Jiwan Singh

Vs

Rajendra Prasad and Another

Civil Appeal No. 999(N) Of 1971

(K. K. Mathew, P. N. Bhagwati, N. L. Untwalia JJ)

19.12.1974

JUDGMENT

MATHEW, J. –

1. This is an appeal, by special leave, from a judgment and decree of the High Court of Allahabad, setting aside a decree passed by the Small Causes Court, Agra, reversing the decree passed by the Additional Munsiff holding that the order of allotment of the premises in question to the appellant was illegal and ultra vires.

2. The facts of the case are these. There are two shops owned by one Genda Puri (hereinafter called the 'landlord') in Agra City. One Kedarnath Tandon ('Tandon' for short) was a tenant of these shops till September 1966. Tandon intimated to the Rent Control and Eviction Officer, Agra ('Rent Control Officer' for short) on September 12, 1966 that he has vacated the shops and delivered possession of the same to the landlord. The rent of the shops was also paid by Tandon to the landlord upto that date sometime before September 20, 1966. The first respondent who got into possession of the shops after Tandon vacated the same, made an application in the prescribed form with the express consent of the landlord to the Rent Control Officer for allotment to him of the two shops on September 19, 1966. On November 15, 1966, the landlord revoked his consent for allotment of the shops to the first respondent and intimated to the Rent Control Officer that Tandon had not vacated the shops. Thereafter on December 20, 1966, the landlord intimated to the Rent Control Officer that the accommodation had fallen vacant. On January 6, 1967, the Rent Control Officer passed an order fixing February 2, 1967 as the date for consideration of the application for allotment made by the first respondent. On January 21, 1967, the appellant applied to the Rent Control Officer for allotment of the shops to him and the landlord consented to have them allotted to him. The Rent Control Officer passed an order allotting the two shops to the appellant as a nominee of the landlord on January 27, 1967. The first respondent applied for cancellation of the allotment order passed in favour of the appellant. That was rejected. Thereafter, proceedings were taken under Section 7A of the U.P. Act No. 3 of 1947 (hereinafter referred to as the 'Act') to eject the first respondent, and notice was issued to the first respondent to show cause why he should not be ejected. The first respondent then instituted the suit for a declaration that the order of allotment dated January 27, 1967 in favour of the appellant was illegal and ultra vires and praying that the appellant may be restrained by a permanent injunction from interfering with his possession.

3. The suit was contested by defendants Nos. 1 and 2, namely, the appellant and the landlord. Their main contention was that the order dated January 27, 1967 allotting the two shops to the appellant was proper as, under Rule 4 of the Rules framed under the Act, if the Rent Control Officer failed to allot the shops within 30 days of the intimation of vacancy by the landlord, the officer was bound to

allot the same to the appellant as the nominee of the landlord. It was also contended that the first respondent came into possession of the shops clandestinely by entering into an arrangement with Tandon, the previous tenant, and that the landlord never inducted the first respondent into possession or accepted him as his tenant.

4. The Additional Munsiff found that Tandon, the previous tenant, delivered possession of the two shops to the landlord on September 12, 1966 who on October 22, 1966 put the first respondent in possession of the same and that the first respondent became the tenant of the shops. He further found that the Rent Control Officer committed an error of law in not allotting the shops to the first respondent as the landlord had given his consent for allotting the shops to the first respondent although he revoked the consent later on and hence the allotment order passed in favour of the appellant was in contravention of the rules and without affording a reasonable opportunity to the first respondent of being heard. He, therefore, passed a decree in favour of the first respondent holding that the order of allotment dated January 27, 1967 was illegal and restraining the appellant by an injunction from disturbing the possession of the first respondent.

5. On appeal by the appellant the Judge, Small Causes Court, reversed the decree passed by the Additional Munsiff and dismissed the suit.

6. The learned Judge, Small Causes Court, held that the landlord having intimated to the Rent Control Officer under Section 7(1)(a) of the Act on December 20, 1966 that the accommodation became vacant, the Rent Control Officer was obliged to pass an order of allotment in favour of the nominee of the landlord under Rule 4, as he did not pass an order of allotment within 30 days of the intimation, and therefore, the order of allotment in favour of the appellant passed on January 27, 1967 was valid and no occasion arose for considering the application of the first respondent for allotment, nor was there any necessity to hear the first respondent on his application. He, therefore, set aside the decree passed by the Additional Munsiff.

7. The High Court reversed this decree on the basis of its finding that the shops became vacant when Tandon delivered possession of the same to the landlord on September 12, 1966 and since the landlord did not intimate in writing to the Rent Control Officer about the vacancy within seven days after the accommodation became vacant, the Rent Control Officer was not entitled to act under Rule 4 of the Rules framed under the Act which alone obliged him to allot the shops to the nominee of the landlord in preference to the first respondent and, therefore, he committed a jurisdictional error in making the order of allotment to the appellant and the suit was therefore maintainable.

8. In order to appreciate the question which arises for decision, it is necessary to read Section 7(1)(a) of the Act as well as Rule 4 made under the rule-making power conferred under Section 17 of the Act. Section 7(1)(a) reads :

Every landlord shall, within seven days after an accommodation becomes vacant by his ceasing to occupy it, or by the tenant vacating it, or otherwise ceasing to occupy it, or by termination of tenancy or by release from requisition or in any other manner, whatsoever, give notice of the vacancy in writing to the District Magistrate.

Rule 4 provides as under :

Landlord's right to let - If the landlord, receives no notice from the District Magistrate of the intimation given by the landlord under Section 7(1)(a), the landlord may nominate a tenant and the

District Magistrate shall allot the accommodation to his nominee unless, for reasons to be recorded in writing, he forthwith allots the accommodation to other person.

9. The point for consideration is whether the notice given by the landlord on December 20, 1966 can be said to be a notice as provided in Section 7(1)(a) of the Act and whether the provisions of Rule 4 were attracted to the facts of the case.

10. Section 7(1)(a) would show that the landlord was obliged to give notice in writing to the District Magistrate of the vacancy within seven days after the accommodation became vacant; and Rule 4 comes into play only on the fulfilment of that obligation by the landlord under Section 7(1)(a). The learned Additional Munsiff found that the accommodation fell vacant on September 12, 1966. In appeal, the Small Causes Court assumed that Tandon vacated the shops on September 20, 1966. Whichever date is taken as the date on which the accommodation became vacant, the landlord did not give notice in writing about the vacancy within seven days after the accommodation became vacant as the notice was given only on December 20, 1966. It is only if the landlord gives the notice in writing of the vacancy within the time specified in Section 7(1)(a) that Rule 4 would come into operation. In other words, notice in writing within the time specified in Section 7(1)(a) intimating that the accommodation has become vacant is a condition - precedent to the exercise of jurisdiction under Rule 4. The landlord cannot, without complying with the provisions of Section 7(1)(a), claim that the Rent Control Officer shall allot the premises to his nominee. It is therefore clear that the Rent Control Officer went wrong in thinking that Rule 4 obliged him to allot the premises to the nominee of the landlord as he did not make the allotment within 30 days of the receipt of the notice. As the Rent Control Officer allotted the premises to the appellant on the basis that Rule 4 obliged him to do so, and, as we hold that rule did not come into play since the landlord did not give notice in writing within seven days after the accommodation became vacant, the Rent Control Officer committed an error of jurisdiction in allotting the premises to the appellant by his order dated January 27, 1967. The High Court was, therefore, right in holding that the order was ultra vires the power of the Rent Control Officer, and that the proceedings to evict the first respondent under Section 7A were incompetent. In these circumstances we would direct the Rent Control Officer to consider the application filed by the first respondent on September 19, 1966 for allotment of the shops to him as also the application of the appellant for the same purpose, after giving them an opportunity of being heard, and pass the proper order, and in the light of that order take any proceedings, if necessary, under Section 7A of the Act.

11. In the result, we modify the decree of the High Court to the extent indicated and allow the appeal to that extent but dismiss it in other respects. We make no order as to costs.

9100119750121005

The Anant Mills Co. Ltd.

Vs

State of Gujarat and Others

The Aryodaya Spg. & Wvg. Mills Co. Ltd.

Vs

State of Gujarat and Others

The Municipal Corpn. of the City of Ahmedabad and Others,

Vs

The Anant Mills Co. Ltd. and Others

State of Gujarat

Vs

The Municipal Corpn. of the City of Ahmedabad and Others

The Aryodaya Spg. & Wvg. Mills Co. Ltd. and Others

Vs

The Municipal Corporation of The City of Ahmedabad and Others

Civil Appeals Nos. 752 to 755, 489 to 513, 643 to 684 of 1973 and 389 to 430 of 1974

(Khanna, J.)

21.01.1975

JUDGMENT

KHANNA, J. –

1. Questions relating to the constitutional validity of the different provisions of the Bombay Provincial Municipal Corporations Act (Bombay Act 59 of 1949) (hereinafter referred to as the Corporations Act) as amended by Gujarat Acts No. 8 of 1968 and No. 5 of 1970 arise for determination in these appeals and the connected writ petitions. The Corporations Act was enacted by the Bombay Legislature in December, 1949 for the establishment of municipal corporations in the cities of Ahmedabad and Poona. It was applied to Ahmedabad on July 1, 1950.

2. The assessment of properties to property tax in Ahmedabad was made under the Corporations Act by making entries in the assessment books in accordance with the procedure prescribed in the Taxation Rules set out in Chapter VIII of Schedule A of the Corporations Act. A separate section of the assessment book was prepared by the Commissioner of the Corporation for each official year in respect of the assessment of property tax on certain kinds of properties like textile mills, factories and buildings of university. These properties were classified as special properties. The rateable value of properties included in the Special Property Section was previously determined on flat rate for every 100 sq. ft. of the floor area. In arriving at the figure of the rateable value, the plants and machinery situate upon lands and buildings were also taken into account as provided in clauses (2) and (3) of Rule 7 of the Taxation Rules. There was some increase in the rateable value fixed by the Commissioner for the years 1964-65 and 1965-66. The commissioner also made initial entries in assessment book in respect of those properties for the year 1966-67. A number of writ petitions under Article 32 of the Constitution were field in this Court challenging the validity of the assessment for the years 1964-65 and 1965-66 as well as the initial entries for the year 1966-67. Those writ petitions were disposed of by this Court by a judgment delivered on February 21, 1967

and reported as New Manek Chowk Spinning & Weaving Mills Co. Ltd. v. Municipal Corporation of the City of Ahmedabad ((1967) 2 SCR 679 : AIR 1967 SC 1801). This Court allowed the writ petitions and held the relevant entries in the assessment books to be invalid. It was held in that case that the State Legislature had no competence under Entry 49 of the State List in the Seventh Schedule to the Constitution to make a law for taxing machinery. Rule 7(2) was held to be beyond the legislative competence of the State. Rules 7(2) and (3) were also held to be invalid on account of excessive delegation of powers by the Legislature. Under those rules the specification of the classes of machinery for the purpose of taxation was to be made by the Commissioner with the approval of the Corporation irrespective of the question as to where they were to be found. This Court found that it depended upon the arbitrary will of the Commissioner as to what machinery he would specify and what he would not that he was the only person who could examine this question as there was no right of appeal. Dealing with the method of levy of tax on the basis of the floor area, this Court observed that it was against the provisions of the Act and the rules made thereunder and that it had not been shown that conditions perquisite for determination of the annual value on that basis had existed at the relevant time. The above method of taxation on the basis of floor area, it was held, was violative of Article 14 of the Constitution as it would in the absence of the classification of factories on any rational basis give rise to inequalities.

3. Although the Supreme Court directed the Corporation to prepare fresh assessment lists relating to properties in the Special Property Section for the official years 1964-65, 1965-67, the Corporation was unable to do so in view of the decision of the High Court in the case of Ahmedabad Municipality v. Keshavlal (6 GLR 228 : ILR 1965 Guj 701) wherein it was held that the Corporation has no power to assess and levy property tax for any official year after that year had ended. The Legislature in order to get over this difficulty enacted Gujarat Act 8 of 1968 and by this amending Act inserted inter alia new Section 152A in the Corporations Act. The new section conferred power on the Corporation to assess or re-assess property taxes if the original assessment was affected by a decree or order of a court on either of the grounds on which the Supreme Court had set aside the assessment for the official years 1964-65, 1965-66 and 1966-67 in New Manek Chowk Mills case (supra). The amending Act also substituted new Rule 7 for the old rule which contained the offending clauses (2) and (3). Rule 21B was also inserted by the amending Act and the said rule permitted the Municipal Commissioner to make fresh valuation of properties after the expiry of the official year, if preparation or completion of the assessment before the expiry of the official year were or would be affected on account of any order of a court. After the amending Act had come into force, the Corporation initiated proceedings for reassessment of lands and buildings of the petitioners to property tax for the official years 1964-65, 1965-66 and 1966-67. When notices were served on the petitioners to furnish return of the particulars, the petitions in the High Court challenging the validity of those notices. These petitions were allowed by the High Court as per judgment dated July 3, 1969 on the ground that the demand for certain particulars contained in the notices was beyond the scope of Rule 8(1). The contention of the petitioners in those petitions that no assessment could be made after the expiry of the official year was repelled and it was held that the Corporation had the power under Section 152A to re-assess lands and buildings of the petitioners to property tax for the official years 1964-65, 1965-66 and 1966-67 notwithstanding the expiration of those years. The High Court also held that the new section did not stand in the way of the petitioners getting refund of the property tax already paid. Appeal was field in this Court against the above judgment by the Corporation.

4. The Ahmedabad Corporation, it may be stated, used to pass a resolution under Section 99 of the Corporations Act determining the rate at which property tax would be levied for the particular official year. So far as conservancy tax was concerned, the rate determined by the corporation was 3

per cent. A special rate of conservancy tax of 7 1/2 per cent was, however, fixed by the Corporation for the official year up to 1966-67 for hotels, clubs, stables, theatres or cinemas or other large premises including mills and factories registered under the Factories Act and where fifty or more workmen were employed in manufacture for all the shifts. For the official year 1967-68 the Corporation determined the rate of conservancy tax to be 3 per cent and a special rate of 9 per cent for the large premises mentioned above. The rate of general tax for ordinary property was fixed on a graduated scale but on properties used by textile mills the rate was uniform at 30 per cent. The powers of the Commissioner under the Taxation Rules were entrusted to the Deputy Municipal Commissioner by virtue of an office order issued under Section 49(1). The Deputy Commissioner thereafter determined the rateable value of the lands and buildings of the petitioners. The petitioners preferred appeals against the order of the Deputy Commissioner determining the amount of property tax to the Chief Judge of the Court of Small Causes, Ahmedabad. The Chief Judge was, however, precluded from hearing those appeals since the amount of tax was not deposited by the petitioners as required by Section 406(2)(e) of the Corporation Act. The petitioners thereafter field petitions on the High Court challenging the validity of the assessments made by the Deputy Municipal Commissioner for the official years 1966-67, 1967-68 and 1968-69. Those writ petitions were allowed by the Gujarat High Court as per judgment dated October 27, 1969. It was held that Section 49 of the Corporations Act did not contemplate delegation of judicial or quasi-judicial powers by the Municipal Commissioner under Taxation Rule 18 and that disposal of complaints by the Deputy Commissioner was not possible. The High Court also declared Section 406(2) (e) violative of Articles 14. Part of Rule 42 which related to destroys or attachment for default in payment of tax was also struck down on the ground that it could not stand independently of Section 406(2)(e). The fixation of special rate of 9 per cent for conservancy tax in respect of large premises including mills and factories was also held to be illegal and void.

5. The official year 1969-70 having in the meantime commenced, the Municipal Commissioner adopted under Taxation Rule 21 the entries of the official year 1968-69 as the entries for the official year 1969-70. Complaints were then filed by the petitioners against the amount of rateable value entered in the assessment books. During the pendency of those complaints, the Governor of Gujarat promulgated Ordinance No. 6 of 1969 on December 23, 1969. The ordinance was replaced by Gujarat Act No. 5 of 1970 which came into force with effect from March 31, 1970. The ordinance amended the definition of rateable value as well as Section 49 with retrospective effect. It also contained certain validating provisions. Gujarat Act 5 of 1970 was on the line of Ordinance No. 6 of 1969, except in the matter of definition of rateable value. A number of petitions in the meantime were field to challenge the validity of the provisions of Ordinance No. 6 of 1969 and Act 5 of 1970.

6. For the official year 1970-71, the valuation was made in accordance with Gujarat Act 5 of 1970. A number of writ petitions were filed before the Gujarat High Court challenging the provisions of Gujarat Act 5 of 1970 as well as the valuation for the year 1970-71.

7. In the meantime, on April 17, 1970 appeal field by the Corporation against judgment dated July 3, 1969 of Gujarat High Court was dismissed by this Court. The decision of this was given in Municipal Corporation of the City of Ahmedabad v. New Shrock Spg. & Wvg. Co. Ltd. ((1971) 1 SCR 288 : (1970) 2 SCC 280). It was held by this Court that under Section 152A before the Corporation can retain an amount collected as property tax, there must be assessment according to law. As the impugned assessments were not in accordance with law, the Corporation was not entitled to retain that amount. This Court also struck down sub-section (3) of Section 152A which had been added by Ordinance 6 of 1969 and which gave power to the Corporation to refuse refund the amount illegally collected despite the order of the Court.

8. It may be stated that the dispute with which we are concerned in the present appeals and writ petitions relates to assessment to property tax of large premises like textile mills, and factories. One writ petition relates to an electricity company.

9. Before setting out the findings of the High Court and dealing with the questions which arise for determination in the appeals and writ petitions before us, we consider it appropriate to refer to some of the relevant provisions. Sections 127(1) of the Corporation Act requires the Corporation to impose inter alia property taxes. "Property taxes", according to Section 129, shall comprise (a) water tax, (b) conservancy tax, and (c) a general tax. Clause (b) and the relevant part of clause (c) of that section read as under :

For the purpose of sub-section (1) of section 127 property taxes shall comprise the following taxes which shall, subject to the exceptions, limitations and conditions hereinafter provided, be levied on buildings and lands in the city.

> #(a) .. .. ..##
>
> (b) a conservancy tax at such percentage of their rateable value as will in the opinion of the Corporation suffice to provide for the collection, removal and disposal, by municipal agency, of all excrementitious and polluted matter from privies, urinals and cess-pools and for efficiently maintaining and repairing the municipal drains constructed or used for the reception or conveyance of such matter; subject however to the provisos that the minimum amount of such tax to be levied in respect of any one building or of any one portion of a building which is let as separate holding shall be eight annas per mensem and that the amount of such tax to be levied in respect of any hotel, club or other large premises may be specially fixed under Section 137 :
>
> (c) a general tax of not less than twelve per cent of their rateable value, which may be levied, if the Corporation so determines, on a graduated scale :
>
> #Provided .. .. ..##
>
> According to Section 99 the Corporation shall, on or before the twentieth day of February, after considering the Standing Committee's proposals in this behalf, determine inter alia subject to limitation and conditions prescribed in Chapter XI the rates at which municipal taxes referred to in sub-section (1) of Section 127 shall be levied in the next ensuing official year. "Official year" has been defined in Section 2(44) to mean the year commencing on the first day of April. Section 137 reads as under :
>
> (1) The Commissioner may, whenever he thinks fit, fix the conservancy tax to be paid in respect of any hotel, club, stable or other large premises at such special rate as shall be generally approved by the Standing Committee in this behalf, whether the service in respect of which such tax is leviable be performed by human labour or by substituted means or appliances.
>
> (2) In the case of premises used solely for public purpose and not used or intended to be used for purposes of profit or for residential or charitable or religious purpose in respect of which the conservancy tax is payable by the Government the Commissioner shall fix the said tax at a special rate special rate approved as

aforesaid.

(3) In any such case the amount of the conservancy tax shall be fixed with reference to the cost or probable cost of the collection, removal and disposal, by the agency of municipal conservancy staff, of excrementitious and polluted matter from the premises.

Section 150 relates to supplementary taxation. Clause (1) of section 49 enables a Deputy Municipal Commissioner, subject to the orders of the Commissioner, to exercise such of the powers and perform such of the duties of the Commissioner as the Commissioner shall from time to time depute to him. Section 406 deals with appeals. According to clause (1) of Section 406, subject to the provisions hereinafter contained, appeals against any rateable value or tax fixed or charged under the Act shall be heard and determined by the Judge. "Judge" has been defined in clause (29) (as amended by Act 8 of 1968) of Section 2 to mean in the city of Ahmedabad the Chief Judge of the Court of Small Causes. Clause (e) of sub-section (2) of Section 406 states that no appeal shall be heard against a tax, or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant, unless the amount claimed from the appellant has been deposited by him with the Commissioner. Section 411 (as amended by Act 8 of 1968) makes provision for appeal to the High Court from a decision of the Judge in an appeal in certain contingencies. Clause (54) of Section 2 defines "reteable value" to mean the value of any building or land fixed in accordance with the provisions of the Act and the rules for the purpose of assessment to property taxes. According to Section 453, the rules in the schedule as amended from time to time shall be deemed to be part of the Act. Chapter VIII of the schedule contains the Taxation Rules. According to clause (1) of Rule 7, in order to fix the rateable value of any building or land assessable to a property-tax there shall be deducted from the amount of the annual rent for which such land or building might reasonably be expected to let from year to year a sum equal to ten per cent of the said annual rent, and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever. Clauses (2) and (3) of that rule need not be set out as they were struck down by this court in the case of New Manek Chowk Mills (supra). Rule 9 relates to the keeping of assessment book in which shall be entered inter alia every year the rateable value of buildings and lands in the city of Ahmedabad determined in accordance with the provisions of the Act and the Rules as also the names of persons primarily liable for the payment of property taxes, if any, leviable on each such building on land. Clause (1) of Rule 42 reads as under :

(1) If the person on whom a notice of demand has been served under Rule 41 does not within fifteen days from such service pay the sum demanded or shows sufficient cause for non-payment of the same to the satisfaction of the Commissioner and if no appeal is preferred against the said tax, as hereinafter provided, such sum, with all costs of the recovery, may be levied under a warrant in Form H or to the like effect, to be issued by the Commissioner, by distress and sale of the movable property of the defaulter or the attachment and sale of the immovable property of the defaulter or, if the defaulter be the occupier of any premises in respect of which a property-tax is due, by distress and sale of any movable property found on the said premises or, if the tax be due in respect of any vehicle, boat or animal in whomsoever's ownership,

possession or control, the same may be.

10. We may now set out the material changes brought about in the Corporations act by Gujarat Act No. 5 of 1970. Sections 2, 4, 6, 7, 10, 11, 12, and 13(2) of the amending Act read as under :

2. In the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as 'the principal Act'), in Section 2, -

(1) before clause (1) the following clause shall be, and shall be deemed always to have been, inserted, namely :-

"(1A) 'annual letting value' means, -

(i) in relation to any period prior to 1st April, 1970, the annual rent for which any building or land or premises, exclusive of furniture or machinery contained or situate therein or thereon might, if the Bombay Rents, Hotels and Lodging House Rates Control Act, 1947, were not in force, reasonably be expected to let from year to year with reference to its use;

(ii) in relation to any other period, the annual rent for which any building or land or premises, exclusive of furniture or machinery contained or situate therein or thereon, might reasonably be expected to let from year to year with reference to its use;

and shall include all payments made or agreed to be made to the owner by a person (other than the owner) occupying the building or land or premises on account of occupation, taxes, insurance or other charges incidental thereto :

Provided that, for the purpose of sub-clause (ii), -

(a) in respect of any building or land or premises the standard rent of which has been fixed under Section 11 of the Bombay Rents, Hotels and Lodging House Rates Control Act, 1947, the annual rent so fixed;

(b) in the case of any land of a class not ordinarily let, the annual rent of which cannot in the opinion of the Commissioner be easily estimated, the annual rent shall be deemed to be six per cent of the estimated market value of the land at the time of assessment;

(c) in the case of any building of a class not ordinarily let, or in the case of any industrial or other premises of a class not ordinarily let, or in the case of a class of such premises the building or building in which are not ordinarily let, if the annual rent thereof cannot in the opinion of the Commissioner be easily estimated, the annual rent shall be deemed to be six per cent of the total of the estimated market value, at the time of the assessment, of the land on which such building or buildings stand or, as the case may be, of the land which is comprised in such premises, and the estimated cost, at the time of the assessment, of erecting the building, or as the case may be, the building or buildings comprised in such premises;"

(2) for clause (54), the following shall be, and shall be deemed always to have been, substituted, namely :-

"(54) 'rateable value' means the value of any building or land fixed, whether with reference to any given premises or otherwise, in accordance with the provisions of this Act and the rules for the purpose of assessment to property taxes;"

4. In Section 49 of the principal Act, in sub-section (1), -

(1) for the words 'such of the duties of the Commissioner' the words 'such of the duties of the Commissioner, including powers and duties of a judicial or quasi-judicial nature,' shall be, and shall be deemed always to have been, substituted;

(2) after the first proviso, the following further proviso shall be, and shall be deemed always to have been, added, namely :-

'Provided further that nothing in this sub-section shall be deemed to empower the Commissioner to issue any order regulating the exercise of powers of performance of duties of a judicial or quasi-judicial nature deputed by him.'

