority given to it under that clause. By Art. 53 the executive power of the Union is vested in the President and is exercisable by him either directly or through officers subordinate to him in accordance with the Constitution and the executive power of the Union by Art. 73 extends subject to the provisions of the Constitution :

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreements :

Provided that the executive power referred to in sub-cl. (a) shall not, save as expressly provided in the Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. Prima facie, the executive power of the Union extends to all matters with respect to which Parliament has power to make laws and in respect of matters to which the power of the Parliament extends. It was claimed that by the use of the expression "save as expressly provided in the Constitution" it was intended that unless a provision in the Constitution expressly enacts that the executive power of the Union shall, within the meaning of Art. 73(1) proviso, extend to a matter in respect of which the Legislature of a State has also power to make laws, that provision cannot exclude the operation of the proviso to Art. 73(1). But the expression "save as expressly provided in the Constitution" is not susceptiable of that limited interpretation. A provision in the Constitution conferring authority upon the Union to exercise its powers in matters with respect to which the Legislature of the State has also power to make laws, operates notwithstanding the limitation enacted by the proviso. Article 298, which, inter alia, extends the power of the Union to the "acquisition" of property, is one such provision. Our attention has not been invited to any provision which makes an enactment of the nature suggested by counsel for the appellant excluding the operation of the proviso to Art. 73(1). Articles 353, 360(3), 339(2), 256 and 257 on which reliance was placed, merely enact provisions in the Constitution for giving directions to the State Governments in respect of certain specified matters or purposes. The form in which these provisions are couched do not expressly provide that within the field of their operation Art. 73(1) proviso will not apply. The language used, on the other hand, supports the view that power is conferred upon the Union to do certain things falling within the limits of the executive power, even though normally the power in respect of that matter may be exercised by the State Legislature by virtue of the legislative entry to which it relates. It is therefore open to the President, subject to the proviso to cl. (1) of Art. 73, with the consent of the State Government, to entrust executive power of the Union relating to acquisition of land either to the State or any officers of the State.

We are in this appeal not concerned to ascertain whether the exercise of powers entrusted to the State or its officers has the force of law. We are directly concerned with the nature of the power exercised by the President under Art. 258(1) entrusting functions to the State or its officers. The President is indisputably the executive head of the Union, but it cannot be assumed on that account that the exercise of power by him under Art. 258(1) cannot have the effect of law within the meaning of s. 87 of the Bombay Reorganisation Act. By the notification dated July 24, 1959, issued by the President, power was entrusted to the Commissioner, Baroda Division, in respect of matters relating to acquisition of land under the Land Acquisition Act. 1894. By item 42, List III, the subject of acquisition of property falls within the Concurrent List and the Union Parliament has power to legislate in respect of acquisition of property for the purpose of the Union, and by virtue of Art. 73(1)(a) the executive power of the Union extends to the acquisition of property for the Union. By Art. 298 of the Constitution the executive power of the Union extends to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The expression "acquisition, holding and disposal of property" would, in our judgment, include compulsory acquisition of property. That is a provision in the Constitution which within the meaning of the proviso to Art. 73(1) expressly provides that the Parliament may acquire property for the Union and consequently executive power of the Union in relation to compulsory acquisition of property is saved thereby, power of the State to acquire land notwithstanding.

In this background we may consider the effect of the Presidential notification. It cannot be and has not been denied that it was open to the Legislature by making an express provision in the Act to entrust the functions of the Central Government that is to confer powers and impose duties under Art. 258(2) in relation to matters under ss. 4, 5A, 7, 9 and 11 and related sections to Commissioners of Divisions in the State. Such entrustment of power would not be open to challenge on the ground that it was unauthorised. If entrusted by enactment, it would have the force of law. It was open to the Parliament by appropriate legislation incorporated in the Land Acquisition Act or otherwise to provide that the power to issue notifications under ss. 4 & 6 of the Land Acquisition Act, and to appoint the Collector, be exercised by an officer to be named by the appropriate Government. Issue of a notification by the appropriate Government designating the officer to exercise the powers would unquestionably have the force of law, within the meaning of s. 2(d). Instead of making detailed provisions and cataloguing the entrustment of functions in the different statutes which may be entrusted to the authorities of the State by the exercise of legislative power, the Constitution has invested the President with authority to entrust the functions to the Government of the State or their officers. The effect of Art. 258(1) is merely to make a blanket provision enabling the President by notification to exercise the power which the Legislature could exercise by legislative, to entrust functions to the officers to be specified in that behalf by the President and subject to the conditions prescribed thereby. By the entrustment of powers under the statute, the notification merely authorises the State or an officer of the State in the circumstances and within the limits prescribed to exercise the specified functions. Effect of the Presidential notification is that, wherever the expression "appropriate Government" occurs in the Act in relation to provisions for acquisition of land for the purposes of the Union, the words "appropriate Government or the Commissioner of the Division having territorial jurisdiction over the area in which the land is situate", were deemed to be substituted. In other words, by the issue of the Presidential notification, the Land Acquisition Act must be deemed pro tanto amended. It would be difficult to regard such an amendment as not having the force of law.

In this connection we may refer to the decision of this Court in The Edward Mills Company Ltd. v. The State of Ajmer ([1955] 1 S.C.R. 735.), which illustrates the view which we have expressed. It

