Superintendent & Legal Remembrancer, State of West Bengal

Vs

Corporation of Calcutta

Criminal Appeal No. 193 of 1964

(CJI Subba Rao, J. C. Shah, K. N. Wanchoo, S. M. Sikri, R. S. Bachawat, V. Ramaswami JJ)

07.12.1966

JUDGMENT

SUBBARAO, C.J. –

This Full Bench of 9 Judges has been constituted to consider the correctness of the decision of this Court in Director of Rationing and Distribution v. The Corporation of Calcutta ([1961] 1 S.C.R. 158).

The relevant facts are simple and are not in dispute. The State of West Bengal was carrying on the trade of a daily market at 1, Orphanganj Road, Calcutta, without obtaining a licence as required under section 218 of the Calcutta Municipal Act, 1951 (West Bengal Act 33 of 1951) hereinafter called the Act. The Corporation of Calcutta filed a complaint against the State of West Bengal in the Court of the Presidency and Municipal Magistrate, Calcutta, under section 541 of the Act for contravening the provisions of s. 218 thereof. Under section 218 of the Act, every person who exercises or carries on in Calcutta any trade, shall take out a licence and shall pay for the same such fee as is mentioned in that behalf in Schedule IV to the Act. Admittedly for the year 1960-61, the Government of West Bengal did not take out a licence under the said section but carried on the said trade. The main contention of the Government was that the State was not bound by the provisions of the Act. The learned Magistrate, accepting the said contention, acquitted the State. On appeal, the High Court of Calcutta held that the State was carrying on the business of running a market and, therefore, it was as much bound as a private citizen to take out a licence. It distinguished the decision of this Court in Director of Rationing and Distribution v. The Corporation of Calcutta ([1961] 1 S.C.R. 158) on the ground that the said decision was concerned with the sovereign activity of the State. In the result the State of West Bengal was convicted under section 537 of the Act - section 537 appears to be a mistake for section 541 - and sentenced to pay a fine of Rs. 250, with the direction that when realized, it should be paid to the Corporation. Hence the present appeal.

Learned Advocate General of West Bengal raised before us the following points : (1) The State is not bound by the provisions of a statute unless it is expressly named or brought in by necessary implication; (2) the said principle equally applies to sovereign and non-sovereign activities of a State; and Mr. N. S. Bindra, learned counsel appearing for the Attorney General raised before us the third point, namely, this Court has no power under the Constitution to review its earlier judgment.

While the learned Advocate General contended that the rule of construction in favour of the State was part of the common law of England accepted as the law of this country and, therefore, was law in force within the meaning of Art. 372 of the Constitution, Mr. N. S. Bindra argued that the said rule of construction was law of the land in that it was declared to be so by the Judicial Committee in

Province of Bombay v. Municipal Corporation of the City of Bombay ([1946] L.H. 73 I.R. 271) and, therefore, it was law in force within the meaning of Art. 372 of the Constitution.

The third contention need not detain us, for it has been rejected by this Court in The Bengal Immunity Company Limited v. The State of Bihar ([1955] 2 S.C.R. 603). There a Bench of 7 Judges unanimously held that there was nothing in the Constitution which prevented the Supreme Court from departing from a previous decision of its own if it was satisfied of its error and of its baneful effect on the general interests of the public. If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which affect the evolution of our polity, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. In this case, as we are satisfied that the said rule of construction is inconsistent with our republican polity and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision.

At the outset it will be convenient to notice the facts of the decision of this Court in Director of Rationing and Distribution v. The Corporation of Calcutta ([1961] 1 S.C.R. 158) and the reasons given by this Court for applying the said rule of construction to an Indian statute. There, the Director of Rationing and Distribution was using certain premises in Calcutta for storing rice flour, etc. without taking out any licence under section 385(1)(a) of the Calcutta Municipal Act, 1923. The Corporation of Calcutta filed a complaint against the said Director in the Magistrate's Court for the contravention of the said provision. This Court held that the State was not bound by the provisions of section 386(1)(a) of the said Act and that the appellant was not liable to prosecution for the contravention of the said section. Sinha, C.J., speaking for Imam and Shah, JJ., gave one judgment, Sarkar, J., gave a separate but concurrent judgment, and Wanchoo, J., recorded his dissent. The reasoning of Sinha, C.J., is found in the following passage :

> "It is well-established that the common law of England is that the King's prerogative is illustrated by the rule that the Sovereign is not necessarily bound by a statutory law which binds the subject. This is further enforced by the rule that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless, the statute being for the public good, it would be absurd to exclude the King from it". (at page 170).
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> "That was law applicable to India also, as authoritatively laid down by the Privy Council in the case referred to above [(1946) L.R. 73 I.A. 271)]..... it (law in force under Art. 372 of the Constitution) must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force". (At p. 173).
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> Sinha, C.J., therefore, held that the said rule of construction was part of the common law of England, that it was adopted by this country and that Art. 372 of the Constitution continued it. Sarkar, J., on the other hand, agreed with the conclusion arrived at by Sinha, C.J., but on a different ground. He based his conclusion not on any common law doctrine, but simply on the ground that the said rule of construction of statutory provisions was accepted and followed in England, America and India. Wanchoo, J., in his dissent, put the case in a different perspective. The following passage brings out his line of thought :

> "Two things are clear from this modern conception of royal prerogative, namely (1) that there must be a Crown or King to whom the royal prerogative attaches, and (2) that the prerogative must be part of the common law of England. Both these conditions existed when the Privy Council decision in Province of Bombay v. Municipal Corporation of the City of Bombay ([1946] L.R. 73 I.A. 271) was given in October 1946; the King was still there and the Privy Council held that the English common law rule of construction applied to Indian legislation as much as to English statutes". (At p. 184).
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> "In our country the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Part III thereof as well as by other provisions in other Parts..... It is to my mind inherent in the conception of the Rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all power - executive, legislative and judicial - has disappeared and in our republican Constitution, sovereign power has been distributed among various organs created thereby, it seems to me that there is neither justification nor necessity for continuing the rule of construction based on the royal prerogative". (At p. 185).
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> "But where the royal prerogative is merely a rule of construction of statutes based on the existence of the Crown in England and for historical reasons, I fail to see why in a democratic republic, the courts should not follow the ordinary principle of construction that no one is exempt from the operation of a statute unless the statute expressly grants the exemption or the exemption arises by necessary implication". (At pp. 188-189).

The conflict between the two views expressed by the learned Judges in the earlier decision mainly rests on the meaning of the expression "law in force" in Art. 372 of the Constitution. While Sihna, C.J., took the view that the common law of England, including the rule of construction, was accepted as the law of this country and was, therefore, the law in force within the meaning of the said Article, Wanchoo, J., took the view that whatever might be said of the substantive laws, a rule of construction adopted by the common law of England and accepted by the Privy Council at a time when the Crown was functioning in India, was not the law in force within the meaning of the said Article.

We shall now consider the validity of the conflicting views. The common law of England is clear on the subject. In Halsbury's Laws of England, 3rd Edn., Vol. 7, in Part 5 of the Chapter on "Constitutional Law" under the heading "The Royal Prerogative", the Royal prerogatives are enumerated and their limitations are given. In para 464 it is stated :

> "The general rule is that prerogatives cannot be affected or parted with by the Crown, except by express statutory authority".

The prerogative right can be taken away by law because the law is made by the Crown with the assent of the Lords and the Commons. It can be taken away only by law to which the Crown is a party. Whether a particular statute has taken away such right pertains to the domain of the rule of construction. The relevant rule of construction evolved by judicial decisions in England may be stated thus :

> "At all events, the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest". (See Perry v. Eames) ([1891] 1 Ch. 658).

It is said much to the same effect in Maxwell's Interpretation of Statutes, 11th Edn., at page 129, thus :

> "It is presumed that the legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible".

The same rule is given in Bacon's Abridgment 7th Edn., 9.462. The legal position in England may be summarised thus :

> "The substantive rule of law is that the prerogative of the Crown can only be taken away by law. The rule of construction evolved by the courts to ascertain the legislative intention is, that it is presumed that a statute has not taken away the prescriptive right unless it has expressly or by necessary implication done so".

There is an essential distinction between a substantive law and a rule of construction and that is well expressed by Craies in his book "On Statute Law", 6th Edn., at p. 10, thus :

> "A rule of law, e.g., the Rule against Perpetuities or the Rule in Shelley's case (abolished in 1925), exists independently of the circumstances of the parties to a deed, and is inflexible and paramount to the intention expressed in the deed. A rule of law cannot be said to control the construction of a statute, inasmuch as a British statute is itself part of the supreme law of the land and overrides any pre-existing rules with which it is inconsistent. A rule or canon of construction, whether of will, deed or statute, is not inflexible, but is merely a presumption in favour of a particular meaning in case of ambiguity. This was well expressed by Bowen, L.J. in L. N. W. Ry. v. Evans : ([1893] I Ch. 16, 27). 'These canons do not override the language of a statute where the language is clear : they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all-powerful, and when its meaning is unequivocally expressed the necessity for rules of construction disappears and reaches its vanishing point".

The same principle was stated by Bhashyam Ayyangar, J., in Bell v. The Municipal Commissioners for the City of Madras (I.L.R. [1902] 25 Mad. 457, 484) thus :

> "The compendious canons of interpretation which are in the nature of maxims can only be regarded as mere guides to the interpretation of Statutes and ought not to be applied as if they were statutory clauses, enacted with all the precision and provisos of an Interpretation Act".

Franfurter, J., said to the same effect in United States v. United Mine Workers of America thus : ([1947] 91 L.ed. 923).

> "At best, this cannon, like other generalities about statutory construction, is not a rule of law. Whatever persuasiveness it may have in construing a particular statute derives from the subject-matter and the terms of the enactment in its total environment".

Even in England this rule of interpretation has not been treated as inflexible. It is gradually losing ground in many branches of law. The incongruity of the rule of discrimination in favour of the Crown was pointed out by Glanville L. Williams in his treatise on "Crown Proceedings", at p. 53 :

> "The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the vis inertiae".

The author continues, at p. 54 :

> "With the great extension in the activities of the State and the number of servants employed by it, and with the modern idea, expressed in the Crown Proceedings Act, [compare in this connection Art. 300 of our Constitution], "that the State should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than it does not".