6. In Section 129 of the principal act, to clause (b), the following proviso shall be, and shall be deemed always to have been, added, namely :-

'Provided that when determining under Section 99 or Section 150 the rate at which conservancy tax shall be levied for any official year or part of an official year, the Corporation may determine different rates for different classes of properties.'

7. In Section 137 of the principal Act, to sub-section (1), the following proviso shall be added, namely :-

'Provided that if the Corporation shall have determined for any official year any different rate of conservancy tax for any class of properties to which any of the properties referred to in this sub-section belongs, the Commissioner shall not, without the previous approval of the Corporation fix, for such official year or part thereof, the conservancy tax to be paid in respect of any property belonging to such class for which such different rate may have been determined by the Corporation, at any other different rate under this sub-section.'

10. In Section 406 of the principal Act, in sub-section (2), -

(1) for the words 'shall be heard' the words "shall be entertained" shall be substituted; and

(2) the following proviso shall be added after clause (e), namely :-

'Provided that where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject to such conditions as he may deem fit.'

11. In Section 411 of the principal Act, after clause (a), the following clause shall be inserted, namely :-

"(bb) from any order of the Judge under the proviso to sub-section (2) of section 406; and;"

12. In schedule A to the principal Act, in Chapter VIII, -

(i) in sub-rule (3) of Rule 7, for the words 'annual rent for which such building, land or premises might reasonably be expected to let from year to year a sum equal to ten per cent of the said annual rent' the word 'annual letting value of such building, land or premises a sum equal to ten per cent of such annual letting value' shall be, and shall be deemed always to have been substituted; and

(ii) in sub-rule (1) of Rule 42, for the words 'is preferred' the words 'is preferred or entertained' shall be substituted.

13. Notwithstanding anything contained in any judgment, decree or order of any court of tribunal or any other authority, -

#(1) .. .. ..##

(2) no determination of any special or different rate of conservancy tax by a Municipal Corporation constituted by or under the principal Act in respect of any hotel, club, stable, industrial premises or other large premises in exercise of its power under any of the provisions of the principal Act, at any time before the commencement of the said Ordinance, shall be deemed to have been invalidly made be reason of the Corporation having no power to determine such rate at the time when such determination was made; and any such determination shall be deemed to be valid and shall be deemed always to have been validly made under the provisions of the principal act as amended by this Act as amended by this Act as amended by this Act as if this Act had been in force at the time when such determination was made; and no such determination of different or special rate of conservancy tax, or any levy of such tax or bill or notice of demand or distress or attachment issued of executed for collection of such tax, shall be be called in question in any court or before any tribunal or authority merely on ground that Corporation had no power or authority to determine such different or special rate of conservancy tax in respect of any hotel, club, stable, industrial premises or other large premises or on any ground consequential thereto.

11. The High court protracted hearing which we are given to understand lasted for 21 days besides 4 days for judgment while partly allowing petitions filed before it under Article 226 of the constitution made the following declaration :

(i) Section 2(1A) clause (i) is valid so far as it is applicable to the official year 1969-70 but it is null and void in so far as it applies to the official year 1968-69, on account of infraction of Article 14.

(ii) Proviso (c) to Section 2(1A) clause (ii) is not violative of Article 14 and is constitutionally valid.

(iii) Section 49 does not suffer from the vice of unresonableness and is constitutionally valid and so also in Section 13(1) of Gujarat Act 5 of 1970.

(iv) The proviso to section 129(b) is not violative of Article 14 nor does it suffer from the vice of excessive delegation of legislative power.

(v) Section 13(2) of Gujarat Act 5 of 1970 is not violative of Article 14 or Article 19(1)(f) and cannot be challenged as constitutionally invalid.

(vi) Section 406(2)(e) and Section 411(bb) are null and void as being in contravention of Article 14 : Rule 42 of the Taxation Rules is also ultra vires and void in so far as it provides that if an appeal is preferred of entertained against the tax, warrant shall not issue for the recovery of the amount of tax.

(vii) The Resolutions passed by the Corporation for the official years 1967-68, 1968-69, 1969-70 and 1970-71 to the extent to which they the rate of conservancy tax at 9 per cent inter alia in respect of textile mills and factories belonging to the petitions are ultra vires the proviso to section 129(b) and rate of conservancy tax applicable in respect of these textile mills and factories must, therefore, be taken to be the general rate of 3 per cent.

12. Civil Appeals Nos 489 to 513 and 752 to 755 of 1973 have been filed in this Court by the petitioners before the High Court against the judgment of that Court in so far as the Court has upheld the constitutional validity impugned provisions. Civil Appeals Nos 643 to 684 of 1973 have been filed by the Municipal Corporation of the city of Ahmedabad and others against the above judgment in so far as the High Court has struck down the impugned provisions and the Resolutions. Civil Appeals Nos. 389 to 430 of 1974 has been filed by the State of Gujarat against the judgment in so far as the judgment in so far as the High Court has struck down the impugned provisions. Writ Peterson Nos. 51, 60 to 73, 87 to 91, 157, 492 to 503, 533, 534 and 583 of 1972 as also Writ petition Nos. 1866 to 1877 and 2046 of 1973 which have been filed by the Aryodaya Spg. & Wvg. Mills Co. Ltd. and other parties involve substantially the same questions which arises in appeals, though some these writ petitions relate to the subsequent period of 1971-72. Writ Petition No. 74 of 1972 filed by the Ahmedabad Electricity Co. Ltd. involves an additional point regarding its liability to pay property tax which has been levied on the ground that it occupies land below the surface for under-ground cables. This judgment would dispose of all the appeals and writ petitions.

13. The first important question which arises for determination is whether clause (i) of Section 2(1A) is violate of Article 14. According to this clause, annual letting value means in relation to any period prior to April 1, 1970 the annual rent for which any building or land prior to April 1, 1970 the annual rent for which any building or land or premises, exclusive of furniture of machinery contained or situate of therein or thereon, if the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 were not in force, reasonably be expected to let from year to year with reference to its use. According to the petitioners, the operation of this clause affected only the assessment proceedings pending on December 23, 1969 then Ordinance 6 of 1969 (which was subsequently replaced by Act 5 of 1970) came into force and did not affect the assessments which were final and completed before that date. The said provision was thus said to create an arbitrary and irrational classification which had no reasonable nexus with the object of levying the tax. As against the above the following four contentions were advanced on behalf of the Corporation.

(1) There is no discrimination in the matter of completed assessment and pending assessment because the prior law did not require valuation to be restricted to standard rent. The impugned provision is merely declaratory of previous state of law,

(2) There is no discrimination in the matter of completed assessment and pending assessment because as a matter of fact valuation assessments finalised before December 23, 1969 were in disregard of the provision of the Rent Act.

(3) Pending cases constitute a class by themselves and any law which makes a distinction between decided cases and pending cases is not violative of Article 14 of the Constitution as the above distinction is based upon rational classification.

(4) In any case so far as the year 1969-70 is concerned, there is no discrimination or violation of Article 14.

14. The High Court rejected the first three contention urged on behalf of the corporation but accepted the fourth contention. Accordingly, it held that clause (i) of Section 2(1A) was valid in so far as it was valid in so far as it was applicable to the official year 1969-70 but was null and void in so far as it applied to the previous years on account of the infraction of Article 14.

15. Regarding clause (c) of the proviso to sub-clause (2) of clause (1A) of Section 2 of the Act, High Court held that it is only if the annual rent having regard to the provisions of the Bombay Rent Act cannot be easily estimated that the Commissioner can adopt the basis of the valuation set out in proviso to clause (c). Mr. Tarkunde learned counsel for the petitioners has not pressed the attack on the constitutional validity of clause (c) because, according to him, it is not known as to which property would be covered by that clause as construed by the High Court.

16. Likewise, so far as the constitutional validity of Section 49 of the Act is concerned the attack has not been pressed on behalf of the petitioner-appellants. Mr. Tarkunde has also pointed out that despite the decision of this court in Manek Chowk Spg. & Wvg. Mills case (supra) in making assessment attempts are being made by the Corporation to include some structures which constitute plant and machinery as part of building. The learned Counsel, however, concedes that this would be a question of fact depending upon each case. He accordingly states that his clients would if necessary agitate the matter in appeal.

17. It has been argued before us by the Additional Solicitor General Mr. Vakil and Mr. Bhandare of behalf of the Corporation as well as the State Government that the High Court was in error holding that clause (i) of Section 2(1A) was violative of Article 14 in respect of the years prior to the official year 1969-70. As against that Mr. Tarkunde on behalf of petitioners (the word petitioners covers not only the petitioners in this court but also those who were the petitioners in the High Court) has supported the finding of the High Court in this respect. Mr. Tarkunde in his own turn has assailed the finding of the High Court in so far as it has held that clause (i) of section 2(1A) is not violative of Article 14 in respect of the year 1969-70. After hearing the learned Counsel for the parties, we find considerable force in the submission made on behalf of the Corporation and the State Government.

18. The first question which arises for consideration in the above context is whether there is any discrimination in relation to the assessments for the period prior to April 1, 1970 between pending cases which assessment had already been completed. So far as this aspect is concerned, we find that

in the case of Assessment Committee of the Metropolitan Borough of Popular v. Roberts ((1922) 2 AC 93 : 91 LJ KB 449 : 38 TLR 499) the House of lords held by majority that in arriving at the valuation of the purposes of the Valuation (Metropolis) Act, 1869, of a hereditament to which the Increase of Rent and Mortgage Interest (Restriction) Act, 1920 applies, the maximum gross value to be assigned to that hereditament is not limited to the standard rent of the hereditament together with the additions thereto permitted by the latter Act. It has further held that above mentioned Act of 1920 is not to be taken into account in determining the valuation for rating purpose to which his applies. Following the above decisions of the Lord a division bench of the Bombay High held in the case of Gulam Ahmad Rogay v. Bombay Municipality (AIR 1951 Bom 320 : 53 Bom LR 145) that in arriving at the rateable value, for the purpose of Section 154(1) of the city of Bombay Municipal Act, 1888 of property to which the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 applies the maximum value to be assigned to the property is not to be limited to the maximum standard rent of the property together with additions thereto permitted by the later Act. Similar question thereafter arose in the case of Corporation of Calcutta v. Padma Debi ((1962) 3 SCR 49 : AIR 1962 SC 151). This Court in that case was concerned with the provisions of Section 127(a) of the Calcutta Municipal Act, according to which the annual rental value of land and the annual value of any building erected for letting purposes or ordinarily let shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less, in the case of a building, an allowance of ten per cent for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent. It was held by this Court that on a fair reading of the above provision the rental value cannot be fixed higher than the standard rent under the Rent Control Act. It was further held that the words "gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year" imply that the rent which the landlord might realise if the house was let is the basis for fixing the annual value of the building. The criterion is the rent realisable by the landlord and not the value of the holding in the hands of the tenant. The value of the property to the owner is the standard in making the assessment. The Corporation, it was accordingly concluded, had no power to fix the annual value of the premises higher than the standard rent.

19. It was argued on behalf of the Corporation before the High Court that no averment had been made by the petitioners in the petitions that the assessments which had been completed before the coming into force of Ordinance 6 of 1969 were made having regard to the provisions of the Bombay Rent Act and that in the absence of such averments no case of discrimination could be said to have been made by the petitioners. The High Court rejected this contention because in its opinion it would be reasonable to presume that the assessments were made keeping in view the rent restriction provisions of the Bombay Rent Act. We are unable to agree with the above approach of the High Court.

20. There is a presumption of the constitutional validity of a statutory provision. In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. No averments were made in the petitions before the High Court by the petitioners that the assessments before the coming into force of ordinance 6 of 1969 had been made by taking into account the rent restriction provisions of the Bombay Rent Act. Paragraph 2B and some other paragraphs of Petition No. 233 of 1970 before the High Court, to which our attention was invited by Mr. Tarkunde, also do not contain that averment. No material on this factual aspect was in the circumstances produced either on behalf of the petitioners or the Corporation. The High Court, as already observed, decided the matter merely on the basis of a presumption. It is, in our opinion, extremely hazardous to decide the question of the constitutional

validity of a provision on the supposed existence of certain facts by raising a presumption. The facts about the supposed existence of which presumption was raised by the High Court were of such a nature that a definite averment could have been made in respect of them and concrete material could have been produced in support of their existence or non-existence. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact. When, however, the fact to be established is of such a nature that direct evidence about its existence or non-existence would be available, the proper course is to have the direct evidence rather than to decide the matter by resort to presumption. A pronouncement about the constitutional validity of a statutory provision affected not only the parties before the Court, but all other parties who may be affected by the impugned provision. There would, therefore, be inherent risk in striking down an impugned provision without having the complete factual data and full material before the Court. It was therefore, in our opinion, essential for the High Court to ascertain and find out the correct factual position before recording a finding that impugned provision is violative of Article 14. The fact that the High Court acted on an incorrect assumption is also borne out by the material which has been adduced before us in the writ petitions field under Article 32 of the Constitution.

21. In the affidavit of Jayantilal Maneklal Shah, Assessor and Collector of the Corporation, field on behalf of the respondents in these petitions, the factual position has been brought out at length. According to the affidavit, after the Corporation had been constituted with effect from July 1, 1950 the Commissioner kept for every official year an assessment book as contemplated by Rule 9 of the Taxation Rules. The rateable value of lands and buildings in Special Property Section were first determined by the municipal valuers on Contractor's Theory in accordance with the methods prevailing under the English law of rating. The owners of lands and buildings which were valued on Contractor's Theory field appeals. During the pendency of the appeals, the authorities concerned agreed to refer the question of determination of the rateable values to the arbitration of two arbitrators, on appointed by the Corporation and the other appointed by the taxpayers. On disagreement between the two arbitrators the matter was referred in 1953 to Shri H. V. Divetia, a former Judge of the High Court of Judicature at Bombay as umpire. Shri Divetia held that flat rate floor area method which was being adopted by the Municipal Corporation of the city of Bombay in similar cases was the proper method. The municipal authorities consequently adopted that method. The award of Shri Divetia was effective only till the official year 1954-55, but its application was extended by agreement between the parties up to the year 1958-59. The municipal authorities continued to value the lands and buildings aforesaid on the flat rate floor area method for the year 1959-60 and onwards to prevent any dispute being raised. The affidavit further shows that notwithstanding the decision in Padma Debi's case (supra) the Corporation continued as before to value the properties included in the Special Property Section on the flat rate floor area method. Both the valuers as well as the persons liable to pay property taxes were not conscious of any impact of rent restriction for the purposes of property taxes. The Collector has denied that in determining the rateable value the Municipal Commissioner had been taking into account the standard rent of the building or land or was following the principle that the rent restricted by law was the measure of the true rent of the building.

22. There is no material before us to show that the factual position is in any way different from that brought out in the affidavit of the Assessor and Collector of the Corporation. Mr. Tarkunde has referred to three orders dated March 22, 1969 of the Deputy Municipal Commissioner whereby the rateable value as initially fixed was reduced on complaint filled by the rate payer. It would appear from the orders that in reducing the rateable value the Deputy Municipal Commissioner took into account the rental value. The above three orders, in our opinion, can hardly be of any help to the

petitioners because there is nothing to show that the Deputy Municipal Commissioner while making those orders took into account the standard rent and the restrictions placed on the increase in rent by the Bombay Rent Act.

23. Mr. Tarkunde then urges that the material which has been placed before this Court regarding the factual position was not before the High Court on the constitutional validity of clause (i) of Section 2(1A). We are unable to accede to this submission. The validity of the above clause has also been assailed in the writ petitions filed before us and in deciding those writ petitions, we cannot refuse to take into account the material which has been placed before us. As that material discloses that the factual position as it existed before the promulgation of Ordinance 6 of 1969 was that the provisions of the Bombay Rent Act were not taken into account in determining the rateable value, there would be no escape from the conclusion that no differential treatment has been meted out to pending cases in clause (i). It is plain that the impugned provision cannot be held to be violative of Article 14 in the appeals filed against the judgment of the High Court and constitutionally valid in the writ petitions. As the High Court decided the matter without having the full and complete data before it and as such data is available to us, the contention that we should not take that data into account, in our opinion, is wholly untenable. We would, therefore, hold that there is no material on record as might justify the inference that a differential hostile treatment has been meted out in pending cases. The very basis of striking down the impugned provisions on the ground of being violative of Article 14 would thus disappear.

24. Apart from the above, we are of the opinion that classification by treating decided cases as belonging to one category and pending cases as belonging to another category is reasonable and not per se offensive to Article 14.

25. It is well-established that Article 14 forbids class legislation but not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the statute in question. In permissible classification mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over other, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine. But, in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification so long as it adheres to the fundamental principle underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways (see Ram Krishna Dalmia v. Justice S. R. Tendolkar (1959 SCR 279 : AIR 1958 SC 538) and Khandige Sham Bhat v. Agricultural Income-tax Officer, Kasaragod ((1963) 3 SCR 809 : AIR 1963 SC 591 : (1963) 48 ITR 21)). Keeping the above principles in view, we find no violation of Article 14 in treating pending cases as a class different from decided cases. It cannot be disputed that so far as the pending cases covered by clause (i) are concerned, they have been all treated alike. In the case of Rao Shiv Bahadur Singh v. State of V. P. (1953 SCR 1188, 1197 : AIR 1953 SC 394 : 1953 Cri LJ 1480) this Court observed.

But there is no reason why pending proceedings cannot be treated by the Legislature as a class by themselves having regard to the exigencies of the situation which such pendency itself calls for. There can arise no question as to such a saving provision infringing Article 14 so long as no scope is

left for any further discrimination inter se as between persons affected such pending matters.

In Hathising Manufacturing Co. Ltd. v. Union of India ((1960) 3 SCR 528 : AIR 1960 SC 923 : (1960) 2 Lab LJ 1) the constitutional validity of Section 25FFF of the Industrial Disputes Act, 1947 was assailed. That section made a distinction between employers who had closed their undertakings on or before November 28, 1956 and those who closed their undertakings after that date. It was urged that the above provision was violative of Article 14 of the Constitution. The above contention was rejected and it was observed :

When Parliament enacts a law imposing a liability as flowing from certain transaction prospectively, it evidently makes a distinction between those transactions which are covered by the Act and those which are not covered by the Act, because they were completed before the date on which the Act was enacted. This differentiation, however, does not amount to discrimination which is liable to be struck down under Article 14. The power of the Legislature to impose civil liability in respect of transaction completed even before the date on which the Act is enacted does not appear to be restricted. If as is conceded - and in our judgment rightly - by a statute imposing civil liability in respect of post-enactment transactions, no discrimination is practised, by a statute which imposes liability in respect of transactions which have taken place after a date fixed by the statute, but before its enactment, it cannot be said that discrimination is practised.

In the case of Jain Bros. v. Union of India ((1970) 3 SCR 253 : (1969) 3 SCC 311) it was urged on behalf of the appellants that clause (g) of Section 297(2) of the Income-tax Act, 1961 was violative of Article 14 inasmuch as in the matter of imposition of penalty, it discriminated between two sets of assessment had been completed before first day of April, 1962 and others whose assessment was completed on or after that date. While upholding the validity of the above provision, this Court observed : (SCC p. 318, para 11)

Now the Act of 1961 came into force on first April, 1962. It repealed the prior Act of 1922. Whenever a prior enactment is repealed and new provisions are enacted the Legislature invariably lays down under which enactment pending proceedings shall be continued and concluded. Section 6 of the General Clauses Act, 1897, deals with the effect of repeal of an enactment and its provisions apply unless a different intention appears in the statute. It is for the Legislature to decided from which date a particular law should come into operation. It is not disputed that no reason has been suggested why pending proceedings cannot be treated by the Legislature as class for the purpose of Article 14. The date first April, 1962, which has been selected by the Legislature for the purpose of clauses (f) and (g) of Section 297(2) cannot be characterised as arbitrary or fanciful.

26. We would, therefore, hold that clause (i) of Section 2(1A) is constitutionally valid and not violative of Article 14 in respect of all the years to which it has been made applicable.

27. Learned Additional Solicitor-General and Mr. Vakil on behalf of the Corporation have assailed the finding of the High Court in so far as it has held the resolutions passed by the Corporation for the four years from 1967-68 to 1970-71 fixing the rate of conservancy tax at 9 per cent in respect of textile mills, factories and other large premises instead of the general rate of 3 per cent to be ultra vires the proviso to Section 129(b). We may in this context set out the material part of the impugned resolution for the assessment year 1971-72 taking it to be a specimen for the four years in question :

> (c) Conservancy tax at 3% of the rateable value of the premises liable to tax under provisions of Section 131 of the Act, subject, however, to the proviso that the

minimum amount of such tax to be levied in respect of any one separate holding of land or of any one portion of a building which is let as a separate holding shall be eight annas per month, and that the amount of such tax to be levied in respect of any hotel, club, stable or other large premises may be specially fixed under Section 137.

(d) as per the provisions of Section 137, hotel, club, stables, theatres or cinemas or other large premises including mills and factories, registered under the Factories Act, and where 50 or more workmen are employed in manufacture in all the shifts, shall be subject to a conservancy tax at 9% of the rateable value.

28. The High Court in striking down the four resolutions in so far as the rate of conservancy tax in respect of the large premises had been fixed at 9 per cent instead of 3 per cent, observed that the power to fix different rates of conservancy tax for different classes of properties is limited by the actual cost element and the differential rate of conservancy tax fixed for a particular class of properties must be replated to the actual cost involved in supplying conservancy service to that class. The High Court agreed that large premises could be treated as a class and given differential treatment in the matter of fixation of conservancy tax. On the question, however, as to what rate of conservancy tax should be fixed for large premises, the High Court observed that there was nothing in the affidavits filed on behalf of the Corporation which might show that the Corporation was guided by the actual cost of conservancy service supplied to each class.