was held in the Edward Mills' case ([1955] 1 S.C.R. 735.) that an order made under s. 94(3) of the Government of India Act, 1935, was, notwithstanding the repeal of the Government of India Act, 1935, by Art. 395 of the Constitution, law in force. By s. 94(3) of the Government of India Act, 1935, a Chief Commissioner's Province had to be administered by the Governor-General acting to such extent as he thinks fit through the Chief Commissioner to be appointed by him in his discretion. On March 16, 1949, the Central Government issued a notification in exercise of its powers under s. 94(3) of the Government of India Act, 1935, directing that the functions of the appropriate Government under the Minimum Wages Act, 11 of 1948, would in respect of every Chief Commissioner's Province be execised by the Chief Commissioner. After the commencement of the Constitution the Chief Commissioner of Ajmer purporting to act as the appropriate Government published a notification in terms of s. 27 of the Act of his intention to include "employment in the textile mills" as an additional item in Part I of the Schedule, and issued the final notification directing that "the employment in textile industry" be added in Part I of the schedule. The validity of the orders of the Chief Commissioner was challenged on the ground, among others, that the order of the Governor-General under s. 94(3) of the Government of India Act was not "law in force" within the meaning of Art. 372 of the Constitution. It was urged that without delegation of fresh authority be the President under Art. 239 of the Constitution, the Chief Commissioner of Ajmer was not competent, after the enactment of the Constitution, to function as the appropriate Government under the Minimum Wages Act and therefore all steps taken by the Chief Commissioner under the provisions of the Act including the issue of the final notification fixing the minimum rates of wages for the employment in the textile mills in the State of Ajmer was illegal and ultra vires. The question which therefore fell to be determined in the Edward Mills' case ([1955] 1 S.C.R. 735.) was whether the order made by the Central Government under s. 94(3) of the Government of India Act, 1935, could be regarded as "law in force" within the meaning of Art. 372 of the Constitution. It was urged that an order may fall within the definition of existing law but it cannot be included within the expression "law in force" in Art. 372 of the Constitution. Mukherjea J., speaking for the Court in that case observed that there was no distinction between the expression "existing law" used in Art. 366(1) and the expression "law in force" occurring in Art. 372 of the Constitution, that the words "law in force" as used in Art. 372 are wide enough to include not merely a legislative enactment but also a regulation or order which has the force of law, and that an order made by the Governor-General under s. 94(3) investing the Chief Commissioner with authority to administer a province is really in the nature of a legislative provision, which defines the rights and powers of the Chief Commissioner in respect of that province falls within the purview of Art. 372 of the Constitution and being "law in force" immediately before the commencement of the Constitution continues to remain in force under cl. (1) of the Article. In our view, the Edward Mills' case ([1955] 1 S.C.R. 735.) strongly supports the conclusion that the notification issued by the President coferring authority upon the Commissioner to exercise the powers of the appropriate Government in the matter of land acquisition under the Land Acquisition Act has the force of law because even though issued by an executive authority, the Courts are, if challenged, bound to recognise and give effect to the authority conferred by the notification. We see no distinction in principle between the notification which was issued by the Governor-General in Edward Mills' case ([1955] 1 S.C.R. 735.) and the notification with which we are dealing in this case. This is not to say that every order issued by an executive authority has the force of law. If the order is purely administrative, or is not issued in exercise of any statutory authority it may not have the force of law. But where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law.

In Chanabasappa Shivappa v. Gurupadappa Murigappa (I.L.R. (1958) Mysore 48.) decided by the Mysore High Court under s. 119 of the States Reorganisation Act, 1956, which in terms is substantially the same as s. 87 of the Bombay Reorganisation Act, 1960, and the definition of 'law' as given in s. 2(h) of that Act is in terms identical with the definition given in s. 2(d) of the Bombay Reorganisation Act, the operation of a notification issued by the Government of Bombay conferring powers to try election petitions under the Bombay District Municipal Act, 1901, after the reorganisation of the State of Bombay under the States Reorganisation was, in our view, properly upheld.

The second question on which argument was advanced does not require much elaboration. By s. 5A of the Land Acquisition Act, power to hear objections has to be exercised by the Collector as defined in s. 2(c) of the Act. The power to hear objections is under the statute, not the power of the appropriate Government, but of the Collector. The expression 'Collector' as defined in the Act is either the Collector of a district or any officer specially appointed by the appropriate Government to perform the function of a Collector under the Act. The statute itself confers authority to appoint a Collector for the purposes of the Act by the appropriate Government, and the Commissioner acting in pursuance of the powers conferred upon him by Art. 258(1) appointed the Additional Special Land Acquisition Officer, Ahmedabad, as Collector for the purposes of s. 5A. In so appointing the Additional Special Land Acquisition Officer the Commissioner exercised the power which was statutorily vested in the appropriate Government.

It may at once be observed that no materials have been placed before the Court by the appellant to support the contention which was at one stage faintly advanced that the proceedings of the Collector were irregular or illegal. The Collector held an inquiry as contemplated by s. 5A and made his report to the Commissioner exercising the functions of the appropriate Government and in pursuance of that report the notification under s. 6 of the Land Acquisition Act was issued. Under s. 5A(2) every objection to the acquisition of the land notified or of any land in the locality has to be made to the Collector in writing and the Collector has to give the objector an opportunity of being heard either in person or by pleader and he has, after hearing all such objections, and after making such further inquiry, if any, as he thinks necessary, to make a report of his recommendations on the objections. The report under s. 5A is not a condition precedent to the issue of the issue of the notification under s. 6. The appropriate Government may under the emergency clause in s. 17 take possession of the land free from all encumbrances and direct under sub-s. (4) of s. 17 that in the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-s, (1) or sub-s. (2) are applicable, the provisions of s. 5A shall not apply. Again the Collector is not required to arrive at any decision. He has to submit the case for the decision of the appropriate Government together with the record of the proceedings held by him and a report containing his recommendations on the objections. Prima facie, such a report would be an administrative report, relying upon which the Government makes its decision under s. 6 whether or not to notify the land for acquisition. The decision that any particular land is needed for a public purpose is an administrative decision and it is for the purpose of arriving at that decision that the Act requires that certain inquiries be made. It is true that the Collector is required to follow the procedure prescribed and to give an opportunity to the objector of being heard in person or by a pleader. It is, however, open as s. 5A expressly provides to the Collector to make an independent inquiry, apart from the enquiry on the objections submitted. It cannot in the circumstances be said that the inquiry is a judicial or a quasi-judicial inquiry. There was in the present case no delegation of any judicial power vested in the Central Government. The power to hold an inquiry is statutorily vested in the Collector, and the Collector has exercised that power. The Commissioner exercising his authority entrusted to him merely appointed o behalf of the Central Government the Additional Land

Acquisition Officer as the Collector and considered the report in pursuance of the functions entrusted to him under the notification issued by the President. In so acting he did not act in any manner inconsistent with the authority conferred, or which could in law be conferred, upon him. The second objection must also fail.

In our view therefore the appeal fails is dismissed with costs.

WANCHOO J. –

We regret we are unable to agree.