The next question is, how far and to what extent the common law of England relating to the prerogatives of the Crown has been accepted as the law of our country ? Nothing has been placed before us to show that the entire body of the common law pertaining to prerogatives was accepted as the law throughout India. India at the relevant time comprised Provinces and Native States. As Bhashyam Ayyangar, J., pointed out in Bell v. The Municipal Commissioners for the City of Madras (I.L.R. (1902) 25 Mad. 457, 484) "the prerogatives of the Crown in India - a country in which the title of the British Crown is of a very mixed character - may very in different provinces, as also in the Presidency towns as distinguished from the mofussil. The determination, with anything like legal precision, of all the prerogatives of the British Crown in India is by no means an easy task". It is well-known that the Common law of England was applied as such in the original sides of the High Courts of Calcutta, Bombay and Madras, and that in the mofussil courts the principles embodied in the common law were invoked in appropriate cases on the ground of justice, equity and good conscience. It cannot, therefore, be posited that either the entire body of common law of England relating to prerogatives of the King or even the rule of construction as forming part of that law was accepted as law in every part of the country. It has to be established whenever a question arises as to what part of the common law was accepted as the law in a particular part of the country.

Learned Advocate General of West Bengal referred us to the decision of the Privy Council in Province of Bombay v. Municipal Corporation of the City of Bombay ([1946] L.R. 73 I.A. 271) in support of his contention that the common law of England was accepted as the law of our country in that regard. In that case the question was whether the Crown was not bound by section 222(1) and section 265 of the City of Bombay Municipal Act, 1888 which gave the Municipality power to carry water-mains for the purposes of water supply through across or under any street and into, through or under any land "whatsoever within the city". When the Municipal Corporation wanted to lay water-mains through the land belonging to the Government of Bombay, the Government did not agree except on some conditions. Thereafter, the dispute between the parties was referred to the High Court. Ultimately, setting aside the order of the High Court, the Privy Council held that the rule that no statute bound the Crown unless the Crown was expressly or by necessary implication made bound thereunder applied to the Crown in India and that there was no such express intention or necessary implication in the said section. Indeed, the High Court also accepted that principle, but on the construction of the relevant provisions it came to the conclusion that there was such a necessary implication thereunder. On the application of the principle there was no contest before the Privy Council. The Privy Council expressly stated so at p. 274, when it observed :

> "The High Court held, following previous decisions of its own, that the principle to be applied for the decision of the question whether or not the Crown is bound by a statute is no different in the case of Indian Legislation from that which has long been applied in England. The parties concurred in accepting this view, and their Lordships regard it as correct".

The decision made on a concession made by the parties even though the principle conceded was accepted by the Privy Council without discussion, cannot be given the same value as one given upon a careful consideration of the pros and cons of the question raised. Further, no argument was raised before the Privy Council that the Common law of England had legal force only in the said three Presidency towns and not in the rest of the country, for that case happened to be one that arose in the City of Bombay. The observations of the Privy Council that the principles obtaining in England also governed the Crown in India are, rather wide. Nor any argument was raised before the Privy Council making a distinction between substantive branches of common law and mere rules of construction. It is not possible to predicate what the Privy Council would have said if that distinction had been placed before it. Be that as it may, this decision cannot be taken as finally deciding the question that is raised before us.

Learned counsel relied upon a series of Indian decisions in support of his contention that this rule of construction had become the law of the land.

It was held in The Secretary of State in Council of India v. The Bombay Landing and Shipping Company (Limited) ([1868] 5 Hom. H.C. Rep. 23, 27). that in a winding up proceedings the Crown was entitled to the same precedence in regard to the debts due to it, in England, in Ganpat Putava v. Collector of Kanara ([1875] I.L.R. I. Bom. 7) that the Crown was entitled to the same precedence in regard to fees payable to it by a pauper plaintiff, in The Secretary of State for India v. Mathura Bhai ([1889] I.L.R. 14 Bom. 213) that section 26 of the Limitation Act, 1877 being a branch of substantive law did not affect the Crown's right, in Motilal Virchand v. The Collector of Ahmedabad ([1906] I.L.R. 31 Bom. 86) that the Mamlatdars' Courts could not entertain and decide a suit to which the collector was a party in The Government of Bombay v. Esufali Salebhai ([1909] I.L.R. 34 Bom. 618) that the Crown had a prerogative right to intervene and claim compensation in Land Acquisition proceedings, in Hiranand Khushiram v. Secretary of State, (A.I.R. 1934 Bom. 379) that the Crown was not bound by the provision of the Bombay Municipality Act, in The Secretary of State for India v. The Municipal Corporation of Bombay (No. 1) ([1935] 37 Bom. L.R. 499, 509) that the Crown was subject to a charge under section 212 of the Bombay City Municipal Act. A careful study of these decisions discloses that all of them related to particular prerogatives of the Crown and that the Court held either that the prerogative of the Crown was taken away by the statute or not, having regard to the construction placed by it on the relevant statute. It is true that in some of the decisions the said rule of construction was noticed, but as the decisions turned upon the construction of the relevant provisions, it could not be said that the said rule had been accepted as an inflexible rule of construction by the Bombay High Court. In one of the judgments even the applicability of the rule of construction was doubted.

A learned thesis on the subject is found in the judgment of Bhashyam Ayyangar, J., in Bell v. The Municipal Commissioners for the City of Madras (I.L.R. (1902) 25 Mad. 457, 484). The Superintendent of the Government Gun-carriage Factory, Madras, having brought timber belonging to the Government into the City of Madras without taking out a licence and paying the licence fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted. There was no mention of Government in the said section. A Division Bench of the Madras High Court held that

according to the well-known codes of the Indian legislation, statutes imposing duties or taxes bound the Government unless the very nature of the duty or tax was such as to be inapplicable to it. Bhashyam Ayyangar, J., in his judgment, after considering all the relevant material on the subject - statutes and English and Indian decisions - came to the conclusion that exemption from the payment of tolls, rates and taxes was not in reality a prerogative of the Crown, but depended solely upon the right construction to be put on the Crown grant or the statute in question. Though the learned Judge noticed the rule of construction and affirmed its application both to English and Indian statutes vis-a-vis the Crown, he pointed out that the said rule, like every cognate rule of construction was not really a prerogative of the Crown but only a canon of interpretation and a mere guide to the interpretation of statutes. That case arose in the Madras City. In Madras the position was that non-liability of the Crown to taxes was not treated as its prerogative and the aforesaid rule of construction was only treated as a guide in interpreting the provisions of a statute.

Now coming to Calcutta a Division Bench of the Calcutta High Court in Corporation of Calcutta v. Bhupal Chandra Sinha (A.I.R. 1950 Cal. 421) held that the Crown was bound by section 421 of the Calcutta Municipal Act, 1923 and that the unwholesome barley found in the Government stores was liable to be destroyed. No doubt, the Court re-stated the said rule of construction and came to the conclusion that by necessary implication the State was bound by the said provision.

A Division Bench of the same High Court in Corporation of Calcutta v. Director of Rationing and Distribution (A.I.R. 1955 Cal. 282) held that the State Government which was carrying on a trade at premises No. 259, Upper Chitpur Road, Calcutta, and was using or permitting the use of the said premises for the purpose of storing rice etc. without licence was liable to be convicted under section 386(1)(a) of the Calcutta Municipal Act, 1923, read with section 488 thereof. When the said rule of construction was pressed upon the learned Judges, they held that the law, even after coming into force of the Government of India Act, 1935, was that the Crown or the Government was bound by the statute unless it was exempted from its operation either expressly or by necessary implication. They did not, therefore, accept the rule of construction laid down by the Privy Council. It cannot, therefore, be said that in the City of Calcutta there was a universal recognition of the rule of construction in favour of the Crown.

The legislative practice in India establishes that the various Legislatures of the country provided specifically exemptions in favour of the Crown whenever they intended to do so indicating thereby that they did not rely upon any presumption but only on express exemptions, see, for instance, section 74 of the Contract Act, section 9 of the Specific Relief Act, section 90 of the Indian Registration Act, section 2(a) and (b) of the Indian Easements Act, The Crown Grants Act XV of 1895, ss. 295 (proviso), 356(b) and 411 and 616 (a) of the Code of Civil Procedure (old), section 212 (proviso) of the Indian Companies Act, section 20 (proviso) of the Sea Customs Act, 1878, section 1(4)(i) of the Indian Ports Act, section 3, proviso (1) of the Indian Stamps Act, 1899, and section 3 of the India Act XI of 1881 etc. What is more, Act XI of 1881 empowered the Governor-General in Council by order to prohibit the levy by a Municipal Corporation of any specified tax payable by the Secretary of State for India and to direct the Secretary of State for India to pay to the Municipal Corporation in lieu of such tax some definite amounts. This Act was a pointer against the contention that there was a presumption in favour of the Crown that a statute was not binding on it. It is true that there are other Acts where there are specific provisions to the effect that the provisions of the Acts shall be binding on the Government : see section 10 of the Arbitration Act (Act X of 1940), section 116 of the Oil Field Regulation and Development Act (Act LIII of 1948). Subsequent to the making of the Constitution also there were Acts where such a provision was found. There is no firm legislative practice based upon the said presumptive rule of construction. Different statutes

adopted different devices to achieve their desired results. The legislative practice, therefore, does not support the contention that in India the said rule of construction was accepted. It only shows that wherever an exemption was intended to be given to the Government it was expressly mentioned and wherever there might have been any doubt of the liability of the Government, it was expressly made liable. The rule of construction was not statutorily recognised either by incorporating it in different Acts or in any General Clauses Act; at the most, it was relied upon as a rule of general guidance in some parts of the country.

Some of the American decisions may usefully be referred to at this stage. It was said that in America where the Crown did not exist, the same rule of construction was adopted in that country as law of the land and therefore by analogy the same legal position must be accepted in India.

The decision in H. Snowden Marshall v. People of the State of New York ([1920] 65 L.ed. 315) only lays down that the State of New York has the common law prerogative right of priority over unsecured creditors. This case has nothing to do with the rule of construction but was based upon the common law prerogative of the Crown expressly embodied in the State's Constitution. The decision in Guarantee Trust Company of New York v. United States of America ([1938] 82 L.ed. 1224) accepted the immunity of the sovereign from the operation of statutes of limitation. That decision was based upon the doctrine of public policy evolved by courts, though in evolving the said policy the courts had been influenced, to some extent, by the doctrine of the prerogative of the Crown. This decision also does not express any opinion on the rule of construction.