29. We may at this stage advert to the scheme of the Corporations Act in the matter of levy of conservancy tax. Clause (b) of Section 129 states that the rate of conservancy tax shall be such percentage of rateable value as will in the opinion of the Corporation suffice to provide for the collection, removal and disposal, by municipal agency, of all excrementitious and polluted matter from privies, urinals and cess-pools and for efficiently maintaining and repairing the municipal drains constructed or used for the receiption or conveyance of such matter. It is further provided that the minimum amount of such tax to be levied in respect of any one separate holding of land or of any one building or of any one portion of building which is let as a separate holding shall be eight annas per mensem and that the amount of such tax to be levied in respect of any hotel, club or other large premises may be specially fixed under Section 137. Sub-section (1) of Section 137 provides that the Commissioner may, whenever he thinks fit, fix the conservancy tax to be paid in respect of any hotel, club, stable or other large premises at such special rate as shall be generally approved by the Standing Committee in this behalf, whether the service in respect of which such tax is leviable be performed by human labour or by substituted means or appliances. Sub-section (2) of Section 137 directs the Commissioner to fix a special rate of conservancy tax in the case of premises used solely for public purposes and not used or intended to be used for purposes of profit or for residential or charitable or religious purposes in respect of which the conservancy tax is payable by the Government. According to sub-section (3) of Section 137, in any such case the conservancy tax shall be fixed with reference to the cost or probable cost of the collection, removal and disposal, by the agency of municipal conservancy staff, of excrementitious and polluted matter from the premises.

30. One of the questions which has been agitated before us is as to whether sub-section (3) of Section 137 deals only with cases mentioned in sub-section (2) or whether it applies to cases covered both by sub-section (1) as well as sub-section (2) of Section 137. But differently, the question is as to what is the significance of the opening words "In any such case" in sub-section (3).

31. After giving the matter our consideration, we are of the view that sub-section (3) deals only with

cases mentioned in sub-section (2) of Section 137 and is not attracted in cases mentioned in sub-section (1).

32. Sub-section (3) provides for a concessional rate of conservancy tax because the amount of such conservancy tax has to be fixed with reference to the cost or probable cost of the collection, removal and disposal, by the agency of municipal conservancy staff, of excrementitious and polluted matter from the premises. The rate of conservancy tax covered by Section 137(3) would be lower compared to the general rate of conservancy tax under clause (b) of Section 129 which would be fixed after taking into account not only the cost or probable cost referred to in Section 137(3) but also the expenses for efficiently maintaining and repairing the municipal drains constructed or used for the receiption or conveyance of excrementitious and polluted matter. The scheme of the Corporations Act appears to be that in case of premises used solely for public purposes and not intended to be used for purposes of profit or in the case of premises intended to be used for residential or charitable or religious purposes in respect of which conservancy tax is payable by the Government the rate of conservancy tax should be lower compared to the rate of general conservancy tax. Sub-section (1) deals with large premises like hotels, clubs and stables which in the very nature of things require greater conservancy service, and it hardly stands to reason that the Legislature would contemplate the fixing of lower concessional rate of conservancy tax in the case of such premises. The opening words of sub-section (3) of Section 137, viz., "In any such case" make it clear that its concessional provisions apply only to the immediately preceding clause, namely, Section 137(2).

33. Act 5 of 1970 added a proviso to clause (b) of Section 129. According to that proviso, when determining under Section 99 or Section 150 the rate at which conservancy tax shall be levied for any official year or part of an official year, the Corporation may determine different rates for different classes of properties. A proviso was also added to Section 137(1) by the act that if the Corporation shall have determined for any official year any different rate of conservancy tax for any class of properties to which any of the properties referred to in this sub-section belongs, the Commissioner shall not, without the previous approval of the Corporation, fix, for such official year or part thereof, the conservancy tax to be paid in respect of any property belonging to such class for which such different rate may have been determined by the Corporation.

34. Perusal of the different provisions shows that the rate of conservancy tax can be fixed under the following three provisions :

> (1) A rate of conservancy tax (which for the sake of convenience may be described as general rate of conservancy tax) to be fixed by the Corporation under clause (b) of Section 129. This is, however, subject to the proviso that it would be open to the Corporation to determine different rates for different classes of properties.
>
> (2) A special rate of conservancy tax to be fixed by the Commissioner in respect of certain large premises under sub-section (1) of Section 137. Such rate shall not without the previous approval of the Corporation be different from the rate of conservancy tax for that class of properties in case the Corporation he determined the rate of conservancy tax for that class.
>
> (3) A special rate of conservancy tax in respect of premises mentioned in Section 137(2) to be fixed by the Commissioner.

35. The following affidavit was field on behalf of the Corporation in justification of the higher rate of conservancy tax of 9 per cent for large premises mentioned in the resolution :

I submit that the properties in respect of which the Corporation has determined the rate of conservancy tax at 9 per cent are properties belonging to a class the cost of providing conservancy services to which is proportionately higher than corresponding cost in respect of other properties . . . . I state that it is not necessary for the purpose of determining such higher rate that the Corporation or the Commissioner should separately work out the expenditure involved in dealing with these properties. I deny that there is no valid justification for providing a higher rate of conservancy tax in respect of such properties. I submit that it is competent to the Corporation to take notice of the higher cost of conservancy services required to be incurred in respect of these properties and to form an opinion on general facts - that the cost of providing conservancy services to these properties would be higher and to what extent. I submit that matters of this type do not demand an arithmetical accuracy and broad compliance in matters of this type is sufficient for compliance with law. I submit that according to the estimate of the Municipal Corporation, to meet the total expenditure of conservancy services, if a unit rate of conservancy tax was to be provided, it is necessary to determine the rate of conservancy tax at 4 1/2 per cent of the rateable value. The Corporation has, however, sought to distribute the incidence of conservancy tax equitability among all the lands and buildings, determine the general rate of conservancy tax at 3 per cent and determine a higher rate of conservancy tax at 9 per cent in respect of industrial premises and other properties as provided in the said resolution. I submit that the use of the premises has a material relation to the cost of providing conservancy services and to the maintenance and repairs thereof. I submit that the hotels, clubs, industrial premises and other large premises referred to in Section 129(b) as well as in Section 137 are premises which need relatively larger conservancy services.

36. The question with which we are concerned in the present cases is whether it is sufficient, as has been argued on behalf of the Corporation, to find out the total expense to be incurred for conservancy service and thereafter to fix different rates for different categories of properties so that the tax raised is sufficient to meet the total expenses, or whether, as has been held by the High Court, the different rate of conservancy tax fixed for a particular class of property under the proviso to clause (b) of Section 129 must be related to the actual cost involved in supplying conservancy service to that class. In other words the question is whether the Corporation in determining the rates of conservancy tax has to find out the total expenses it would have to incur for the various purposes mentioned in Section 129(b) in connection with the conservancy service and thereafter to raise that amount by fixing different rates of conservancy tax for various categories of properties or whether the Corporation would have to find out separately the expenses required in respect of conservancy service for each category of property and thereafter to fix such rate of conservancy tax for the category of property as would be sufficient to meet the expenses on the conservancy service for that particular category. To put it differently is the rate of conservancy tax for a class of property to be determined by taking into account the total expense which the Corporation has to meet for conservancy service in an official year or is to be determined by taking into account the expenses which the Corporation has to meet for conservancy service for that particular class of property ?

37. After giving the matter our consideration, we are of the view that what is required by Section 129 is that before determining the rates of conservancy tax for different categories of properties the Corporation should find out the total expenses it would have to incur for the various purposes mentioned in clause (b) of that section. After having ascertained the total expense it would be permissible to the Corporation to fix different rates of conservancy tax for various categories of properties. It is not essential except in cases mentioned in sub-sections (2) and (3) of Section 137

that the rate of conservancy tax for a particular category of properties should be such as would be related only to the expense for conservancy service for that particular category of properties. According to the proviso which has been added to clause (b) of Section 129 of the Corporations Act by Act 5 of 1970, when determining under Section 99 or Section 150 the rate at which conservancy tax shall be levied for any official year or part of an official year, the Corporation may determine different rates for different classes of properties. There is nothing in the above proviso which makes it obligatory for the Corporation to take into account separately the cost of conservancy service for each class of property for which conservancy tax is fixed. Apart for the fact that there is no statutory obligation for the Corporation to have separate estimates of the costs of conservancy service for various classes of properties referred to in the above proviso with a view to allocate the cost amongst different classes of properties, it would not even be feasible to do so for there would not be separate municipal drains for different classes of properties. As already mentioned, clause (b) of Section 129 also takes into account the expense required for efficiently maintaining and repairing the municipal drains for finding out the total expenditure for conservancy service. The High Court, in our opinion, was in error in striking down the resolutions passed by the Corporation for the official years 1967-68, 1968-69, 1969-70 and 1970-71 to the extent to which they fixed the rate of conservancy tax at 9 per cent in respect of textile mills and factories because of the absence of sufficient data to show as to what would be the cost of conservancy service for that particular category of properties. The affidavit filed on behalf of the Corporation, extract from which has been reproduced above, shows that the rates of conservancy tax for the different category of properties have been fixed after taking into account the total expense for the conservancy service. It is not possible to insist upon arithmetical accuracy in such matters. A broad and general estimate of the cost of conservancy service and the tax receipts after taking into account the relevant factors would satisfy the requirement of law.

38. We are unable to accede to the submission of Mr. Tarkunde that in view of the construction which we are placing upon the provision to Section 129(b) the proviso would be violative of Article 14 of the Constitution on account of excessive delegation of legislative power. As already mentioned, the Corporation must keep in view the total expense it would have to incur for the conservancy service before fixing the various rates of conservancy tax. The different rates of conservancy tax have thus to be related to the total cost of conservancy service to be borne by the Corporation. The "opinion of the Corporation" mentioned in clause (b) of Section 129 is formed after budget estimates are prepared in accordance with Section 95, 96 and 100 of the Corporation Act. According to the above provisions the Commissioner is to make a statement of proposals as to the taxation which would in his opinion be necessary or expedient to impose under the provisions of the Act in the annual budget estimate of the next official year. The Standing Committee then considers the estimates and proposals of the Commissioner, and after having obtained from the Commissioner further details and information as they think fit, the Committee frames the budget estimates. The budget estimates contain proposals of rates and extents of municipal taxes. The budget estimates are then printed and the printed copies are sent to each municipal councillor. The budget estimates are thereafter laid before the Corporation which then considers the same. In considering the budget estimates the Corporation is entitled to refer them back to the Standing Committee for further consideration or to adopt them as they stand or subject to alterations. The entire procedure provides builtin safeguards and lays down adequate guidelines in the matter of taxation. It therefore cannot be said that the Legislature has not prescribed any guiding principle for the Corporation for determining the rates of conservancy tax. We agree with the High Court that the proviso to clause (b) of Section 129 does not suffer from the vice of excessive delegation of legislative power.

39. Mr. Bhandare on behalf of the State of Gujarat has assailed the finding of the High Court that Section 406(2)(e) and Section 411(bb) are violative of Article 14 and that Rule 42 of the Taxation Rules is void in so far as it has provided that if an appeal is preferred or entertained against the tax, warrant shall not be issued for the recovery of the amount of tax. The High Court in striking down Section 406(2)(e) and Section 411(bb) relied upon its earlier judgment dated October 27, 1969 which had been given before the addition of the proviso to Section 406(2)(e) by Act 5 of 1970. According to the earlier judgment, clause (e) of sub-section (2) of Section 406 classified the appellants filling appeals against tax and rateable value into two classes : (1) those who deposited the amount of tax assessed by the commissioner; and (2) those who did not. It was held that the above classification had no rational nexus with the object of provision for appeal and that there was no reasonable justification for giving a right of appeal to one class and denying it to the other. After referring to the observation in the earlier judgment, there High Court expressed the opinion in the judgment under appeal that the addition of the proviso to Section 406(2)(e) by Act 5 of 1970 did not make any material difference so far as the constitutional validity of the above provision was concerned. According to the High Court the proviso merely carves out an exception from the main provision in Section 406(2)(e) and limits the applicability of the main provision to appellants who can deposit the amount of tax without undue hardship. The result, in the opinion of the High Court, was that the discrimination between the appellants who deposited the amount of tax and the appellants who did not, which is the necessary consequence of the condition requiring deposit of the amount of tax, still persists, though it is now limited to the class of appellants who can deposit the amount of tax without undue hardship.

40. After hearing the learned Counsel for the parties we are unable to subscribe to the view taken by the High Court. Section 406(2)(e) as amended states that no appeal against a ratable value or tax fixed or charged under the Act shall be entertained by the Judge in the case of an appeal against a tax or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant, unless the amount claimed from the appellant has been deposited by him with the Commissioner. According to the above clause, where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject to such conditions as he may deem fit. The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any property upon such value has been presented to him. Power at the same time is given to the appellate Judge to relieve the appellant from the rigour of the above provision in case the Judge is of the opinion that it would cause undue hardship to the appellant. The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution. It is significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of

the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own commission and default. The above provision, in our opinion, has not the effect of making invidious or creating two classes with the object of meting out differential treatment to them; it only spells out the consequences flowing from the commission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income-tax Act, 1922. The proviso to that section provided that "... no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission.

41. Observations in the case of Hannah Cohen Exrx. of Sol Cohen, Deceased and David E. Cohen, Intervener, Petitioners v. Beneficial Industrial Loan Corporation (337 US 539) lend some support to the view we have taken. Headnote 10 which is based upon the observations in the body of the judgment reads as under :

> 10. A State statute which requires that in a stockholder's derivative action a plaintiff who owns less than 5 per cent of the defendant corporation's outstanding shares, or shares having marked value not exceeding $50,000, give security for the reasonable expenses including Counsel fees, incurred by the corporation and by other parties defendant, and which makes the plaintiff liable for such expenses if he does not make good his claims, and subjects the amount of security to increase if the progress of the litigation reveals that it is inadequate or to decrease if it is proved to be excessive does not violate the contract clause, or the due process clause, or the equal protection clause of the Federal Constitution.

42. So far as the constitutional validity of Section 411(bb) and Rule 42 is concerned, it is the common case of the parties that it hinges upon the validity of Section 406(2)(e) and that in case we uphold the validity of the last mentioned provision, the validity of the other two provisions would have to be upheld. We accordingly uphold the constitutional validity of all three provisions.

43. The Ahmedabad Electricity Co. Ltd. petitioner in Writ Petition No. 74 of 1972 is a licensee

under the Indian Electricity Act, 1910. It has laid underground supply lines under most of the roads and public streets in the city of Ahmedabad. The Corporation has in that connection assessed property tax and made the petitioner-company liable to pay that tax on the ground that the underground supply lines occupy space below the surface and that the said space constitutes land. Section 12 of the Indian Electricity Act confers a right upon a licensee to open and break up the soil and pavement of any street, railway or tramway for laying down and placing electric supply lines and other works. Although the roads and public streets under which the petitioner-company has laid down underground supply lines vest in the Corporation under Section 202 of the Corporations Act, the liability to pay property tax in respect of the space in which supply lines are laid is sought to be fastened upon the petitioner-company in view of the provisions of Section 139(1) of the Corporation Act. According to Section 139(1), subject to the provision of sub-section (2), with which we are not concerned, property taxes assessed upon any premises shall be primarily leviable if the premises are held immediately from the Government or from the Corporation, from the actual occupier thereof. The word "premises" as defined in Section 2(46) includes land. The case of the Corporation as set out in the affidavit of Shri Narendra R. Desai, Town Development Officer of the Corporation is that only such area of the land as is occupied by the underground supply lines that is valued for the purpose of assessing properly taxes. It is stated that for the purpose of laying supply lines the petitioner digs trenches and lays down bricks to serve as bedding for the supply lines. The petitioner-company, it is urged, occupies by means of the supply lines that area of land which is occupied by the bedding prepared for laying down the supply lines.

44. Mr. Tarkunde on behalf of the petitioner-company has urged that under Entry 49 of the State List in the Seventh Schedule to the Constitution, the State Legislature is empowered to enact a law relating to taxes on lands and buildings. It is submitted that the State Legislature has no competence under the above entry to enact a law for levying tax in respect of the area occupied by the underground supply lines. The word "land", according to the learned Counsel, denotes the surface of the land and not the underground strata. We are unable to accede to the above submission. Entry 49 of List II contemplates a levy of tax on lands and buildings or both as units. Such tax is directly imposed on lands and buildings and bears a definite relation to it. Section 129 makes provision for the levy of property tax on buildings and lands. Section 139 merely specifies the persons who would be primarily responsible for the payment of that tax. The word "land" includes not only the face of the earth but everything under or over it, and has in its legal signification an indefinite extent upward and downward, giving rise to the maxim, Cujus est solum ejus est usque ad coelum (see p. 163, 73 Corpus Juris Secondum). According to Broom's Legal Maxims, 10th Ed. p. 259, not only has land in its legal signification an indefinite extent upwards, but in law it extends also downwards, so that whatever is in a direct line between the surface and the centre of the earth by the common law belongs to the owner of the surface (not merely the surface, but all the land down to the centre of the earth and up to the heavens) and hence the word "land" which is nomen generalissimum, includes, not only the face of the earth, but everything under it or over it.

45. In Ryde on Rating, 11th Ed., it is stated on page 14 :

By far the largest number of persons rated are as 'occupiers of land or house'. The word 'land' as used in the statute, must be understood in the widest possible sense : it includes not only the surface of the earth, but everything under it, or over it. In Electric Telegraph Co. v. Salford Overseers ((1855) 11 Ex 181, 186 : 156 ER 795 : 3 CLR 973), Pollock, C. B., said,

There is no distinction between the occupying land, by passing through a fixed point of space in the air to another fixed point, or by passing in the same manner through land or water. Land extends

upwards as well as downward. ...

46. In the case of Mayor, Aldermen and Councillors of the City of Westminster v. The Southern Railway Company, the Railway Assessment Authority and W. H. Smith & Son, Limited (1936 AC 511) Lord Russel of Killowen observed :

Subject to special enactments, people are rated as occupies of land, land being understood as including not only the surface of the earth but all strata above or below.

47. There can, therefore, be no doubt that land in Entry 49 of List II would include the underground strata.

48. It may be stated that the word "land" has also been defined in clause (30) of Section 2 of the Corporations Act to include land which is being built upon or is built upon or is built upon or covered with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street. This definition is of inclusive nature and does not exclude from its ambit the underground strata of the land.

49. It has been argued by Mr. Tarkunde that the right to lay down supply lines under Section 12 of the Indian Electricity Act is in the nature of a statutory licence and is not a right in land. Hence the right does not constitute land within Entry 49 and is not taxable by the State Legislature. This submission is wholly misconceived because what is taxed under the Corporations Act is land. Section 139, as already mentioned earlier, merely fastens the liability and states that the person primarily liable to pay that tax would be the actual occupier. It is not the case of the Corporation that the right of the petitioner-company of laying and placing electric supply lines constitutes land and as such the petitioner-company is liable to pay property tax. On the contrary, the liability is sought to be fastened on the petitioner-company because of the company being in occupation of the land wherein electric supply lines, have been laid and placed. Section 52 of the Indian Easement Act, 1882, to which reference has been made on behalf of the petitioner-company, merely defines "license" and has no bearing on the question with which we are concerned.

50. It cannot, in our opinion, be doubted that the petitioner-company is in occupation of the land wherein underground supply line is laid. In England also a similar view was taken. We may refer in this context to the case of The Assessment Committee of the Holywell Union v. The Halkyn District Mines Drainage Co. (1895 AC 117 : 11 TLR 132). The headnote of this case, which was decided by the House of Lords, reads as under :

Land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying rateable to the relief of the poor. Such a person may be rateable, though his occupation is exclusive only for certain purposes and though the owner of the soil has reserved to himself rights of possession subordinate to the paramount right granted to the other. The test of ratability is not whether the rights granted are corporeal or incorporeal, but whether there is an occupation - which is a question of fact.

Where in pursuance of a statute the owner of land granted to a drainage company the exclusive right of drainage through a tunnel and a water-course in his land, with the right of placing works in the tunnel and water-course, and of making other tunnels in connection therewith, reserving to himself mineral and other rights :-

Held, reversing the decision of the Court of Appeal that the statute and grant gave the company not merely an easement but possession of the tunnels and water-course, that the right reserved to the owner were subordinate to the rights granted to the company were de facto in occupation of the tunnels and water-course and rateable to the poor in respect thereof.

Lord Herschell, L.C. in that case observed :

Along the tunnel for a considerable distance the company have placed iron tubbing in parts they have placed brick arches; it seem to me that in these parts they occupy land precisely in the same sense as a water company does by its pipes or a tramway company by its rails, or a telephone company by the supports for its wires.

It was further observed :

The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title. The person legally possessed may not occupy. On the other hand, a person may be occupier either with or without the consent of without the consent of the owner.

Lord Herschell also relied upon the case of Rex v. Chelsea Waterworks Company ((1833) 5 B & Ad 156 : 110 ER 750) wherein a water company to whom the Crown granted the right to lay down its pipes was held by the Court of King's Bench to be occupier of land and liable to be rated. Lord MacNaghten in the above case observed :

Now, putting aside for a moment the reservations contained in the deed of grant, can there be any doubt as to the position of the company for rating purposes as regards their authorized works ? The numerous cases relating to gas companies, water companies and tramways, place the matter beyond question.

Lord Davey observed in the above case :

My Lords, I agree with the learned judges in the Court of Appeal that the drainage company are not owners of the soil of the tunnels or water-course. But that does not seem to me conclusive on the question of their rateablility in respect of their occupation. The right of the company may be an easement or incorporeal right; but the easement may be of such a character as requires the occupation of land for its exercise, and confers upon the company of land for its exercise, and confers upon the company a right to occupy land during its continuance. According to a long course of authority the occupation of land under such circumstances is sufficient for rating purposes though unaccompanied by ownership of any portion of the soil. The law was thus stated by Wightman, J. in Reg. v. West Middlesex Waterworks ((1859) 1 E and E 716, 720 : 120 ER 1078) : 'In this case', says the learned judge, 'the first question is whether the company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is de facto in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be de facto merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute.

51. Nothing cogent has been argued before us as may induce us to take a view different from that we have arrived at and which is also in accord with the view of the House of Lords, We would,

therefore, hold that the petitioner-company is in occupation of the underground strata of the land through which their electric supply lines had been laid.

52. It has been argued by Mr. Tarkunde that even if the petitioner electricity-company may be held to be actual occupier of the underground space on which its supply line has been laid the petitioner company does not hold the said space from the Corporation. It is urged that the petitioner-company is in occupation of that space under a statute and not from the Corporation. In order to hold that space from the Corporation, it was essential, according to the learned Counsel, that there should have been some agreement between the petitioner-company and the Corporation or that the Corporation should have given its consent for that purpose. We are unable to accede to the above submission. Clause (a) of Section 139(1) of the Corporations Act fastens the liability for payment of property tax on the actual occupier of the premises held immediately from the Government or from the Corporation. In order to attract the liability under the above clause, it is not essential that there should have been an agreement between the actual occupier and the Government or the Corporation for the holding of the premises or that the holding must be with the consent of the Government or the Corporation. The liability would accrue even if the premises vesting in the Government or the Corporation are occupied in pursuance of a statutory provision. The words "held immediately from the Government or from the Corporation" signify only the party in whom the premises vest which are held by the actual occupier thereof.

53. Contention has also been advance by Mr. Tarkunde regarding the quantum of tax levied on and the extent of the land alleged to have been occupied by the petitioner-company for the under-ground supply lines. This is essentially a question of fact and would have to be agitated before the authorities concerned, including the appellate authority.

54. As a result of the above, we dismiss Writ Petitions Nos. 51, 60 to 74, 87 to 91, 157, 492 to 503, 533, 534 and 583 of 1972 as also Write Petitions Nos. 1886 to 1877 and 2046 of 1973 with costs. One hearing fee. We also dismiss Civil Appeals Nos. 489 to 513 and 752 to 755 of 1973. We accept Civil Appeals Nos. 643 to 684 of 1973 and Civil Appeal Nos. 389 to 430 of 1974 and set aside the judgment of the High Court in so far as it has struck down Section 2(A) (i), Section 406(2)(e), Section 411(bb) and Rule 42 of the Taxation Rules in Schedule A to the Corporation Act. We also set aside the judgment of the High Court to the extent it has struck down resolutions passed by the Corporation for official years 1967-68, 1968-69, 1969-70 and 1970-71 fixing the rate of conservancy tax at 9 per cent in respect of textile mills and factories. The writ petitions which were filed in the High Court by the respondents concerned are dismissed. The appellants shall be entitled to their costs in these two sets of appeals. One hearing fee.

