Sajjan Singh

Vs

State of Rajasthan (with connected petitions)

Writ petitions Nos. 31, 50, 52, 54, 81 and 82 of 1964

(CJI P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah, Raghuvar Dayal , J.R. Mudholkar JJ)

30.10.1964

JUDGMENT

GAJENDRAGADKAR C.J.

These six writ petitions which have been filed under Art. 32 of the Constitution, seek to challenge the validity of the Constitution (17th Amendment) Act, 1964. The petitioners are affected by one or the other of the Acts added to the 9th Schedule by the impugned Act, and their contention is that the impugned Act being constitutionally invalid, the validity of the Acts by which they are affected cannot be saved. Some other parties who are similarly affected by other Acts added to the 9th Schedule by the impugned Act, have intervened at the hearing of these writ petitions, and they have joined the petitioners in contending that the impugned Act is invalid. The points raised in the present proceedings have been elaborately argued before us by Mr. Setalvad and Mr. Pathak for the interveners and Mr. Mani for the petitioners. We have also heard the Attorney General in reply.

The impugned Act consists of three sections. The first section gives its short title. Section 2(i) adds a proviso to cl. (1) of Art. 31A after the existing proviso. This proviso reads thus :

> "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof".

Section 2(ii) substitutes the following sub-clause for sub-cl. (a) of cl. (2) of Art. 31A :-

> "(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include -
>
> (i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam, right;
>
> (ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans".

Section 3 amends the 9th Schedule by adding 44 entries to it. That is the nature of the provisions contained in the impugned Amendment Act.

In dealing with the question about the validity of the impugned Act, it is necessary to consider the scope and effect of the provisions contained in Art. 368 of the Constitution, because a large part of the controversy in the present writ petitions turns upon the decision of the question as to what the true scope and effect of Art. 368 is. Let us read Art. 368 :

"368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :

Provided that if such amendment seeks to make any change in -

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this Article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent".

It would, thus, appear that the broad scheme of Art. 368 is that if Parliament proposes to amend any provision of the Constitution not enshrined in the proviso, the procedure prescribed by the main part of the Article has to be followed. The Bill introduced for the purpose of making the amendment in question, has to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. This requirement postulates that a bill seeking to amend the relevant provisions of the Constitution should receive substantial support from members of both the Houses. That is why a two-fold requirement has been prescribed in that behalf. After the bill is passed as aforesaid, it has to be presented to the President for his assent and when he gives his assent, the Constitution shall stand amended in accordance with the terms of the bill. That is the position in regard to the amendment of the provisions of the Constitution to which the proviso does not apply.

If Parliament intends to amend any of the provisions of the Constitution which are covered by clauses (a) to (e) of the proviso, there is a further requirement which has to be satisfied before the

bill can be presented to the President for his assent. Such a bill is required to be ratified by the Legislatures of not less than one-half of the States by Resolutions to that effect passed by them. In other words, in respect of the Articles covered by the proviso, the further safeguard prescribed by the proviso is that the intended amendment should receive the approval of the Legislatures of not less than one-half of the States. That means that at least half of the States constituting the Union of India should by a majority vote, approve of the proposed amendment.

It is obvious that the fundamental rights enshrined in Part III are not included in the proviso, and so, if Parliament intends to amend any of the provisions contained in Articles 12 to 35 which are included in Part III, it is not necessary to take recourse to the proviso and to satisfy the additional requirements prescribed by it. Thus far, there is no difficulty. But in considering the scope of Art. 368, it is necessary to remember that Art. 226, which is included in Chapter V of Part VI of the Constitution, is one of the constitutional provisions which fall under cl. (b) of the proviso; and so, it is clear that if Parliament intends to amend the provisions of Art. 226, the bill proposing to make such an amendment must satisfy the requirements of the proviso. The question which calls for our decision is : what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Art. 226 are likely to be affected ? The petitioners contend that since it appears that the powers prescribed by Art. 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, it is invalid; and that raises the question about the construction of the provisions contained in Art. 368 and the relation between the substantive part of Art. 368 with its proviso.

In our opinion, the two parts of Art. 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged. It is urged that any amendment of the fundamental rights contained in Part III would inevitably affect the powers of the High Court, prescribed by Art. 226, and as such, the bill proposing the said amendment cannot fall under the proviso; otherwise the very object of not including Part III under the proviso would be defeated. When the Constitution-makers did not include Part III under the proviso, it would be reasonable to assume that they took the view that the amendment of the provisions contained in Part III was a matter which should be dealt with by Parliament under the substantive provisions of Art. 368 and not under the proviso. It has no doubt been suggested that the Constitution-makers perhaps did not anticipate that there would be many occasions to amend the fundamental rights guaranteed by Part III. However that may be, as a matter of construction, there is no escape from the conclusion that Art. 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament on obligation to adopt the procedure prescribed by the proviso. It is true that as a result of the amendment of the fundamental rights, the area over which the powers prescribed by Art. 226 would operate may be reduced, but apparently, the Constitution-makers took the view that the diminution in the area over which the High Courts' powers under Art. 226 operate, would not necessarily take the case under the proviso.

On the other hand, if the substantive part of Art. 368 is very liberally and generously construed and it is held that even substantial modification of the fundamental rights which may make a very serious and substantial inroad on the powers of the High Courts under Art. 226 can be made without invoking the proviso, it may deprive cl. (b) of the proviso of its substance. In other words, in construing both the parts of Art. 368, the rule of harmonious construction requires that if the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Courts'

powers under Art. 226, it would become necessary to consider whether the proviso would cover such a case or not. If the effect of the amendment made in the fundamental rights on the powers of the High Courts prescribed by Art. 226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply. The proviso would apply where the amendment in question seeks to make any change, inter alia, in Art. 226, and the question in such a case would be : does the amendment seek to make a change in the provisions of Art. 226 ? The answer to this question would depend upon the effect of the amendment made in the fundamental rights.

In dealing with constitutional questions of this character, courts generally adopt a test which is described as the pith and substance test. In Attorney-General for Ontario v. Reciprocal Insurers and others ([1924] A.C. 328), the Privy Council was called upon to consider the validity of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, Ont., c. 62) and s. 508c which had been added to the Criminal Code of Canada by ss. 7 & 8 Geo. 5, c. 29 Dom. Mr. Justice Duff, who spoke for the Privy Council, observed that in an enquiry like the one with which the Privy Council was concerned in that case, "it has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the 'true nature and character' of the enactment : Citizens' Insurance Co. v. Parsons ([1881] 7 App. Cas 96); its 'pith and substance' : Union Colliery Co. v. Bryden ([1899] A.C. 580); and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinised in its entirety' : "Great West Saddlery Co. v. The King" ([1921] 2 A.C. 91,117). It is not necessary to multiply authorities in support of the proposition that in considering the constitutional validity of the impugned Act, it would be relevant to inquire what the pith and substance of the impugned Act is. This legal position can be taken to be established by the decisions of this Court which have consistently adopted the view expressed by Justice Duff, to which we have just referred.