The decision in United States of America v. United Mine Workers of America ([1947] 91 L.ed. 884, 923) ruled that statutes which in general terms divested pre-existing rights and privileges would not be applied to the sovereign without express words to that effect. But Frankfurter, J., after citing the said rule, pointed out that :

> "At best, this canon, like other generalities about statutory construction, is not a rule of law".

The same rule was again re-stated in United States of America v. Reginald P. Wittek ([1949] 93 L.ed. 1406). The question there was whether the District of Columbia Emergency Rent Act did not apply to Government-owned defence houses in the District such as Bellevue Houses. The Court relied not only upon the said rule of construction but also on other circumstances in support of the conclusion that the United States was exempt from the operation of that Act by necessary implication. In Jess Larson, as War Assets Administrator and Surplus Property Administrator v. Domestic and Foreign Commerce Corporation, ([1949] 93 L.ed. 1628) the purchaser of surplus coal from the War Assets Administration filed a suit against the said Administration for an injunction prohibiting the latter from selling or delivering the coal to any other person. The suit was dismissed on the ground that the sovereign immunity in suits for injunction or for specific performance was based upon public policy. But it was argued that the principle of sovereign immunity was an archaic hangover not consonant with modern morality; the majority conceded that there was substance in such a viewpoint as applied to suits for damages. Mr. Justice Frankfurter in his dissent went further and pointed out that the doctrine of sovereign immunity was in disfavour. The American decisions, therefore, were mainly based either on the provisions of the constitution of the State or on the ground of public policy evolved by Courts. The founding fathers carried with them the English doctrine of the Crown Prerogative and it continued to influence some of the principles of public policy evolved in that country. Even so, the decisions made it clear that the rule of construction was relied upon only as one of the guides to arrive at the intention of a particular statute. That apart, the

fact that the common law of England pertaining to prerogatives influenced some of the decisions of the Supreme Court of the United States cannot help us in coming to a conclusion whether the said rule had become part of the Law in India.

Mr. Bindra, the learned counsel appearing for the Attorney-General sought to reach at the same result by a different process. He argued that the decision of the Privy Council in Province of Bombay v. Municipal Corporation of the City of Bombay and another (73 I.A. 271) is a law of the country. We have already noticed the decision in another context. It accepted the rule of construction on a concession made by the counsel. Even if it was a considered decision on the point, it was nothing more than an application of a rule of construction with which it was familiar for ascertaining the intention of statutory provisions applicable to the Bombay City.

To sum up : some of the doctrines of common law of England were administered as the law in the Presidency Towns of Calcutta, Bombay and Madras. The Common Law of England was not adopted in the rest of India. Doubtless some of its principles were embodied in the statute law of our country. That apart, in the mofussil, some principles of Common Law were invoked by courts on the ground of justice, equity and good conscience. It is, therefore, a question of fact in each case whether any particular branch of the Common Law became a part of the law of India or in any particular part thereof. The aforesaid rule of construction is only a canon of interpretation, it is not a rule of substantive law. Though it was noticed in some of the judgments of the Bombay High Court, the decisions therein mainly turned upon the relevant statutory provisions. One decision even questioned its correctness. There is nothing to show that it was applied in other parts of the country on the ground of justice, good conscience and equity. In Madras, it was not considered to be a binding rule of law, but only as a simple canon of construction. In Calcutta there was a conflict : one Bench accepted the construction and the other rejected it. The Privy Council gave its approval to the rule mainly on the concession of Advocates and that decision related to Bombay City. It is, therefore, clear that the said rule of construction was not accepted as a rule of construction throughout India and even in the Presidency towns it was not regarded as inflexible rule of construction. In short it has not become a law of the land.

Let us now proceed on the assumption that it has been accepted as a rule of construction throughout India. This leads us to the question whether the said rule of construction is the law of the land after the Constitution came into force. Under Article 372, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. Can it be said that the said canon of construction was a 'law in force' which can only be amended by a Legislature ? Under Explanation (1) to the said Article, the expression 'law in force' shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of the Constitution. It has been held by this court that the said expression includes not only enactments of the Indian Legislatures but also the Common Law of the land which was being administered by the Courts in India. (See Director of Rationing and Distribution v. The Corporation of Calcutta and others ([1961] 1 S.C.R. 158) and V. S. Rice and Oil Mills & others v. State of Andhra Pradesh ([1965] 3 S.C.R. 289). But it is not possible to hold that a mere rule of construction adopted by English Courts, and also by some of the Indian Courts to ascertain the intention of the Legislature was a law in force within the meaning of this term. There is an essential distinction between a law and a canon of construction. This distinction between law and the canon of construction has been noticed by us earlier and we have held that a canon of construction is not a rule of law. We are not concerned here with the statutory rules of interpretation. We are, therefore, of the opinion that a rule of construction is not a 'law in force' within the meaning of Article 372.

The next question is whether this Court should adopt the rule of construction accepted by the Privy Council in interpreting statute vis-a-vis the Crown. There are many reasons why the said rule of construction is inconsistent with and incongruous in the present set-up we have no Crown, the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. To illustrate : (1) State "A" made a general Act without expressly making the Act binding on the said State. In the same State States "B", "C" and "D" and the Union have properties. Would the rule of construction apply only to the properties of State "A" or to the properties of all the States and the Union ? (2) The Central Act operated in different States; the rule of construction was accepted in some States and rejected in other States. Is the Central Act to be construed in different States in different ways ? (3) Acts in general terms might be made in different States - States where the said rule of construction was accepted and the States where it was not so accepted. Should different States construe the General Acts in different ways, some applying the presumption and some ignoring it ?

There is, therefore, no justification for this Court to accept the English canon of construction, for it brings about diverse results and conflicting decisions. On the other hand, the normal construction, namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies. It prima facie applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. This natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempted from the operation of an Act, under certain circumstances such an exemption may necessarily be implied. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the State. We, therefore, hold that the said canon of construction was not 'the law in force' within the meaning of Art. 372 of the Constitution and that in any event having regard to the foregoing reasons the said canon of construction should not be applied for construing statutes in India. In this view it is not necessary to express our opinion on the question whether the aforesaid rule of construction would not apply to the trade activities of the State, even if it applied to its sovereign activities.

Even so, it was contended that by necessary implication the State was excluded from the operation of section 218 of the Act. It was contended that, as the infringement of the said provision entailed a prosecution and, on conviction, imposition of fine and imprisonment, and that as the State could not obviously be put in prison and as the fine imposed on the State would merge in the consolidated fund of the State, it should necessarily be implied that the State was outside the scope of the section . This argument was based upon the reasoning of Wanchoo, J., in his dissenting judgment in Director of Rationing and Distribution v. Corporation of Calcutta (1961] 1 S.C.R. 158). To appreciate the argument it is necessary to notice the relevant provisions of the Act. Under section 218(1) every person who exercises or carries on in Calcutta any of the trades indicated in Schedule IV shall annually take out a licence before the prescribed date and pay the prescribed fee. Section 218 is in Ch. XIII. Under section 541(1)(b) if any person exercises on or after the first day of July in any year any profession, trade or calling referred to in Chapter XIII without having the licence prescribed by that chapter, he shall be punished with fine; and under section 541(2) such fine, when levied, shall be taken in full satisfaction of the demand on account of the said licence. Under section 547A, which was inserted in the Act by section 96 of the Calcutta Municipal (Amendment) Act, 1953 (West Bengal Act XIX of 1953), in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to pay a fine, it shall be competent to the

Court to direct that in default of payment of the fine the offender shall suffer imprisonment for such term or further term not exceeding six months as may be fixed by the Court. Under the Act there is a distinction between fines imposed under section 537 and under section 541 of the Act. The fines under s. 537 are in respect of offences enumerated therein and they certainly go to the coffers of the States. In respect of such offences it may be contended that, as the fines paid reach the State itself, there is an implication that the State is not bound by the sections mentioned therein, for a person who receives the fine cannot be the same person who pays it. This incongruity may lead to the said necessary implication. But the same cannot be said in respect of the provisions covered by section 541. Under the said section the fine recovered for the infringement of the said provisions, when levied, shall be taken in full satisfaction of the demand on account of the licence not taken thereunder. Though the expression "fine" is used, in effect and substance, section 541 is a mode of realization of the fee payable in respect of the licence : it goes to the municipal fund and forms part of it. In this context, section 115 of the Act is relevant. Under that section, there shall be one Municipal Fund held by the Corporation in trust for the purposes of the Act to which the moneys realised or realisable under the Act (other than fine levied by Magistrates) and all moneys otherwise received by the corporation shall be credited. Reliance is placed upon the words within the brackets, viz., "other than fine levied by Magistrates" and an argument is raised that the fine levied under section 541 will not be credited to the Municipal Fund. That interpretation brings that section into conflict with section 512. On the other hand, a harmonious construction of these two provisions makes it clear that the fine mentioned in section 115 is the fine imposed under section 537, for section 541(2) in terms directs that the fine shall be credited to the demand. All amounts credited towards demands, it cannot be denied, necessarily have to be credited in the Municipal Fund. Nor section 547A detracts from our conclusion. Under that section in every case of an offence where the offender is sentenced to pay a fine, it shall be competent to the court to direct that in default of payment of the fine the offender shall suffer imprisonment. It was said that this section necessarily implied that the State could not be hit by section 218, as it could not obviously be imprisoned for default of payment of fine. But it will be noticed that this section only confers a discretionary power on the court and the court is not bound to direct the imprisonment of the defaulter. It is only an enabling provision. There are other ways of collecting the money from persons against whom an order under section 547A is not made. This enabling provision does not necessarily imply an exemption in favour of the State.

For all the aforesaid reasons we hold that the State is not exempt from the operation of section 218 of the Act.

In the result we hold that the conclusion arrived at by the High Court is correct. The appeal fails and is dismissed.

Shah, J. - The High Court of Calcutta convicted the State of West Bengal of the offence of carrying on trade as owner and occupier of a market at Calcutta without obtaining a license under s. 218 of the Calcutta Municipal Act, 1951, and imposed a sentence of fine of Rs. 250/-. In this appeal, it is urged that the State not being by express enactment or clear intendment bound by the provisions of the Act relating to the obtaining of a license for carrying on trade as owner or occupier of a market, the order of conviction is not sustainable, and reliance is placed upon the judgment of this Court in Director of Rationing & Distribution v. The Corporation of Calcutta & Ors ([1961] 1 S.C.R. 158). The Corporation contends that since India became a Republic, the rule that "Crown is not bound by statute unless specially named, or clearly intended" has no application to the interpretation of the Calcutta Municipal Act, 1951. The argument is urged on two grounds : (i) since India has ceased to be governed in the name of the British Crown, the rule in terms has no application; and (ii) even if it

be assumed that the rule applies to the State as the sovereign authority, it must be deemed to be superseded, for to accept it would be to countenance unequal treatment between the State and the citizens.