9100119751212002

Firm of Pratapchand Nopaji

Vs

Firm of Kotrike Venkata Setty and Sons and Others

Civil Appeals Nos. 2382-2384 of 1968

(Beg, J.)

12.12.1974

JUDGMENT

BEG, J. –

The three consolidated appeals before us by grant of special leave are directed against a common judgment of the High Court of Andhra Pradesh, by which the plaintiff's appeals in three suits, filed on similar facts, were dismissed. They can be decided by us on the question whether the contracts set up by the plaintiff-appellant were struck by the provisions of Section 23 of the Contract Act. The section reads as follows :

23. The consideration or object of an agreement is lawful, unless -

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

2. The appellant, firm of Pratapchand Nopaji, is the plaintiff in all the three suits, but the defendants of each suit, the respondents before us, are different. The plaintiff claimed Rs. 78,201.15 ans. in Original Suit No. 106 of 1954, Rs. 13,978.4 ans. in Original Suit No. 107 of 1954 and Rs. 91,697.4 ans, in Original Suit No. 114 of 1954, as amounts due to indemnify him under Section 222 of the Contract Act on the strength of payments said to have been made by the plaintiff to third parties on behalf of the defendants who are alleged to have directed the plaintiff to enter into "badla" transactions for them. Three other suits, claiming amounts alleged to have been borrowed, also filed by the same plaintiff, were tried together with these three suits; but, we are not concerned here with the other three suits from the dismissal of which no appeal was preferred.

3. The character of the contract set up in each case is brought out by paragraph 3 of the Original Suit No. 106 of 1954 where the plaintiff said :

The defendants are big merchants and have been carrying on trade outside Dhone, even in places like Bombay. They wanted to do the business of purchasing and selling groundnut seeds and oil seeds in Bombay market and for this purpose engaged the plaintiffs as commission agents to contact with Bombay Commission Agents, who were entering into contracts with customers for purchasing or selling groundnut seeds and castor oil seeds, according to the orders of the defendants which the plaintiffs were communicating to them. The Bombay commission agents used to give intimation to the plaintiffs of the fact of having executed the orders (the contracts of sale or purchase) and the terms, the rate, etc., of the contracts. The plaintiffs were immediately communicating the information to the defendants. The business was according to the custom prevailing in the Bombay market, viz. the custom of badla. The defendants not only agreed in general to abide by the custom of badla, but specifically consented to every such badla. At the request of the defendants the transactions were settled after undergoing a few badlas. Such settlements were beneficial to the

defendants as the market was falling and delay would have meant greater loss when the market was falling the Bombay agents were pressing for cash settlement on pain of declaring them as defaulters which will result in a disability to do any further business. The defendants knew this state of affairs and they realised that a settlement was the only course beneficial to them. So they specifically told the plaintiffs that they must at any cost preserve their reputation in the Bombay market and with plaintiffs. The defendants hence agreed to pay the amount and on their request and on their behalf the plaintiffs paid all amounts due to the Bombay commission agents according to the patties sent by the Bombay agents in respect of the transactions relating to the defendants. The defendants also agreed to pay to the plaintiffs interest on the amounts so advanced by the plaintiffs for payment to the Bombay agents. The Bombay commission agents were sending patties of transactions to the plaintiffs. As already stated, at the request of the defendants, the plaintiffs paid all such losses and other charges according to the patties sent by Bombay commission agents on the promise of the defendants to repay all such amounts to the plaintiffs with interest. The extracts of the accounts filed with this plaint show the transactions and the amounts paid by the plaintiffs at the request of and on behalf of the defendants.

4. The plaintiff's case was that the authority to engage in badla transactions on forward contracts, which are contracts for the delivery of specified goods on future dates, implied what is known as "continuation" or "carrying over" in the terminology of the Stock Exchange. The meaning of such a transaction is given, in Halsbury's Laws of England - 3rd Edn. Vol. 36 at p. 547 (para 842) as follows :

If purchaser of securities during a dealing period does not wish to complete his purchase during the next following settlement period he may arrange to resell for the current account the securities which he has agreed to buy for that account, and to purchase for the mew account. Conversely a seller of securities during a dealing period who does not wish to deliver during the next following settlement period may arrange to repurchase for the current account the securities which he has agreed to sell and to sell for the new account. Such an arrangement is known as a continuation of carrying over.

This is explained future and distinguished from a loan (at page 548 - para 845) :

Continuation or carrying over is in form and in law a sale and repurchase, or a purchase and resale, as the case may be. It is a new contract, and not merely getting further time for the performance of the old contract.

A continuation being a contract of sale and repurchase and not a loan, the original seller becomes again the absolute owner of the securities carried over, and is not bound to redeliver the identical securities but an equal amount of similar securities. If, therefore, he sells the securities taken in by him and makes a profit thereon, he may retain it to own use. In the case of a loan, however, if the lender sells the securities deposited, the borrower may charge him with the price obtained for them if he finds it to his interest to do so.

5. Under the Defence of India Rules the definition of badla provides that it

includes a contango and a backwardation and any other arrangement whereby the performance of any obligation under a contract to take or give delivery of securities within a stipulated period is postponed to some future date in consideration of the payment or receipt of interest or other charges.

> "Carrying over" or "continuation" is also given as one of the meanings of the term "contango" or "backwardation" in Halsbury's Laws of England - 3rd Edn. Vol. 36 at p. 548. If we substitute "goods", in respect of which forward contracts are made, for "securities", we get the exact nature of the transactions set up by the plaintiff in each case. They are nothing short of contracts for speculation in rise and fall of prices of goods purchased only nationally without any intention to actually deliver them to the purchasers. In such a transaction, a purchaser is not at all expected to make a demand for actual delivery of goods only ostensibly sold.

6. We find considerable force in the plaintiff's contention that at least contracts between the plaintiffs and defendants were not wagering contracts although we think, in agreement with the High Court, that each party knew that their object was to indulge in speculation. In Bhagwandas Parasram (a firm) v. Burjori Ruttoniji Bomanji (45 IA 29, 33 : 44 IC 284 : AIR 1917 PC 101), after examining the facts of a case in which a firm of "pucca adatias" was authorised, by a defendant intending to speculate in differences, to sell and then to re-sell for the purpose of making profits, it was found that, as the plaintiff could not be said to either lose or benefit correspondingly from variations in price, there could be no agreement in the nature of a wager between the principal and the agent whatever may have been intentions of the principal. It was held that, in a wagering contract, there has to be a mutuality in the sense that the gain of one party would be the loss of the other on the happening of the uncertain event which is the subject-matter of a wager. It was pointed out there (at p. 33) :

Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. No such intention has been proved.

We, therefore, accept the contention of the appellant that there was no wagering contract between the plaintiff and any of the defendants.

7. The next question we may consider is whether the contracts set up could be said to be collateral contracts quite unaffected by the objects or intentions of defendants in entering into these contracts which involved making of other contracts which may or may not be wagering contracts but were not "prohibited". Strong reliance was placed upon Gherulal Parakh v. Mahadeodas Maiya ((1959) Supp 2 SCR 406, 431 : AIR 1959 SC 781), where the object of a contract of partnership was to enter into forward contracts for the purchase and sale of wheat so as to speculate in rise and fall of price of wheat in future. The object of the partnership was held to be not illegal, within the meaning of Section 23 of the Contract Act, although the business for which the partnership was formed was held to involve wagering. The position was thus summarised there (at p. 431) :

The aforesaid discussion yields the following results :

> (1) Under the Common Law of England a contract of wager is valid and therefore both the primary contract as well as the collateral agreement in respect thereof are enforceable; (2) after the enactment of the Gaming Act, 1845, a wager is made void but not illegal in the sense of being forbidden by law, and thereafter a primary agreement of wager is void but a collateral agreement is enforceable; (3) there was a conflict on the question whether the second part of Section 18 of the Gaming Act, 1845, would cover a case for the recovery of money or valuable thing alleged to be won upon any wager under a substituted contract between the same parties : the House of Lords in Hill's case ((1921) 2 KB 351) had finally resolved the conflict by

holding that such a claim was not sustainable whether it was made under the original contract of wager between the parties or under a substituted agreement between them; (4) under the Gaming Act, 1892, in view of its wide and comprehensive phraseology, even collateral contracts, including partnership agreements, are not enforceable; (5) Section 30 of the Indian Contract Act is based upon the provision of Section 18 of the Gaming Act, 1845, and through a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under Section of 23 of the Contract Act; and (6) partnership being an agreement within the meaning of Section 23 of the Indian contract Act, it is not unlawful, though its object is to carry on wagering transactions. We, therefore, hold that in the present case the partnership is not unlawful within the meaning of Section 23(A) of the Contract Act.

Re. (ii) Public Policy : The learned Counsel for the appellant contends that the concept of public policy is very comprehensive and that in India, particularly after independence, its content should be measured having regard to political, social and economic policies of a welfare State and the traditions of this ancient country reflected in Srutis, Smritis and Nibandas. Before adverting to the argument of the learned Counsel, it would be convenient at the outset to ascertain the meaning of this concept and to note how the Courts in England and India have applied it to different situations. Cheshire and Fifoot in their book on "Law of Contract", 3rd Edn. observe at page 280, thus :

The public interests which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different judges, that it forms a treacherous and unstable ground for legal decision. . . . These questions have agitated the Courts in the past, but the present state of the law would appear to be reasonably clear. Two observations may be made with some degree of assurance.

First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the courts to invent a new head of public policy. A judge is not free to speculate upon what, in this opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand; this particular branch of the law.

Secondly, even though the contract is one which prima facie fails under one of the recognised heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case, "should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. . . . In popular language. . . The contract should be given the benefit of the doubt.

8. If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which, though void, is not in itself prohibited, within the meaning of Section 23 of the Contract Act, it may be enforced as a collateral agreement. If, on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the

object sought to be achieved which is hit by Section 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a "void contract". A void agreement, when coupled with other facts, may become part of transaction which creates legal rights, but this is not so if the object is prohibited or "mala in se". Therefore, the real question before us is : Does the agreement between the parties in each case, which was to be carried out in Bombay, so connected with the execution of an object prohibited by either a law applicable in Bombay or a law more widely applicable so as to be hit by Section 23 of the Contract Act ?

9. A question which has been raised before us is whether the plaintiff, who entered into contracts with third parties, who appeared as witnesses in the cases now before us, so that these third parties made the purchases and settlements in Bombay, the payments for which are the subject matter of suits, was dealing with them as a principal to principal. The High Court had found that the relationship between the plaintiff and the third parties he employed to conclude the transactions was that of a principal to principal. The question whether the parties through whom the plaintiff actually alleged carrying out of the contract set up between the plaintiff and the defendants could themselves be regarded as principals or agents or the plaintiff will become quite immaterial if the objects of the contracts are found to be tainted with the kind of illegality which is struck by Section 23 of the Contract Act. Again the mere fact that the contracts between the plaintiff and the defendants were entered into at Kurnool in the State of Andhra Pradesh would also not make any difference in principle it the objects of the contracts which were to be carried out at Bombay were of such a kind as to be hit by Section 23 of the Act. The principle which could apply, if the objects are struck by Section 23 of the Contract Act, is embodies in the maxim : "Qui facit per alium facit per se" (What one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothes with the powers of an ordinary commission agent only.

10. In view of the opinion already expressed us, that, at any rate, the initial contracts between the plaintiff and the defendants were not really wagering contracts, we need not deal with the provisions of the Bombay Act No. 3 of 1865 for Avoiding Wagers which are declared void by Section 30 of the Indian Contract Act. We will, however, consider the applicability of the provisions of Bombay Forward Contract Control Act, No. 64 of 1947 (hereinafter referred to as the 'Bombay Act') and of the Oilseeds (Forward Contract Prohibition) Order, 1943, (hereinafter referred to as the Control Order) which was kept alive by the provisions of Section 17 of the Essential Supplies (Temporary Powers) Act, 1946 (hereinafter referred to as 'the Central Act').

11. Section 2, sub-section (2) of the Bombay Act says :

> "Contract" means a contract entered into, made or to be performed in whole or in part in any notified area relating to the sale or purchase of any goods to which this Act applies :
>
> Provided that the Provincial Government may by notification in the Official Gazette direct any contract or class of contracts to be excluded from the provisions of this Act, subject to such conditions as the Provincial Government may deem fit to impose;

Section 2, sub-section (3) lays down :

'Forward Contract' means a contract for the delivery of goods at a future date and which is not a ready delivery contract;

Section 2, sub-section (4) enacts :

'Goods' means any kind of moveable property and includes securities but does not include money of actionable claims;

Section 2, sub-section (7) reads :

'Option in goods' means a contract for the purchase or sale of a right to buy or a right to sell, or a right to buy or sell goods in future and include a gully, a teji, a mandi or a teji-mandi in goods;

Section 2, sub-section (9) says :

'Ready delivery contract' means a contract which provides for delivery and payment of price either immediately or within such number of days not exceeding seven after the date of the contract and under such conditions as the Gazette, specify in this behalf in respect of any particular goods;

Section 2, sub-section (1) provides :

'Recognised association' means an association which is for the time being recognised by the Provincial Government as provided in Section 3 :

The recognition of association is governed by Section 3 of the Act, and Section 6, sub-section (1) gives the power to every recognised association to

subject to the sanction of the Provincial Government, make and, from time to time, add to, vary or rescind bye-laws for the regulation and control of forward contracts in goods for which such association has been recognised.

12. Section 6, sub-section (2)(f) refers specifically to the power of the recognised Association to lay down, "the terms, conditions and incidents of contracts and the forms of such contracts as are in writing", and Section 6, sub-section (2)(g) covers :

regulating the entering into, making, performance, rescission and termination of contracts, including contracts between members, or between a commission agent and his constituent or between a broker and his constituent or between jetthawala or muccadum and his constituent or between a member of the recognised association, and a person who is not a member, and the consequences of insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer and the responsibility of commission agents muccadums and broker not parties to such contracts;

Section 6, sub-section 2(i) indicates "the method and procedure for settlement of claims and disputes including settlement by arbitrations"; Section 6, sub-section (3) says :

The bye-laws may provide that the contravention of any of the bye-laws shall -

> (i) make a contract which is entered into, made or is to be performed otherwise than in accordance with the bye-law void or illegal;
>
> (ii) render the member liable to expulsion, suspension, fine or other non-monetary penalty.

Section 8 of the Bombay Act deals with illegality of the contracts and its consequences as follows :

> (1) Every forward contract for the sale or purchase of, or relating to, any goods, specified in the notification under sub-section (3) of section 1 which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed -
>
> (a) in accordance with such bye-laws, made under Section 6 to 7 relating to the entering into, making or performance of such contracts, as may be specified in the bye-laws, or
>
> (b)(i) between member of a recognised association,
>
> (ii) through a member of a recognised association, or
>
> (iii) with a member of a recognised association, provided that such member has previously secured the written authority or consent, which shall be in writing if the bye-laws so provide, of the persons entering into or making the contract,
>
> and no claim of any description in respect of such contract shall be entertained in any civil court.
>
> (2) Any person entering into or making such illegal contract shall, on conviction, be punishable with imprisonment for a term which may extend to six months or with fine or with both.

13. Section 9 of the Bombay Act lays down :

> (1) Notwithstanding anything contained in this Act or in any other law for the time being in force on a notification being issued by the Provincial Government in the Official Gazette, options or such kinds of options in such goods and in the whole of the Province of Bombay or such part thereof as may be specified in the notification shall be illegal.
>
> (2) Any person entering into any option made illegal under sub-section (1) shall, on conviction, be punishable with imprisonment which may extend to six months or with fine or with both.

14. The Andhra Pradesh High Court had reached the conclusion that it was not necessary to decide the question whether provisions of Section 8 Clause 1(a) had been contravened probably because no bye-law made under Section 6 or 7 of the Bombay Act had been placed before it. No such bye-law has been pointed out us. We are, therefore, not in a position to hold that there has been an

infringement of any bye-law. The High Court had, however, held that there had been a contravention of Section 8(1) (b) of the Bombay Act inasmuch as only one of the third parties, namely Shivdanmal Agarwal & Co., whose partner Ganga Ram was examined as PW 1, was shown to be a member of a recognised association. We do not consider it necessary to decide this question either as it appears to us that the Andhra Pradesh High Court was correct in holding that the forward contracts under consideration violated the provisions of the two orders set out below :

> (1) No. 7561/33-D(4), which reads :
>
> "In exercise of the powers conferred by the proviso to clause (2) of Section 2 of the Bombay forward Contracts Contract act, 1947 (Bom. LXIV of 1947), the Government of Bombay is pleased to direct that the following contracts shall be excluded from the provisions of the said Act namely :
>
> Forward contract for specific delivery of any variety of oilseeds for specified price the delivery order, railway receipts or bill of lading against which are not transferred to the third parties, made or entered into before the 19th December, 1950, and outstanding on that date."
>
> (2) No. 7561/33-D(2) which says :
>
> "In exercise of the powers conferred by sub-section (1) of Section 9 of the Bombay Forward Contracts Control Act, 1947 (Bom. LXIV of 1947) the Government of Bombay is pleased to direct that all options in all varieties of oilseeds shall be illegal in Greater Bombay."

15. Moreover, as regards oilseeds, we find that the Central Act enacted for the control of production, supply, and distribution of essential commodities, covers "food-stuffs" which, under Section 2(c), "include edible oilseeds and oils". Section 3(2) (c) to (g) of the Central Act authorises the Central Government to pass orders for the purposes given as follows :

> (c) for controlling the prices at which any essential commodity may be bought or sold;
>
> (d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity;
>
> (e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;
>
> (f) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or in such circumstances, as may be specified in the order;
>
> (g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles, which, in the opinion of the authority making the order are, or if unregulated are likely to be, detrimental, to public interest;
>
> Section 7(2) of the Central Act provides that :

If any person contravenes any order under Section 3 relating to foodstuffs, -

(a) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the court is of opinion that a sentence of fine only will meet the ends of justice; and

(b) any property in respect of which the order has been contravened or such part thereof as to the court may seem fit shall be forfeited to the Government ...

16. As already indicated, Section 17 of the Central Act keeps alive the provisions of Oilseeds (Forward Contract Prohibition) Order, 1943. The provisions of this Control Order appear to us to be so important for the decision of the question before us that we reproduce it below in toto. It runs as follows :

1. (1) This order may be called the Oilseeds (Forward Contracts Prohibition) Order, 1943.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

2. In this order -

(i) "contract" means a contract made, or to be performed in whole or in part in British India relating to the sale or purchase of oilseeds;

(ii) "forward contract" means a contract for the delivery of oilseeds at some future date;

(iii) "oilseeds" means any of the oilseeds for the time being specified in the first column of the schedule to this Order;

(iv) "specified date" in relation to any oilseeds means the date specified against those oilseeds in the second column of the schedule to this Order.

3. No person shall, after the specified date for any class of oilseeds, enter into any forward contract in any of those oilseeds.

4. Notwithstanding any custom, usage or practice of the trade, or the terms of any contract or any regulation of an association relating to any contract -

(1) every forward contract in any class of oilseeds outstanding at the close of business on the specified date shall be deemed to be closed out at such rate as the Central Government may by notification in the Official Gazette fix in this behalf, and different rates may be fixed for different classes of contracts;

(2) all differences arising out of any contract so deemed to be closed out shall be payable on the basis of the rate fixed as aforesaid and the seller shall not be found to give and the buyer shall not be bound to take delivery;

(3) payment of all differences legally due from a member of an association to another member of such association in respect of any forward contract closed out under this clause shall be made to the clearing house of the rate fixed by the Central Government under sub-clause (1) shall be deemed to be the settlement rate fixed by the association under its bye-laws or other regulations which shall, for the relevant purpose, continue to have effect subject to the provisions of this Order.

5. The Central Government may, by notification in the Official Gazette, exclude any contract or class of contracts from the provisions of this Order. (Noti. No. P. and S.C. 75(1) /43, dated 31st May, 1943.)

17. A notification was issued on May 31, 1943 under Section 5 of the above-mentioned Order, the relevant part of which reads as follows :

I. Forward Contracts for groundnut, linseed, mustard seed, repeseed or toriaseed or specified qualities or types and for specific delivery at a specified price - not transferable to third parties are excluded from the provisions of this Order (Noti. No. P. & S.C. 75(2)/43, dated 31st May, 1943).

II. No. P. & S.C. (X) 75(A)1/43. - In exercise of the powers conferred by clause 5 of the Oilseeds (Forward Contracts Prohibition) Order, 1943, the Central Government is pleased to exclude the following class of contracts from the provisions of the said Order, namely :

"Forward contracts for castor seed, cotton seed or sesamum (til or jinjil) or specific qualities or types and for specific delivery orders, railway receipts or bills of lading against which contracts are not transferable to third parties."

18. Learned Counsel for the appellant contended that the contracts under consideration for groundnut seeds and castor seeds are excluded under the above-mentioned notification because they satisfy, in each case, the first of the two alternative conditions of exclusion. These conditions for contracts for sale of groundnut seeds are : (1) they must relate to specified qualities or types for specific deliveries at a specified price; and, (2) they should not be transferable to third parties. Excluded forward contracts for castor seeds must (a) be in respect of specified qualities or types; and (b) be for specific delivery orders, railway receipts, or bills of lading against which are not transferable to third parties. The trial Court had accepted the contention the it is enough that one of two conditions are satisfied and had read the word "and" in the above-mentioned notification is the equivalent of the disjuncture 'or'. The contention of the respondents, that the High Court rightly held that the word "and" cannot be converted into an "or" and that both the conditions must be satisfied for an exemption, appear to us to be correct. We, therefore, hold that the contracts under consideration before us were prohibited under the provisions of the Essential Supplies Act read with the Central Order of 1943. They were not shown to be covered by the conditions for their exemption from prohibition.

19. Having regard to the objects of the prohibition imposed by the Central Government on forward contracts on, inter-alia, groundnut seeds and oilseeds, in the interest of the general public, so that the supply at reasonable prices of commodities essential to the life or well-being of masses of the people is not jeopardized, the absolute terms of the prohibition, the penalties imposed for its infringement, and the careful manner in which only those contracts are excluded from the

prohibition, which are for actual delivery and supply to bona fide purchasers, we agree with the High Court that the contracts under consideration are tainted with an unlawfulness of their object and for forbidden by law.

20. The High Court had given very good reasons for accepting the view of the trial court that the contracts under consideration could not possibly be for actual delivery. It observed that the total quantity of groundnut seeds alone shown to have been originally purchased on behalf of the defendants was 950 tons which would have required two special goods' trains to transport them from Bombay to Kurnool, where such a huge quantity of groundnut seeds could not possibly be required. Indeed, Kurnool itself has so much of groundnut seeds that, far from importing any, it exports them. The plaintiff did not specifically set up any case of contracts for actually intended delivery. On the other hand, contracts set up were for badla transactions, which are not, as we have already indicated, understood to be contracts for actual delivery. To assume an intention to demand actual deliveries from the mere form of the contracts, would be believe, very naively, that they were contracts for the proverbial carrying of coals to Newcastle. If, as both the trial Court and the High Court have rightly held, the contracts were not for genuine or actual delivery contracts but only for speculation on differences in price, even the first condition for exclusion of these transactions from the purview of the Control Order, which contemplates actually intended delivery, would not be satisfied. Hence, we have no doubt in our minds that the contracts were not merely void but illegal in the sense that their objects are forbidden.

21. We think that the High Court correctly distinguished and refused to apply authorities recognising the enforcibility of agreements collateral to what are merely void agreements. It rightly relied on decisions holding agreements collateral to prohibited contracts also to be unenforceable because a taint attaches to them which makes them also contrary to public policy. Such agreements fall within the class of cases mentioned in Gherulal Parakh's case (supra) where harmful results of permitting the contracts, in terms of injury to the public at large, are evident and indisputable.