What then is the pith and substance of the impugned Act ? For answering this question, it would be necessary to recall very briefly the history of Articles 31A and 31B. Articles 31A and 31B were added to the Constitution with retrospective effect by s. 4 of the Constitution (First Amendment) Act, 1951. It is a matter of general knowledge that it became necessary to add these two provisions in the Constitution, because it was realised that legislative measures adopted by certain States for giving effect to the policy of agrarian reform which was accepted by the party in power, had to face a serious challenge in the courts of law on the ground that they contravened the fundamental rights guaranteed to the citizens by Part III. These measures had been passed in Bihar, Uttar Pradesh and Madhya Pradesh, and their validity was impeached in the High Courts in the said three States. The High Court of Patna held that the relevant Bihar legislation was unconstitutional, whilst the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in Uttar Pradesh and Madhya Pradesh respectively. [See Kameshwar v. State of Bihar (A.I.R. 1951 Pet 91) and Surya Pal v. U. P. Government (A.I.R. 1951 All 674).] The parties aggrieved by these respective decisions had filed appeals by special leave before the Supreme Court. At the same time, petitions had also been preferred before the Supreme Court under Art. 32 by certain other zamindars, seeking the determination of the same issues. It was at this stage that Parliament thought it necessary to avoid the delay which would necessarily have been involved in the final decision of the disputes pending before the Supreme Court, and introduced the relevant amendments in the Constitution by adding Articles 31A and 31B. That was the first step taken by Parliament to assist the process of legislation to bring about agrarian reform by introducing Articles 31A and 31B.

The second step in the same direction was taken by Parliament in 1955 by amending Art. 31A by

the Constitution (Fourth Amendment) Act, 1955. The object of this amendment was to widen the scope of agrarian reform and to confer on the legislative measures adopted in that behalf immunity from a possible attack that they contravened the fundamental rights of citizens. In other words, this amendment protected the legislative measures in respect of certain other items of agrarian and social welfare legislation, which affected the proprietary rights of certain citizens. That is how the second amendment was made by Parliament. At the time when the first amendment was made, Art. 31B expressly provided that none of the Acts and Regulations specified in the 9th Schedule, nor any of the provisions thereof, shall be deemed to be void or ever to have become void on the ground that they were inconsistent with or took away or abridged any of the rights conferred by Part III, and it added that notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall subject to the power of any competent legislature to repeal or amend, continue in force. At this time, 19 Acts were listed in Schedule 9, and they were thus effectively validated. One more Act was added to this list by the Amendment Act of 1955, so that as a result of the second amendment, the Schedule contained 20 Acts which were validated.

It appears that notwithstanding these amendments, certain other legislative measures adopted by different States for the purpose of giving effect to the agrarian policy of the party in power, were effectively challenged. For instance, in Karimbil Kunhikoman v. State of Kerala ([1962] Supp. 1 S.C.R. 829), the validity of the Kerala Agrarian Relations Act (IV of 1961) was challenged by writ petitions filed under Art. 32, and as a result of the majority decision of this Court, the whole Act was struck down. This decision was pronounced on December 5, 1961.

In A. P. Krishnaswami Naidu, etc. v. The State of Madras [1964] 7 S.C. R. 82) the constitutionality of the Madras Land Reforms (Fixation of Ceiling on Land) Act (No. 58 of 1961) was put in issue, and by the decision of this Court pronounced on March 9, 1964, it was declared that the whole Act was invalid. It appears that the Rajasthan Tenancy Act III of 1955 and the Maharashtra Agricultural Lands (Ceiling and Holdings) Act 27 of 1961 have been similarly declared invalid, and in consequence, Parliament thought it necessary to make a further amendment in Art. 31B so as to save the validity of these Acts which had been struck down and of other similar Acts which were likely to be struck down, if challenged. With that object in view, the impugned Act has enacted s. 3 by which 44 Acts have been added to Schedule 9. If the impugned Act is held to be valid and the amendment made in the Schedule is found to be effective, these 44 Acts would have to be treated as valid.

Thus, it would be seen that the genesis of the amendments made by Parliament in 1951 by adding Articles 31A and 31B to the Constitution, clearly is to assist the State Legislatures in this country to give effect to the economic policy in which the party in power passionately believes to bring about much needed agrarian reform. It is with the same object that the second amendment was made by Parliament in 1955, and as we have just indicated, the object underlying the amendment made by the impugned Act is also the same. Parliament desires that agrarian reform in a broad and comprehensive sense must be introduced in the interests of a very large section of Indian citizens who live in villages and whose financial prospects are integrally connected with the pursuit of progressive agrarian policy. Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Art. 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Art. 226 and it cannot be said even to have that effect directly or in any appreciable

measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained. It is an Act the object of which is to amend the relevant Articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of Art. 368 and does not attract the provisions of cl. (b) of the proviso. If the effect of the amendment made in the fundamental rights on Art. 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise. But in the present case, there is no occasion to entertain or weigh the said considerations. Therefore the main contention raised by the petitioners and the interveners against the validity of the impugned Act must be rejected.

Then, it is urged that the true purpose and object of the impugned Act is to legislate in respect of land, and legislation in respect of land falls within the jurisdiction of the State Legislatures under Entry 18 of List II. The argument is that since the State Legislatures alone can make laws in respect of land, Parliament had no right to pass the impugned Act. This argument is based on the assumption that the impugned Act purports to be, and in fact is, a piece of land legislation. The same argument is placed before us in another form. It is urged that the scheme of Articles 245 and 246 of the Constitution clearly shows that Parliament has no right to make a law in respect of land, and since the impugned Act is a legislative measure in relation to land, it is invalid. This argument, in our opinion, is misconceived. In dealing with this argument, again, the pith and substance test is relevant. What the impugned Act purports to do is not to make any land legislation but to protect and validate the legislative measures in respect of agrarian reforms passed by the different State Legislatures in the country by granting them immunity from attack based on the plea that they contravene fundamental rights. Parliament, in enacting the impugned Act, was not making any provisions of land legislation. It was merely validating land legislations already passed by the State Legislatures in that behalf.

It is also urged that inasmuch as the impugned Act purports in substance to set aside the decisions of courts of competent jurisdiction by which some of the Acts added to the Ninth Schedule have been declared to be invalid, it is unconstitutional. We see no substance in this argument. It is hardly necessary to emphasize that legislative power to make laws in respect of areas entrusted to the legislative jurisdiction of different legislative bodies, can be exercised both prospectively and retrospectively. The constituent power conferred by Art. 368 on the Parliament can also be exercised both prospectively and retrospectively. On several occasions, legislatures think it necessary to validate laws which have been declared to be invalid by Courts of competent jurisdiction and in so doing, they have necessarily to provide for the intended validation to take effect notwithstanding any judgment, decree or order passed by a court of competent jurisdiction to the contrary. Therefore, it would be idle to contend that by making the amendment retrospective, the impugned Act has become constitutionally invalid.