This is an appeal on a certificate granted by the Gujarat High Court. The appellant is the owner in possession of Final Plot No. 686 of Ellis Bridge Town Planning Scheme No. 3 in Ahmedabad measuring 7,018 sq. yards. On September 1, 1960, a notification was issued under s. 4 of the Land Acquisition Act, No. 1 of 1894 (hereafter referred to as the Act) by the Commissioner of Baroda acting under powers entrusted to him by an order of the President under Art. 258(1) of the Constitution. By this notification the Commissioner notified that 3,200 sq. yards out of this plot was needed for the construction of a telephone exchange building. Further by this notification the Commissioner appointed the Additional Special Land Acquisition Officer, Ahmedabad to perform the functions of the Collector under s. 5A of the Act in respect of this land. Thereafter necessary action was taken under s. 5A of the Act and the Commissioner made a notification under s. 6 of the Act on January 12, 1961, after considering the report of the Collector appointed under the earlier notification under s. 4 and by this notification the Commissioner specified that 3,387 sq. yards would be needed for the contruction of the telephone exchange building in Ellis Bridge out of plot No. 686. Thereafter on February 22, 1961, the appellant filed the writ petition out of which the present appeal has arisen and he challenged the notification under s. 6 of the Act on three main grounds, namely -

> (1) The notification dated July 24, 1959, under Art. 258(1) of the Constitution could not invest the Commissioner with the powers therein specified in view of the fact that it was made at a time when the new State of Gujarat which came into existence on May 1, 1960 did not exist, and the officers of the State of Gujarat could only be entrusted with these functions under Art. 258(1) with the consent of the Government of Gujarat. As the notification on July 24, did not have the consent of the State of Gujarat, it could not be available for the purpose of conferring any power on the officers of the State of Gujarat after May 1, 1960.
>
> (2) Even if the notification of July 24, 1959, was effective after the coming into existence of the State of Gujarat, the Commissioner could not appoint the Additional Special Land Acquisition Officer as a Collector for the purpose of s. 5-A of the Act, as that would amount to delegation of his delegated authority.
>
> (3) The proceedings under s. 5-A of the Act are quasi-judicial proceedings and that is another reasons why the Commissioner could not delegate his functions under s. 5-A to any other officer.

The petition was opposed on behalf of the Union of India and its contention in reply to the three main grounds was that -

> (1) The notification under Art. 258 dated July 24, 1959, had the force of law and

therefore in view of ss. 82 and 87 of the Bombay Reorganisation Act, 1960, No. XI of 1960, (hereinafter referred to as the Reorganisation Act), the notification continued to have full force and effect and the Commissioner could act under the functions entrusted to him;

(2) The Commissioner had authority in view of the notification under Art. 258(1) to appoint a Collector within the meaning of s. 3(c) of the Act and there was no question of any sub-delegation of delegated authority by the Commissioner; and

(3) The functions under s. 5-A of the Act are not quasi-judicial but administrative. Even if they are quasi-judicial, they are vested in the Collector or any officer specially appointed by the appropriate government to perform the functions of a Collector under the Act, and this is exactly what was done by the Commissioner.

The High Court dismissed the petition holding that the notification of July 24, 1959, under Art. 258(1) of the Constitution had the force of law and was therefore saved under s. 87 of the Reorganisation Act. In consequence reading s. 87 with s. 82 of the Reorganisation Act, the Commissioner would have the power to carry on the functions entrusted to him by the notification of July 24, 1959. It further held that the Commissioner had the authority by virtue of the notification of July 24, 1959, to appoint any officer specially to carry on the duties assigned to the Collector under the Act and therefore the officer so appointed could carry on the duties assigned to the Collector under the Act. Finally, it held that proceedings under s. 5-A of the Act were administrative in nature and there was therefore no question of delegation of any quasi-judicial functions either by the notification dated July 24, 1959, or by the order of the Commissioner appointing an officer specially to carry on the duties of the Collector under the Act. The appellant thereupon applied for a certificate which was granted; and that is how the matter has come up before us.

The main question that falls for consideration is the nature of the notification dated July 24, 1959, under Art. 258(1) of the Constitution. The contention of the appellant is that Art. 258(1) deals with entrustment of executive functions only by the President to the State Government or to its officers with its consent and has no application to entrustment of any other functions of the President, whether legislative or quasi-judicial. Therefore any notification issued under Art. 258(1) can only amount to an executive act of the President and cannot have the force of law. Further, it is urged that even if the fact that the scope of Art. 258(1) is only confined to entrustment of executive functions may not be decisive of the question whether a particular order passed under it is an executive act, the nature of the order passed in the present case is such that it must be held to be executive in character and cannot be a law and have the force of law. Consequently s. 87 of the Reorganisation Act will not apply to this order and it will not be saved as an order or notification having the force of law by that section. Lastly, it is urged that s. 82 by itself would not be sufficient to save the power conferred on the Commissioner by the notification of July 24, 1959, for under that section all persons before the appointed day holding or discharging the duties of any post or office in connection with the affairs of the State of Bombay in any area which on that day falls within the State of Maharashtra or Gujarat shall continue to hold the same post or office in that State and shall be deemed to have been duly appointed to the post or office by the Government of, or other appropriate authority in, that State. This, it is urged, only means that the person holding the office of Commissioner immediately before the appointed day will continue to be a Commissioner for the purpose of the State of Gujarat and will be deemed to have been appointed to that office by the State of Gujarat from the appointed day. But s. 82 will not have the effect of the Commissioner continuing to have the functions entrusted to him by the notification of July 24, 1959, for the pre-

condition to his retaining such functions, namely, the consent of the State of Gujarat, would be wanting.

It is not disputed on behalf of the Union of India that if the notification dated July 24, 1959, has not the force of law and s. 87 of the Reorganisation Act does not apply to it, it will not survive after May 1, 1960, when the State of Gujarat came into existence. It is however contended on behalf of the respondents that Art. 258(1) contemplates entrustment not only of executive functions but of all functions, whether legislative or executive or quasi-judicial, and that the order of July 24, 1959, has the force of law and would be saved under s. 87 of the Reorganisation Act.

We must therefore proceed to consider whether functions which can be entrusted to the State Government or to its officers with the consent of the State Government under Art. 258(1) are only executive functions or all kinds of functions, whether executive, legislative or quasi-judicial. Article 258(1) reads as follows :-

> "(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends."