22. In Shivnarayan Kabra v. State of Madras ((1967) 1 SCR 138, 144 : AIR 1967 SC 986 : 1967 Cri LJ 946), this Court dealing with the objects of similar legislation contained in the Forward Contract (Regulation) Act, 1952, said at page 144 :

> .... the Act was passed in order to put a stop to undesirable forms of speculation in forward trading and to correct the abuses of certain forms of forward trading in the wider interests of the community and, in particular, the interests of the consumers for whom adequate safeguards were essential. In our opinion, speculative contracts of the type covered in the present case are included within the purview of the Act.

23. The result is that we think that the objects of contracts set up by the plaintiff cannot be carried out by merely entering into them outside Bombay or engaging third parties as sub-agents, or, in any other capacity, to execute them. The provisions of the Control Order are applicable throughout India and are not confined to forward contracts entered into or meant to be carried out in any particular part of India. Their violation is a criminal offence. A claim for indemnification, under Section 222 Contract Act, is only maintainable if the acts, which the agent is employed to do, are lawful. Agreements to commit criminal acts expressly and specifically excluded, by Section 224 of the Contract Act, from the scope of any right to an indemnity. These appeals are, therefore, liable to be dismissed on merits, but, inasmuch as both sides to the unlawful agreements are in "pari delicto", we set aside the decrees for costs awarded to the defendants and direct that the parties will bear their own costs throughout. Subject to this modification of decrees for costs we dismiss the three appeals

before us.

9100119750416003

Matabar Parida, Bisnu Charan Parida, Batakrushna Parida, Babaji Parida

Vs

The State of Orissa

Criminal Appeal No. 359 of 1974

(Untwalia, J.)

16.04.1975

JUDGMENT

UNTWALIA, J. –

1. An occurrence took place on March 8, 1974 at a place situated in the district of Cuttack, Orissa. First information report was lodged on March 9, 1974 and a police investigation started in connection with the offences alleged to have been committed under Sections 147, 148, 307, 302 simpliciter as also with the aid of Section 149 of the Indian Penal Code. The four appellants in this appeal by special leave were arrested by the police in the course of the investigation on March 10 and four others who have been enlarged on bail by the Sessions Judge of Cuttack were arrested on March 14. They were produced before the Magistrate who remanded them to jail custody from time to time. The learned Sessions Judge released on bail four of the accused but refused to grant bail to the appellants. An argument based upon proviso (a) to sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) - hereinafter referred to as the New Code, was rejected by the Session Judge relying on the saving clause (a) of sub-section (2) of Section 484.

2. The appellants approached the Orissa High Court and pressed their cases for releasing them on bail on merits as well as on the ground of the provision of law aforesaid contained in the New Code. A Bench of High Court by its order dated August 6, 1974 has repelled the arguments put forward on behalf of the appellants and dismissed their application for bail. They have filed the present appeal by special leave of this Court.

3. This Court is not expected to examine afresh the question of releasing the appellants on bail on merits. But the question for consideration is whether the appellants are entitled to be released on bail under the proviso (a) of Section 167(2) of the New Code.

4. The New Code came into force on and from April 1, 1974. Section 484(1) repealed the Code of Criminal Procedure, 1898 - hereinafter called the Old Code. But there were certain saving clauses engrafted in sub-section (2) : the relevant clause (a) would be adverted to hereinafter in this judgment. Before doing so it is necessary to appreciate the position of law in relation to the power of remand by magistrate during the course of investigation of a case by the police.

5. A person arrested without warrant could not be detained by a police officer for a period exceeding 24 hours as provided in Section 61 of the Old Code. Section 167(1) required the police

officer to forward the accused to the nearest magistrate if the investigation could not be completed within the period of 24 hours fixed by Section 61 and if there were grounds for believing that the accusation or information was well-founded. Sub-section (2) provided :

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be a Magistrate having such jurisdiction :

The Magistrate to whom the accused was forwarded could remand him to police custody or jail custody for a term not exceeding 215 days in the whole under Section 167(2). Even the Magistrate who had jurisdiction to try the case could not remand the accused to any custody beyond the period of 15 days under Section 167(2) of the Old Code. There was no other section which in clear or express language conferred this power of remand on the Magistrate beyond the period of 15 days during the pendency of the investigation and before the taking of cognizance on the submission of charge-sheet. Section 344, however, enabled the Magistrate to postpone the commencement of any enquiry or trial for any reasonable cause. The explanation to Section 344 of the Old Code read as follows :

If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Various High Courts had taken the view that a magistrate having jurisdiction to try a case could remand an accused to jail custody from time to time during the pendency of the investigation in exercise of the power under section 344 : to with Superintendent and Remembrancer of Legal Affairs, Government of W. B. v. Bidhindra Kumar Roy (AIR 1949 Cal 143 : 50 Cri LJ 231); Chandradip Dubey v. State (1955 BLJR 323); Dukhi v. State (AIR 1955 All 521 : 1955 Cri LJ 1305); Shrilal Nandram v. R. R. Agarwal, S. D. M. First Class, Gwalior (AIR 1960 MP 135 : 1960 Cri LJ 608) and State of Kerala v. Madhavan Kuttan (AIR 1964 Ker 232). A contrary view was taken by the Orissa High court in the case of Artatran Mahasuara v. State of Orissa (AIR 1956 Ori 129 : 1956 Cri LJ 909). It may be emphasised here that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law. In the order under appeal the High Court without reference to Section 344 of the Old Code, seems to have assumed that such a power existed. That is not correct.

6. There are two decisions of this Court affirming the view expressed by majority of the High Courts and overruling the one taken by the Orissa High Court in the case referred to above. In A Lakshmanarao v. Judicial Magistrate, First Class, Parvatipuram ((1970) 3 SCC 501 : 1971 SCC (Cri) 107) an argument was advanced that Section 344 falling in Chapter 24 of the Old Code which contained general provisions as to enquiries and trials could not apply to a case which was at the stage of investigation and collection of evidence only. Dua, J. delivering the judgment on behalf of this Court repelled the argument thus at page 506 : [SCC (CRI) p. 122, para 9]

This argument appears to us to be negatived by the express language both of sub-section (I-A) and the explanation. Under sub-section (I-A) the commencement of the inquiry or trial can also be postponed. This clearly seems to refer to the stage prior to the commencement of the inquiry. The explanation makes it clear beyond doubts that reasonable cause as mentioned in sub-section (I-A)

includes the likelihood of obtaining further evidence during investigation by securing a remand. The language of Section 344 is unambiguous and clear and the fact that this section occurs in chapter 24 which contains general provisions as to inquiries and trials does not justify a strained construction.

In Gouri Shankar Jha v. State of Bihar ((1972) 1 SCC 564 : 1972 SCC (Cri) 238) Shelat, J. delivering the judgment on behalf of the Court has said at page 569 : [SCC (CRI) p. 333, para 11]

In cases falling under Section 167, a magistrate undoubtedly can order custody for a period at the most of fifteen days in the whole and such custody can be either police or jail custody. Section 344, on the other hand, appears in Chapter XXIV which deal with inquires and trials. Further, the custody which it speaks of is not such custody as the magistrate thinks fit as in section 167, but only jail custody, the object being that once an inquiry or trial begins it is not proper to let accused remain under police influence. Under this section, a magistrate can remand an accused remain under police influence. Under this section, a magistrate can remand an accused person to custody for a term not exceeding fifteen days at the a time provided that sufficient evidence has been collected to raise a suspicion that such an accused person may have committed an offence and it appears likely that further evidence may be obtained by granting a remand.

Further says the learned Judge at page 570 : [SCC (CRI) p. 334, para 12]

The fact that Section 344 occurs in the Chapter dealing with inquires and trials does not mean that it does not apply to cases in which the process of investigation and collection of evidence it still going on.

7. It would thus be seen that under the Old Code the Magistrate was given the power under Section 344 to remand an accused to jail custody as the section was also applicable to cases in which process of investigation and collection of evidence was going on. In other words, the power of remand by the Magistrate during the process of investigation and collection of evidence was an integral part of the process. The power was meant to be exercised, whenever necessary, to aid the investigation and collection of further evidence.

8. Let us now examine the position of law under the New Code, No police officer can detain a person in custody, arrested without a warrant, for a period longer than 24 hours as mentioned in Section 57 corresponding to Section 61 of the Old Code. Section 167 occurring in Chapter XII bearing the heading "Information to the police and their powers to investigate" - the same as in Chapter XIV of the Old Code - has made some drastic departure. Similar is the position in regard to Section 309 of the New Code corresponding to Section 344 of the Old Code. While retaining the provision of forwarding the accused to the nearest Magistrate (of course under the New Code to the Judicial Magistrate), and while authorising the Magistrate to remand the accused to either police or judicial custody for a period not exceeding 15 days, proviso (a) has been added in these terms :

Provided that -

> (a) the Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail; and every person released on bail under this section shall be deemed to be so released under the

provisions of Chapter XXXIII for the purposes of that Chapter;

The expression "the Magistrate" in the proviso would mean the Magistrate having jurisdiction to try the case. Section 309(2) says :

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Although the expression 'reasonable cause' occurring in sub-section (1A) of Section 344 is nowhere to be found in Section 309 of the New Code, the explanation to Section 344 of the Old Code has been retained as Explanation 1 to Section 309 in the identical language. The law as engrafted in proviso (a) to Section 167(2) and Section 309(2) of the New Code confers the powers of remand to jail custody during the pendency of the investigation only under the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. In such a situation what is the purpose of Explanation-I in Section 309 is not quite clear. But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy - murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under Section 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the court releasing him on bail, if it considers necessary so to do, to direct, that such person be arrested and committed to custody as provided in sub-section (5) of Section 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under Section 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals", but surely it would not be so, as sometimes it is supposed to be, because of the courts. It would be so under the command of the Legislature.

9. But the question in this case is whether during the pendency of the investigation which started before coming into force of the New Code the appellants can press into service proviso (a) to Section 167(2) of the Code and claim to be released on bail as a matter of right when they are prepared to furnish bail. The answer to this question depends on the interpretation of Sections 167 and 484 of the New Code. Unlike the wordings of Section 428 the language of Section 167(1) which will govern sub-section (2) also, is - "whenever any person is arrested", suggesting thereby that the section would be attracted when the arrest is made after coming into force of the Act, while the expression used in Section 428 is "where an accused person has, on conviction, been sentenced

...." Interpreting such a phrase it has been held in the case of Boucher Pierre Andre v. Superintendent, Central Jail, Tihar, New Delhi (AIR 1975 SC 164 : (1975) 1 SCC 192 : 1975 SCC (Cri) 70) by Bhagwati, J. delivering the judgment of this Court at page 166; [SCC pp. 194-195 : SCC (CRI) p. 72, para 2]

This section, on a plain natural construction of its language, posits for its applicability of fact situation which is described by the clause "Where an accused person has, on conviction, been sentenced to imprisonment for a term". There is nothing in this clause which suggests, either expressly or by necessary implication, that the conviction and sentence must be after the coming into force of the New Code of Criminal Procedure.

We may, however, hasten to add that in spite of the phrase "is arrested occurring in Section 167(1), since the Old Code has been repealed by sub-section (1) of Section 484 of the New Code, the provision would have applied, a fortiori, if the savings provided in sub-section (2) would not have applied to the situation with which we are concerned in this case. In our judgment clause (a) of sub-section (2) of Section 484 does apply. It reads as follows :

Notwithstanding such repeal, -

> (a) If, immediately, before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898, as in force immediately before such commencement, (hereinafter referred to as the Old Code), as if this Code had not come into force :
>
> Immediately before the first day of April, 1974 the investigation of this case was pending. Saving clause (a) therefore enjoins that the said investigation shall be continued or made in accordance with the provisions of the Old Code. The police officer, therefore, making the investigation has to continue and complete it in accordance with Chapter XIV of the Old Code. Section 167 of that Code could not enable the Magistrate to remand the appellants to jail custody during the pendency of the investigation. The police could seek the help of the Court for exercise of its power of remand under Section 344, bringing it to the notice of the Court that sufficient evidence had been obtained to raise a suspicion that the appellants may have committed an offence and there will be hindrance to the obtaining of further evidence unless an order of remand was made. As we have said above, invoking the power of the court under Section 344 of the Old Code by the investigating officer would be a part of the process of investigation which is to be continued and made in accordance with the Old Code. That being so, we hold that the appellants in this case cannot claim to be released under proviso (a) to Section 167(2) of the New Code.

10. In the result the appeal fails and is dismissed.

9100119750429001

Sita Ram

Vs

The State Of Rajasthan

Criminal Appeal No. 98 Of 1971

(Untwalia, J.)

29.04.1975.

JUDGMENT

UNTWALIA, J. –

1. This is an appeal by special leave. The appellant along with one Vikram Singh was convicted by the Special Judge, Sikar under Section 161, Indian Penal Code and each of them was sentenced to undergo rigorous imprisonment for one year and pay a fine of Rs. 500. The appellant was further convicted under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 - Hereinafter called the Act. But no separate sentence was awarded to him under this count. Both the them filed appeal in the Rajasthan High Court. The appeal of Vikram Singh was allowed by the High Court. His conviction and sentence were set aside. It has, however, maintained the conviction of and the sentence imposed upon the appellant.

2. The case against both the accused was initiated on report Ext. P-7 lodged by complainant Mohan Lal, PW 11 on June 4, 1963 before the Superintendent of Police, Anti-Corruption Department, Jaipur. Mohan Lal at the relevant time was the Secretary of the Gram Sewa Sahakari Samiti, Dadia. In the complaint it was alleged by Mohan Lal that in the month of January, 1963 he handed over charge to PW 7 Bhuraram, Chairman of the Samiti, and proceeded to Sikar in order to impart Chief Officer's training. On his return to Dadia in February, 1963, he requested Bhuraram to hand over charge back to him. Bhuraram informed Mohan Lal that appellant Sitaram, Assistant Inspector, Co-operative Societies, Shri. Madhopur had taken away the whole record of the samiti from him. Mohan Lal further alleged that he had approached accused Vikram Singh, Inspector, Co-operative Societies, Shri. Madhopur as well as Sitaram for return of the record but they evaded doing so on one pretext or the other. Eventually both the officers demanded Rs. 400 as bribe from him for setting right the record, which according to them, revealed embezzlement of a huge amount. Along with his report Ext. P-7 complainant Mohan Lal produced four currency notes of Rs. 100 each before PW 13 Paneysingh, Superintendent of Police. The latter noted down the numbers of the currency notes on the back of Ext. P-7 and after making initials on them handed over the report as well as the notes to the Deputy Superintendent of Police, Anti-Corruption Department, PW 12 I. D. Pant. The Dy. S.P. alongwith other police officers and constables reached Shri. Madhopur railway station on June 4, 1963 at 9.30 p.m. In presence of PW 2 Mukandsingh honorary Secretary of the Samiti, the Dy. S.P. made over the initialled currency notes to the complainant for passing them on to accused Vikram Singh and Sitaram in compliance with their demand for bribe. The two motbirs were directed to watch, see and hear the talks between the complainant and the accused at time of the handing over of the notes to them. Mohan Lal along with Sugansingh and two motbirs then proceeded to the office of the panchayat samiti at Shri. Madhopur. Mohan Lal and Sugansingh went inside the office. The two motbirs remained standing on the road outside the office. Some time later the two accused, complainant Mohan Lal and PW 9 Sugansingh left the panchayat office and went to a hotel. After taking tea there, accused Vikram Singh went away saying that the amount be paid to appellant Sitaram. Thereafter the complainant, the appellant and Sugansingh left the hotel. When they had covered some distance on the road the appellant is said to have demanded the amount from

the complainant. Thereupon the latter handed over the initialled currency notes Exts. 1 to 4 to him. The complainant then made the appointed signal by rubbing his head. The raid followed and the Dy. S.P. asked the appellant to produce the four currency notes worth Rs. 400 which he had accepted as bribe. On his evading to do so his person was searched and the initialled four currency notes were recovered from the pocket of the appellant's shirt. After completing the investigation and on obtaining sanction under Section 6 of the Act from the Registrar, Co-operative Societies, Rajasthan, Jaipur the two accused were put trial before the Special Judge.

3. Both the accused denied to have committed any offence. No bribe, according to them, was ever demanded. Accused Vikram Singh denied the allegation of his asking Mohan Lal to pay the bribe to Sitaram and Sitaram denied to have accepted any bribe.

4. The learned Special Judge, as noted in the judgment of the High Court, recorded the following findings :

(1) That both the accused were public servants at the relevant time.

(2) That both the accused demanded illegal gratification from complainant Mohan Lal.

(3) That accused Vikram Singh asked the complainant to hand over the amount to accused Sitaram.

(4) That the currency notes Exts. 1 to 4 were recovered from the possession of accused Sitaram and this fact gave rise to a presumption under Section 4(1) of the Prevention of Corruption Act that accused Sitaram had received the said currency notes for showing favour or for any of the purpose mentioned in Section 161 I.P.C.

(5) That the sanction Ex. P-5 is valid.

5. The fact that both the accused were public servants at the relevant time has been in dispute. The findings of the recovery of the four currency notes from possession of the appellant could not be assailed in the High Court. The complainant had turned hostile in the Court of the Special Judge. On consideration of the relevant pieces of other evidence the learned Single Judge of the High Court held :

In my opinion, the prosecution has failed to prove beyond a reasonable manner of doubt that the accused demanded Rs. 400 as bribe from the complainant Mohan Lal.

This finding was not only in favour of accused Vikram Singh but also in favour of the appellant. The High Court thought that there was only some vague evidence against accused Vikram Singh that he authorised Sitaram to accept illegal gratification on his behalf and therefore gave the benefit of doubt to the former and acquitted him of the charge under Section 161 of the Penal Code. Conviction of the appellant, however, was maintained after affirming a further finding on the basis of the evidence of PW 2 Mukandsingh (one of the motbirs) and PW 9 Sugansingh that the amount had in fact been paid by Mohan Lal to the appellant, although Mohan Lal had denied giving of the tainted currency notes to Sitaram. Thus believing the acceptance of the gratification of Rs. 400 from Mohan Lal by the appellant the rule of presumption engrafted in Section 4(1) of the Act was applied. Since the appellant could not give any explanation of the receipt of the gratification his guilt was held to have been established beyond reasonable doubt. The sanction given by the Registrar, Co-operative Societies was held to be valid on the view that the Registrar was the competent authority to remove from service accused Vikram Singh and Sitaram who at the relevant

time were Inspector and Assistant Inspector respectively of the Co-operative Societies.

6. Mr. A. K. Sen appearing for the appellant pressed only two points in support of the appeal :

(1) That the Registrar, Co-operative Societies was not the appointing authority of the appellant under Section 3 of the Rajasthan Co-operative Societies Act, 1965. The appointing authority was the State Government. Hence the sanction given by the Registrar for prosecution of the accused was not in accordance with Section 6 of the Act.

(2) That on the facts and in the circumstances of this case the conviction of the appellant has wrongly been sustained drawing upon the rule of presumption engrafted in Section 4(1) of the Act. Or, in any view of the matter the presumption stood rebutted when the story of demand of bribe by the appellant from Mohan Lal the complainant has not been held to be true.

7. We do not see any substance in the first point urged on behalf of the appellant. The Registrar was examined as PW 5 in the case. Inspectors of Assistant Inspectors are not appointed by the State Government in accordance with Section 3 of the Rajasthan Co-operative Societies Act. The appointing authority of such persons was the Registrar. The sanction was therefore valid.

8. We are, however, of the opinion that the conviction of the appellant cannot be sustained on the basis of Section 4(1) of the Act. As pointed out in the judgment of his Court delivered by one of us (Untwalia, J.) in Criminal Appeal No. 73 of 1971 decided on March 13, 1975 (V. K. Sharma v. State (Delhi Administration), ((1975) 1 SCC 784 : 1975 SCC (Cri) 277), Section 4(1) does not permit the drawing of presumption in Section 5 of the Act. The only clauses incorporated in Section 4(1) by Act 40 of 1964 are clauses (a) and (b) of sub-section (1) of Section 5 and not clause (d). We now proceed to discuss whether the rule of presumption for sustaining the appellant's conviction under Section 161 of the Penal Code can be applied in this case.

9. On the point of payment of money by complainant Mohan Lal to the appellant the evidence of the former was of no help to the prosecution. The High Court found this fact established, as stated above, on the evidence of PW 2 Mukandsingh and PW 9 Sugansingh. Learned Counsel for the appellant rightly pointed out that the former on being further cross-examined had stated "When Mohan Lal gave currency notes to Sitaram I did not see it". The attention of the High Court does not seem to have been drawn to the above statement of PW 2 in cross-examination. That makes his evidence hearsay on the point of acceptance of gratification by the appellant from Mohan Lal. So many jerks and jolts seem to have been given to the prosecution case by contradictory and hostile statements of the witnesses that a good part of it had to be rejected by the High Court. In the background of the High Court's findings that it had not been proved that the appellant had demanded any bribe from Mohan Lal, we do not consider it safe to sustain its finding on the point of payment of the bribe by the complainant to the appellant on the testimony of PW 9 alone went the evidence of PW 2 is not admissible on the point. The result is that not only the story of demand of bribe by appellant from the complainant is not proved but even the story of payment of the money by the complainant is not established beyond reasonable doubt. That being so the rule of presumption engrafted in Section 4(1) cannot be made use of for convicting the appellant.

10. The main ingredients of the charge under Section 161 of the Penal Code with reference to the facts of this case are these :

(1) That the accused was a public servant.

(2) That he must be shown to have obtained from any person any gratification.

(3) That gratification should be other than legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to the person.

When the first two ingredients are proved by evidence then a rebuttable presumption arises in respect of the third ingredient. In absence of the proof of the first two facts, the presumption does not arise. On mere recovery of certain money from the person of an accused without the proof of its payment by or on behalf of some person to whom official favour was to be shown the presumption cannot arise. We are not very much impressed with the argument of Mr. Sen that the presumption, even if it arose, stood rebutted on the finding of the High Court that the prosecution has failed to prove that the appellant had demanded any gratification from the complainant. The charge against the appellant was not that he had agreed to accept gratification. But the charge was that he had accepted gratification. If the accusation against the appellant would have been the former the argument put forward on his behalf as to the rebuttal of the presumption could have been acceptable. But the contention put in that form does not stand scrutiny in respect of the charge of acceptance of gratification. On the proof of the charge of acceptance of gratification from the complainant unless the contrary was proved it could have been presumed against the appellant as has been done by the courts below that the acceptance of the gratification was taking a bribe within the meaning of Section 161 of the Penal Code. But on reversal of the finding of the High Court on the question of acceptance of money by the appellant from the complainant and being against the prosecution, the rule of presumption cannot be pressed into service. In the circumstances we are constrained to hold that the conviction of the appellant under Section 161 of the Penal Code cannot be sustained.

11. In the result the appeal succeeds and is allowed. The convictions of appellant and the sentences imposed upon him are set aside. He is acquitted of the charges levelled against him. His bail bond will be cancelled.

9100119750304001

Mamleshwar Prasad And Another

Vs

Kanhaiya Lal (Dead) Through L. Rs.

Civil Appeals Nos. 2167 To 2169 Of 1968

(Krishna Iyer, J.)

04.03.1975.

JUDGMENT

KRISHNA IYER, J. –

1. A common judgment of the Division Bench of the Delhi High Court disposed of four appeals, the points covered by all being admittedly identical. Special leave was granted by this Court and thus

four appeals came into existence here. However, the appellants before us moved this Court that with a view to save money and energy, one of the four may be directed to be got ready and disposed of and the others may, thereafter, follow the fate of the first. On this basis C.A. No. 2556 of 1966 was heard all length decided adversely to the present appellants. Shri Bindra, learned Counsel for the appellants, submits that the earlier adjudication by this Court amounted to a judgment per incuriam and did not bind him or the Court. He was thus free to argue on the merits, especially the holding on the civil court's jurisdiction, and the matter was at large. We have to consider this contention on its merits.