It has also been contended before us that in deciding the question as to whether the impugned Act falls under the proviso, we should take into account the operative words in the proviso. The proviso takes in cases where the amendment sought to be made by the relevant bill seeks to make any change in any of the Articles specified in clauses (a) to (e) of the proviso, and it is urged that on a fair reading of clauses (b) and (c), it would follow that the impugned Act purports to do nothing else but to seek to amend the provisions contained in Art. 226. It is not easy to appreciate the strength or validity of this argument. This argument is really based on assumption that the legislative mechanism adopted by the Parliament in passing the impugned Act introduces this infirmity. The argument obviously assumes that it would have been open to Parliament to make appropriate changes in the different Articles of Part III, such as Articles 14 and 19, and if such a course had been adopted, the impugned Act would have been constitutionally valid. But inasmuch as the

impugned Act purports to amend only Arts. 31A and 31B and seeks to add several Acts to the Ninth Schedule, it does not amend any of the provisions in Part III, but is making an independent provision, and that, it is said, must take the case within the scope of the proviso. It is clear that what the impugned Act purports to do is to amend Art. 31A, and Article 31A itself is included in Part III. If Parliament thought that instead of adopting the cumbersome process of amending each relevant Article in Part III, it would be more appropriate to add Articles 31A and 31B, and on that basis, it passed the material provisions of the Constitution (First Amendment) Act, it would not be reasonable to suggest that this method brings the amendment within the proviso. What the Parliament did in 1951, has afforded a valid basis for further amendments made in 1955 and now in 1964. It would be clear that though the arguments which have been urged before us in the present proceedings have been put in different forms, basically, they involve the consideration of the main question whether the impugned Act falls within the scope of the proviso or not; and the answer to this question, in our opinion, has to be against the petitioners by the application of the doctrine of pith and substance.

Then, it is urged that the power to amend, which is conferred by Art. 368, does not include the power to take away the fundamental rights guaranteed by Part III. The contention is that the result of the material provisions of the impugned Act is to take away a citizen's right to challenge the validity of the Acts added to the Ninth Schedule, and that means that in respect of the said Acts, the relevant fundamental rights of the citizens are taken away. We do not think there is any substance in this argument. It is true that the dictionary meaning of the word "amend" is to correct a fault or reform; but in the context, reliance on the dictionary meaning of the word is singularly inappropriate, because what Art. 368 authorises to be done is the amendment of the provisions of the Constitution. It is well-known that the amendment of a law may in a proper case include the deletion of any one or more of the provisions of the law and substitution in their place of new provisions. Similarly, an amendment of the Constitution which is the subject matter of the power conferred by Art. 368, may include modification or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases. The power to amend in the context is a very wide power and it cannot be controlled by the literal dictionary meaning of the word "amend".

The question about the validity of the Constitution (First Amendment) Act has been considered by this Court in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar ([1952] S.C. R. 89). In that case, the validity of the said Amendment Act was challenged on several grounds. One of the grounds was that the newly inserted Articles 31A and 31B sought to make changes in Articles 132 and 136 in Chapter IV of Part V and Art. 226 in Chapter V of Part VI, and so, they required ratification under cl. (b) of the proviso to Art. 368. This contention was rejected by this Court. Patanjali Sastri J., as he then was, who spoke for the unanimous Court, observed that the said Articles "did not either in terms or in effect seek to make any change in Art. 226 or in Articles 132 and 136", and he added that it was not correct to say that the powers of the High Courts under Art. 226 to issue writs for the enforcement of any of the rights conferred by Part III or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing to issue such writs were in any way affected. In the opinion of the Court, the said powers remained just the same as they were before; only a certain class of cases had been excluded from the purview of Part III. The fact that the courts could not exercise their powers in respect of the said class of cases, did not show that the powers of the courts were curtailed in any way or to any extent. It only meant that certain area of cases in which the said powers could have been exercised, had been withdrawn. Similarly, the argument that the amendments were invalid because they related to legislation in respect of land, was also rejected on the ground that the impugned Articles 31A and 31B were essentially

amendments of the Constitution which Parliament alone had the power to make.

It would thus appear that in substance the points urged before us in the present proceedings are really concluded by the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89). It was, however, urged before us during the course of the hearing of these writ petitions that we should reconsider the matter and review our earlier decision in Sankari Prasad's case. It is true that the Constitution does not place any restriction on our powers to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decision of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good. The doctrine of stare decisis may not strictly apply in this context and no one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this Court to the detriment of general welfare. Even so, the normal principle that judgments pronounced by this Court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them.

It is universally recognised that in regard to a large number of constitutional problems which are brought before this Court for its decision, complex and difficult questions arise and on many of such questions, two views are possible. Therefore, if one view has been taken by this Court after mature deliberation, the fact that another Bench is inclined to take a different view may not justify the Court in reconsidering the earlier decision or in departing from it. The problem of construing constitutional provisions cannot be reasonably solved merely by adopting a literal construction of the words used in the relevant provisions. The Constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time. Naturally, in a progressive and dynamic society the shape and appearance of these problems are bound to change with the inevitable consequence that the relevant words used in the Constitution may also change their meaning and significance. That is what makes the task of dealing with constitutional problems dynamic rather than static. Even so, the Court should be reluctant to accede to the suggestion that its earlier decisions should be light-heartedly reviewed and departed from. In such a case the test should be : is it absolutely necessary and essential that the question already decided should be re-opened ? The answer to this question would depend on the nature of the infirmity alleged in the earlier decision, its impact on public good, and the validity and compelling character of the considerations urged in support of the contrary view. If the said decision has been followed in a large number of cases, that again is a factor which must be taken into account.

In the present case, if the arguments urged by the petitioners were to prevail, it would lead to the inevitable consequence that the amendments made in the Constitution both in 1951 and 1955 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the Ninth Schedule which have been pronounced by different High Courts ever since the decision of this Court in Sankari Prasad's ([1952] S.C.R. 89) case was declared, would also be exposed to serious jeopardy. These are considerations which are both relevant and material in dealing with the plea urged by the petitioners before us in the present proceedings that Sankari Prasad's case should be re-considered. In view of the said plea, however, we have deliberately chosen to deal with the merits of the contentions before referring to the decision itself. In our opinion, the plea made by the petitioners for re-considering Sankari Prasad's case in wholly unjustified and must be rejected.

In this connection, we would like to refer another aspect of the matter. As we have already

indicated, the principal point which has been urged before us in these proceedings is that the impugned Act is invalid for the reason that before presenting it to the President for his assent, the procedure prescribed by the proviso to Art. 368 has not been followed, though the Act was one which fell within the scope of the proviso. In other words, it was not disputed before us that Art. 368 empowers Parliament to amend any provision of the Constitution, including the provisions in respect of the fundamental rights enshrined in Part III. The main contention was that in amending the relevant provisions of the Constitution, the procedure prescribed by the proviso should have been followed. But it appears that in Sankari Prasad's case, another argument was urged before this Court in challenging the validity of the Constitution (First Amendment) Act, and since we are expressing our concurrence with the said decisions, we think it is necessary to refer to the said argument and deal with it, even though this aspect of the matter has not been urged before us in the present proceedings.