The origin of the rule in England that the Crown is not bound by a statute unless expressly named or clearly intended lay undoubtedly in the prerogative of the British Crown. In Bacon's Abridgement, 7th Edn., p. 462, the general rule is stated thus : "where a statute is general, and thereby any prerogative, right, title or interest is divested or taken away from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him". But the Crown is bound where it is expressly named or by clear implication intended to be bound. An inference that the Crown was intended to be bound by implication is, however, not to be raised merely because the Crown assented to the statute, for as stated by Plowden "when the King gives his assent he does not mean to prejudice himself or to bar himself of his liberty and his privilege, but he assents that it shall be a law among his subjects".

The common law of England was adopted in this country subject to local variations and the personal law of the parties, within the Presidency towns by the establishment of Mayors' Courts in the 18th century with the express injunction to apply that law. In the mufassal of the three Presidencies the common law was adopted by the Regulations constituting tribunals for administration of justice enjoining them to decide disputes according to 'justice, equity and good conscience', and elsewhere by the diverse Civil Courts Acts imposing similar injunctions. In the three Presidency towns of Calcutta, Madras and Bombay the charters of 1726 which established the Mayors' Courts introduced within their jurisdiction the English common and statute law in force at the time so far as it was applicable to Indian circumstances. By the statute of 1781 (21 Geo. III c. 70, section 17) the Supreme Court at Calcutta was enjoined to apply in the determination of actions against the Indian inhabitants of the town in matters of succession and inheritance to lands, rents, goods, and in all matters of contract and dealing between party and party, their personal law if both parties belonged to the same community, and by the law and usages of the defendant if they belonged to different communities. The English common law in its application to Hindus and Mahomedans in the matters enumerated in the statute was to that extent superseded, but in other matters the English common law unless it was inconsistent with statute or Indian conditions continued to apply. Similar statutes were passed enjoining the Courts in the Presidency towns of Madras and Bombay in 1797 (37 Geo. III c. 142, s. 13) to apply in the enumerated matters the personal law of the parties. It may however be observed that by the Supreme Court charters English law, not in its entirety but as nearly as the circumstances of the place and of the inhabitants admit, was applied : Advocate General of Bengal v. Ranee Surnomove Dossee ([1864] 9 M.I.A. 387). In the mufassal Courts by Bengal Regulation III of 1793 in respect of Bengal, by Regulation II of 1802 in respect of Madras, it was ordained that where no specific rule existed the Courts were to act according to "justice, equity and good conscience" which expression was interpreted to mean the rules of English common law in so far as they were applicable to Indian society and circumstances : Waghela Rajsanji v. Shekh Masludin ([1887] 14 I.A. 89). The Bombay Regulation IV of 1827 provided by section 26 that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government; in the absence of such acts and regulations the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage equity and good conscience. By the Letters Patents of the High Courts of the three principal Courts of Calcutta, Madras and Bombay by cls. 19 in exercise of the original jurisdiction law or equity to be applied was such law or equity which would have been applied if the Letters Patents had not been issued. By cl. 20 in respect of suits tried in exercise of the extraordinary original jurisdiction, and by cl. 21 in respect of the appellate jurisdiction, the High Courts were directed to apply law or equity and the

rule of good conscience which the Court in which the proceeding was originally instituted would have applied. Similar provisions were made in the Letters Patents of the Allahabad, Patna, Lahore and Nagpur High Courts by cls. 13 & 14 and in respect of Jammu & Kashmir High Court by cls. 14 & 15, and in respect of Rajasthan by cls. 33 & 34 of the Rajasthan High Court Ordinance, 1949. The jurisdiction of the Assam and Orissa High Courts was derived from their respective parent High Courts - the Calcutta High Court and the Patna High Court. In the Courts in the mufassal, the Civil Courts Acts e.g. Bengal, Agra and Assam Civil Courts Act, 1887 section 37; the Punjab Laws Act, 1872, section 5; the Central Provinces Laws Act, 1875, ss. 5, 6; the Oudh Laws Act, 1876, section 3 require the Courts to decide cases according to justice, equity and good conscience. There can therefore be no doubt that the Courts which functioned in the former British India territory were enjoined to decide cases not governed by any specific statutory rules according to justice, equity and good conscience, which meant rules of English common law in so far as they were applicable to Indian society and circumstances.

By a long course of decisions of the High Courts in India the rule of the English common law that the Crown is not, unless expressly named or clearly intended, bound by a statute was applied in India. In The Secretary of State in Council of India v. Bombay Landing and Shipping Co. Ltd. (5 Bom. H.C.R. O.C.J. 23) the Secretary of State for India claimed priority in the payment of a debt in the course of winding up of a company and it was held by the High Court of Bombay that a judgment debt due to the Crown is in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there be no special legislative provision affecting that right in the particular case. The Court held that as the Crown is not, either expressly or by implication, bound by the Indian Companies' Act (X of 1866), and as an order made under that Act for the winding up of a Company does not work any alteration of property against which execution is sought, such an order does not enable the Court to stay the execution of a judgment debt due to the Crown, or to the Secretary of State in Council for India. Westropp, J., who delivered the judgment of the Court after an exhaustive review of the earlier authorities observed :

> "The King, by his prerogative, regularly is to be preferred, in payment of his duty or debt, before any subject although the King's debt or duty be the latter". The learned Judge also observed that the rule was recognised by the laws of many countries as applicable to the claims of the Sovereign or the State, e.g. France, Spain, America and Scotland and that principle was no novelty in India, because at an earlier date it was promulgated by Hindu jurists Yajnavalkya and others.

In The Secretary of State for India v. Mathurahbai and Ors. (I.L.R. 14 Bom. 213) the rule was held to apply to India as a rule of construction of statutes. In that case the inhabitants of a village sued to establish their right of grazing their cattle on certain Government land and for an injunction restraining the Government from interfering with their right. It was held by the High Court of Bombay that the right of free pasturage which the plaintiffs enjoyed did not necessarily confer that right on any particular piece of land, and that section 26 of the Limitation Act 15 of 1877 did not bind the Secretary of State. It was also applied in three later decisions of the Bombay High Court : Hiranand Khushiram Kirpalani v. Secretary of State; (I.L.R. 58 Bom. 635) Secretary of State v. Municipal Corporation Bombay (No. 1) (I.L.R. 59 Bom. 681) and Province of Bombay v. The Municipal Corporation of Bombay (I.L.R. [1944] Bom. 45). In the first case the Secretary of State was held not bound by ss. 305, 489 and 491 of the Bombay City Municipal Act, 1888, which deal with levelling, metalling or paying, sewering, draining, channelling and lighting of private streets and with execution of that work to the satisfaction of the Commissioner, if the work be not done in accordance with the requisition and for recovery of the expenses incurred in that behalf. In the

second case, the Court held that the Crown was bound by necessary implication in respect of the charge which arises under s. 212 of the Bombay City Municipal Act 3 of 1888, that section being an integral part of the general scheme of the Act imposing tax on land in Bombay including Government land. In the third case the Bombay High Court observed that the general principle is that the Crown is not bound by legislation in which it is not named expressly or by necessary implication. But reading the relevant sections in the Act relating to the water supply it appeared that it would be impossible to carry them out with reasonable efficiency, unless Government was bound by them. The view of the High Court in the last judgment that the Province was bound by the statute by implication was overruled by the Judicial Committee in Province of Bombay v. Municipal Corporation of the City of Bombay and Another (I.L.R. 73 I.A. 271) to which I will presently refer. The Madras High Court in Bell v. The Municipal Commissioners for the City of Madras (I.L.R. 25 Mad. 457) also upheld the rule which prevailed in the Bombay High Court that the Crown is not bound by a statute unless expressly named or clearly intended. In that case the Superintendent of the Gun Carriage Factory in Madras brought timber belonging to Government into Madras without taking out a licence and paying the license fee prescribed by section 341 of the City of Madras Municipal Act. The Court held that the timber brought into Madras by or on behalf of Government was liable to the duty imposed by s. 341 of the City of Madras Municipal Act, although Government was not named in the section. Bhashyam Ayyangar, J., entered upon a detailed analysis of the case law and set out certain principles at p. 500. The learned Judge was of the view that "the canon of interpretation of Statutes that the prerogative or rights of the Crown cannot be taken away except by express words or necessary implication, is as applicable to the Statutes passed by the Indian Legislatures as to Parliamentary and Colonial Statutes". But he held that "the English law as to the exemption of the Crown and Crown property from payment of tolls, poor-rates and other taxes, local or imperial, imposed by statutes rests partly upon historical reasons and principally upon judicial decisions which do not proceed upon a course of reasoning or principle which will be binding on Indian Courts". It is not necessary to express any opinion on the question whether the general exception engrafted by the learned Judge on the rule in so far as it relates to taxing statute is wholly correct and applied to all taxing statutes in India.

The Municipal Corporation of Calcutta is, it may be recalled, seeking to collect the license fee by prosecuting the State of West Bengal, but the primary purpose of the prosecution is to enforce compliance with the provisions relating to the conduct of a market by compelling the State to take out a license, and paying a fee in lieu of services rendered to the owners of the markets.

These decisions were affirmed by the Judicial Committee in Province of Bombay v. Municipal Corporation of the City of Bombay and Another (L.A. 73 L.A. 271). The question which fell to be determined was whether by section 222(1) and section 265 of the City of Bombay Municipal Act, 1888, which invested the Municipality with power to carry water-mains through, across or under any street and "into, through or under any land whatsoever within the city" bound the Crown in whom the lands were vested either expressly or by necessary implication. The Judicial Committee observed that the general principle applicable in England in deciding whether the Crown is bound by a statute - that it must be expressly named or be bound by necessary implication - applies to Indian legislation. The Board observed at p. 274 :

> "The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, "Roy n'est lie per ascun statute si il ne soit expressment nosme". But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication". If, that is to say, it is manifest from the vary terms of the statute, that it was the intention of

> the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions".