2. Certain background facts bearing on the narrow question above posed serve to appreciated the point made. The present batch of appeals, as already stated, emanated from a judgment covering them all rendered by the Delhi High Court which itself arose out of a like common judgment of a Single Judge of the High Court so on down the pyramid to the base viz., the decree of the trial Court. The present appellant had lost the battle all along the line. For brevity's sake, we may content ourselves with the statement that the courts had been invited to pronounce upon the jurisdiction of the civil court to adjudicate upon the controversy which related to the Delhi Land Reforms Act with special reference to relevant provisions barring suits. In short the point about the civil court's power to go into a land reform litigation had been considered and adversely decided, so much so it is not correct for the appellants to say that the matter had, by grave inadvertence, been missed. We are not examining the soundness of the actual decision on the merits since indeed we feel that the appeals must fail in limine and no principle of judgment per incuriam can salvage the case.

3. At an early stage, an application was made before this Court embracing all the appeals, including the present three, which runs thus :

In the matter of Civil Appeal No. 2556 of 1966

and

In the matter of Appeals arising from the orders dated 14-8-1968 of the Delhi Court in S.C.A. No. 186-D/66, 189-D of 1966 and 190-D/66

and

In the matter of Mamleshwar Pershad and another.

#* * * * *##

The petitioners (appellants) accordingly pray that this Hon'ble Court may be pleased to pass orders

(1) Consolidating the 4 appeals above-mentioned.

(2) Modifying the orders dated 8-12-1966 in S.L.P. 1366 of 1966 so that the security for the respondents' costs deposited in the said appeal may be considered also as security for the costs of the respondents in the 3 appeals arising from the S.C. As. Nos. 186-D, 189-D and 190-D of 1966.

(3) That in the case appellants are required to furnish security apart from the amount deposited in Civil Appeal No. 2556 of 1966, time may be suitably extended for such deposit and delay in depositing within the time allowed by the Rules may be condoned.

(4) Modifying the directions regarding the preparation of record so that the proceedings in the High Courts to be printed in the appeal No. 2556 of 1966 be read as record in the three other appeals afore-mentioned and that the record for the said three other appeals may be printed only so as to include the proceedings in the trial Court and the First Appellate Court; and

(5) Such further or other directions may be made as this Hon'ble Court may deem fit in the circumstances of the case.

4. What needs to be underscored is the appellant's own prayer that the four appeals be consolidated. The reason given is tell-tale :

That only one judgment of the High Court in the Letters Patent Appeals is impugned before your Lordships in all the 4 appeals above-mentioned. It is therefore in the interest of justice that the 4 appeals viz., the Civil Appeal No. 2556 of 1966 and the other 3 appeals arising from SCAs Nos. 186-D, 189-D and 190-D of 1966 deserve to be consolidated and would be disposed of by one argument (sic) common to all of them. That there is nothing to be decided by this Hon'ble Court in any of the Appeals which is not common to any of the rest of them.

This prayer was granted and thus the appellants got the benefits like reduced security deposit and consolidation for purposes of printing and hearing of the appeals, on their representation to the Court that the points arising in all the appeals were common and the disposal of one would govern the rest.

5. A litigant cannot play fast and loose with the Court. His word to the Court is as good as his bond and we must, without more ado, negative the present shift in stand by an astute discovery of a plea that the earlier judgment was rendered per incuriam.

6. The wisdom which has fallen from Bowen, L.J. in Ex Parte Pratt (52 QB 334, 341), though delivered in a different context, has wider relevance to include the present position. The learned Lord Justice observed :

There is a good old-fashioned rule that no one has a right to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction".

7. Certainty of the law, consistency of rulings and comity of courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or obligatory running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind.

9. Shri Bindra, learned Counsel has cited a few decisions before us to substantiate his submission that judgment per incuriam bind none except the particular parties to the lis. In this context, he has drawn our attention to the observations in Young v. Bristol Aeroplane Co. Ltd. ((1944) 1 KB 718, 729) which has been approved by the House of Lords in Young v. Bristol Aeroplane Co. Ltd. (1946

AC 163, 169). Similar statements are found in brief terms in the rulings reported Nicholas v. Penny ((1950) 2 KB 466) and The Bengal Immunity Company Ltd. case (The Bengal Immunity Co. v. State of Bhiar, ((1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446). We need not debate, in the present case, this fresh ground to undermine otherwise conclusive judgments for other paramount rules governing justice administration prevail, as earlier indicated. But it is extremely significant that this facile theory was forwarded upon by the House of Lords in Cassel & Co. Ltd. v. Broome ((1972) 1 All ER 801 : (1972) 2 WLR 645). In that case the Highest Court, viz. the House of Lords.

rejected in condemnatory terms the Court of Appeal's decision to the effect that the decision of the House of Lords in Rookes v. Barnard (1964 AC 1129) on the issue of exemplary damages had been reached per incuriam because of two previous decisions of the House. Lord Hailsham, L.C., in the course of the leading speech for the majority asserted that

"it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way."

While Lord Reid took the view that it was 'obvious that the Court of Appeal failed to understand Lord Devlin's speech'. The per incuriam principle is of limited application. Very few decisions have subsequently been regarded as having been reached per incuriam and in Morelle v. Wakeling ((1955) 2 QB 379) a Master of the Rolls stated that such instances should be 'of the rarest occurrence', and should be limited to 'decisions given in ignorance or forgetfullness of some inconsistent statutory provision or of some authority binding on the court concerned. Thus the doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to misinterpret a statute ("The English Legal System" by R.J Walker and M. G. Walker, III Edn., Butterworthns, 1972).

10. Now to costs. A compassionate submission was made by Shri Bindra that the parties do bear their costs in this Court. We direct accordingly.

9100119750421002

K. P. Poulose

Vs

State Of Kerala And Another

Civil Appeal No. 1485 Of 1974

(Goswami, J.)

21.04.1975.

JUDGMENT

GOSWAMI, J. –

1. This is an appeal by special leave against the judgment of the Kerala High Court setting aside the judgment of the Subordinate Judge, Ernakulam and restoring the award the Arbitrator who had

earlier refused the claim of the appellant.

2. The appellant (briefly the contractor) was a successful tenderer for construction of three zonal R.C.C. overhead reservoirs, two in Mattacherry and one in Cochin, in connection with the Ernakulam Mattacherry Water Supply Scheme. In the schedule annexed to the notification inviting tenders under the heading 'site', it was stated that "the soil at the site for Reservoir No. 1 and Reservoir No. 2 is loose clay and for Reservoir No. 3, sandy". The tenderer was to execute an agreement on a stamped paper before commencing work. It appears later on the Kerala Engineering Research Institute, Peechi, Soil Mechanics and Foundation Division (briefly the Research Institute) submitted a report (Ex. P 19, dated September 14, 1965) that the sub-soil at the three places chosen as sites for the reservoirs upto 16 showed that the top soil was sand, the middle layer clay, and the bottom layer, silty sand or sand. It was stated that the clay found at the three places was of a highly compressible nature and hence pile foundation was preferable and that as the top strata was sandy, jetting had to be resorted to for driving the piles through this strata. After receipt of the opinion of the Research Institute, respondent No. 2 (hereinafter to be described as the Department) gave instructions to the contractor to adopt the process of jetting for driving piles for the tank at Thoppumpady which is alone in dispute in this case. On October 7, 1965, the Chief Engineer after scrutinising the pile design of the contractor wrote to him, inter alia, as follows :

The piles as per design submitted with raftlike cap may be adopted for tank at Thoppumpady where the length of pile suggested by the research division is in the region of 30 ft .... Jetting has to be resorted to in the top strata where sandy layer is met with .... Your statement that piles of more than 30 ft. length is very difficult to be driven in Ernakulam is not quite convincing to the Department.

Anyhow a decision will be taken on this only after ascertaining the details regarding the practical difficulties if any from agencies actually engaged in such type of works in the locality.

Meanwhile you may please execute the agreement and start the work on the Reservoir at Thoppumpady receiving further instructions from Executive Engineer, Public Health, Alwaye, (Ext. P 1.)

On February 21, 1966, the contractor wrote to the Executive Engineer informing him that as per instructions of the Research Institute and site conditions he provided jetting arrangements for driving the piles although the process of jetting was not included in his tender. He enclosed the details of expenditure on that account and mentioned that for the pile casting he used extra reinforcement for additionally strengthening the head of piles due to the site condition. He pointed out that this was not included in his original design. The sum and substance of the contractor's grievance was that he assumed the site condition to be as represented in the schedule to the notification inviting tenders and submitted his original design on that basis and since, however, the site condition was found to be different and on the advice of the Research Institute jetting had to be resorted to involving extra expenditure he was entitled to claim additional amount for the work of jetting. The Department, however, refused the claim which led to the arbitration under Clause 34 of the tender notification. The Arbitrator was the Chief Engineer. It appears the award was based on examination of documents and after hearing arguments of the parties.

3. The award with which we are concerned is a speaking one and gives the reasons for the decision against the contractor. Mr. Gupte, the learned Counsel for the appellant submits that the Arbitrator was guilty of legal misconduct in conducting the proceedings. He submitted that two very material documents. Exts. P 11 and P 16, were absolutely ignored by the Arbitrator resulting in miscarriage

of justice. On the other hand Mr. Krishnamurthi Iyer submitted that these documents were not even marked before the Arbitrator; they were marked only before the Subordinate Judge. According to him, therefore, there is no foundation for the grievance.

4. We have been taken through all the relevant documents by the learned Counsel for both sides and we are satisfied that Ext. P 11 and Ext. P 16 are material documents to arrive at a just and fair decision to resolve the controversy between the Department and the contractor. In the background of the controversy in this case even if the Department did not produce these documents before the Arbitrator it was incumbent upon him to get hold of all the relevant documents including Exts. P 11 and P 16 for the purpose of a just decision. Ext. P 11 dated September 8, 1966, is a communication from the Superintending Engineer to the Chief Engineer with regard to the objections raised by audit in connection with the construction of the reservoirs. The following extract will explain the position then taken by the Department :

The contention of the Accountant General that jetting was resorted to by the contractor to facilitate the driving of the piles is not correct. Had it not been for jetting, it would not have been possible for the piles to reach the required depth of 30', passing through sandy strata and we would have been constrained to stop with a smaller depth viz., upto the point of refusal for penetration of the pile by hammering. It was, therefore, in the interest of the work that jetting was insisted upon by the Department for pile driving. The Contractor had to resort to jetting under instructions from the Department.

The Accountant General has stated that the department is not bound to may extra for adopting the method of jetting for pile driving. This does not appear correct since the method of jetting was adopted in the interest of the department in view of the sandy stratum obtaining at the site as against the indication given by the department that the soil is clayey upto a depth of nearly 200 ft. No doubt, the contractor was asked to ascertain the nature of the soil; but this does not imply that he was to conduct exploratory borings to confirm the classification given by the department in the tender within the short span of time available for submitting tenders.

Earlier also on July 25, 1966, as per Ext. P 16 the Executive Engineer had written to the Chief Engineer wherefrom paragraph 4 is revealing :

Even though while inviting tenders for the work there was a condition that the tenderer should examine the soil condition it was not expected of them to do soil testing in detail within the period available to them to tender for the work. A clear indication regarding the nature of the strata that is likely to be met with was also furnished at the time of inviting tenders. After complete soil investigation the strata was found to be different from that furnished by the department and so in my opinion technical specification has changed. In the circumstances jetting done by the contractor can be considered as an extra item.

5. We now come to the award. Although the Arbitrator has held that "jetting, however, is not an authorised extra covered by the agreement", he has made the following significant observation which is inconsistent with his conclusion that the contractor has no right for extra payment for the jetting :

The Chief Engineer has rejected the claims of the contractor on grounds of non-inclusion of this (jetting) in the agreement which was executed subsequent to the direction issued by the department to adopt jetting. The Chief Engineer's decision totally ignores the next sentence in that letter

'Meanwhile you may execute the agreement. By this sentence the issue of extra of extra payment for jetting is left open even after the execution of the agreement.

If the above is the conclusion of the Arbitrator, rejection of the claim on the ground that "jetting, however, is not an authorised extra covered by the agreement" cannot be anything but rationally inconsistent. The award, therefore, suffers from a manifest error apparent ex facie.

6. Under Section 30(a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself or the proceeding. Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. It is in this sense that the Arbitrator has misconducted the proceeding in this case. We have, therefore, no hesitation in setting aside such an award. In the result the judgment of the High Court is set aside and that of the Subordinate Judge is restored. The award of the Arbitrator thus stands quashed. The Arbitrator will complete the proceeding after considering all the relevant documents including Ext. P 11 and Ext P 16 after giving opportunity to the parties. The appeal is allowed with costs.

9100119750502007

Dharam Singh Rathi

Vs

Hari Singh, M. L. A. And Others

Civil Appeal No. 84(Nce) Of 1973

(Untwalia, J.)

02.05.1975.

JUDGMENT

UNTWALIA, J. –

1. This is an appeal under Section 116A of the Representation of the People Act, 1951 - hereinafter called the Act, by election petitioner whose petition challenging the election of respondent No. 1 (for brevity - the respondent) has been dismissed by the High Court. Eventually the only ground which could be pressed in the High Court to challenge the election of the respondent was that the nomination papers of two persons namely Shri Jagan Nath and Shri Prabha Ram were improperly rejected by the Returning Officer. The High Court framed only two issues for trial and decided them against the appellant. It has held that the nomination papers - both of Jagan Nath and Prabha Ram suffered from defects of substantial character and, therefore, they were rightly rejected by the Returning Officer.

2. Jagan Nath filed two nomination papers in the prescribed Form No. 2B prescribed under Rule 4 of the Conduct of Elections Rules, 1961 - hereinafter referred to as the Rules. In both the papers in the column "His postal address" the only thing written was - "Smalkha Mandi". The Returning

Officer rejected both the nomination papers of Jagan Nath on the ground that the candidate had not given the name of his father and his full address. The name given as Jagan Nath and address as Smalkha Mandi were not sufficient. The Returning Officer described it as a technical error fit to be rectified but because there was nobody present on behalf of the candidate at the time of the scrutiny of the nomination papers the rectification could not be made. Hence the nominations were rejected. Following the decisions of this Court in Brijendralal Gupta v. Jwalaprasad ((1960) 3 SCR 650 : AIR 1960 SC 1049 : 22 ELR 366) and in Prahladdas Khandelwal v. Narendra Kumar Salve ((1973) 2 SCR 157 : (1973) 3 SCC 104) the High Court has held that the nomination papers suffered from a defect of non-compliance with the requirement of Section 33(1) of the Act and that the defect was of a substantial character. On consideration of the evidence adduced before it, it held :

Thus in the established circumstances of the case, it was manifest that the mention of Smalkha Mandi only, in the nomination papers, was no more than an apology of an address. It was, according to Mr. Joginder Pal Narang's testimony in this Court hopelessly incomplete. To my mind also it was equal to not giving any address at all.

3. We concur in the view of the High Court that filling up the column of postal address of the Candidate in the nomination paper is necessary. The High Court has referred to several provisions in the Act and the Rules to point out the purpose of supplying the postal address. It appears that the name of the post office concerning Smalkha Mandi, Smalkha village, Modeltown, etc. was Smalkha. The name of the post office was not Smalkha Mandi. On the face of the address given in the nomination papers there was the defect of incorrect mention of the name of the post office. The name of the district was also not given. It has come in the evidence of the respondent that there were other places of the names of Smalkha and Smalkha Mandi in the States of Haryana and Rajasthan. Even ignoring the defects aforesaid the High Court has noticed on consideration of the evidence and specially of Jagan Nath himself that the postal address given in either of his nomination forms was so very incomplete that no letter addressed to him to that address could possibly be delivered to him. There were several persons of the name of Jagan Nath in Smalkha Mandi, Smalkha village. Jagan Nath was serving at the shop of a sweetmeat seller, Railway Road, Smalkha Mandi and was resident of Bharbbujanwali Gali. The interesting part of this case is that Jagan Nath did not file an election petition. It was filed by the brother of an unsuccessful candidate. Eventually Jagan Nath was impleaded as a respondent in the election petition. He filed a written statement and examined himself as RW 5. His definite case was that until and unless some more details were given in his postal address no letter on that skeleton description as given in the nomination papers could be delivered to him by the postal authorities. Taking the totality of the circumstances the High Court has rightly held that no postal address in effect was given on either of the nomination papers of Jagan Nath.

4. A nomination paper has to be delivered to the Returning Officer by the candidate or his proposer in accordance with Section 33(1) of the Act. The nomination paper must be completed in the prescribed from. The requirement of sub-section (4) is that the Returning Officer shall satisfy himself on the presentation of a nomination paper that the names and electoral roll numbers of the candidate and his proposer as entered rolls. In certain types of defects detected at the time of the presentation of the nomination paper the proviso to sub-section (4) empowers the Returning Officer to overlook such mistakes or to get them rectified as the case may be. Generally speaking the kinds of defects mentioned in the proviso would not be of a substantial character so as to justify the rejection of a nomination paper. There may, however, even amongst those types of defects be some such that necessitates their rectification and if not rectified that may make the nomination paper liable to be rejected. But the defect of non-supply of postal address is not covered by the proviso to

sub-section (4) of Section 33 of the Act. It is a defect which falls for consideration at the time of the scrutiny of the nomination papers. If the defect is a substantial one then the nomination paper has got to be rejected. Sub-section (4) of Section 36 enjoins the Returning Officer not to reject any nomination paper on the ground of any defect which is not of a substantial character. But if it is of a substantial character then sub-section (2) provides that the Returning Officer shall reject the nomination paper when "there has been a failure to comply with any of the provisions of Section 33 or Section 34". Reading Rule 4 of the Rules and From 2B it would be noticed that non-supply of postal address of the candidate or supplying such cryptic address which virtually amounts to non-supply of address is a failure to comply with the provisions of Section 33(1). Hence we agree with the findings of the High Court that Jagan Nath's nomination papers were not improperly rejected by the Returning Officer.

5. The nomination paper of Prabha Ram suffered from more serious types of defects. The Returning Officer rejected the nomination of Prabha Ram on the grounds (1) that the name of the constituency of the proposer was not given in the nomination paper; (2) that the numbers of electoral roll given in the nomination paper did not tally with the candidate's number in the true copy of the electoral roll; (3) that at the name of the proposer one more name was given and the entries in the electoral roll did not tally with the numbers mentioned by the proposer and the candidate in the nomination paper. Following the dictum of this Court in the case of N. T. Veluswami Thever v. G. Raja Nainar (AIR 1959 SC 422 : (1959) Supp 1 SCR 623 : 17 ELR 181) the High Court has taken into consideration another defect, in that the thumb impression required by law. Even ignoring grounds Nos. 2 and 3 forming the basis of the order of the Returning Officer rejecting the nomination paper of Prabha Ram as being possibly covered by the proviso to Section 33(4), the first defect pointed out by the Returning Officer was of a substantial character. It made it obligatory for him to reject the nomination paper. Over and above that defect the High Court has rightly noticed another fatal defect. Section 2(i) of the Act says :

"Sign" in relation to a person who is unable to write his name means authenticate in such manner as may be prescribed.

The prescribed manner of authentication is to be found in Rule 2(2) of the Rules. A thumb mark has to be placed by the proposer on the nomination paper in the presence of the Returning Officer and such officer on being satisfied as to his identity has to attest the mark as being the mark of that person. There was, therefore, a clear violation of this rule also. We see no reason to differ from the view of the High Court that the nomination paper of Prabha Ram was not improperly rejected by the Returning Officer.

6. For the reasons stated above the appeal fails and is dismissed with costs payable to respondent No. 1 alone.

9100119750219002

Employers In Relation To Manoharbahal Colliery, Calcutta

Vs

K. N. Mishra And Others

Civil Miscellaneous Petition No. 9193 Of 1974 In Civil Appeal No. 1029 (Nl) Of 1967

(Alagiriswami, J.)

19.02.1975.

ORDER

ALAGIRISWAMI, J. –

1. This is an application by the first respondent in the appeal to set aside the compromise decree dated February 7, 1972. The Memorandum of Compromise on the basis of which the appeal was disposed of was signed by the Counsel for the appellants as well as Mr. P. K. Mukherjee, Advocate purporting to appear on behalf of the petitioner/respondent. The writ petition out of which this appeal arises was disposed of as early as January 13, 1966. The petitioner alleges that the appeal has been disposed of without even service of any notice on him and of any intimation of the lodgment of the appeal. He also alleges that he had not empowered any lawyer to act in this case.

2. It is obvious that his contention that no notice was even served on him cannot be accepted and it is also clear that Mr. Mukherjee had been engaged to appear on behalf of the petitioner. The High Court of Patna has sent a certificate that the notice of lodgment of petition of appeal was given to the Advocate for the petitioner/respondent on September 25, 1967 and also to the General Secretary, Colliery Mazdoor Union of which the petitioner is a member, on September 26, 1967. Mr. Mukherjee entered appearance on behalf of both of them on October 25, 1967. Ext. P-1, the copy of the telegram dated February 5, 1972 sent to Mr. Mukherjee reading "Not agreed for four thousand : Kindly do not proceed with settlement" itself shows that the petitioner was not unaware of the proposal for settlement and that his present case that he had not authorised Mr. Mukherjee to appear on his behalf is not correct. Ext. P-2 referring to an earlier telegram dated January 27, 1972 reading "Proposal for settlement acceptable in principle : Kindly attempt to raise the amount and inform" future reinforces this fact. The Secretary of the Colliery Mazdoor Union had executed a Vakalatnama purports to bear the petitioner's thumb mark. Ext. D-25 dated March 7, 1969 addressed to Mr. Mukherjee also shows that Mr. Mukherjee was duly authorised to appear on behalf of the petitioner. To this letter Mr. Mukherjee had was duly authorised to appear on behalf of the petitioner and the petitioner knew that Mr. Mukherjee was his Advocate. His present averment to the contrary shows the length to which he is prepared to go.

3. The next question is whether the compromise is binding on the petitioner. From what has been stated above it would be clear that the petitioner was not averse to idea of compromise. He only wanted the amount to be paid to him to be raised above four thousand rupees which was originally suggested. It also appears that in pursuance of a stay order passed in this case the petitioner has been receiving half of his wages throughout. He does not specifically deny the receipt of a cheque for Rs. 4,000 sent by Mr. Mukherjee. It cannot therefore be accepted that he was under the impression, as he how tries to make out, that what he was receiving was arrears of past wages deposited in the Court in compliance with the Court's order. The Advocate for the appellant had filed the statement of the case on November 13, 1969.

The petitioner/respondent had to file it by December 17, 1969 but that was not filed and the appeal was therefore set down ex parte against the petitioner/respondent. In the circumstances and the idea of the compromise not being unacceptable to the petitioner it was the right and indeed the duty of his Advocate Mr. Mukherjee to do the best for his client. We are not able to see any lack of authority in the action taken by Mr. Mukherjee. We are of opinion that there are absolutely no merits

in this application and it is dismissed.

9100119750403001

Dattonpant Gopalvarao Devakate

Vs

Vithalrao Maruthirao Janagaval

Civil Appeal No. 1180(N) Of 1974

(Untwalia, J.)

03.04.1975.

JUDGMENT

UNTWALIA, J. –

1. The defendant-appellant in this appeal by special leave was a tenant of the suit premises situated in the town of Hubli when the plaintiffs-respondent purchased the property from the original owners by two sale deeds executed in August, 1968. The appellant thereafter become a tenant under the respondent. The latter gave notice purporting to terminate the former's tenancy and thereafter filed an application under Section 21(1) (a) and (h) of the Mysore Rent Control Act, 1961 - hereinafter referred to as the Act, for his eviction from the suit premises consisting of two shops. The appellant resisted the application for eviction on several grounds. The trial Court dismissed it but on appeal by the landlord the District Judge allowed the application for eviction. The tenant filed an application in revision under Section 50 of the Act in the Karnataka High Court. The High Court dismissed the revision application. Hence this appeal.