In Sankari Prasad's case, it was contended that though it may be open to Parliament to amend the provisions in respect of the fundamental rights contained in Part III, the amendment, if made in that behalf, would have to be tested in the light of the provisions contained in Art. 13(2) of the Constitution. The argument was that law to which Art. 13(2) applies, would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by Art. 13(2) itself. It will be recalled that Art. 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and provides that any law made in contravention of clause (2) shall, to the extent of the contravention, be void. In other words, it was urged before this Court in Sankari Prasad's ([1952] S.C.R. 89) case that in considering the question as to the validity of the relevant provisions of the Constitution (First Amendment) Act, it would be open to the party challenging the validity of the said Act to urge that in so far as the Amendment Act abridges or takes away the fundamental rights of the citizens, it is void. This argument was, however, rejected by this Court on the ground that the word "law" used in Art. 13 "must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power with the result that Art. 13 (2) does not affect amendments made under Art. 368".

It is significant that Patanjali Sastri J. as he then was, who spoke for the Court, described as attractive the argument about the applicability of Art. 13(2) to Constitution Amendment Acts passed under Art. 368, examined it closely, and ultimately rejected it. It was noticed in the judgment that certain constitutions make certain rights "eternal and inviolate", and by way of illustration, reference was made to Art. 11 of the Japanese Constitution and Art. 5 of the American Federal Constitution. It was also noticed that the word "law" in its literal sense, may include constitutional law, but it was pointed out that "there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law which is made in exercise of constituent power". The scheme of the relevant provisions of the Constitution was then examined, and ultimately, the Court reached the conclusion that though both Articles 13 and 368 are widely phrased, the harmonious rule of construction requires that the word "law" in Art. 13 should be taken to exclude law made in exercise of the constituent power.

In our opinion, this conclusion is right, and as we are expressing our full concurrence with the decision in Sankari Prasad's ([1952] S.C.R. 89) case, we think it is necessary to indicate our reasons for agreeing with the conclusion of the Court on this point, even though the correctness of this conclusion has not been questioned before us in the course of arguments. If we had felt a real difficulty in accepting this part of the conclusion, we would have seriously considered the question as to whether the matter should not be referred to a larger Bench for a further examination of the

problem.

The first point which falls to be considered on this aspect of the matter is the construction of Art. 368 itself. Part XX which contains only Art. 368 is described as a Part dealing with the Amendment of the Constitution; and Art. 368 which prescribes the procedure for amendment of the Constitution, begins by saying that an amendment of this Constitution may be initiated in the manner there indicated. In our opinion, the expression "amendment of the Constitution" plainly and unambiguously means amendment of all the provisions of the Constitution. It would, we think, be unreasonable to suggest that what Art. 368 provides is only the mechanics of the procedure to be followed in amending the Constitution without indicating which provisions of the Constitution can be amended and which cannot. Such a restrictive construction of the substantive part of Art. 368 would be clearly untenable. Besides, the words used in the proviso unambiguously indicate that the substantive part of the article applies to all the provisions of the Constitution. It is on that basic assumption that the proviso prescribes a specific procedure in respect of the amendment of the articles mentioned in clauses (a) to (e) thereof. Therefore, we feel no hesitation in holding that when Art. 368 confers on Parliament the right to amend the Constitution the power in question can be exercised over all the provisions of the Constitution. How the power should be exercised, has to be determined by reference to the question as to whether the proposed amendment falls under the substantive part of Art. 368, or attracts the provisions of the proviso.

It is true that Art. 13(2) refers to any law in general, and literally construed, the word "law" may take in a law made in exercise of the constituent power conferred on Parliament; but having regard to the fact that a specific, unqualified and unambiguous power to amend the Constitution is conferred on Parliament, it would be unreasonable to hold that the word "law" in Art. 13(2) takes in Constitution Amendment Acts passed under Art. 368. If the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to Art. 13(2), they would have taken the precaution of making a clear provision in that behalf. Besides, it seems to us very unlikely that while conferring the power on Parliament to amend the Constitution, it was the intention of the Constitution-makers to exclude from that comprehensive power fundamental rights altogether. There is no doubt that if word "law" used in Art. 13(2) includes a law in relation to the amendment of the Constitution, fundamental rights can never be abridged or taken away, because as soon as it is shown that the effect of the amendment is to take away or abridge fundamental rights, that portion of the law would be void under Art. 13(2). We have no doubt that such a position could not have been intended by the Constitution-makers when they included Art. 368 in the Constitution. In construing the word "law" occurring in Art. 13(2), it may be relevant to bear in mind that, in the words of Kania C.J in A. K. Gopalan v. The State of Madras ([1950] S.C.R. 88 at p. 100), "the inclusion of article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid".

The importance and significance of the fundamental rights must obviously be recognised and in that sense, the guarantee to the citizens contained in the relevant provisions of Part III, can justly be described as the very foundation and the corner-stone of the democratic way of life ushered in this country by the Constitution. But can it be said that the fundamental rights guaranteed to the citizens are eternal and inviolate in the sense that they can never be abridged or amended ? It is true that in the case of A K Gopalan ([1950] S.C.R. 88, at p. 100) Patanjali Sastri, as he then was, expressed the view that "there can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of

the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model" (p. 198). This hypothesis may, prima facie, tend to show that the right to amend these fundamental rights vested not in Parliament, but in the people of India themselves. But it is significant that when the same learned Judge had occasion to consider this question more elaborately in In re The Delhi Laws Act, 1912, ([1951] S.C.R. 747, at pp. 883-84) etc. he has emphatically expressed the view that it is established beyond doubt that the Indian Legislature, when acting within the limits circumscribing its legislative power, has and was intended to have plenary powers of legislation as large and of the same nature as those of the British Parliament itself and no constitutional limitation on the delegation of legislative power to a subordinate unit is to be found in the Indian Councils Act, 1861, or the Government of India Act, 1935, or the Constitution of 1950. The suggestion that the legislatures, including the Parliament, are the delegate of the people of India in whom sovereignty vests, was rejected by the learned Judge when he observed that "the maxim 'delegates non potest delegare' is not part of the Constitutional law of India and has no more force than a political precept to be acted upon by legislatures in the discharge of their function of making laws, and the courts cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence or, in other words, to exercise such power through its appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent." It would thus appear that so far as our Constitution is concerned, it would not be possible to deal with the question about the powers of Parliament to amend the Constitution under Art. 368 on any theoretical concept of political science that sovereignty vests in the people and the legislatures are merely the delegate of the people. Whether or not Parliament has the power to amend the Constitution must depend solely upon the question as to whether the said power is included in Art. 368. The question about the reasonableness, or expediency or desirability of the amendments in question from a political point of view would be irrelevant in construing the words of Art. 368.