Stress is laid on behalf of the respondents on the word "functions" and it is urged that that word is not qualified by the word "executive" and therefore it must be given the widest interpretation and would include all kinds of functions, whether executive, legislative or even quasi-judicial, if any. Further it is urged that the words following the word "functions" in Art. 258(1) are only descriptive in nature and do not mean that the functions which can be entrusted are only executive functions. Reliance in this connection is placed on a decision of the Allahabad High Court in Amir Khan v. State (I.L.R. [1962] 2 All. 310.), where it was held with reference to s. 124 of the Government of India Act, 1935, which is in the same terms as Art. 258(1) that it was open to the Governor-General to entrust his functions, even though they may be legislative functions, under that section to the Provincial Government.

It is necessary therefore to examine the scheme and setting of Part XI of the Constitution in which Art. 258(1) appears to decide whether the functions which can be entrusted under Art. 258(1) can only be functions in relation to the executive power of the Union or whether they can be functions relating to the legislative or quasi-judicial powers also. Part XI deals with the "relations between the Union and the States" and is divided into two chapters. The first chapter containing Arts. 245 to 255 deals with legislative functions and is mainly concerned with the distribution of legislative powers between the Union and the States. Article 245 gives the general law-making power to Parliament and the legislatures of the States. Article 246 distributes powers of legislation in accordance with Lists I, II and III of the Seventh Schedule between Parliament and the legislatures of the States and vests additional power in Parliament to make laws with respect to matters in all the Lists with respect to territories not included in a State. Article 247 gives power to Parliament by law to establish additional courts for certain purposes. Article 248 gives residuary power of legislation to Parliament. Article 249 provides for power of Parliament to legislate with respect to matters in the State List in the national interest in certain contingencies. Article 250 gives power to Parliament to legislate with respect to any matter in the State List if a proclamation of emergency is in force. Article 251 provides for resolution of any inconsistency between the laws made by Parliament under Arts. 249 and 250 and the laws made by the legislatures of the States under Art. 246. Article 252 provides for powers of Parliament to legislate for two or more States by consent. Article 253 gives

power to Parliament to legislate to give effect to international agreements. Article 254 provides for resolution of inconsistency between laws made by Parliament and laws made by the legislatures of States with respect to the Concurrent List. Article 255 makes certain procedural provisions with respect to laws which require some recommendation and previous sanction. It will thus be seen that all these Articles in Chapter I deal with legislation.

Chapter II is headed "administrative relations" and contains Articles from 256 to 263. It is divided into three parts, namely, general, disputes relating to water and co-ordination between States, and is mainly concerned with seeing that the executive power of the Union and of the States is smoothly exercised where it is to be exercised in the same territory. Article 256 lays down that "the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose". Article 257 provides for control of the Union over States in certain cases and lays down that the executive power of a State shall be so exercised as not to impede of prejudice the exercise of the executive power of the Union. It further lays down that the executive power of the Union shall extend to the giving of directions to a State for certain purposes and also for payment of certain sums in certain circumstances by the Government of India to the Government of a State. Then comes Art. 258, the first clause of which we have already set out. The second clause provides that a law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof. This clause may be contrasted with cl. (1). Under cl. (1) no entrustment of function can take place without the consent of the State Government but under cl. (2) Parliament may by law confer powers and impose duties in certain circumstances and the consent of the State Government is not necessary for this purpose. This clearly brings out the distinction between entrustment of functions which is exercise of executive power under Art. 258(1) and the making of a law conferring posers and duties which in express terms is exercise of legislative power under Art. 258(2). Clause (3) provides for payment of certain sums. This clause in our opinion refers only to cl. (2), for there is no question of settlement of payment after the consent of the State Government has been obtained. If there is to be any payment for carrying out functions entrusted under Art. 258(1) it will be settled when consent is obtained. Article 258 -A is the counterpart of Art. 258(1) and permits the Governor of a State with the consent of the Government of India, to entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends. Article 260 gives power to the Government of India by agreement with the Government of any territory not being the territory of India to undertake and executive, legislative or judicial functions vested in the Government of such territory. This Article certainly refers to legislative, judicial and executive functions but they are referred to expressly and the Constitution-makers did not content themselves with using only the word "functions". Article 261 provides for full faith and credit to public acts, records and judicial proceedings. Clause (2) thereof lays down how such full faith and credit as provided in cl. (1) shall be given and says that it shall be done as provided by law made by Parliament. Clause (3) provides that final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law. It will be seen that Art. 261 also where it departs from dealing with executive functions specifically mentions whether the functions are legislative or Judicial. Articles 262 deals with disputes relating to water and gives power to Parliament by law to provide for adjudication of such disputes. Here again this Article does not deal with executive functions and this is clear from

the words used in the Article. Article 263 deals with co-ordination between States and provides for the setting up of inter-State Councils and is obviously of an executive nature.

It will be seen therefore that where Chapter II of Part XI dealing with administrative relations deals with matters other than executive functions, it has specifically referred to these other matters which have to be dealt with by law or which are judgments of courts; otherwise the whole of Chapter II of Part XI is concerned with the executive power of the Union or the State and therefore deals with executive functions.

It is true that the word "functions" in Art. 258(1) is not qualified by the word "executive" and therefore it may prima facie appear that all kinds of functions whether legislative or quasi-judicial or executive, can be entrusted by the President to the State Government or its officers with its consent. The word "functions" in Art. 258(1) is governed by the words following "in relation to any matter to which the executive power of the Union extends". It is said that these words are merely descriptive and are in accordance with Art. 73 which defines the executive power of the Union. Under Art 73(1)(a) the executive power of the Union extends to matters with respect to which Parliament has power to make laws subject to the proviso thereto. So the argument runs that the President can ordinarily entrust any kind of function in relation to matters contained in List I and it is immaterial whether such functions are executive, legislative or even quasi-judicial, if any. It is true that the President can under Art. 258(1) entrust his functions in relation to any matter to which the executive power of the Union extends; but we have to ask the question whether it was the intention of the Constitution-makers that such "functions" could be of any kind, whether legislative, executive or even quasi-judicial, if any, in view of the scheme and setting in which Art. 258(1) appears. It seems to us that when Art. 258(1) is giving power to the President to entrust his functions to the Government of a State or do its officers in relation to any matters to which the executive power of the Union extends, the intention is to entrust only executive functions and no other. The word "functions" even though it is not qualified by the word "executive" in Art. 258(1) must in our opinion take its colour from what follows and if that is so the functions to be entrusted must be of the same nature as the executive power of the Union. It is true that the words following the word "functions" describe the field within which the functions can be entrusted and this field is to be found in accordance with List I ordinarily; but it is in our opinion legitimate to hold that the words following the word "functions" when they delimit the field in which the functions can be entrusted also indicate the nature of the functions to be entrusted and this to our mind is clear from the use of the words "executive power" in the clause following the word "functions" and it is only executive functions therefore which can be entrusted by the President under Art. 258(1) to the Government of a State or its officers.