It is true that counsel appearing before the Judicial Committee accepted the correctness of the rule "that the question whether or not the Crown is bound by a statute is no different in the case of Indian legislation from that which has long been applied in England". But the judgment of the Judicial Committee did not proceed upon a concession : the Board expressly observed that they regarded the rule "as correct".

The Union of India now includes territory of the former Indian States in which the law as originally existing and which the Courts are enjoined to apply may have been somewhat different. But that is not peculiar to the application of the rule of interpretation which was adopted by the Courts in British India that the State shall not be deemed to be bound by an enactment unless it is expressly named or by clear intendment included in the statute. Even in respect of matters of personal law, procedure and jurisdiction of the Courts and in other matters where uniform statutes do not apply differences do arise and must be determined according to the law and jurisdiction inherited by the Courts administering justice. But the present case concerns the administration of the law in the town of Calcutta which has for nearly 250 years been governed by the English common law as adopted by the various Acts, Regulations and finally by the Letters Patents. It may also be necessary to observe that we are not called upon to decide whether all the prerogatives of the British Crown have been incorporated in our system of law. Some of those are so wholly inconsistent with the system of law - personal and common - in India, that they have not been held applicable, e.g. the rule of English law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise has never been introduced in India so as to create forfeiture of lands held in Calcutta or the mofussil by an alien and devised by will for charitable purposes. Mayor of the City of Lyons v. The East India Company (L.R.I. Moare's I.A. 173) : the English law of felo de se and forfeiture of goods does not extend to a Hindu committing suicide : Advocate General of Bengal v. Ranee Surnomoye Dossee ([1864] 9 M.I.A.). But the rule that the Crown debt is entitled to priority in payment of debts due to it has been adopted, and the State is entitled to priority in payment of debts due to it : The Secretary of State for India in Council v. The Bombay Landing & Shipping Co. Ltd. (5 Bom. H.C.R. O.C.J. 23) and M/s. Builders Supply Corporation v. The Union of India (A.I.R. [1965] S.C. 1061). As I have already stated the adoption of the English law was not in its entirety, but as nearly as the circumstances of the case and of the inhabitants of the place admit. It would be confusing the issue to hold that because some prerogatives have not been adopted, no prerogative of the State may have any place in our system of law. Again in considering the limited question as to the application of the rule of interpretation under discussion, it would be an idle exercise to enter upon a detailed discussion of the prerogatives which have and which have not been assimilated in our system of law.

In Director of Rationing & Distribution v. The Corporation of Calcutta & Ors. ([1961] 1 S.C.R. 158) this Court regarded the rule as one of interpretation, and it is so expressly stated in State of West Bengal v. Union of India ([1964] 1 S.C.R. 371); Sri Vankata Seetaramanjaneva Rice and Oil Mills v. State of Andhra Pradesh ([1964] 7 S.C.R. 456) and M/s. Builders Supply Corporation v. Union of India (A.I.R. [1965] S.C. 1061).

In England and the Colonies the rule has not been restricted to common Crown actions or the personal prerogatives of the Crown. It excludes from the operation of statutes all public servants acting under the authority of the Crown. It is well-settled that in the Colonies the executive

government represents the Crown as it does in England, and therefore the Executive Government of the Common-wealth of Australia or of a State in Australia is not bound by a statute unless the intention that it shall be bound is apparent : Roberts v. Ahern ([1904] 1 C.L.R. 406). Again because of the origin of the rule, its protection is not restricted to the property and rights of the Crown alone, and applies to State property, actions and rights.

When a statute expressly includes the State in its operation, no difficulty arises in giving effect to the statute. Even if there be no express provision, the State may be bound by clear intendment of the statute, having regard to the nature of the legislation, if the beneficent purpose intended to be served thereby would be wholly frustrated unless the State is bound. The rule of interpretation applies only when the Court has no indication either by express reference or by clear intendment in the statute : a presumption arises in such a case that the words of the statute even though general are not intended to bind the State. The question is one of presumed intention where the language, purpose and the nature of the statute give no clear indication and mere general words are used.

It was urged that in the Act there are certain provisions which expressly refer to the liability of the State and the binding character of those provisions against the State is not in doubt. But that cannot be a ground for holding that the remaining provisions apply to the State. The Judicial Committee in Province of Bombay v. Municipal Corporation of the City of Bombay and Another (L.R. 73 I.A. 271) observed :

> "They (the Judicial Committee) were pressed with the argument that such an inference might be drawn from certain express references to the Crown in other parts of the Act itself, and from the fact that by the Government Building Act, 1899, the legislature had provided for the exemption of Government buildings from certain municipal laws. The argument was that no express provisions saving the rights of the Crown would be necessary if the Crown were already immune. This is not an unfamiliar argument, but, as has been said many times, such provisions may often be inserted in one part of an Act, or in a later general Act, ex abundanti cautela, and, so far as the Act of 1899 is concerned, it is fallacious to argue that the legislature which passed it must have had in mind the particular sections of the Act of 1888 which are not under review, or that it was impliedly interpreting those sections".

The argument that the rule had not received recognition in the High Courts in India, before the judgment of the Judicial Committee reported in Province of Bombay v. Municipal Corporation of the City of Bombay and Anr. (L.R. 73 I.A. 271) was pronounced, is belied by the course of authorities summarised earlier. There was practically a consistent course of authorities prior to the Constitution in support of the principle which was affirmed by the Judicial Committee in Province of Bombay v. Municipal Corporation of the City of Bombay and Another (L.R. 73 I.A. 271).

The origin of the rule undoubtedly was in the prerogative of the Crown, but there is even in the country of its origin authority for the view that the rule is regarded primarily as one of construction. In Madras Electric Supply Corporation Ltd. v. Boarland ([1955] A.C. 667 H.L.), in dealing with the question whether "the immunity" of the Crown "from taxation depends on the construction of the statute or arises from the prerogative in some other way", Lord MacDermott observed :

> "Whatever ideas may once have prevailed on the subject it is, in my opinion, today impossible to uphold the view that the Crown can find in the prerogative an immunity from tax if the statute in question, according to its true construction,

> includes the Crown amongst those made liable to the tax it imposes. The appropriate rule as I understand it is that, in an Act of Parliament, general words shall not bind the Crown to its prejudice unless by express provision or necessary implication. That, however, is, and has long been, regarded as a rule of construction.
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Lord Reid concurred in the view that the immunity depends upon construction of the statute rather than on royal prerogative. Lord Keith of Avonholm appeared to express a different view. In India the rule has been accepted as a rule of interpretation of statutes and applicable to all statutes which governed State actions, authority or property.

Is there any reason then to hold that on January 26, 1950, the rule which previously applied to interpretation of statutes ceased to apply thereto on the date on which the Constitution came into force ?

The rule of interpretation was, as already stated, a settled rule and was law in force in the territory of India within the meaning of Art. 372 of the Constitution. I am unable to agree with the contention that a rule of interpretation is not "law in force" within the meaning of Art. 372. There is no warrant for holding that a rule of interpretation which is incorporated in a statute e.g. The Indian Succession Act, or the General Clauses Act is law in force, and not a rule which was enunciated by the highest Court in the realm. The circumstance that a rule of interpretation is a rule for determination of intention of the legislature and for its application requires determination of facts and circumstances outside the statute will not make it any the less a rule of law. Acceptance of the proposition that a decision of the highest judicial tribunal before the Constitution is law does not involve the view that it is immutable. A statute may be repealed, and even retrospectively, it would then cease to be in operation : a decision which in the view of this Court is erroneous may be overruled and may cease to be regarded as law, but till then it is law in force. It may be pertinent to bear in mind that it was never seriously argued before us that the judgment of the Judicial Committee which affirmed the view expressed in a long course of decisions was erroneous in the circumstances then prevailing.

It was said by counsel for the Corporation that it is one of the fundamental principles of our Constitution that there is equality between the State and the citizens and discrimination is not permissible in the application of a law generally expressed. It was claimed that if other occupiers of markets take out licenses, and comply with the regulatory provisions of the Act, and the State is not obliged to abide by the rules, there would be unequal treatment between owners similarly situate and that the State may ignore the rules regulating the markets, and on that account the public interest would suffer. There is no reason however to assume that the State under a democratic Constitution would be impervious to public opinion, and would merely because it is not bound by a regulatory Act perpetuate a nuisance. If it be assumed that such be the attitude of the State there would be nothing to prevent the State from enacting express legislation excluding itself from the operation of the regulatory laws relating to markets. I do not think that the guarantee of the equal protection clause of the Constitution extends to any differential treatment which may result in the application of a special rule of interpretation between the State and the citizens. Nor can it be said that under our Constitution equality in matters of interpretation between the State and the citizens is predicated in all respects. It must be remembered that our Constitutional set-up is built up not anew, but on the foundations of our old institutions. The political set up is indisputably changed, but can it be said that our concept of a State is so fundamentally altered that the traditional view about State privileges, immunities and rights must be abandoned because they had a foreign origin, and on the

supposed theory of equality between the State and the citizens - a theory which seeks to equate common good of the people represented by the State with the rights and obligations of the individual - the Court should decline to give effect to the State privileges and immunities ? If it be granted that the State in making laws is entitled to select itself for special treatment different from the treatment accorded to the citizen - and it is not denied that in order to achieve public good it can do so even if there is a differential treatment between the State and the citizen - is there any reason to suppose that a statute which evidently was framed on the basis of the well-settled rule of the pre-Constitution days which accorded to the State a special treatment in the matter of interpretation of statutes must be deemed to have a different meaning on the supposition that the Constitution has sought to impose equality between the State and the citizen ? The fact that in our federal set-up sovereignty is divided between the Union and the States, and in the application of the rule that the State is not bound by a statute, unless expressly named or clearly implied, conflicts between the State enacting a law and the Union, or another State may arise does not give rise to any insuperable difficulty which renders the rule in applicable to the changed circumstances, for it is the State which enacts a legislation in terms general which alone may claim benefit of the rule of interpretation, and not any other State.