Incidentally, we may also refer to the fact that the Constitution-makers had taken the precaution to indicate that some amendments should not be treated as amendments of the Constitution for the purpose of Art. 368. Take, for instance Art. 4(2) which deals with law made by virtue of Art. 4(1). Art. 4(2) provides that no such law shall be deemed to be an amendment of the Constitution for the purposes of Art. 368. Similarly, Art. 169(3) provides that any law in respect of the amendment of the existing legislative apparatus by the abolition or creation of Legislative Councils in States shall not be deemed to be an amendment of the Constitution for the purposes of Art. 368. In other words, laws falling within the purview of Articles 4(2) and 169(3) need, not be passed subject to the restriction imposed by Art. 368, even though, in effect, they may amount to the amendment of the relevant provisions of the Constitution. If the Constitution-makers took the precaution of making this specific provision to exclude the applicability of Art. 368 to certain amendments, it would be reasonable to assume that they would have made a specific provision if they had intended that the fundamental rights guaranteed by Part III should be completely outside the scope of Art. 368.

Apart from the fact that the words used in Art. 368 are clear and unambiguous in support of the view that we are taking, on principle also it appears unreasonable to suggest that the Constitution-makers wanted to provide that fundamental rights guaranteed by the Constitution should never be touched by way of amendment. It must not be forgotten that the fundamental rights guaranteed by Art. 19, for instance, are not absolute; the scheme of this article itself indicates that the fundamental

rights guaranteed by sub-clauses (a) to (g) of clause (l), can be validly regulated in the light of the provisions contained in clauses (2) to (6) of Art. 19. In other words, the broad scheme of Art. 19 is two-fold; the fundamental rights of the citizens are of paramount importance, but even the said fundamental rights can be regulated to serve the interests of the general public or other objects mentioned respectively in clauses (2) to (6), and that means that for specified purposes indicated in these clauses, even the paramountcy of fundamental rights has to yield to some regulation as contemplated by the said clauses. It is hardly necessary to emphasise that the purposes for which fundamental rights can be regulated which are specified in clauses (2) to (6), could not have been assumed by the Constitution-makers to be static and incapable of expansion. The Constitution-makers must have anticipated that in dealing with socio-economic problems which the legislatures may have to face from time to time, the concepts of public interest and other important considerations which are the basis of clauses (2) to (6), may change and may even expand; and so, it is legitimate to assume that the Constitution-makers know that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country. That is why we think that even on principle, it would not be reasonable to proceed on the basis that the fundamental rights enshrined in Part III were intended to be finally and immutably settled and determined once for all and were beyond the reach of any future amendment.

Let us illustrate this point by reference to some of the provisions of the Constitution (First Amendment) Act, 1951 itself. By this Act, Articles 15, 19 and 31 were amended. One has merely to recall the purpose for which it became necessary to amend Articles 15 and 19 to be satisfied that the changing character of the problems posed by the words used in the respective articles could not have been effectively met unless amendment in the relevant provisions was effected; and yet, if the argument that the fundamental rights are beyond the reach of Art. 368 were valid, all these amendments would be constitutionally impermissible. That, we think is not the true purport and effect of Art. 368. We are, therefore, satisfied that this Court was right in rejecting the said argument in the case of Sankari Prasad ([1952] S.C.R. 89).

This question can be considered from another point of view. The argument that the fundamental rights guaranteed by Part III are eternal, inviolate, and beyond the reach of Art. 368, is based on two assumptions. The first assumption is that on a fair and reasonable construction of Art. 368, the power to amend the fundamental rights cannot be held to be included within the constituent powers conferred on Parliament by the said Article. We have already held that a fair and reasonable construction of Art. 368 does not justify this assumption. The other assumption which this argument makes, and must of necessity make, is that if the power to amend the fundamental rights is not included in Art. 368 as it stands, it cannot ever be included within its purview; because unless it is assumed that the relevant power can never be included in Art. 368, it would be unrealistic to propound the theory that the fundamental rights are eternal, inviolate, and not within the reach of any subsequent constitutional amendment. It is clear that Art. 368 itself can be amended by Parliament, though cl. (e) of the proviso requires that before amending Art. 368, the safeguards prescribed by the proviso must be satisfied. In other words, even if the powers to amend the fundamental rights were not included in Art. 368, Parliament can, by a suitable amendment of Art. 368, take those powers. Thus, the second assumption underlying the argument about the immutable character of the fundamental rights is also not well founded.

There is one more point to which we would like to refer. In the case of Sankari Prasad ([1952] S.C.R. 89) this Court has observed that the question whether the latter part of Art. 31B is too widely expressed, was not argued before it, and so, it did not express any opinion upon it. This question

has, however, been argued before us, and so, we would like to make it clear that the effect of the last clause in Art. 31B is to leave it open to the respective legislatures to repeal or amend the Acts which have been included in the Ninth Schedule. In other words, the fact that the said Acts have been included in the Ninth Schedule with a view to make them valid, does not mean that the legislatures in question which passed the said Acts have lost their competence to repeal them or to amend them. That is one consequence of the said provision. The other inevitable consequence of the said provision is that if a legislature amends any of the provisions contained in any of the said Acts, the amended provision would not receive the protection of Art. 31B and its validity may be liable to be examined on the merits.

Before we part with this matter, we would like to observe that Parliament may consider whether it would not be expedient and reasonable to include the provisions of Part III in the proviso to Art. 368. It is not easy to appreciate why the Constitution-makers did not include the said provisions in the proviso when Art. 368 was adopted. In In re : the Berubari Union and Exchange of Enclaves ([1960] 3 S.C.R. 250), this Court had pointed out that amendment of Art. 1 of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State, does not attract the safeguard prescribed by the proviso to Art. 368, because neither Art. 1 nor Art. 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso; and it was observed that it was not for this Court to enquire or consider whether it would not be appropriate to include the said two articles under the proviso, and that it was a matter for Parliament to consider and decide. Similarly, it seems somewhat anomalous that any amendment of the provisions contained in Art. 226 should fall under the proviso but not an amendment of Art. 32. Article 226 confers on High Courts the power to issue certain writs, while Art. 32, which itself is a guaranteed fundamental right, enables a citizen to move this Court for similar writs. Parliament may consider whether the anomaly which is apparent in the different modes prescribed by Art. 368 for amending Articles 226 and 32 respectively, should not be remedied by including Part III itself in the proviso. If that is done, difficult questions as to whether the amendment made in the provisions of Part III substantially, directly and materially affects the jurisdiction and powers of the High Courts Under Art. 226 may be easily avoided.

In the result, we hold that the impugned Act is constitutionally valid. The petitions, accordingly, fail and are dismissed. There will be no order as to costs.