Further the language used in Art. 258(1) reinforces the above conclusion. We may in this connection emphasise the words "entrust functions" and "with the consent of". Entrustment implies agency and when the President is entrusting his functions to the State Government or its officers, he is creating an agency to carry out his functions and creation of such agency is more in consonance with carrying out the executive power of the Union which vests in the President. In this connection the language of cl. (2) may be contrasted. Clause (2) speaks of conferment of powers and imposition of duties by law which cl. (1) speaks of entrustment of functions which words are more appropriate to the creation of an agency to carry out the executive power of the Union. Again the "entrustment of functions" can take place only with the consent of the State Government. Now the requirement of consent is another pointer that the functions to be entrusted are executive functions only resulting in the creation of an agency other than that envisaged in Art. 53. Such entrustment with the consent of the State Government is nothing more than the appointment of another to act for the president in

carrying out the executive power of the Union. The concept of consent is also germane to entrustment of executive functions to another agency which is otherwise not bound to carry out such functions. Generally speaking, one does not make a law with the consent of another (and this is so in spite of the special provision contained in Art. 250 though it is usual to ask for consent when one wants another to do some executive act for one. Taking therefore the language used in Art. 258(1) it is to our mind capable of only one meaning viz. that it enables the President to ask the State Government or its officers, with its consent, to carry out functions which pertain to the executive power of the Union vesting in him and to no other kind of power.

If this entrustment were to be extended to functions other than executive some startling results will follow. There are many provisions in the Constitution which give legislative power, delegated or otherwise, to the President and if the word "functions" in Art. 258(1) includes within it legislative functions and the words that follow the word "functions" only prescribe the field within which these functions may be entrusted i.e. ordinarily within the limit of List I, and do not further delimit that the functions to be entrusted within this field are executive functions only, the result will be that even the legislative functions of the President, where they relate to this field, can be entrusted by him to the State Government or its officers. As an example take Art. 123. It gives power to President to promulgate Ordinances in certain circumstances, which have the same force and effect as an Act of Parliament. These Ordinances can ordinarily be made with respect to matters in List I and also in List III. Therefore if the functions which can be entrusted under Art. 258(1) can also be legislative, Art. 258 would be conferring power on the President to entrust his function of Ordinance-making to the Government of a State or its officers with respect to matters in List I ordinarily. Such a startling result which would follow on the interpretation urged by the learned Attorney-General could not possibly have been intended by the Constitution-makers. It seems to us therefore that when Art. 258(1) speaks of entrustment of functions in relation to any matters to which the executive power of the Union extends it not only delimits the fields within which the entrustment can be made (and that field is ordinarily to be found in List I of the Seventh Schedule) but it also delimits the nature of the functions to be entrusted, namely, those functions must be executive. Otherwise, if the words following the word "functions" merely delimit the field and the functions of any kind, be they legislative, executive or even quasi-judicial, if any, relating to List I can be ordinarily entrusted to the State Government or its officers, the result would be that even the Ordinance-making power under Art. 123 insofar as it relates to List I can be entrusted as a function relating to that List to the State Government or its officers. But obviously this could not possibly be the intention of the Constitution-makers. Similar other legislative powers of the President are to be found in Art. 98(3) and Art. 101(2) where he is authorised to make rules, in Art. 118(3) which also gives him power to make rules, in Art. 309 where also the President can make rules, in proviso to Art. 320(3) where the President can make regulations, in Art. 357 which provides for exercise of legislative power when a proclamation has been made under Art. 356, in Arts. 372 and 372-A which provide for adaptation. A review of these provisions would make it clear that where it was intended that the legislative power of the President can be delegated (i.e. entrusted to others), there is a specific provision therefor in the Article itself. For example Art. 309, which gives rule-making power in connection with services, specifically lays down in the proviso that it shall be competent for the President or such person as he may direct to make rules relating to recruitment and the conditions of service of persons to be appointed to the Union services and posts. Similarly Art. 357 provides that where by a proclamation issued under Art. 356 it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent to confer on the President the power of the Legislature of the State to make laws and to authorise the President to delegate subject to such conditions as he may think fit to impose, the

power so conferred upon any other authority to be specified by him in that behalf. It will be seen therefore that where it was intended by the Constitution that the legislative power of the President could be delegated by him to some other person, there is a specific provision in that behalf in the Constitution. It is difficult therefore to accept that Art. 258(1) provides for the entrustment of the legislative functions of the President, for example, with respect to matters contained in List I by a kind of side-wind to the State Government or to any of its officers. We are therefore of opinion that even though the word "functions" in Art. 258 is not qualified by the word "executive", the effect of the words following the word "functions" in Art 258(1) is two-fold, namely, to delimit the field within which the entrustment can take place, namely the field covered ordinarily by List I and also to delimit the nature of functions to be entrusted, namely, executive functions. We may also point out that there are provisions practically in all Central Acts conferring rule-making power on the Central Government. Under s. 3(8)(b) of the General Clauses Act No. 10 of 1897, the "Central Government" means the President. So if the contention of the learned Attorney-General is to be accepted, Art. 258(1) in effect authorises the President to entrust the rule-making power under various statutes to the State Government or its officers. Such a result would not have been intended by the Constitution makers when Art. 258(1) was put in the Constitution. It is argued that the President is not bound to entrust legislative functions to the State Government or its officers and would generally never do so. The fact that the President will not do so is no reason for interpreting Art. 258(1) in such a way as will run against the clear intention of the Constitution-makers deducible from the scheme and setting in which the Article appears and so make it possible for such startling results as we have referred to above. We are therefore of opinion that Art. 258(1) when it speaks of entrustment of functions is only confined to executive functions of the President and no other. In this view the decision in Amirkhan's case with respect to s. 124(1) of the Government of India Act 1935 which is pari materia with Art. 258(1) must be held to be incorrect.