It was urged that even if the rule that the State is not, unless expressly named or by necessary implication intended, to be bound, applies, its application must be restricted to cases where an action of the State in its sovereign capacity is in issue. Where, however, the State is following a commercial or trading activity, the rule can have no application. But in the context of modern notions of the functions of a welfare State, it is difficult to regard any particular activity of the State as exclusively trading. The State was originally regarded as merely concerned with the maintenance of law and order, and was not concerned with any trading activity. But that is now an exploded doctrine. For the welfare of the people the State does and is required in modern times to enter into many trading activities, e.g. to effectuate control of prices, prevent hoarding and distribute commodities in short supply, besides maintenance of departments like Posts, Telegraphs, Railways, Telephones etc., activities which may have been regarded as trading activities in the past. But if initiation and completion of schemes for social welfare of the people be regarded as an attribute of the exercise of sovereign authority, it is difficult to regard activities undertaken by the State for setting up markets for effective distribution of goods as merely trading. Assuming that conducting a market in a metropolitan town may be regarded in a sense as a trading activity there is, in my judgment, no sufficient reason to justify any distinction in the application of the rule of interpretation to statutes concerning sovereign authority and trading activity.

Under the provisions of the Calcutta Municipal Act the owner or occupier of a market is required to take out a license. But there is no express reference to the State : nor is there anything peculiar in the nature, purpose and object or in the language used in the enactment relating to the issue of licenses which may suggest that the State must by necessary implication be bound by its provisions. I am, therefore, of the view that the High Court was in error in holding that the State of West Bengal was bound by the provisions relating to the issue of licenses for occupation or conduct of a market.

I do not deem it necessary to consider the argument that since the State cannot be imprisoned in enforcement of the general provisions, and imposing a fine upon the State would be futile because the hand which pays and the hand which receives the fine is the same, an implication arises that it was not intended that the State should be bound by section 218 of the Calcutta Municipal Act. In my view the penal provision of section 541 is, though in form a provision creating an offence, intended to enable the Corporation to collect the license fee. The offender and the recipient of fine are therefore not the same bodies.

Bachawat, J. - By the common law of England, the Crown is not bound by a statute save by express provision or necessary implication. This rule was applied to Indian legislation in Province of Bombay v. Municipal Corporation of the City of Bombay ([1946] L.R. 73 I.A. 271). In The Director of Rationing and Distribution v. Corporation of Calcutta ([1961] 1 S.C.R. 158), this Court followed the Privy Council decision.

On the subject of the royal prerogative regarding statutes Chitty in his book on "Prerogatives of the Crown at p. 382 said "The general rule clearly is, that though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him". It has been said that the reason of the rule is that "it is inferred prima facie, that the law made by the Crown, with the assent of the Lords and the Commons, is made for the subjects, and not for the Crown", per Alderson, B. in A.G. v. Bonaldson (10 M. & W. 117, 124). Two rules follow from the proposition that the law is prima facie made for subjects and not for the Crown : (i) the Crown is not bound by a statute save by express words or by necessary implication, (ii) that the Crown may take advantage of a statute, though not bound by it, unless expressly or impliedly prohibited from doing so. This Court categorically rejected the second rule in V. S. Rice and Oil Mills v. State of Andhra Pradesh ([1964] 7 S.C.R. 456, 463, 463-4) and held that the State cannot be permitted to rely upon the artificial rule that the State can take advantage of a statute though not bound by it. I think that this Court should have refused to recognise the first rule also.

The exception of the Crown from the operation of statutes is based sometimes on the royal prerogative, and sometimes on a rule of construction. Originally, the exemption was claimed and allowed on the ground of the prerogative. The King by virtue of his prerogative could claim that a statute was made for subjects only and he stood outside it. He waived this prerogative right by assenting to a statute which bound him expressly or by necessary implication. The immunity of the Crown is now couched in the form of a rule of construction. In spite of this modern disguise, there is high authority for the view that this immunity is still based upon the prerogative. In Madras Electric Supply Corporation Ltd. v. Boarland ([1955] A.C. 667, 694) Lord Keith said :

> "The true explanation, easily understandable on historical and legal grounds, is that words in a statute capable of applying to the Crown may be overridden in the exercise of the prerogative. That is necessarily involved in the oft-repeated phrase that the King is not bound by a statute unless by express words or by clear implication. If the statute does not apply to him there can be no question of his being bound by it. It is only because it can apply to him that appeal to the prerogative is necessary. The conception of the prerogative, in my view, is of something that stands outside the statute, on which the Crown can rely, to control the operation of the statute so far as it prejudices the Crown".

But the prerogative right of overriding statutes did not extend to India. When the Crown of England became sovereign in India, it acquired such prerogative rights as were enjoyed by the former Indian sovereigns and such other prerogative rights as may be said to inhere in every sovereign power. But the common law was never bodily imported into India and the Crown never possessed in India all the prerogatives allowed to the Crown by the law of England. In The Mayor of the City of Lyons v. Hon. East India Company ([1837] I M.I.A. 173), the Privy Council held that the common law as to alienage and the royal prerogative of forfeiture of the lands held by a deceased alien on the ground of the incapacity of the alien to hold real property and transmit it by devise or descent was never introduced in the Presidency town of Calcutta or the mofussil. Such a right was not enjoyed by the Indian sovereign, nor was it a necessary incident of sovereignty. Lord Brougham said at pp. 280,

281, 282 and 286 of the Report.

> "But it seems to be contended both here and below, that there is something in the law incapacitating aliens, which makes it, so to speak, of necessary application wheresoever the sovereignty of the Crown is established, as if it were inherent in the nature of sovereign power. To this a sufficient answer has been already afforded, if the acts of the sovereign power to which we have referred, show that no such application to Bengal ever was contemplated, unless direct authority can be produced to show that the right is inseparable from the sovereignty, and, as it were, an essential part of it. . . . . It certainly is not an incident to sovereignty; in several countries the sovereign has no such right ..... Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purpose of protecting the State; and it is not contended that these branches are extended to Bengal. Mines of precious metals, treasuretrove, royal fish, are all vested in the Crown, for the purpose of maintaining its power, and enabling it to defend the State. They are not enjoyed by the sovereign in all or even in most countries, and no one has said that they extend to the East Indian possessions of the British Crown. . . . . .
>
> Upon the whole, their Lordships are of opinion that the law, incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into Calcutta".

The common law of attainder or corruption of blood and the prerogative right of forfeiture or escheat on conviction of treason or felony now abolished by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23) did not prevail in India, see Papamma v. Appa Rau (I.L.R. 16 Mad. 384, 396). Nor did the English law as felo de se and the forfeiture of goods and chattels consequent upon suicide apply to a Hindu, though a British subject, committing suicide at Calcutta, see Advocate-General of Calcutta v. Ranee Surnomoye Dossee (9 M.I.A. 387).

At Common law, no proceedings, civil or criminal, were maintainable against the Sovereign in person for, it was said, that as the Courts were her own they could have no jurisdiction over her, see Halsbury's Law of England, Vol. 7, Art. 544, p. 249. In India, the government did not enjoy a general immunity from suits and legal proceedings, see The Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India (5 Bom. H.C.R. Appendix 1). The subjection of the Government to suits where it was liable to be sued before the Constitution is preserved by Art. 300 of the Constitution. Though orders of mandamus and injunction cannot issue to the Crown in England, see Halsbury's Laws of England, 3rd Edn. Vol. II, Art. 25 and 184 pages 16 and 98, such orders can issue to Government under Arts. 32 and 226 of the Constitution. See also State of Bihar v. Sonavati Kumari ([1961] 1 S.C.R. 728). Province of Bombay v. Khusaldas Advani ([1950] S.C.R. 621, 697). In England the King by his prerogative may sue in what Court he pleases, see Craies on Statute law, 6th Edn., p. 435. The prerogative of choice of Courts by the Crown never applied in India. The State can sue only in a Court competent to entertain the suit under the general law. In England it was the prerogative of the Crown not to pay costs in any judicial proceeding, see Craies on Statute Law, 6th edn., p. 432. But this prerogative was never recognised in India. The State pays and receives costs like a private individual.

The Indian law did not deny that the Crown had certain prerogatives. The Crown inherited the prerogatives enjoyed by the former Indian Sovereigns and had other prerogatives inherent in the

nature of sovereignty. It was the prerogative of the King in Council to hear appeals and petitions from his Indian subjects, see Modee Kai Khocscroo Hormusjee v. Cooverbhaee (6 M.I.A. 448, 455). This prerogative was taken away by the Abolition of Privy Council Jurisdiction Act 1949. When there is a failure of heirs on a person dying intestate, the Crown had the prerogative right to take his property by escheat, and this right was said to rest on grounds of general or universal law, see The Collector of Masulipatam v. Cavaly Vencata Narrainapa ([1859-61] 8 M.I.A. 500), Sonet Koor v. Himmut Bahadoor ([1876] I.L.R. 1 Cal. 391) Mussammat Khursaidi Begum v. Secretary of State for India ([1925] I.L.R. 5 Patna 538). The right of the Government to take the property by escheat or lapse on the failure of heirs or as bona vacantia for want of a rightful owner is recognised by Art. 300 of the Constitution. The prerogative right of the Crown to priority in payment of its claims was recognised on the ground that this right did not arise out of any peculiar quality in the writ of extent and the Hindu, Muhammadan and Portuguese Sovereigns had enjoyed a similar right, see Secretary of State for India v. Bombay Landing and Shipping Company ([1868] 5 Bom. H.C.R. 23). The extent of this prerogative right may be limited by a statutory scheme of administration, see Governor-General in Council v. Shiromani Sugar Mills Ltd. (in liquidation) ([1946] F.C.R. 40). It has been held that the Government continues to enjoy this prerogative right of precedence after the Constitution came into force, see Builders Supply Corporation v. Union of India ([1965] 2 S.C.R. 289), Bank of India v. J. Boman (A.I.R. 1956 Bom. 305). The Crown as parens partriae had other prerogative rights. The Crown may have also enjoyed in India certain prerogative rights which were not allowed to the Crown of England by the common law and those prerogatives might vary in different parts of India, see Bell v. Municipal Commissioners for the City of Madras (I.L.R. 25 Mad. 457). Gopalan v. State of Madras ([1902] I.L.R. 1958 Mad. 798, 802). But in India the Crown never enjoyed the general prerogative of overriding a statute and standing outside it. Such a right is not indigenous to India, nor is it a necessary incident of sovereignty.