2. The issue as to the appellant's liability to be evicted on the ground mentioned in clause (a) of sub-section (1) of Section 21 of the Act was not pursued and eventually given up. The learned Additional Munsif who tried the application in the first instance held against the respondent on the question of the premises being reasonably and bona fide required by the landlord within the meaning of clause (h). He also held that having regard to all the circumstance of the case greater hardship would be caused by passing a decree for eviction than by refusing to pass it. In that view of the matter also as provided in sub-section (4) of Section 21, the trial Court refused to pass a decree. It further held that the lease was for a manufacturing purpose or at least the dominant purpose was a manufacturing one, it was an yearly lease and could not be terminated by less than six months notice or in any view of the matter the notice given even treating the tenancy to be a monthly one was illegal and invalid.

3. The learned District Judge in appeal has reversed all the findings of the trial Court. He has held that the landlord required the premises reasonably and bona fide for occupation by himself and that no hardship would be caused to the tenant by passing a decree for eviction. He also held that the lease was not for a manufacturing purpose nor an yearly one. The notice terminating the monthly tenancy was good and valid. The High Court in revision has affirmed the view of the appellate Court on all the controversial issues.

4. Mr. V. S. Desai, learned Counsel for the appellant urged three points in support of this appeal :

(1) That the findings of the lower appellate Court and the High Court in regard to the reasonable and bona fide requirement of the suit premises for occupation by the landlord are vitiated in law.

(2) The finding on the question of comparative hardship of the landlord and the tenant has been recorded by committing errors of law.

(3) That the notice terminating the tenancy was invalid because the lease was an yearly one being for a manufacturing purpose and even if the tenancy be a monthly one, the notice was not in accordance with law.

Mr. Y. V. Chitaley controverted the submissions made on behalf of the appellant and added in the alternative that the appellant was a statutory tenant and hence no notice was required to be given before seeking a decree for eviction against him.

5. The appellant had taken the suit premises on rent for a period of one year from the respondent's predecessors-in-interest by a written document Ext. P-12 dated June 15, 1945. The tenancy commenced from April 9, 1945. The respondent purchased the property in August, 1968 and gave a notice on November 19, 1968 which was served on the appellant on November 21, 1968 terminating his tenancy and asking him to deliver possession by December 8, 1968. We have been taken through the portions of the judgments of all the three courts below and the relevant pieces of documentary and oral evidence adduced by the parties. On the question of the respondent requiring the suit premises reasonably and bona fide for his personal occupation as also on the point of comparative hardship two views were possible on the materials in the record of this case. A view in favour of the tenant was taken by the trial court but against him by the appellate court. The findings of fact recorded by the appellate court were not found to be such by the High Court as to justify the exercise of its revisional power under Section 50 of the Act. It is true that the power conferred on the High Court under Section 115 of the Code of Civil Procedure. But at the same time it is not wide enough to make the High Court a second court of first appeal. We do not think that there are such pressing grounds in this case which would justify our upsetting the views of the High Court confirming those of the lower appellate Court. It is not necessary to discuss the first two points urged on behalf of the petitioner in any detail and we reject them on the short ground mentioned above.

6. Coming to the question of notice we would like to state at the outset that on the basis of the evidence in the case the appellate Court took the view that the lease was not for a manufacturing purpose. The lease was for one year which expired on April 9, 1946. The tenant held over under Section 116 of the Transfer of property Act. Ext. P-12 did not mention the purpose of the lease. The learned District Judge was of the opinion that the appellant started manufacturing soda in a small portion of the demised premises after the lease for one year was taken. In any view of the matter the dominant purpose of the lease was not a manufacturing one but was the sale of aerated water. The High Court has affirmed this finding in revision. We do not feel inclined to upset the findings of the two courts below in this regard. If the purpose of the lease was not a manufacturing one, then the holding over under Section 116 of the Transfer of Property Act created a month-to-month tenancy terminable by 15 days notice ending with the tenancy month given under Section 106 of the said Act.

7. The appellant, however, must succeed on the last submission made on his behalf that even so, the

notice was invalid. As already stated the notice purported to terminate the tenancy by December 8, 1968 treating the month of tenancy as commencing from the 9th day of a month and ending on the 8th day of the month following. The requisite period of 15 days was given but the defect in the notice was that it did not expire with the end of the month of the tenancy. The end of the month of the tenancy was the 9th day and not the 8th day as wrongly held by the High Court affirming the view of the lower appellate Court.

8. Under Ext. P-12 the appellant agreed to pay Rs. 600 as rent for one year from April 9, 1945. The tenancy obviously, therefore, commenced from that date. That being so, under Section 110 of the Transfer of Property Act in computing the period of one year the date of commencing i.e. the 9th day of April, 1945 had to be excluded. The year's tenancy ended on April 9, 1946. It is clearly mentioned to be so in Ext. P-12 in these words.

I shall make use and enjoyment of the said shops as a tenant for one year and deliver your shops so you without objections on April 9, 1946.

By holding over the tenancy from month to month started from April 10, 1946 ending on the 9th day of the following month. This view finds support from the Rent Receipts Ext. D-I and D-I(a). The evidence on behalf of the respondent that there was a mistake in those receipts is not correct as the said receipts are in conformity with Ext. P-12. On the other hand Ext. P-13 and P-14, the other two rent receipts, being controller by his order dated September 29, 1963 while fixing the fair rent of the suit premises at Rs. 1050 per year had fixed it with effect from April 10, 1963. That also shows that the tenancy month commenced from 10th day of a month and ended on the 9th day of the following month.

9. The view taken by the learned District Judge as also by the High Court that the one year's tenancy ended on April 8, 1946 when the tenant agreed to deliver possession on April 9 and hence the monthly tenancy started from the 9th day of the month ending on the 8th day of the following month is clearly erroneous in law. That being so there was no valid and legal termination of the contractual tenancy.

10. In Benoy Krishna Das v. Salsiccioni ((1933) 59 IA 414 : AIR 1932 PC 279 : 37 CWN 1 : 35 Bom LR 6) on the facts of that case Lord Tomlin delivering the judgment of the Judicial Committee of the Privy Council held the notice to be valid. A lease for residential purpose of certain property in Calcutta was expressed to be from June 1, 1921, for the ensuing four years. The tenant held-over. The monthly tenancy was sought to be terminated by the lessee stating therein that possession would be given up on March 1. The landlord's contention that the notice ended on February 29, 1928 was not accepted. The four years lease was held to have ended on midnight of June 1, 1925. The monthly tenancy began on the 2nd of the month ending on the 1st and so the notice was held to be valid.

11. We do not think that the alternative argument put forward by Mr. Chitaley that no notice was necessary in this case is correct. The appellant was a contractual tenant who would have become statutory tenant within the meaning of clause (r) of Section 2 of the Act if he would have continued in possession after the termination of the tenancy in his favour. Otherwise, not. Without termination of the contractual tenancy by a valid notice or other mode set out in Section 111, T.P. Act it was not open to the landlord to treat the appellant as a statutory tenant and seek his eviction without service of a notice to quit.

12. In support of his contention Mr. Chitaley placed reliance on two decisions of this Court namely Ganga Dutt Murarka v. Kartik Chandra Das ((1961) 3 SCR 813 : AIR 1961 SC 1067) and in Pooran Chand v. Motilal. (1953 Supp 2 SCR 906 : AIR 1964 SC 461) Neither of these supports his contention. In the case of Ganga Dutt Murarka a passage form the decision of the Federal Court in the case of Kai Khusroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden (1949 FCR 262 : AIR 1949 FC 124) was quoted with approval. A portion of it may be usefully quoted here also. It runs thus :

In such circumstance, acceptance of rent by the landlord from a statutory tenant whose lease has already expired could not be regarded as evidence of a new agreement of tenancy, and it would not be open to such a tenant to urge, by way of defence, in a suit for ejectment brought against him, under the provisions of Rent Restriction Act that by acceptance of rent a fresh tenancy was created which had to be determined by a fresh notice to quit.

The tenancy of the appellant in the above case was found to have been determined by efflux of time and subsequent occupation was not in pursuance of any contract, express or implied but by virtue of the protection given by successive statues. In the case of Pooran Chand, Subba Rao, J. as he then was, said at page 912, when a similar argument was advanced before him :

It is not necessary in this appeal to express our opinion on the validity of this contention, for we are satisfied that the term of the tenancy had expired by efflux of time; and, therefore, no question of statutory notice would arise.

No notice is necessary if a lease of immovable property determined under clause (a) of Section 111 of the Transfer of Property act by efflux of the time limited thereby.

13. In the result we allow this appeal and set aside the decree of eviction passed against the appellant and in favour of the respondent by the lower appellate Court as affirmed by the High Court. In the circumstances we shall make no order as to costs.

9100119750403002

Dhanraj

Vs

Smt. Suraj Bai

Civil Appeal No. 476(N) Of 1973

(Untwalia, J.)

03.04.1975.

JUDGMENT

UNTWALIA, J. –

1. In this appeal filed by certificate of the Rajasthan High court we are concerned with the question of the legality and validity of the adoption of the appellant by the husband of the respondent.

Amichand, respondent's husband, adopted the appellant with the consent of the respondent on November 18, 1959 and executed a registered deed evidencing the fact of adoption. The appellant at that time was 21 years of age. Both his natural father an mother were dead. He had a step mother Bhuri Bai was whom the appellant was residing at the time of the impugned adoption. The appellant was given in adoption by his step-mother. Subsequently the respondent's husband and the respondent filed a suit in the year 1963 against the appellant impeaching his adoption on various grounds and for a declaration that the adoption was illegal and invalid. The appellant contested the suit and, inter alia, pleaded a custom applicable to the parties according to which a person being of the age of 15 years or more could be taken in adoption. The custom was pleaded in view of the provision of the law contained in clause (iv) of Section 10 of the Hindu Adoptions and Maintenance Act, 1956 - hereinafter referred to as the Act. The appellant also stated in his written statement that under the Act the step-mother was competent to give him in adoption.

2. Several issues were framed including an issue regarding the custom as pleaded. Issue No. 1-A by agreement of the parties without the adducing of any evidence was tried as a preliminary issue by the trial Court. The said issue runs as follows :

Whether the adoption of Dhanraj is invalid on the ground that he has been given in adoption by his step-mother Smt. Bhuri Bai.

The trial Court decided the issue in favour of the plaintiffs and against the defendant. The latter filed a first appeal in the High Court. During the pendency of the appeal, plaintiff No. 1 died. The only respondent left was his widow. The High Court has held that the step-mother was not competent to give the appellant in adoption and maintained the dismissal (sic) of the suit on that preliminary issue. Hence this appeal.

3. The only point, therefore, which falls for determination in this appeal is whether the step-mother was competent to give the appellant in adoption. If not, whether the adoption is void ?

4. In Mayne on Hindu Law and Usage, eleventh edition, is found a passage at page 226 to say :

No other relation but the father or mother can give away a boy for instance, a step-mother cannot give away her step-son, a brother cannot give away his brother. Nor can the paternal grandfather, or any other person. Nor is a woman competent to give in adoption her illegitimate son born of adulterous intercourse. It is well settled that the parents cannot delegate their authority to another person, a son, so as to enable him after their death, to give away his brother in adoption, for the act when done must have parental sanction. And, therefore, even an adult orphan cannot be adopted he can neither give himself away, nor be given by anyone with authority to do so.

In Papamma v. Appa Rau (ILR 16 Mad 384 : MLJ 80) Mattusami Ayyar and Best, JJ. have held that under the Hindu Law the step-mother could not give her step-son in adoption. An identical view has been expressed in the case of Haribhau v. Ahabrao Ramji Ingale (AIR 1947 Nag 143 : ILR 46 Nag 978).

5. The question for consideration is whether the law that a step-mother and not give a step-son in adoption a changed after coming in force of the Act.

6. Section 4(1) of the Act provides :

Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

7. Section 5(1) says :

No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

No adoption shall be valid as mentioned in Section 6 unless -

(ii) the person giving in adoption has the capacity to do so;

Other conditions for a valid adoption under the Act are stated in Section 11 which provides :

In every adoption the following conditions must be complied with :-

#* * * * *##

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not know, from the place or family where it has been brought up to the family of its adoption :

The physical act of giving and receiving was absolutely necessary to the validity of an adoption under the Hindu Law as it existed before coming into force of the Act : vide para 489 at page 554 of Mulla's Hindu Law, Fourteenth Edition. Identical is the position under the Act. Nor is it different as to the capacity of the step-mother to give her step-son in adoption. Section 9 of the Act enumerates the persons capable of giving in adoption. Sub-section (1) says :

No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

The departure in the law is that under the Act even the guardian of a child has the capacity to give him or her in adoption. But the step-mother as such has not. The father or mother mentioned in sub-section (1) must necessarily mean the natural father and natural mother. Explanation (i) appended to Section 9 was pressed into service to say that the step-mother is included in the term "mother" because the said explanation says "the expressions 'father' and 'mother' do not include an adoptive father and an adoptive mother". Learned counsel for the appellant submitted that step-mother has not been excluded from the expression "mother" and only an adoptive mother has been so excluded. By necessary implications, therefore, it was submitted that it ought to be held that the word "mother" in sub-section (1) includes a step-mother. We have no difficulty in rejecting this argument. Reading Section 9 as a whole and specially in the context of sub-sections (2), (3) and (4) it is clear that he term "mother" means the natural mother and not the step-mother. A step-mother for many purposes such as inheritance etc. is distinct and different form mother; while, generally speaking, an adoptive mother takes the place of mother to all intents and purposes. The necessity of the explanation, therefore, arose to exclude the adoptive mother form the expression mother so that an adoptive mother may not be competent to give the adopted son in adoption to somebody else.

8. Learned Counsel for the appellant then submitted that in case of an adult orphan, as the appellant was at the time of adoption, no consent was necessary of any person except the adoptee himself. Nobody could be available to give him in adoption. The use of the word "child" in clause (vi) of Section 11 and in section 9(1) read in contra-distinction of the use of word "person" in clause (iii) of section 6 would make it clear. Counsel submitted, that the condition of giving in adoption is applicable only to a minor child and not to an adult. We see no substance in this argument. Under the law as engrafted in Section 10 of the Act, a person is not capable of being taken in adoption if he or she has completed the age of 15 years and that is the reason that the word "child" has been used in Sections 9 and 11. The use of the word "person" in Section 6 (iii) and at the commencement of Section 10 is not for the purpose of bringing about any difference in law in regard to the giving of the child. If the custom permits a person of the age of 15 years or more to be taken in adoption then even such person would be the child of the father or the mother.'Child' would not necessarily mean in that context a minor child. If the child is a minor, in absence of the father or the mother, a guardian appointed by the will of the child's father or mother and a guardian appointed or declared by a court, would be competent to give the child in adoption. But in case of the major in absence of the father or the mother, nobody will be competent go give him in adoption because no such provision has been made in the Act to meet such a contingency. The scheme of the Act was not to make a child of 15 years of age or above fit to be taken in adoption. Exception was made in favour of a custom to a contrary.

9. Learned Counsel for the appellant then attempted to argue on the basis of the decision of the Bombay High Court in the cases of Motilal Mansukhram v. Maneklal Dayabhai (AIR 1921 Bom 147 : 23 Bom LR 276 : 61 IC 455) and Pralhad Sheonarayan Chokhani v. Damodhar Rankaran Vaishnao (AIR 1958 Bom 79), that even under the old Hindu Law the adoption of an orphan was not valid except by custom but if the custom permitted it, and in the case of Porwal Jains it did permit, then an orphan who was not minor could go in adoption by him own consent without the consent of and the giving by anybody else. We think that it would be a ticklish and debatable question to decide whether the second part of clause (a) of Section 4 would have such a customer from the over-riding effects of Sections 6, 9 and 11. But it will be a futile exercise here to embark upon the decision of this point as in out judgment it does not arise at all in this case. In paragraph 4 of the written statement the only custom pleaded was that a person more than 15 years old could be taken in adoption. Nothing as pleaded to say that there was a custom of typing an orphan in adoption or that a person above the age of 15 years could go in adoption without the physical act of giving by anybody, on his own and with his consent only. On the other hand the pleading in sub-paras (1) and (3) of paragraph 4 of the written statement was that under the Act the step-mother was competent to give the defendant in adoption and that she did not give him in adoption. It was not open to the appellant, therefore, to take this new point of the law for the first time in this court without the foundation of facts of found it upon.

10. For the reasons stated above, we dismiss this appeal. No costs.

9100119750408003

M/S. Harsook Das Bal Kishan Das

Vs

The First Land Acquisition Collector And Others

Civil Appeal No. 558 Of 1970

(Ray, C.J.)

08.04.1975.

JUDGMENT

RAY, C.J. –

1. This appeal by certificate raises the question as to whether Section 49(2) of the Land Acquisition Act hereinafter referred to as the Act has any application to the acquisition of the land in question.

2. The premises in question are 2, Gariahat Road now known as 2, Raja Subodh Mullick Road, Calcutta. The total area is approximately 23 bighas. The appellant alleges that there are no houses or buildings. The Land Acquisition Collector found certain structures occupied by certain persons and other structures and a compound wall and the major portion of the land to be vacant. There is a big tank covering over 3 bighas of the land. The appellant alleges that the land is highly developed and is ideal for building site. The Land Acquisition Collector found the major portion of the land undeveloped and below road level and to become water-logged during rainy season. The appellant denies these allegations.

3. Out of the total area the State in 1959 acquired 1 bigha, 13 chattaks, 43 sq. feet for the State Transport. The appellant claimed Rs. 3,50,000 inter alia for severance of the land acquired. In the month of September, 1962 the Government communicated to the appellant that the Government agreed that the claim put forward by the appellant under the clause "thirdly of sub-section (1) of Section 23 of the Act" is unreasonable and excessive.

4. The sanction of the Governor was unforeseen accorded to the acquisition of the entire premises 2, Gariahat Road, Calcutta under Section 49(2) of the Act. Between the months of February and September, 1960 notices were issued to acquire a further area of 7 bighas, 4 cottahs, 9 chattaks and 10 sq. feet. The premises were acquired. An award was made.

5. The principal contention of the appellant is that Section 49(2) of the Act has no application in the case of acquisition of vacant land. The appellant contends that the land acquired in the present case was vacant. The State contended to the contrary. The materials on record support the contention of the State. The appellant submits that Section 49(2) of the Act applies only where land with building is taken. Section 49(2) of the Act is as follows :

If, in the case of any claim under Section 23, sub-section (1), thirdly, by a person interested, on account of the severing of the land to be acquired from his other land, the appropriate Government is of opinion that the claim is unreasonable and excessive, it may, at any time before the Collector has made his award, order the acquisition of the whole of the land of which the land first sought to be acquired forms a part.

6. Land is defined in Section 3(a) of the Act to include benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. Therefore, land contemplated in Section 49(2) of the Act may be land or land including building or part of building.

7. Counsel for the appellant relied on the decision of this Court in State of Bihar v. Kundan Singh

((1964) 3 SCR 382 : AIR 1964 SC 350) and extracted the observation at page 394 of the report that Section 49(2) of the Act contemplates cases where land is acquired and it is shown to form part of a house. In short, the contention of the appellant is that if there is vacant land Section 49(2) of the Act has no application. This is not only misreading the decision but also the relevant section.

8. In Kundan Singh's case (supra) the question for consideration was whether the desire of the owner for the acquisition of the entire house under Section 49(1) of the Act should be expressed before the award is made. In Kundan Singh's case the State acquired a plot of land which consisted of the main house and an outhouse with an open space. The owner of the property was not satisfied with the award. The owner contended that other lands and buildings contiguous to the land and building acquired which all belonged to the owner had not been acquired. As a result of partial acquisition the owner alleged loss. The ruling of this Court is that such plea under Section 49 of the Act cannot be considered in an enquiry under Section 18 of the Act. Section 49(1) of the Act shows that if the owner has any objection to the acquisition of a part of his house it is open to him to withdraw or modify his objection before an award is made under Section 11 of the Act. If an objection under Section 49(1) of the Act is taken by the owner and the Collector decides to accept the objection then the Collector acquires the whole of the house. If the Collector does not accept the claim the matter is judicially determined under the second proviso to Section 49(1) of the Act.

9. Section 49(2) of the Act states that where on account of the severing of the land to be acquired from his other land, the person interested prefers a claim under the third clause under Section 23(1) of the Act and the Government is of opinion that the claim is unreasonable or excessive, the Collector may, at any time before the award is made, order the acquisition of the land.

10. The appellant submits that the appellant made the claim for compensation under the third and fourth clauses of Section 23(1) of the Act, and, therefore, Section 49(2) of the Act has no application. In one of the letters of the appellant dated February 25, 1960 it is stated that the area of 7 bighas, 4 chattaks and 10 sq. feet of front land has been acquired for the purpose of over-bridge at Gariahat Road level crossing including the entire frontage of the said premises as a result of which the remaining portion of the land measuring about 16 bighas of land will be land-locked causing heavy damages, severance and injurious affectation. In the writ petition the appellant claimed damages only in respect of severance. Section 23(1) clause three of the Act speaks of damage sustained by the person interested at the time of the Collector's taking possession of the land by reason of severance of such land from the other land of the owner. Clause four of Section 23(1) of the Act speaks of claim for damage sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition including affecting his other property, movable or immovable, in any other manner, or his earnings. Therefore, if a claim under the third clause of Section 23(1) of the Act is made the requirement of Section 49(2) of the Act is satisfied. Addition of a claim under the fourth clause of Section 23(1) of the Act makes no difference.

11. In the present case, the land was not completely vacant. Even if there is vacant land Section 49(2) of the Act will be attracted by reason of definition of land. To accede to the contention on behalf of the appellant that Section 49(2) speaks only of acquisition of land along with a building and not to the case of acquisition of vacant land is to rob the meaning of land under Section 49(2) of the Act and the content of Section 49(2) of the Act. Section 49(2) of the Act applies to cases of acquisition of vacant land along with structures.

12. The object of Section 49(1) of the Act is to give to the owner the option whether he would like part to be acquired. The Government cannot take the other part under Section 49(1) of the Act

unless the owner says so. Section 49(2) of the Act has nothing to do with Section 49(1) of the Act. Section 49(2) of the Act gives the option to the Government only where the claim under the third clause of Section 23(1) of the Act is excessive. Reference to the third clause of Section 23(1) of the act makes it clear that the claim under the third clause of Section 23(1) is for severance. The Government in such a case of acquisition of the remaining portion of the land under Section 49(2) of the Act saves the public exchequer money which otherwise will be the subject-matter of a claim for severance.

13. Counsel on behalf of the appellant contended that the acquisition of the remaining land was not for a public purpose and was, therefore invalid. It was said that there should have been a fresh declaration of public purpose after the proposed acquisition of the remaining portion of the end. The contention is unacceptable. Sub-sections (2) and (3) of Section 49 of the Act indicate that the acquisition for public purpose need not be started. Section 49(3) of the Act specifically provides that no fresh declaration under Sections 6 to 10 of the Act shall be necessary. Section 49(2) of the Act implies public purpose inasmuch as the compensation for acquisition is payable out of the public fund. Sections 4 and 5 of the Act are excluded because of proposal by owner in case of further acquisition under Section 49(1) of the Act and proposal by Government for further acquisition in a case under Section 49(2) of the Act. All that is necessary is that in one case the owner of the land and in the other the Government must act under Section 49(1) and 49(2) of the Act respectively before the award is made. The public purpose is to prevent people from making exaggerated claims. Section 49(2) of the Act is subsidiary to public purpose. The acquisition if for public purpose. The subsequent acquisition is in aid of that purpose.