It is next urged on behalf of the appellant that even if Art. 258(1) is confined only to executive functions it was not open to the President to entrust this particular function under Art. 258(1) to an officer of the State Government in view of the proviso to Art. 73(1) which lays down the extent of executive power of the Union. Article 73(1) lays down by sub-cl. (a) that the executive power of the Union extends to matters with respect to which Parliament has power to make laws. This would prima facie include both Lists I and III. But the proviso lays down that the executive power referred to in sub-cl. (a) shall not save as expressly provided in this Constitution or in any law made by Parliament extend in any State to matters with respect to which the Legislature of the State has also power to make laws. The effect of this proviso is that the executive power of the Union will not normally extend to matters covered by List III, unless they are brought in by one or other of the two exceptions in the proviso. These two exceptions are : (i) where there is an express provision in the Constitution, and (ii) where any law made by Parliament provides otherwise. The contention on behalf of the appellant is that there is no law providing otherwise and there is no express provision in the Constitution by which the power of entrustment could be extended to a case of acquisition of land by the Union as the power to make laws in respect of acquisition and requisitioning is covered by entry 42 of List III. Therefore, it is urged that this being a matter relating to List III, the executive power of the Union does not extend to it and therefore no order with respect to it can be made by the President under Art. 258(1). We do not think it necessary to express any oipinion on this aspect of the matter in view of our decision on other points raised before us.

This brings us to the main question involved in this appeal, namely, whether the notification dated July 24, 1959, is law to which s. 87 of the Reorganisation Act applies. The first contention of the appellant in this connection is that as Art. 258(1) deals with entrustment of executive functions, an order passed thereunder can be an executive order and cannot be a law. Prima facie this may be so;

but it is not in our opinion conclusive of the matter, and we have still to see the contents of the order passed under Art. 258(1) to see whether it satisfies the definition of law as contained in s. 2(d) of the Reorganisation Act. Section 2(d) says that law includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay. It will be seen that the definition is inclusive and has not actually defined what law means. Further all the terms, which have been included in s. 2(d) may not necessarily be law and they will be law only if they have the force of law. It is not disputed, for example, that every order passed and every notification issued by the Government will not necessarily be law and it is only such orders and notifications as have the force of law which will be law within the meaning of s. 2(d) and therefore law for the purpose of s. 87 of the Act. We have therefore to find out the exact connotation of the expression "having the force of law" in order to determine whether an order or notification is law within the meaning of s. 2(d).

What then is the concept of law which must in our opinion be borne in mind before deciding whether an order or notification has the force of law ? "In the broadest sense in which the term 'law' should be used, it signifies a command which obliges a person or persons to a course of conduct. Being a command, it must issue from a determinate person or group of persons, with the threat of displeasure if the rule be not obeyed." This concept is to be found in Austin's Jurisprudence. But it was open to the criticism that it would exclude customs or usages which have the force of law, as customs or usages are not commands which issue from a determinate person or group of persons. Salmond therefore broadened the concept of law and defined it as a "body of principles recognised and applied by the State in the administration of justice". Paton in his book on Jurisprudence, second edition, at p. 77 defines 'law' as follows :-

> "Law may shortly be described in terms of a legal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance."

It will be seen therefore whether law comes as a command of a sovereign body or as a custom or usage having the force of law, the basic concept is that it should consist of a body of rules which govern the conduct of persons forming the community in which it is enforced and which that community enforces through necessary machinery. It follows therefore that if a notification or order made by Government is to have the force of law, it must consist of a rule or body of rules regulating the course of conduct of a person or persons living in the community and further it should be enforceable by judicial or other processes created for the purpose.

Let us see how this concept of law is satisfied in the present case taking into account the definition given in s. 2(d) of the Reorganisation Act. The essence of that definition is that an order or notification in order to be law must have the force of law. The expression "force of law" must be distinguished from "the authority of law". Many orders issued by Government have the authority of law behind them but all of them cannot invariably be said to have the force of law, for in order that they may have the force of law they must satisfy the basic concept of law, i.e., they must contain a rule or body of rules regulating the course of conduct of a person or persons living in that community enforceable through courts or other machinery provided therefor. Thus if an order is issued under the authority of law but it does not prescribe a course of conduct regulating the action of a person or persons living in the community, it cannot be law, for such an order would not necessarily require enforcement by courts or other machinery, for no question of its breach requiring

enforcement arises as it prescribes no course of conduct for the community to obey. Such an order may have the authority of law behind it and in a State governed by the rule of law it will usually be so, But "the authority of law" as we have said already must be distinguished from "the force of law" and every order that has the authority of law behind it would not be one having the force of law, unless it complies with the basic concept of law as mentioned above. It has however been urged that an order having "the authority of law" would be enforced by courts and therefore it may be said to have the force of law. There is in our opinion a misconception in this argument. An order having "the authority of law" behind it may be recognised by courts but unless it prescribes a rule of conduct which a person or persons living in the community must obey there is no question of its being enforced by a court of law or other authority. The recognition of an order having the authority of law by courts or other authorities is in our opinion different from its enforcement by courts or other authorities, and it is only when the order can be enforced by courts or other authorities that it can be said to have the force of law. The courts or other authorities may even recognize orders of Government which have no direct authority of law behind them but which are not opposed to any law. Such orders cannot be said to have the force of law and be enforceable by courts or other authorities and thus claim to have the force of law, for they lack the basic concept of law as already referred to.