In The Secretary of State for India in Council v. Bombay Landing and Shipping Company ([1868] 5 Bom. H.C.R. 23), Ganpat Putava v. The Collector of Canars ([1875] I.L.R. I Bom. 1) the Bombay High Court held that a prerogative of the Crown cannot be taken away except by express words or by necessary implication. To appreciate these rulings, it is necessary to remember that until 1861 there were constitutional restrictions on the power of the Indian legislature to affect the prerogative of the Crown, see Statutes 3 and 4 William cap. LXXV section 43 and 16 and 17 Vict. cap XCV section 43, which were swept away by later statutes, see the Indian Councils Act, 1861 section 24, the Government of India Act 1915, section 84(1)(A), the Government of India (Amendment) Act, 1917, section 2 as interpreted in The Secretary of State v. Bombay Municipality (37 Bom. L.R. 499), with one exception introduced by the Government of India Act, 1935, section 110(b)(ii). Having regard to this historical background, it was considered that the prerogative of the Crown was a very special subject matter and in the absence of express words or necessary implication, it should be presumed that general words of an Indian Act were not intended to affect the prerogative. In Bells case (I.L.R. 25 Mad. 457) Sir Bhashyam Ayyangar J. therefore pointed out that the doctrine that the prerogative could not be taken away save by express words or by necessary implication could be based on the maxim generalia specialibus non derogant. This maxim does not exempt the Crown from the operation of statutes generally whenever a statute prejudicially affects it. In order to invoke this doctrine, the Crown must establish that it has some prerogative right which it claims to be outside the purview of the statute.

As pointed out already under the Indian law the Crown could not claim a general exemption from statutes on the ground of the prerogative. But there is high authority for the view that such an exemption is allowed to the Crown in England on the basis of a rule of construction. In Madras Electric Supply Corporation v. Boarland ([1955] A.C. 667, 685) at p. 685 Lord Macdermott said

that the rule that in an Act of Parliament general words shall not bind the Crown to its prejudice unless by express words or by necessary implication has long been regarded as a rule of construction. This rule has a wide sweep, and is not limited to cases where the prerogative right or property of the Crown is in question. It protects the Crown whenever general words in a statute may operate to its prejudice. See Broom's Legal Maxims, 10th Edn., pp. 39-40, Glanville L. Williams' Crown Proceedings, p. 48 (f.n.). A review of the decided cases shows that until the decision of the Privy Council in the Province of Bombays case ([1946] L.R. 73 I.A. 271) this wide rule of construction had not obtained a firm foothold in India. In Verubai v. The Collector of Nasik (I.L.R. 7 Bom. 552), the Bombay High Court held that the Government was bound by Art. 167 of Schedule II of the Indian Limitation Act, 1877. Westropp, C.J. said :

> "The legislature in passing the Limitation Act of 1871, which is applicable to this case, where it intends that Government should have a longer period than the subject, has been careful expressly to say so, as for instance, in article 150 of Schedule II, where the period assigned to suits brought by the Secretary of State is sixty years from the time of the accruer of the cause of action; but the Legislature makes no difference between Government and its subjects in the case of appeals or applications - see Govind Lakshman v. Narayan Moreshvar (11 Bom. H.C.R. 111)".

In Appava v. The Collector of Vizagapatam ([1882] I.L.R. 4 Mad. 135), the Madras High Court held that the Government was bound by Art. 178 of the Indian Limitation Act, 1877. Turner, C.J. and Muttusami Ayyar, J. said :

> "If the maxim on which the counsel for the Crown relies applies to this country - and the Crown is not bound by the provisions of any Act unless they are expressly declared binding on the Crown - it may be inferred from the circumstance that this Act contains provisions prescribing a Limitation to the Government for the institution of suits and presentation of criminal appeals that the Legislature contemplated that the Crown should be subject to the provisions of the Act and should enjoy a privilege to the extent expressed and no further - expressum facit cessare tacitum"

In the last two cases, the Courts did not apply the strict English rule that the Crown under the prerogative was not bound by the statute of limitation, see Bank Voor Handel v. Hungarian Administrator ([1954] 1 A.E.R. 969, 984 (H.L.). In The Secretary of State for India v. Mathurabhai ([1889] I.L.R. 14 Bom. 213) Sargent, C.J. was inclined to apply the English rule that the Crown is not included in an Act unless there are words to that effect and to hold that the Government was not bound by section 26 of the Indian Limitation Act, 1877. But he observed that it was not necessary to express a decided opinion on the question. In Bells, case (I.L.R. 25 Mad. 457), the Madras High Court held that the Government was bound by the taxing provisions of section 341 of the City of Madras Municipal Act, 1884, though not named in that section. Sir Bhashyam Ayyangar, J. reviewed the earlier cases and decisively rejected the general claim of immunity of the Crown from a statute imposing a tax on the basis of any prerogative right or supposed rule of construction. In Motilal v. The Collector of Ahmedabad ([1906] I.L.R. 31 Bom. 86, 89). Russel, Acting C.J. and Beaman, J. doubted the application of the English rule of construction in this country. They said :

> "It is contended that the maxim of English law that the Crown cannot be bound by any statute unless expressly named therein applies, and reference is made to the cases of Ganpat Putaya v. The Collector of Kanara ([1875] I.L.R. I Bom. 1) The Secretary

> of State for India v. Mathurabhai ([1889] I.L.R. 14 Bom. 213). Without in any way wishing to prejudge the question or fetter future argument, we may say that as at present advised we entertain some doubt whether an exact analogy exists between the privileges and immunities of the Crown under the Constitutional Law of England and those of servants of the Indian Government".

The full Bench left the question open. In The Secretary of State v. Mohamed Yysuf ([1919] 21 Bom. L.R. 1120, 1136), Pratt J. held that ss. 17(2) (vii) and 90 of the Indian Registration Act, 1908 contained an implication that the Crown was bound by the Act. In Hiranand Khushiram v. Secretary of State for India ([1934] I.L.R. 58 Bom. 635), Beaumont, C.J. and Rangnekar, J. applied the strict English rule of construction and held that since the Crown was not named either expressly or by necessary implication in ss. 305, 489 and 491 of the City of Bombay Municipal Act, 1888, the Crown was not bound by those sections. Soon thereafter, the same learned Judges held in Secretary of State for India v. The Municipal Corporation of Bombay (37 Bom. L.R. 499), that the Crown was bound by section 212 of the City of Bombay Municipal Act, 1888 by necessary implication, though not expressly named therein. In Province of Bombay v. The Municipal Corporation for the City of Bombay (I.L.R. 1944 Bom. 95), Beaumont, C.J. and Rajadhayaksha, J. held that ss. 222(1) and 265 of the City of Bombay Municipal Act, 1888 by necessary implication bound the Crown. They refused to follow the dictum of Day, J. in Corton Local Board v. Prison Commissioner ([1904] 2 K.B. 165) that the test of necessary implication binding the Crown involves that the legislation is unmeaning unless the Crown is bound. They said :

> "..... if it can be shown that legislation cannot operate with reasonable efficiency, unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication".

This decision was reversed by the Privy Council on appeal in Province of Bombay's case ([1946] L.R. 73 I.A. 271). The Privy Council rejected the test laid down by the Bombay High Court. They held that the strict English rule of construction exempting the Crown from the operation of statutes applied in the case of Indian legislation. The parties appearing before the Privy Council concurred in accepting this view. The attention of the Privy Council was not drawn to Bell's case (I.L.R. 25 Mad. 457) and the propriety of applying the English rule to Indian legislation was not considered. Lord Du Parcq said :

> "If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound".

They held that the Crown was not bound by ss. 222(1) and 265 of the City of Bombay Municipal Act, 1888 and an inference of necessary implication binding the Crown could not be drawn from certain express references to the Crown in other parts of the same Act and from the exemption of the Crown in a later general Act since such provisions are often inserted ex abundanti cautela. It is to be noticed that in several earlier decisions the Bombay High Court had drawn an inference of necessary implication binding the Crown in other sections of the same Act. Moreover, except the Bombay High Court, no other High Court held that the English rule of Crown exemption from statutes applied to India. Even in Bombay, some of the Judges doubted the applicability of the rule to Indian conditions. The imposition of the strict rule of construction by the Privy Council decision was received very unfavourably in India. In Corporation of Calcutta v. Sub Postmaster, Dharamtala

([1948] 54 C.W.N. 429), the Calcutta High Court felt bound to follow the Privy Council decision, and held that the Government was not bound by the provisions of the Calcutta Municipal Act, 1923. Mookerjee, J., however, said :

> "Had the question been res integra and had it been open to us to consider the question untrammelled by a decision of the Judicial Committee we might have considered the reasonableness and propriety of applying the principles as enunciated by the English Courts and also how far they should be applied to Indian conditions. For some years past the position of the Crown with regard to liability and procedure has been considered by the lawyers in England as being antiquated and absurd as contrasted with that of ordinary individuals and reform in this respect has been considered to be long overdue".

In The Corporation of Calcutta v. Director of Rationing and Distribution (A.I.R. 1955 Cal. 282), the Calcutta High Court refused to follow the Privy Council decision and held that the State was bound by section 386(1)(a) of the Calcutta Municipal Act, 1923. This decision was reversed in The Director of Rationing and Distribution's case ([1961] 1 S.C.R. 158) and a majority of a Bench of this Court held that the law was correctly laid down in the Province of Bombay's case ([1964] L.R. 73 I.A. 271) and continued to apply in this country even after the Constitution came into force, and the State was not bound by section 386(1)(a) of the Calcutta Municipal Act, 1923. Wanchoo, J. dissented and held that the rule laid down by the Privy Council did not apply to the construction of Indian statutes after the Constitution came into force. Later decisions of this Court disclose a tendency to relax and soften the rigour of this rule. In Sri Venkata Seetaramanjaneya Rice and Oil Mills and others v. State of Andhra Pradesh ([1964] 7 S.C.R. 456, 462) this Court held that an inference of necessary implication binding the State may be drawn if "the conclusion that the State is not bound by the specific provision of a given statute would hamper the working of the statute, or would lead to the anomalous position that the statute may lose its efficacy". In other words, the Court was inclined to revive the Bombay heresy rejected by the Privy Council.

With regard to this rule of exemption of the Crown from statutes, Glanville L. Williams in his book on "Crown Proceedings", 1948, pp. 53 and 54 said :

> "The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the vis inertiae. The chief objection to the rule is its difficulty of application.... With the great extension in the activities of the State and the number of servants employed by it, and with the modern idea, expressed in the Crown Proceedings Act, that the State should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than that it does not".