Hidayatullah J. I have had the privilege of reading the judgment just delivered by my lord the Chief Justice. I agree with him that there is no force in the contention that the 17th Amendment required for its valid enactment the special procedure laid down in the proviso to Art. 368. It would, of course, have been necessary if the amendment had sought to make a change in Art. 226. This eventuality cannot be said to have arisen. Article 226 remains unchanged after the amendment. The proviso comes into play only when the article is directly changed or its ambit as such is sought to be changed. What the 17th amendment does is to enlarge the meaning of the word 'estate' in Art. 31-A and to give protection to some Acts passed by the State Legislatures by including them in the Ninth Schedule under the shield of Art, 31-B. These Acts promoted agrarian reform and but for the inclusion in the Ninth Schedule they might be assailed by the provisions of Articles 14, 19 or 31 of the Constitution. Some of the Acts were in fact successfully assailed but the amendment makes them effective and invulnerable to the three articles notwithstanding Art. 13 of the Constitution. In sri Sankari Prasad's ([1952] S.C.R. 89) case when the Constitution] (First Amendment) Act was passed and Articles 31-A and 31-B and Ninth Schedule were introduced, the effect of that amendment on Art. 226 was considered and it was held that the Amendment had not the effect visualised by the proviso to Art. 368. The reasoning in that case on this point applies mutatis

mutandis to the 17th Amendment.

I find, however, some difficulty in accepting a part of the reasoning in Sankari Prasad's case and my purpose in writing a separate judgment is to say that I decide the present cases without the assistance of that reasoning. I shall briefly indicate what that reasoning is and why I have doubts. In Sankari Prasad's case it was contended that by Art. 13(2) the Fundamental Rights in Part III of the Constitution were put beyond the reach of Art. 368 and outside the power of amendment conferred on Parliament by Art. 368. This argument was considered "attractive" but was rejected because of certain "important considerations" which it was held pointed "to the opposite conclusion". Two reasons alone appear to have weighed with this Court. The first is that as constitutional law is distinguishable from other municipal laws and as there is no "clear indication" to be found that the Fundamental Rights are "immune from constitutional amendment", only the invasion of the Fundamental Rights by laws other than constitutional laws must be the subject of the prohibition in Art. 13(2). Art. 13 may be quoted at this stage :

> "13. Laws inconsistent with or in derogation of the fundamental rights.
>
> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires, -
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
>
> #(b) ....."##

It is true that there is no complete definition of the word "law" in the article but it is significant that the definition does not seek to exclude constitutional amendments which it would have been easy to indicate in the definition by adding "but shall not include an amendment of the Constitution". The meaning is also sought to be enlarged not curtailed. The meaning of Art. 13 thus depends on the sense in which the word "law" in Art. 13(2) is to be understood. If an amendment can be said to fall within the term "law", the Fundamental Rights become "eternal and inviolate" to borrow the language of the Japanese Constitution. Article 13 is then on par with Art. 5 of the American Federal Constitution is its immutable prohibition as long as it stands. But the restricted meaning given to the word "law" prevents this to be held. There is a priori reasoning without consideration of the text of the article in Part III. The Article use the language of permanency. I am of opinion that there are indications in the Constitution which needed to be considered and I shall mention some of them later as illustrations.

The next reason was that Art. 368 was "perfectly general" and allowed amendment of "the Constitution, without any exception whatsoever" and therefore Art. 13(2) did not cover a constitutional amendment. It was observed in this connection that if it was considered necessary to save Fundamental Rights a clear proviso in Art. 368 would have conveyed this intention without any doubt. To my mind the easiest and most obvious way was to say that the word "law" in Art. 13

did not include an amendment of the Constitution. It was finally concluded as follows :-

> "... In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations averted to above, we are of opinion that in the context of article 13 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result the article 13(2) does not affect amendments made under article 368."

At the hearing reliance was not placed on Art. 13(2) but emphasis was laid on the amendment of Art. 226. Mr. R. V. S Mani did, however, refer to the provision for the suspension of Fundamental Rights as showing that unless suspended in an emergency, Part III must stand unchanged and he referred to Art. 32(4). For the disposal of these cases I indicate my view that on the arguments before us I must hold that as decided in Sankari Prasad's ([1952] S.C.R. 89) case Art. 226 is not sought to be changed by the 17th Amendment. But I make it clear that I must not be understood to have subscribed to the view that the word "law" in Art. 13(2) does not control constitutional amendments. I reserve my opinion on that case for I apprehend that it depends on how wide is the word "law" in that Article. The prohibition in that article may have to be read in the light of declarations in the various articles in Part III to find out the proper meaning. Though I do not express a final opinion I give a few examples. Take for instance Art. 32. It reads :

> "32. Remedies for enforcement of rights.
>
> (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
>
> (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
>
> (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by the Constitution."

It is prima facie at least, reasonable to think that if cls. (1), and (4) of this Article were included in Part XX (Amendment of the Constitution) that would have made the guarantee absolute against any amendment. It is a matter for consideration whether this guarantee is any the less because the article is in another Part ? The first clause assures a guaranteed remedy. That guarantee is equally against legislative and executive actions. Part III is full of declarations of what the legislature can do and what it cannot do. The guarantee covers all those actions which are not open to the legislature and the executive. If it be held that the guarantee is inviolable would not be guarantee of the remedy make the rights equally protected ?

Another provision, namely, the Preamble of the Constitution is equally vital to our body politic. In

in re : The Berubari Union and Exchange of Enclaves ([1960] 3 S.C.R. 250) it is held that although the preamble is the key to the mind of the Constitution-makers, it does not form part of the Constitution. Perhaps, in one sense, it does not but, in another sense, it does. Our preamble is more akin in nature to the American Declaration of Independence (July 4, 1776) then to the preamble to the Constitution of the United States. It does not make any grant of power but it gives a direction and purpose to the Constitution which is reflected in Parts III and IV. Is it to be imagined that a two-thirds majority of the two Houses at any time is all that is necessary to alter it without even consulting the States ? It is not even included in the proviso to Art. 368 and it is difficult to think that as it has not the protection of the proviso it must be within the main part of Art. 368.

Again, Art. 13(1) rendered void the laws in force in the territory of India which conflicted with Part III. Can it be said that Art. 13 may be repealed retrospectively and all those statues brought back to life ? Because of successive amendments we have seen many faces of Art. 31-A. It is for consideration whether Art. 13 was not intended to streamline all existing and future laws to the basic requirements of Part III. Or is the door left open for reversing the policy of our Constitution from time to time by legislating with the bigger majority at any given time not directly but by constitutional amendments ? It is possible to justify such amendments with the aid of the provisos in Art. 19 which permit the making of laws restricting the freedoms but not by ignoring Art. 13 and relying solely on Art. 368.

I am aware that in A K Gopalan v. State of Madras ([1950] S.C.R. 88 at p. 100) Kania C J said :

> "... the inclusion of article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits invalid."

The observation is not clear in its meaning. There was undoubtedly a great purpose which this article achieves. It is probable that far from belittling the importance of Art. 13 the learned Chief Justice meant rather to emphasize the importance and the commanding position of Fundamental Rights in that even without Art. 13 they would have the same effect on other laws. To hold that Art. 13 is framed merely by way of abundant caution, and serves no additional or intrinsic function of its own, might, by analogy persuade us to say the same of Art. 32(1) because this Court would do its duty under Art. 32(2) even in the absence of the guarantee.