Let us now look to the definition in s. 2(d) in the light of this basic concept of law and see how the various terms included within "law" as having the force of law satisfy this basic concept. The first term included in s. 2(d) is enactment. An enactment has necessarily the force of law because it is an expression of the legislative will and is expressly enacted as law by the legislature and would necessarily contain a body of rules which have to be obeyed by persons living in the particular community. The second term used in s. 2(d) is ordinance having the force of law. If an ordinance is passed, say under Art. 123 or Art. 213 of the Constitution, it stands exactly on the same footing as an enactment and would necessarily have the force of law. If it is another kind of ordinance, it can have the force of law if it lays down a binding rule of conduct and the body passing it has the authority of law to lay down such a binding rule of conduct. Such an ordinance would usually be subordinate legislation. The third term is regulation. A regulation may be a direct command of the legislature in which case it will stand on the same footing as an enactment. Examples of this kind of regulations are to be found in the old regulations passed by the Governor-General before 1857 under his law-making power, some of which are still in force in this country. Secondly, regulations may be a kind of subordinate legislation and in such a case they are bound to consist of a body of rules which regulate the conduct of persons living in the community and are enforceable by courts or other authorities provided the body passing the regulations has the authority to do so. The fourth term is order. Orders may be of two kinds; they may be merely executive orders laying down no course of conduct for anybody, though they may have the authority of law or may not be opposed to any law and courts or other authorities may recognise them. Another kind of orders will be in the form of subordinate legislation laying down rules of conduct which can be enforced by courts or other authorities. An example of such orders may be found in various orders passed under the Defence of India Act, 1939, or the Essential Commodities Act, 1955. These orders lay down a body or rules which regulate the conduct of person or persons living in the community and are enforceable by courts or other authorities. The next term is bye-law. Bye-laws are a well-known species of subordinate legislation. They lay down general rules of conduct governing persons and are enforceable by courts or other authorities if passed by a body having the authority of law to do so. The next term is Rule. Rules are again a well-known species of subordinate legislation laying down general rules of conduct and if they are passed by a body having the authority to do so they are enforceable by courts or other authorities. The next term is scheme. Schemes may be of two

kinds. They may embody subordinate legislation containing a body of rules binding on persons with whom they are concerned and in such a case if passed by a body having the necessary authority they will be enforceable by courts or other authorities and would have the force of law. But there may be another kind of schemes which are merely executive in nature and they do not contain any rules of conduct for any body to follow. This will not have the force of law and will not be enforceable by courts or other authorities, as they lay down no rule of conduct which courts or other authorities may enforce. The next term is notification. Notifications again may be of two kinds. Most government orders are notified so that the public may know them. All of them have not the force of law. Only such notifications have the force of law which are a species of subordinate legislation passed by a body having the authority to promulgate them and which lay down rules of conduct for persons in the community to obey. But there may be notifications which lay down no rule of conduct. For example, all appointments, and transfers of officers are notified through notifications and these are merely executive orders for the purpose of the information of public and do not lay down any rule of conduct to be followed by persons in the community. The last term is "other instruments" and these again may be of two kinds, like schemes. If they have the characteristic of subordinate legislation and contain a rule or body of rules to be followed by persons living in the community they will have the force of law and will be enforced by courts or other authorities. But they can also be merely executive in nature; for example, sale-deeds, mortgage deeds etc., are all instruments but have not the force of law. Similarly treaties between sovereign powers are also instruments but they have by themselves no force of law. That is why we find a specific provision in Art. 253 for legislation to give effect to international agreements.

It is therefore clear that in order that a notification or order may have the force of law it has to contain a rule or body of rules regulating the conduct of a person or persons living in the community; it has to be passed by a body which has the necessary authority fort the purpose and it is then that it will be enforceable by courts or other authorities and will have the force of law. In short, in order that a notification or order may have the force of law it is not enough that courts may recognise it is necessity arises; it is further necessary that the same should lay down a rule or course of conduct which a person or persons living in the community may be obliged to follow and which therefore becomes enforceable by courts or other authorities and acquires the force of law.

In this connection an argument was advanced on behalf of the respondent that many statutes empower Government or an authority empowered by it to make rules and that when the Government names the authority which will make the rules, its order has the force of law. We do not think that is the correct way of looking at the matter. When the Government names the authority in such a case, it is merely performing an executive function, though when the authority proceeds to frame rules it is making subordinate legislation which will have the force of law for such rules will lay down a course of conduct to be followed by a person or persons living in the community the breach of which will be enforceable by courts to other authorities. In all such cases there are three stages; (1) conferment of power by the law on the government or its nominee to make rules, (2) nomination of the nominee by the government, and (3) exercise of the rule-making power by the nominee. The first and the third are clearly legislative acts but second is in our view clearly executive, for it is merely the designation of the person or authority who will make the law.

Let us now examine the notification in the present case on the basis of these principles. The notification says that in exercise of the powers conferred by clause (1) of Art. 258 of the Constitution, the President hereby entrusts, with the consent of the State Government, to the Commissioners of Divisions in the State of Bombay, the functions of the Central Government under the Land Acquisition Act, 1894 (1 of 1894) in relation to acquisition of land for the purpose of the

Union within the limits of the respective territorial jurisdiction of the said Commissioners subject to the same control by the Government of Bombay as is from time to time exercisable by that Government in relation to acquisition of land for the purpose of the State. In effect the notification appoints the Commissioners of Divisions to exercise the functions of the Central Government under the Act for acquisition of land for Union purposes. It lays down no rules of conduct for persons living in the community to follow; it merely entrusts the powers of the Central Government for certain purposes to the Commissioners of Divisions. It is true that the notification has the authority of law behind it, for it is made under cl. (1) of Art. 258 of the Constitution and as such if an order is passed by the Commissioner by virtue of the powers conferred on him by the notification that order will be recognised by courts. But there is no question of enforcement of this notification by courts, for no citizen can go and ask courts to enforce this notification. The force of law arises only when a notification lays down a rule of conduct for citizens to follow and thus makes the notification enforceable either at the instance of the citizens or of government in case there is any breach of the rule laid down. The mere fact that courts will take notice and recognise it and it has the authority of law behind it would not in our opinion be sufficient to covert this notification into a law within the meaning of "law" which we have already referred to. There is nothing enforceable in this notification which is nothing more than an appointment of a particular person to carry out certain duties which would otherwise be carried under the Act by the Central Government. Such a notification cannot in our opinion have the force of law even though it has the authority of law behind it. It is that authority of law behind it which makes it recognisable by courts. Even so it cannot be said that the notification lays down a rule or body of rules regulating the conduct of a person or persons living in the community, as such there is no question of its being enforceable as a law by courts or other authorities and therefore it has not the force of law. The notification in our opinion is merely an executive order with the authority of law behind it but has not the force of law, within the meaning of that expression under s. 2(d) of the Reorganisation Act.

It is however urged on behalf of the respondents that the notification has the effect of amending the definition of "appropriate government" contained in s. 2(ee) of the Act which is as follows :-

> "the expression 'appropriate Government' means in relation to acquisition of land for the purpose of the Union, the Central Government, and, in relation to acquisition of land for any other purposes, the State Government."