Thus, the artificial rule of construction has not escaped criticism even in England. This rule of construction is unsuitable to Indian conditions and should never have been applied to India. Before 1946 there was no settled course of decisions of the Indian Courts necessitating or justifying the application of this rule to the construction of Indian statutes. Rules of English law which could not suitably be applied to Indian conditions were not introduced even in the Presidency Town of Calcutta by 13 Geo III c. 63 or 21 Geo III c. 70 or any other cognate statute or by the Charter of Charles II in 1661 see The Mayor of the City of Lyons v. The Hon. East India Company ([1837] 1 M.I.A. 175, 246-9, 274-5) The Advocate General of Calcutta v. Ranee Surnomoyee Dossee (9 M.I.A. 387, 407-13, 424-30). Technical rules of English common law were not applied even in the

Presidency Towns if they clashed with principles of justice, equity and good conscience, see Abdul Kawder v. Mahomed Mera, (I.L.R. 4 Mad. 410) Mool Chand v. Alwar Chetty (I.L.R. 39 Mad. 584, 553). In the mofussil, common law had no force proprio vigore but the Judges were free to adopt and apply any rule of common law if it was consonant with principles of justice, equity and good conscience. Artificial rules of Common Law based on feudal notions had no application in India. In Mithibai v. Limii Nowroji Benaji ([1881] I.L.R. 5 Bom. 506, 531), the Bombay High Court refused to apply the rule in Shelley's case in a case arising between Parsis in the mofussil. In The State of Rajasthan v. Mst. Vidyawati ([1962] 2 Supp. S.C.R. 989, 1007) this Court refused to apply rules of immunity of the Crown based on old feudalistic notions. In interpreting a statute, it is the duty of the Court to give effect to the expressed intentions of the legislature. There is no compelling reason why the Courts in India should not give full effect to the general words of a statute on the basis of some artificial rule of construction prevailing in England.

No doubt, there are many Indian Acts which expressly provide that the Crown or the Government shall be bound by their provisions. See the Indian Arbitration Act No. 10 of 1940, section 43, Trades and Merchandise Marks Act No. 43 of 1958, section 130, the Factories Act No. 63 of 1948, section 116, the Oil Fields (Regulation and Development) Act No. 53 of 1948, the Mines Act, 1952, section 85. Some of these Acts are modelled on English statutes which contain similar provisions. In some Acts, the express provision binding the Government is inserted by way of abundant caution. But the bulk of the Indian legislation proceeds upon the assumption that the Government will be bound unless the contrary is stated. Many Acts like the Code of Civil Procedure, 1908 and the Indian Contract Act 1872 make special provisions for the Government in respect of particular matters on the assumption that in respect of all other matters the Government will be bound by the general provisions of the Act. The Indian Limitation Act 1882 provided a special period of limitation for suits by the Government on the assumption that the Government like the subjects will be bound by its other general provisions. To apply the technical rule of construction exempting the Crown from the operation of Indian statutes will be to stultify the intention of the legislature in most cases. The English Courts have gone to the length of deciding that the Crown is not bound even by general regulations as to public safety, see Cooper v. Hawkins ([1904] 2 K.B. 164). Such a result has not escaped criticism even in England. In India, no one has doubted that general regulations as to public safety bind the Government equally like the citizens.

The Director of Rationing and Distribution's case ([1961] 1 S.C.R. 158) left open the question whether the State could claim immunity from the provisions of a statute with regard to its trading or commercial activities. But the executive power of the State extends to the carrying on of a trade or business, see Art. 298 of the Constitution. On a question of construction of a statute, no rational distinction can be made between the trading and non-trading activities of the State. If the State is not bound by a statute, it would seem that it is not so bound in respect of all its activities.

In a country having a federal system of government, it is difficult to apply the rule of Crown exemption from statutes. In R. v. Sutton ([1908] 5 C.L.R. 789), the High Court of Australia held that this presumption should not be applied so as to bring about either State exemption from federal laws or federal exemption from State statutes. But the contrary opinion seems to have prevailed in later cases, see Minister of Works (W.A.) v. Gulson ([1944] 69 C.L.R. 338). The Commonwealth of Australia v. Bogle ([1953] 89 C.L.R. 229, 254). This branch of Australian law is discussed in detail by Dr. Wynes in his book on Legislative, Executive and Judicial Powers, 3rd Edition pp. 518 to 544. We should not import in this country either the English rule of implied exception of the Crown or the subtle distinctions engrafted on it by the Australian Courts. Our system of Government is federal in character. The taxing power is vested both in the Union and the States. Subject to certain

constitutional restrictions, the Union can tax the State and the State can tax the Union. There is no ground for presuming that the States are excluded from the scope of a general taxing statute enacted by Parliament or that the Union is outside the purview of the general words of a taxing statute enacted by a State legislature.

I am therefore of the opinion that the rule that the Government is not bound by a statute unless it is expressly named or bound by necessary implication does not prevail in this country and the decisions in the Province of Bombay's case ([1946] L.R. 73 I.A. 271) and The Director of Rationing and Distribution's case ([1961] 1. S.C.R. 158) and the subsequent decisions applying the rule to the construction of Indian Acts should not be followed. The imposition of this artificial rule has been harmful to our body politic. We have power to reconsider our previous decisions, see The Bengal Immunity Company Ltd. v. The State of Bihar ([1955] 2 S.C.R. 603). This is a fit case where we should exercise this power. If the rule of common law controlling the operation of a statute on the ground of the prerogative applied to India, it would be a law in force before the Constitution and would continue to be in force by virtue of Art. 372 of the Constitution. It would be the law in force because it would limit and control the operation of the existing Indian Acts. But we have ample power to say that this rule was not in force in India and the Indian law was not correctly laid down by the Privy Council in the Province of Bombay's case ([1946] L.R. 73 I.A. 271) and the decisions which followed it.

There is no presumption that the provisions of an Act do not bind the State (using the expression "State" in a compendious sense as including the Union and the States). In each case, it is a question of fair construction of the Act whether or not any particular provision of the Act binds the State. The intention of the legislature has to be gathered on a careful scrutiny of the Act in question. Particular care should be taken in scrutinising the provisions of a taxing or a penal Act. If the application of the Act leads to some absurdity, that may be a ground for holding that the State is excluded from its operation by necessary implication. If the only penalty for an offence is imprisonment, the State cannot be convicted of the offence, for the State cannot be locked up in prison. If the penalty for the offence is fine and the fine goes to the consolidated fund of the State, it may be presumed that the penal provision does not bind the State, for the legislature could not have intended that the State will be the payer as well as the receiver of the fine. Presumably, the Union is not bound by the Central Income-tax Act because if it paid income-tax, it will be both the payer and the receiver. Likewise, a State is prima facie not bound by a State Agricultural Income-tax Act where the tax is receivable by it. Moreover cases may conceivably arise where express provisions in a statute binding the State in respect of certain specific matters may give rise to the necessary implication that the State is not bound in respect of other matters.

The Calcutta Municipal Act, 1951 contains special provisions exempting the Government from some of its provisions. Section 167(2) exempts from the consolidated rate certain open spaces and parade grounds which are the property of the Government. Section 208(1)(b) exempts certain carriages and animals belonging to the Government from payment of tax on carriages and animals. Section 225(1)(c) proviso exempts carts which are the property of the Government from payment of registration fees. Sections 218(1) and 541(1)(b) are however framed in general terms and do not expressly exempt the Government from their operation. Under section 218(1) it is the duty of every person carrying on any of the trades mentioned in schedule IV to take out a licence and to pay the prescribed fee. Under section 541(1)(b) any person carrying on such a trade without taking out the licence is punishable with fine. Prima facie, the two provisions apply to all persons including the State Government. Section 218 is a taxing section and its object is to levy revenue for the municipality. There is no reason why the State Government like any other person should not take

out a license and pay the prescribed fee if it chooses to exercise or carry on a trade and why it should not be punished with fine under section 541(1)(b) if it chooses to carry on a trade without taking a license. By section 541(2), such fine, when levied, is taken by the Municipality in full satisfaction of the demand on account of the license Fee. Section 115 of the Act no doubt provides that all monies realised or realisable under the Act (other than fine levied by magistrates) shall be credited to the municipal fund. Reading sections 115 and 541(2) together it appears that the excepting words "other than fine levied by magistrates" in section 115 do not refer to the fine levied under section 541. The general provisions of section 115 must be read subject to the special provisions of section 541(2) and the fine realisable under section 541 is received by the Municipality. It follows that the State Government is the payer but is not the receiver of the fine. There is nothing to indicate that the State Government should be excluded from the purview of section 218(1) and section 541(1)(b). Section 218 renders the State liable to pay the license fee. Section 541(1) provides the remedy for the recovery of the fee in case of default in taking out the license and payment of the fee. If we are to hold that s. 218(1) applies to the State but section 541(1)(b) does not, the result would be that though the State is liable to pay the license fee, the Municipality will have no remedy against the State for the recovery of the fee. The legislature could not have contemplated such a result.

Section 541(1)(b) is a penal provision. But the State is not necessarily exempt from the operation of a statute having a punitive aspect. No doubt, under section 547(A) the Court is competent to direct imprisonment of the offender in default of the payment of fine under section 547(1)(b). Obviously, this provision cannot be applied to the State, because the State cannot be detained in prison. But there is no reason why section 541(1)(b) should not be applied to the State. In Rani Sonavati Kumari v. The State of Bihar ([1961] S.C.R. 728) this Court held that under the punitive provisions of O. 39, r. 2(3) of the Code of Civil Procedure, 1908, the Court could direct attachment of the property of the State for breach of an order of injunction, though the Court could not direct detention of the State in civil prison.

The High Court found that the State of West Bengal was carrying on a trade referred to in schedule IV of the Calcutta Municipal Act, 1951, and was bound to take out a license under s. 218(1). It is common case that the State did not take out a license for 1960-61. The State was therefore rightly convicted by the High Court under section 541(1). In the judgment of the High Court it is stated by inadvertence that the conviction was under section 537, but from the materials on the record it is clear that the High Court intended to pass the order of conviction under section 541.

It was argued that the State was the owner of a market and did not carry on any business. It was suggested that the trades, if any, in the market were carried on by the stall-holders and not by the Government. But the High Court has recorded the finding that the Government carried on a trade. In this appeal under Art. 136 of the Constitution, I do not propose to interfere with this finding of fact. This judgment will not preclude the Government from proving in any future case that it is not carrying on any trade or business at 1, Orphanage Road, Calcutta.

The appeal is dismissed.

ORDER

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

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