I would require stronger reasons that those given in Sankari Prasad's ([1952] S.C.R. 89) case to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States. No doubt Art. 19 by clauses numbered 2 to 6 allows a curtailment of rights in the public interest. This shows that Part III is not static. It visualises change and progress but at the same time it preserves the individual rights. There is hardly any measure of reform which cannot be introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without Article 31-A and 31-B but they would have cost more to the public exchequer. The rights of society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the Fundamental Rights by resort to cls. 2 to 6 of Art. 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another. This is the implication of Sankari Prasad's case. It is true that such things would never be, but one is concerned to know if such a doing would be possible.

It may be said that the words of Art. 368 are quite explicit. Art. 3 6 8 does not give power to amend "any provision" of the Constitution. At least the article does not say so. Analysed by the accepted canons of interpretation it is found to lay down the manner of the amendment of "this Constitution" but by "this Constitution" it does not mean each individual article wherever found and whatever its language and spirit. The Constitution itself indicates in some places a contrary intention expressly (See Articles 4, 169 and the former Art. 240) and in some others by implication (See Art. 11). What Art. 368 does is to lay down the manner of amendment and the necessary conditions for the effectiveness of the amendment. The contrast between the opening part and the proviso does not show that what is outside the proviso is necessarily within the powers of amendment. The proviso merely puts outside the exclusive Power of Parliament to amend those provisions on which our federal structure rests. It makes it incumbent that a majority of the States should also agree. The proviso also preserves the structure of the higher judiciary so vital to a written Constitution and to a Democracy such as ours. But the article no where says that the preamble and every single article of the Constitution can be amended by two-thirds majority despite any permanency in the language and despite any historical fact or sentiment.

The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than one on which the article mentioned in the proviso stand. The anamoly that Art. 226 should be somewhat protected but not Art. 32 must give us pause. Article 32 does not erect a shield against private conduct but against state conduct including the legislatures (See Art. 12). Can the legislature take away this shield ? Perhaps by adopting a literal construction of Art. 368 one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions.

For these reasons though I agree with the order proposed, I would not like to be understood to have expressed a final opinion on the aspect of the case outlined above.

Mudholkar J. I have seen the judgments of my Lord the Chief Justice and my brother Hidayatullah J. and I agree that the Writ Petitions should be dismissed.

Of the various contentious raised in Sankari Prasad Singh Deo v. Union of India and State of Bihar ([1952] S.C.R. 89. L2Sup./65-18) in which the Constitution (First Amendment) Act, 1951 was challenged before this Court only two would be relevant in the context of the Constitution (Seventeenth Amendment) Act, 1964. They are : (a) whether the Amendment Act in so far as it purports to take away or abridge the right' conferred by Part III of the Constitution falls within the prohibition of Art. 13(2) and (b) whether Arts. 31A and 31B seek to make changes in Arts. 132, 136 or 226 or in any of the Lists in the Seventh Schedule and, therefore, the requirements of the proviso to Art. 368 had to be satisfied. Both these contentions were negatived by this Court. The first contention has not been raised in the arguments before us and the attack on the Seventeenth Amendment Act was based only on the second contention. Most of the grounds which learned counsel urged before us were the same as those urged in the earlier case. Some additional arguments were also urged before us but, as my Lord the Chief Justice has pointed out, they are unsubstantial. An attempt was made by Mr. Mani, learned counsel for the petitioners, to persuade us to reconsider the decision in the earlier case with regard to the second contention. As, however, no case was made out by him for reconsideration of that decision we intimated to him that we do not propose to reconsider it.

Since my Lord the Chief Justice in his judgments has dealt with the first contention also and expressed the view that the previous decision is right I think it necessary to say, partly for the reasons stated by my learned brother Hidayatullah J. and partly for some other reasons, that I would reserve my opinion on this question and that I do not regard what this Court has held in that case as the last word.

It seems to me that in making the view that the word "law" occurring in Art. 13(2) of the Constitution does not include an amendment to the Constitution this Court has not borne in mind some important considerations which would be relevant for the purpose. The language of Art. 368 is plain enough to show that the action of Parliament in amending the Constitution is a legislative act like one in exercise of its normal legislative power. The only difference in respect of an amendment of the Constitution is that the Bill amending the Constitution has to be passed by a special majority (here I have in mind only those amendments which do not attract the proviso to Art. 368). The result of a legislative action of a legislature cannot be other than 'law' and, therefore, it seems to me that the fact that the legislation deals with the amendment of a provision of the Constitution would not make its result any the less a 'law'. Article 368 does not say that when Parliament makes an amendment to the Constitution it assumes a different capacity, that of a constituent body. As suggested by my learned brother Hidayatullah J. it is open to doubt whether this Article confers any such power upon Parliament. But even assuming that it does, it can only be regarded as an additional legislative power.

Then again while the Constitution as originally framed can only be interpreted by a court of law and the validity of no provision therein can be challenged the same cannot be said of an amendment to the Constitution. For an amendment to be treated as a part of the Constitution it must in fact and in law have become a part of the Constitution. Whether it has become a part of the Constitution is thus a question open to judicial review. It is obvious that an amendment must comply with the requirements of the Constitution and should not transgress any of its provisions. Where, therefore, a challenge is made before the Court on the ground that no amendment had in fact been made or on the ground that it was not a valid amendment it will be both the duty of the Court as well as be and within its power to examine the question and to pronounce upon it. This is precisely what a Court is competent to do in regard to any other law, the validity of which is impugned before it.

Neither of these matters appears to have been considered in Sankari Prasad's case ([1952] S.C.R. 89) and I think that they do merit consideration.

My Lord the Chief Justice has observed that thought in A K Gopalan v. The State of Madras ([1950] S.C.R. 88) Patanjali Sastri J., (as her then was) has said that fundamental rights are those rights which the people have reserved for themselves that learned Judge has emphatically stated in In re The Delhi Laws Act, 1912 ([1951] S.C.R. 747) that Parliament, acting within the limits of its legislative power, has plenary powers of legislation which are as large and which are of the same nature as those of the British Parliament and rejected the suggestion that Parliament is the delegate of the people in whom the sovereignty rests. But does it follow that the learned Judge has departed from his earlier view ? No reference was made by him in Sankari Prasad's case ([1952] S.C.R. 89) to his observations though they needed to be explained. In the Delhi Laws Act case he has undoubtedly said that Parliament enjoys plenary powers of legislation. That Parliament has plenary powers of legislation within the circumscribed limits of its legislative power and cannot be regarded as a delegate of the people while exercising its legislative powers is a well accepted position. The fact, however, remains that unlike the British Parliament our Parliament, like every other organ of the State, can function only within the limits of the powers which the Constitution has conferred

upon it. This would also be so when, in the exercise of its legislative power, it makes an amendment to the Constitution or to any of its provisions. It would, therefore, appear that the earlier observation of Patanjali Sastri J., cannot be regarded as inconsistent with what he has said In the Delhi Laws Act case. At any rate, this is an aspect of the matter which requires further consideration, particularly because the same learned Judge has not adverted to those observations in Sankari Prasad's case. It is true that by virtue of s. 8 of the Indian Independence Act, 1947 it was upon the Constituent Assembly which framed the Constitution and not upon the people of India - that sovereignty devolved after the withdrawal of the British power. But both the "Objectives Resolution" adopted by the Constituent Assembly on January 22, 1947 and the Preamble to the Constitution show that this sovereign body framed the Constitution in the name of the people of India and by virtue of the powers derived from them. In the circumstances it would have to be considered whether Patanjali Sastri J., was not right in saying that the fundamental rights are the minimum rights reserved by the people to themselves and they are, therefore, unalterable.