It is submitted that the effect of this notification is the addition of the words "where an order under Art. 258(1) of the Constitution has been passed, the officer to whom the functions of the Central Government under the Act are entrusted". We see no force in this argument. It is true, as we have already said, that courts will recognise this notification and an order passed by the Commissioner of a Division in pursuance of it will have the same effect as the order of the Central Government; but we cannot accept the argument that an order under Art. 258(1) by the President entrusting certain functions to an officer of the State Government can even amount to the amendment of the law in connection with which the order has been made. No amendment to an enactment can be made except through the legislative process provided in the Constitution and Art. 258(1) does not provide for any legislative process for amendment of an enactment. It is true that the effect of the notification in this case is that the Commissioner of a Division can do what the Central Government can do under the Act but that does not mean that the definition of the "appropriate Government" in the Act is amended because of the order. We therefore reject this argument.

It now remains to refer to certain cases which were cited in this behalf. The main case on which reliance has been placed on behalf of the respondents is The Edward Mills Co. Limited v. the State

of Ajmer ([1955] 1 S.C.R. 735.). In that case this Court was dealing with an order made under s. 94(3) of the Government of India Act, 1935, and the question that arose was whether such an order was a law in force capable of adaptation. This Court held that an order passed under s. 94(3) of the Government of India Act (which corresponded to Art. 239 of the Constitution) which dealt with the governance of Chief Commissioner's Provinces, was a law in force within the meaning of Art. 372 of the Constitution and could therefore be adapted. That case in our opinion is clearly distinguishable and must be confined to the facts therein. The order in question there was passed under s. 94(3) of the Government of India Act which, as we have said already, corresponded to Art. 239 of the Constitution. In the present case we are concerned with an order under Art. 258(1) of the Constitution. The provision corresponding to Art. 258(1) is s. 124(1) in the Government of India Act. That case, therefore is not a direct authority for a case like the present which deals with Art. 258(1) corresponding to s. 124(1) of the Government of India Act. Besides s. 94, corresponding to Art. 239, dealt with the governance of Chief Commissioners' Provinces, and governance would include all kinds of functions, whether executive, legislative or judicial. In the present case we are concerned with Art. 258(1), which as we have already held deals with the executive functions of the Union only and there is therefore no analogy between an order passed under Art. 258(1) of the Constitution and an order passed under s 94(3) of the Government of India Act. On these considerations that case is of no help to the respondents.

The next case to which a reference may be made is Madhubhai Amathalal Gandhi v. the Union of India ([1961] 1 S.C.R. 191.). In that case this Court was dealing with a notification under the securities Contracts (Regulation) Act, No. 42 of 1956. There was however no dispute in that case on the question whether the notification was law or not and it was accepted without question that the notification in dispute there was a law. In these circumstances that case is of no help for the proposition that every notification under a law would necessarily have the force of law.

The next case is The Public Prosecutor v. Illur Thippayya (I.L.R. [1949] Mad. 371.). That was a case with respect to orders issued under the Essential Supplies (Temporary Powers) Act, No. 24 of 1946, and the orders were held to have the force of law. Those orders seem to have laid down a body of rules governing the conduct of persons with respect to matters covered by them and would therefore be subordinate legislation. That case is thus of no help to the respondents.

The next case is The State of Bombay v. F. N. Balsara ([1951] S.C.R. 682.). That was clearly a case of subordinate legislation inasmuch as the order there passed was in pursuance of s. 139 of the Bombay Prohibition Act, No. 25 of 1949, which gave power to the Government by general or special order to exempt any intoxicant or class of intoxicants from the operation of any of the provisions of that Act. Such an order would clearly have the force of law being subordinate legislation and that was what was held in that case.

Two other cases to which references may be made are : (1) King-Emperor v. Abdul Hamid ([1923] I.L.R. II Patna 134.), and Ramendrachandra Ray v. Emperor ([1931] I.L.R. L VIII Cal. 1303.). In the first case the Superintendent of Police passed an order under s. 30 of the Police Act prohibiting processions and the question was whether it was law. The Patna High Court held it was law and we think rightly. The order was passed by the Superintendent of Police under authority vested in him by the Police Act and it prescribed a course of conduct to be followed by persons living within his police jurisdiction, disobedience of which was punishable. It could therefore be enforced by courts and would have the force of law. The other case dealt with a similar prohibitory order under the Calcutta Police Act and would have force of law for the same reasons. These cases also do not help the respondents.

Reliance was also placed on two other cases, namely, Chanabasapa Shivappa Tori v. Gurupadappa Nurgeppa Hanji ([1958] I.L.R. Mys. 48.) and Haji K. K. Moidu v. Food Inspectors Kozhikode (I.T.R. [1961] Kerala 639.). These two cases were certainly concerned with two notifications which were held to have the force of law. It is unnecessary to examine these cases in detail as that would require the consideration of the various enactments under which the notifications were made. All that we need say is that the view taken by the High Courts as to the two notifications being law in those two cases is open to grave doubt.

We have therefore come to the conclusion that Art. 258(1) contemplates only entrustment of executive functions; as such the presumption is that any notification issued under that provision entrusting such functions to an officer in a State is prima facie an executive act and cannot have the force of law. Further on examination of the notification in the present case we are satisfied that the notification in question is merely an executive order, in effect appointing certain officers to perform the functions of the Central Government in relation to the Act. It cannot therefore have the force of law and is thus not a law under s. 2(d) of the Reorganisation Act. It therefore does not continue under s. 87 of the Reorganisation Act. The Commissioner of Baroda therefore would have no power to act under the notification of July 24, 1959, after May 1, 1960, for the consent of the State of Gujarat was lacking to that notification. The notifications therefore issued under ss. 4 and 6 by the Commissioner acting under the functions entrusted to him by this notification would therefore be invalid and must be struck down. We may add that since then the President has made another notification under Art. 258(1) of the Constitution whereby Commissioners of Divisions in the State of Gujarat have been entrusted with functions under the Act with the consent of that State. That notification is however of July 12, 1961, and cannot cure the present notifications under ss. 4 and 6 of the Act as they are anterior in date.

In view of our decision on the nature of the notification under Art. 258(1) dated July 24, 1959, it is necessary to consider the other points raised on behalf of the appellant.

We would therefore allow the appeal with costs, set aside the order of the High Court and allow the writ petition and strike down the notifications under ss. 4 and 6 of the Act made by the Commissioner of Baroda for acquisition of the appellant's property.

ORDER BY COURT

In accordance with the opinion of the majority, the appeal is dismissed with costs.

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