It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide Art. 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Art. 368 some of which are perhaps less vital than fundamental rights. It is possible, as suggested by my learned brother, that Art. 368 merely lays down the procedure to be followed for amending the Constitution and does not confer a power to amend the Constitution which, I think, has to be ascertained from the provision sought to be amended or other relevant provisions or the preamble. The argument that if fundamental rights are regarded as unchangeable it will hamper legislation which the changing needs of a dynamic society may call for in future is weighty enough and merits consideration. It is possible that there may be an answer. The rights enumerated in Art. 19(1) can be subjected to reasonable restrictions under cls. (2) to (6) of Art. 19 and the other fundamental rights - or at least many of them - can perhaps be adapted to meet the needs of a changing society with the aid of the directive principles. For, Art. 37, the second Article in Part IV which deals with 'Directive Principles of States Policy', imposes a duty on the State to apply those directive principles in making laws. These principles are also fundamental in the governance of the country and the provisions of Part III of the Constitution must be interpreted harmoniously with those principles. This is also an aspect of the matter which requires consideration.

We may also have to bear in mind the fact that our in a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution, created three organs of State, made the union executive responsible to Parliament and the State executives to the State legislatures; erected a federal structure and distributed legislative power between Parliament and the State legislatures; recognised certain rights as fundamental and provided for their enforcement; prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require the members of the Union Judiciary and of the higher judiciary in the States, to uphold the Constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the Constituent Assembly to give a permanency to the basic features of the Constitution ?

It is also a matter for consideration whether making a change in a basis feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution and if the latter, would it be within the purview of Art. 368 ?

The Constitution has enjoined on every member of Parliament before entering upon his office to take an oath or make an affirmation to the effect that he will bear true faith and allegiance to the Constitution. On the other hand under Art. 368 a procedure is prescribed for amending the Constitution. If upon a literal interpretation of this provision an amendment even of the basic features of the Constitution would be possible it will be a question for consideration as to how harmonise the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonised by excluding from the procedure for amendment, alteration of a basic feature of the Constitution ? It would be of interest to mention that the Supreme Court of Pakistan has, in Mr. Fazlul Quader Chowdhry v. Mr. Mohd Abdul Haque (1963 P.L.D. 486) held that franchise and form of government are fundamental features of a Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution. For striking down the action of the President under, what he calls 'sub-constitutional power' Cornelius C.J., relied on the Judges' oath of office. After quoting the following passage from Cooley's Constitutional Limitations :

> "For the constitution of the state is higher in authority than any law, direction, or order made by anybody or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity." The learned Chief Justice observed :
>
> To decide upon the question of constitutional validity in relation to an act of a statutory authority, how-high-so-ever, is a duty devolving ordinarily upon the superior Courts by virtue of their office, and in the absence of any bar either express or implied which stands in the way of that duty being performed in respect of the Order here in question it is a responsibility which cannot be avoided." (p. 506)

The observations and the passage from Cooley, quoted here for convenience support what I have said earlier regarding the power of the Courts to pronounce upon the validity of amendments to the Constitution.

The Constitution indicates three modes of amendments and assuming that the provisions of Art. 368 confer power on Parliament to amend the constitution, it will still have to be considered whether as long as the preamble stands unamended, that power can be exercised with respect to any of the basic features of the Constitution.

To illustrate may point, as long as the words 'sovereign democratic republic' are there, could the Constitution be amended so as to depart from the democratic form of Government or its republic character ? If that cannot be done, then, as long as the words "Justice, social economic and political etc.," are there could any of the rights enumerated in Arts. 14, to 19, 21, 25, 31 and 32 be taken away ? If they cannot, it will be for consideration whether they can be modified.

It has been said, no doubt, that the preamble is not a part of our Constitution. But, I think, that if upon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features or, to put it differently if these features are an amplification or concretisation of the concepts set out in the preamble it may have to considered whether the preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an

Act of a legislature. It has stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it ?

In view of these considerations and those mentioned by my learned brother Hidayatullah J. I feel reluctant to express a definite opinion on the question whether the word 'law' in Art. 13 (2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment at all to Part III of the Constitution.

In so far as the second contention is concerned I generally agree with what my Lord the Chief Justice has said but would only like to add this : Upon the assumption that Parliament can amend Part III of the Constitution and was, therefor, competent to enact therein Articles 31A and 31B as also to amend the definition of 'estate', the question still remains whether it could validate a State law dealing with land. I take it that only that legislature has power to validate a law which has the power to enact that law. Since the agrarian laws included in the Ninth Schedule and sought to be protected by Art. 31B could not have been enacted by Parliament, would it be right to say that Parliament could validate them ? If Parliament could amend Part III it could, indeed, remove the impediment in the way of the State Legislatures by enacting Art. 31A and amending the definition of 'estate'. But could it go to the extent it went when it enacted the First Amendment Act and the Ninth Schedule and has now added 44 more agrarian laws to it ? Or was it incompetent to it to go beyond enacting Art. 31A in 1950 and now beyond amending the definition of estate ? This, however, does not appear to have been considered in Sankari Prasad's case ([1952] S.C.R. 89) nor was such an argument advanced before us in this case. I am only mentioning this to make it clear that even in so far as the second contention is concerned I base my decision on the narrow ground that upon the arguments advanced before us no case has been made out for striking down the Seventeenth Amendment.

As indicated in the judgment of my Lord the Chief Justice an amendment made by resort to the first part of Art. 368 could be struck down upon a ground such as taking away the jurisdiction of the High Courts under Art. 226 or of this Court under Art. 136 without complying with the requirements of the proviso. To this I would like to add that if the effect of an amendment is to curtail substantially, though indirectly, the jurisdiction of High Courts under Art. 226 or of this Court under Art. 136 and recourse has not been had to the proviso to Art. 368 the question whether the amendment was a colourable exercise of power by Parliament will be relevant for consideration.

Before I part with this case I wish to make it clear that what I have said in this judgment is not an expression of my final opinion but only an expression of certain doubts which have assailed me regarding a question of paramount importance to the citizens of our country : to know whether the basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time - or at least for the forseeable future - or whether they are no more enduring than the implemental and subordinate provisions of the Constitution.

Petitions dismissed.

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