14. Counsel on behalf of the appellant submitted that he was entitled to be heard before the order was made under Section 49(2) of the Act. This submission is unacceptable. Section 49(2) of the Act does not require that the opinion shall be formed after hearing the person concerned.

15. For these reasons, the appeal fails and is dismissed. In view of the fact that the High Court directed each party to pay and bear its own cost, there will be no order as to costs.

9100119750502006

M/S. Killick Nixon Limited

Vs

Killick And Allied Companies Employees' Union

Civil Appeals Nos. 734 And 735 Of 1973

(Goswami, J.)

02.05.1975.

JUDGMENT

GOSWAMI, J. –

1. The only question with which we are concerned in these appeals by special leave is : Should there be a ceiling on dearness allowance in this case ?

2. On May 11, 1966, the employers gave a notice of change for placing a ceiling on dearness allowance (for brevity D.A.) already in vogue at the figure of Rs. 325. Since this was not acceptable to the union, both sides agreed for a reference to the Industrial Tribunal, Maharashtra. By the impugned order on January 24, 1973, the Tribunal removed the ceiling and hence this appeal.

3. There was also another demand with regard to the D.A. for drivers on the same basis as that for clerical staff. The Tribunal following this Court's decisions in Bengal Chemical & Pharmaceutical Works Ltd. v. Workmen ((1969) 2 SCR 113 : AIR 1969 SC 360 : (1969) I LLJ 751) and Greaves Cotton and Co. v. Workmen ((1964) 5 SCR 362 : AIR 1964 SC 689 : (1964) I LLJ 342) allowed the union's claim for the two categories to be treated on equal footing. This Court held in the above decisions that employees getting the same wages should get the same D.A. irrespective of whether they are working as clerks or as members of subordinate staff or as factory workmen. This part of the award is, therefore, rightly not challenged before us.

4. The reference was made in June 1966. There was an earlier award in the reference. At the instance of the management, the High Court set it aside and remanded the above two items of dispute alone for disposal. The Tribunal had in the earlier award rejected all other claims of the union including that of revision of wage scale.

5. The only point that survives, therefore, is with regard to the ceiling on D.A. When the reference was made in June 1966 the cost of living index for Bombay city was 626. At the time of the impugned award in January 1973 it rose to 906 and in December 1974 it reached 1336 mark.

6. Various expert committees and commissions have dealt with the question of wages and D.A. from time to time. Dearness allowance as such is not known in foreign countries with the exception of Ceylon and Pakistan. Whenever there is any significant rise in the cost of living in foreign countries there is a revision of wage rather than payment of any D.A. as such. D.A. in India is a relic of the First World War to cope with the rise of cost of living although then in the shape of ad hoc payments not linked to any consumer price index. During the Second World War it was introduced in the form of a Grain Compensation Allowance to compensate the hardship of the employees for the rise in prices of foodgrains. So far as the Central Government employees were concerned, the Government constituted the First Pay Commission in 1947 to examine the wage structure. The Government of India also set up a Committee on Fair Wages and the report was submitted in June 1949. A Second Pay Commission was also constituted by the Government in 1959. The Government of India in August 1964 constituted a one-man independent body to enquire into the question of D.A. payable to the Central Government employees and the report was submitted in January 1965 by Shri S. K. Das. In July 1966, the Government of India appointed a Dearness Allowance Commission presided over by Shri P. B. Gajendragadkar. The Commission examined the principles which should govern the grant or D.A. to Central Government employees in future and was also required to review the formula for the grant of D.A. as recommended by the Second Pay Commission and to recommend charges, if any. In December 1964, the Government of India set up a National Commission on Labour presided over by Shri P. B. Gajendragadkar with exhaustive terms of reference and the Commission submitted its report on August 28, 1969. Then in sequence came the report of the Third Pay Commission in 1973. The parties have extensively quoted from the above reports during arguments.

7. Historically and by the industrial texts and also observations of various commissions and committees, D.A. was regarded as applicable to those employees whose salaries are at the subsistence level or little above it ... in order to enable them to face the increasing dearness of

essential commodities. (See Gajendragadkar Commission on Dearness Allowance, May, 1967).

8. Like all changes in life and in continuous march in progress of society the concept of D.A. also may change to take in a wider range of commodities and services to make life worth living as far as practicable subject to compelling limitations of general interest. We recognise that the old definition of D.A. may not even serve the climate of new aspirations of various classes of employees of this vast country. Luxuries of yesterdays may be the comforts of today and necessities of tomorrow. Economic solutions must reckon the turn-abouts in social urges. Because even the worm turns. Industrial adjudication which has not the limitations of the ordinary courts has to respond to the needs of changing society and it may be possible to widen the scope of D.A. if that serves the cause of general welfare. There may be no inexorable rule tying down economic existence to definitions of bygone days, if unsuitable or irrelevant in the context of the times.

9. The National Commission of Labour (1969) while dealing with D.A. observed :

We consider that payment of D.A. has to be viewed in broader context of wage policy, many elements of which have been discussed in the previous chapter. In a developing economy where price stabilisation has proved ineffective, or the inflationary potential cannot be controlled, any arrangement for compensating for price rise will have its raison d'etre. At the same time, a direct linkage between a rise in the index and the D.A. may create problems for price stabilisation. It can hardly be disputed that the index is the best available indicator of charges of price level. The reason for a disproportionately high D.A. is the fixation of basic wage on a date far remote from the present. (Para 16, 39, page 240).

The Commission further observed :

It is obvious that unless money wages rise as fast as the consumer prices, it would result in an erosion of real wages. But the extent of its impact will depend on the margin of cushion available at different levels of income ... We accordingly recommend that 95 per cent neutralisation should be granted against rise in cost of living to those drawing minimum wage in non-scheduled employments. (Para 16, 47, page 242.)

The Third Pay Commission in its Interim Report made some significant observations :

We need hardly emphasise that it would be an exercise in futility to keep on increasing the emoluments of Central Government employees, if these increases are largely wiped out soon afterwards by increases in prices of goods and services. There is, therefore, paramount need to maintain price stability and we are confident that the Government will take all necessary fiscal, monetary and other measures, including control over production and distribution, to maintain the price line.

10. D.A. was primarily intended to be a temporary expedient and was sought to be made available as a protection to those who have no cushion at all in their wage packet in the face of any appreciable rise in prices. Some relief was given to others also. The hope of the two Pay Commissions that prices will decline and stabilise, never came true. D.A. has, therefore, come to stay. The price indices have now assumed menacing figures. This is the stark reality of the situation and any problem regarding wage or D.A. has to be considered in that background at the same time not losing sight of the national economy.

11. In considering the question of D.A. the total wage packet of the employee must be kept in view.

The first and foremost consideration is the case of the employees at the minimum wage level. It must, however, be remembered that minimum wage should enable an employee not merely for the bare sustenance of life but for the preservation of his efficiency by providing for some measure of education, medical requirements and amenities. The concept of minimum wage as also of fair wage cannot be static. It will change with the progress of time and development.

12. In a recent decision of this Court in Bengal Chemical (supra) the principles for fixing of D.A. came up for consideration. After reviewing the earlier decisions, this Court held as follows :

1. Full neutralisation is not normally given, except to the very lowest class of employees.

2. The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on the rise in the cost of living and a decrease on a fall in the cost of living.

3. The basis of fixation of wages and dearness allowance is industry-cum-region.

4. Employees getting the same wages should get the same dearness allowance, irrespective of whether they are working as clerks or members of subordinate staff or factory workmen.

5. The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account.

13. It is submitted on behalf of the employers that in a scheme of D.A. linked not only to the cost of living index but also to basic wages by way of slabs, there must be a ceiling as otherwise it will not be a compensation for increased cost of living but additional remuneration unconnected with the increasing cost of living at the lowest level. It is emphasised that where there is a dual link, a ceiling removes the incongruity in the D.A. rising with the basic wages out of proportion to the cost of living compensation at the lowest level. It is fairly admitted that the ceiling fixed at any given time on the basis of a possible rise in the cost of living index in the foreseeable future may be altered if the rise in the cost of living index later makes the ceiling unreflective of the requisite neutralisation of the increase in the cost of living at the lowest level. It is submitted that without a ceiling it will be impossible for any management to plan the business of the employers including production, expansion, etc. without any certainly of wage bill being estimated at any definite figure for the foreseeable future.

14. On the other hand it is submitted on behalf of the workers that there should be no ceiling on D.A. till the workers reach the level of living wage. It is also submitted that in the interest of social justice there should be no ceiling on wages without first putting a ceiling on profits and controlling and stabilising prices.

15. The award pertains to the clerical staff and drivers working in the Head Office of the appellant numbering about 265 out of about 743 workmen in its various establishments (page 120 of the record). Out of that also only two classes of workers are involved, namely, the clerks and drivers. Amongst the clerical staff there are grades, Grade A, Grade B and Grade C as under :

#Grade A : Rs. 165-15-240-20-400-E.B.-25-500.Grade B : Rs. 110-10-150-12 1/2-200-15-260-E.B.-20-360.Grade C : Rs. 70-5-90-8-130-10-200-E.B.-12 1/2-250.##

The wages scale for drivers is as follows :

Rs. 75-5-100-7-135-7.50-150.

The scheme of D.A. which is sought to be introduced with the ceiling is as under :

#----------Basic Pay Slabs Percentage of Basic Variations for every Salary 10 points of C.P.I. (C.P.I. 441-450)----------1st Rs. 100 120 5%2nd Rs. 100 40 2%Rs.201 to Rs.500 30 1%Over Rs. 500 25----------Maximum D.A. Rs. 325/----------##

16. Mr. Mehta, representing the union, has drawn our attention to few awards in the Bombay region prescribing slab system of D.A. without ceiling. The first is that of the Ahmedabad Manufacturing and Calico Printing Company Limited. It is true that on fourth slab of Rs. 100 and balance, 9.75% D.A. was allowed without imposition of any ceiling. D.A. was awarded by the Industrial Tribunal in this case on a slab system at the consumer price index 841-850. The second is the case of Indian Vegetables Products Limited, Bombay, where there was no introduction of any ceiling and 10% D.A. at the third slab of Rs. 100 and above was granted. In that case the consumer price index was at 311-320. The third case is that of Godrej Soap Private Limited where again although no ceiling on D.A. was imposed, the Tribunal was dealing with a case when the consumer price index was at 396-405. It is pointed out that in all the three above cases special leave was refused by this Court. That, however, cannot be a ground for holding that this Court endorsed non-imposition of ceiling on D.A. as a principle. The question as such was neither raised before the Tribunal nor before this Court in any of the above cases.

17. Mr. Mehta also filed a list of 25 awards during the period between 1st January, 1970 and December, 1974 in the Bombay region. This was with the object of establishing his case for a slab system of D.A. linked to the consumer price index with point variation without ceiling. Mr. A. K. Sen has commented that some of these awards were as a result of settlement and the question of ceiling on D.A. was not even raised for a decision. In the case of Dorr-Oliver (India) Limited, the scale of pay was fixed on the basis of the consumer price index 700 and D.A. was fixed, if the index rose beyond 700, on a slab system. It is to be noted that a flat sum of Rs. 9 as D.A. was allowed on the salary of Rs. 500 and above and for variation of rise of every ten points in slab above 700, Rs. 9 was fixed for such slab. It is to be noted that there is no percentage basis of D.A. on the salary and it is only linked to the consumer price index. In the case of Kanji Jadhavji & Company, it is, however, seen that for pay in excess of Rs. 210 but upto Rs. 670 per month 1/2 paisa per rupee per point upto Rs. 130 per month plus 1/3 paisa per rupee per point in excess of Rs. 180 upto Rs. 210 plus 1/4 paisa per rupee per point in excess of Rs. 210 subject to a maximum of Rs. 1-65 per point per month was allowed. There is a fixed salary of Rs. 670 beyond which D.A. was not made admissible. In the case of Tata Press Limited which is an award said to be by settlement, additional D.A. of 10 per cent has been given on the basic wage of above Rs. 401, but there is no linkage to the consumer price index. In Godavari Sugar Mills Mamli Private Limited, D.A. stopped at the fourth Rs. 100 of basic salary. At this slab 36 per cent D.A. was awarded with variation of 1 per cent for every ten points rise or fall in the consumer price index 791-800. Identical is the case of another award in the case of Somaiya Organo Chemicals Limited. In Britannia Biscuit Company Limited's case, no D.A. has been awarded beyond the salary slab of Rs. 500. D.A. was considered in this case when the cost of living index number was 301-310 (old series). In several awards in the compilation given by Mr. Mehta, minimum D.A. has been fixed.

18. On the other hand Mr. Kaka intervening for Cyanamid India Limited has drawn our attention to a number of awards in the Bombay region wherein there appears to be a ceiling on D.A. These are :

#(1) National Machinerp Manufacturers Maharashtra Gazette (M.G.G. Ltd. Ltd. dated June 30, 1966.(2) Indian Organic Chemicals Ltd. M.G.G. dated November 21, 1974.(3) The Millowners Association. M.G.G. dated October 31, 1974.(4) Phoenix Mills Ltd. M.G.G. Part I-L dated June 22, 1972.(5) Bayer (India) Ltd. M.G.G. dated January 31, 1974.(6) West Coast Paper Mills Ltd. M.G.G. dated July 20, 1972.(7) Voltas India Ltd. I.C.R. February 1970, page 57.(8) Murphy India Ltd. M.G.G. dated July 27, 1972.(9) Polychem Ltd. M.G.G. dated August 6, 1970.##

19. Mr. Mehta has, however, submitted that most of the settlements in pursuance of which awards had been made have expired and notice of termination have been served on the employers and in some cases disputes have been raised.

20. The management also argued that this Court in M/s. Unichem Laboratories Ltd. v. the Workmen ((1972) 3 SCC 552 : (1972) I LLJ 576) noticed in paragraph 33 of the decision :

Another feature of the scheme adopted by the Tribunal is that it puts a ceiling on the employees drawing basic wages up to Rs. 300 per month alone being eligible for dearness allowance; whereas under the practice originally obtaining in the company there was no such limit,

and, therefore, must be held to have approved of imposition of ceiling. We are unable to accept that this Court was called upon to decide about the question of ceiling in that appeal which was at the instance of the employers and not of the employees nor against the imposition of ceiling. The management also drew our attention to a decision of this Court in Remington Rand of India v. Workmen ((1962) I LLJ 287 : 23 FJR 831) wherein the scheme of D.A. contained a maximum of Rs. 200 at the index figure 351-360 and the maximum was not interfered with by this Court. It is sufficient to point out that the question of desirability of ceiling or otherwise was not at all in issue in that appeal and, therefore, this Court was not called upon to pronounce upon the matter.

21. We, however, find that in the case of employees under the Central Government a kind of ceiling has been in vogue. For example one of the Second Pay Commission's recommendations was that the benefit of D.A. should in future adjustments be extended to all employees drawing a basic pay below Rs. 400 per mensem in such a way that the total of basic pay and D.A. paid to an employee in the pay range of Rs. 300 to Rs. 400 does not exceed Rs. 400 (page 97, paragraph 16). The Third Pay Commission also after fixing D.A. at a percentage of 3.5% of pay upto the pay range of Rs. 300 fixed a maximum of Rs. 10 per month and a minimum of Rs. 7 per month. Similarly for the pay range above Rs. 300 a percentage of 2.5% of pay was fixed subject to a maximum of Rs. 20 per month and a minimum of Rs. 10 per month. The Commission further recommended that the pay plus D.A. should in no case exceed Rs. 2,400 per month.

22. From the above one thing, however, is clear that the question of imposition of ceiling on D.A. is not an absolutely alien phenomenon. Although it might not have been the general practice, ceiling was not rejected out of hand as irrational or unjust by unions in course of collective bargaining in the Bombay region.

23. So far as the workers involved in these appeals are concerned the question whether D.A. should cease at a certain level of salary does not arise for consideration. The maximum basic of the highest grade in the case of these employees is Rs. 500. It may, however, be noted that a system has been in

vogue in the case of government employees where D.A. ceases to be admissible on reaching a certain level of salary. The question remains as to whether a ceiling should be placed on D.A. itself, when it exceeds Rs. 325 as has been sought to be done by the employers. The employers gave a notice of change for imposition of ceiling on D.A. in May, 1966, when the cost of living index has been on the constant rise each year. While the average for 1966 was 630 those for the subsequent years from 1967 to 1974 were 697, 740, 766, 797, 832, 876, 982 and 1198. In December, 1974 it was 1336. The cost of living index being on a constant rise it is necessary to consider the totality of the wage packet of the workers and other relevant factors in order to decide if a ceiling on D.A. should be imposed. In this context our attention has been drawn by Mr. Sen to the statement of objects and reasons to the Additional Emoluments (Compulsory Deposit) Bill, 1974, which is as follows :

Controlling inflation is today the single most important task facing the country. Periodical revision of wages and adjustments in the rates of dearness allowance, which have been adopted as remedies for moderating the impact of rising prices, have been proving ineffective. In view of the mounting pressure of inflationary forces, payments of additional wages or dearness allowance will give an upward thrust to prices and will inevitably aggravate the situation, and also neutralise the effect of any increase in the wages of dearness allowance. In the circumstances, urgent steps aimed at breaking this vicious circle of money incomes chasing prices became inescapable. These measures undoubtedly involve some sacrifice by different sections of the community. As a part of these anti-inflationary measures, the Additional Emoluments (Compulsory Deposit) Ordinance, 1974, was promulgated by the President on the 6th July, 1974. .....

24. Reference to the above is made in order to highlight the dreadful consequences of inflation and the inefficacy of mere wage rise as a solution.

25. We may, however, in this connection usefully refer to what the National Commission on Labour said on this subject :

Firstly, the increased purchasing power in the hands of the workers on account of compensatory payments for rise in cost of living forms a small part of the overall increase in purchasing power. Secondly, the elasticity of compensatory payments to changes in cost of living is generally less than unity so that the feed-back must taper off. Money wage stability, though important for price stability, is seldom a necessary, much less a sufficient condition for it. On the other hand, holding of the price line, particularly of the cost of living is an adequate condition for preventing increases in money wage payments that are not related to increases in productivity. This alone can prevent a fall in real wages.

26. Before we proceed further we have to take note of certain facts concerning the dispute. Although the company employs a total of 1142 workmen in its various factories and branches the present dispute relates to 265 workers in the Head Office (Bombay) out of them. It is not disputed that the supervisory staff consisting of 86 members, although not involved in this reference, have been in receipt of D.A. under the same scheme. There is no ceiling on D.A. in the Calcutta branch of the Company where the workers are paid according to the Bengal Chamber of Commerce's rates. The industry-cum-region aspect may at present take care of the few employees working in Calcutta. It is, however, not unlikely that all the employees of the company may claim to be treated alike. There are also disputes pending in respect of the subordinate staff at the Head Office. Without adding further details it is sufficient to state that a general problem like imposition of ceiling on D.A. in a company cannot be treated on the statistical burden relevant only to a section of the

employees. Both the parties realise the importance of this aspect and produced before us a large number of documents containing various details including balance-sheets of the company upto 1973 to enable us to have a complete picture of the entire matter.

27. The management has produced a statement showing the comparison of total emoluments of clerical and supervisory staff after implementation of the award and those of the junior executive staff. We have quoted therefrom showing the figures in April, 1973 and July 1974 with the respective index at 924 and 1194.

KILLICK NIXON LIMITED, BOMBAYCOMPARISON OF TOTAL EMOLUMENTS OF CLERICAL, SUPERVISORY AND JUNIOREXECUTIVE STAFF Clerical Supervisory Junior Executive ---------- Basic D.A. Total Basic D.A. Total Basic House Trave- Salary Salary Rent lling Total Allow- Allow- ance ance ---------- ---------- Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs.April Minimum 70 340 410 Min. 275 555 830 400 150 150 7001973 Middle 300 574 874 Mid. 520 730 1,250 530 150 150 830[Feb. Maximum 500 730 1,230 Mid. 800 730 1,530 800 200 150 1,150CPI Max. 1,200 730 1,930 1,000 200 150 1,350924]. Min. 275 764 1,039 400 150 150 700July Minimum 70 475 545 Mid. 520 1,000 1,520 530 150 150 8301974 Middle 300 790 1,090 Mid. 800 1,000 1,800 800 200 150 1,150[May Maximum 500 1,000 1,500 Max. 1,200 1,000 2,200 1,000 200 150 1,350CPI1194].##

It will be seen that the minimum basic salary of a junior executive is Rs. 400 and maximum Rs. 1,000. With allowances the junior executive at the minimum gets a total of Rs. 700 and at intermediate stages, namely, of Rs. 530 and Rs. 800, he gets a total of Rs. 830 and Rs. 1,150 respectively. When he reaches the maximum the total with allowance is Rs. 1,350. The clerical staff at the maximum grade which is Rs. 500 gets a total amount of Rs. 1,230 inclusive of D.A. of Rs. 730 after removal of the ceiling at the C.P.I. 924. At the intermediate stage a clerk gets Rs. 874 in the same index (Rs. 300 basic salary plus Rs. 574 D.A.). At the minimum he gets Rs. 70 basic pay plus Rs. 340 D.A. totalling Rs. 410 in the same index 924. The position is worse when the consumer price index touches 1194 as seen above. The absence of ceiling on D.A. can result in curious anomalous situations wherein the pay packet of clerical staff would exceed the pay packed of junior executive staff. This is hardly conductive to discipline, efficiency and effective exercise of control.

28. Although the change in the D.A. scheme imposing ceiling was notified in May, 1966, it could not have been then contemplated that the index would touch such a high mark; yet within these nearly nine years that the dispute unfortunately has dragged on, it has given the Court in idea of the effect of removal of the ceiling.

29. The management has submitted statements showing the actual working of the D.A. formula without the ceiling and tried to show that it would not be possible for it to bear the financial burden. The Tribunal went into this aspect, although at that time the figures of the actual working could not be there, and refused to accept the plea of incapacity to bear the burden. The main argument of the management was about the loss of managing agency which, according to it, resulted in shrinkage of income. The tribunal went into matter and came to the conclusion and, according to us, rightly, that the said plea had no substance.

30. The company is one of the twenty big industrial houses in the country. Originally there were two companies, one Killick Industries Limited and another Killick Nixon & Co. Private Limited. Killick Industries Limited was incorporated as a public limited company on November 14, 1947 and Killick

Nixon & Co. Private Limited was incorporated as a private company on January 23, 1948. Sometime in 1957 the Killick Industries Limited purchased all the shares of Killick Nixon & Co. Private Limited with the result that Killick Nixon & Co. Private Limited became a wholly owned subsidiary of Killick Industries Limited. Under Section 43A of the Companies Act, 1956, Killick Nixon & Co. Private Limited became a public limited company with effect from March 28, 1961 and by an order of the Bombay High Court of March 24, 1970, was amalgamated with Killick Industries Limited with effect from August 1, 1969. Following the amalgamation and with the approval of the Central Government the name of Killick Industries Limited was changed to Killick Nixon Limited (the appellant). The activities of the company are : manufacturing of engineering products, namely, Jhonson Vibrators, Udall Pressing Equipments and E.F.C.C. Furnaces; selling agency of engineering products such as vibrators, drilling equipment, electric a meters and dredgers; general selling agency in respect of snowcem cement paint and allied products, carbon papers; slotted angles, Hawkins pressure cookers; export of piece goods; and agency of City Line and Hall Line of U.K. and clearing and forwarding work.

31. The question, however, in this case may not be simply the financial capacity of the company alone. Ordinarily the capacity to bear the additional burden would certainly be a relevant factor. We are, however, not considering the matter from that aspect in the present case. We will assume that the company will be able to bear the additional financial burden if the ceiling is removed. We do not agree with the Tribunal that it is only if the company would be required to close down that such a demand should be rejected. That is an incorrect view to take in dealing with the problem with which we are concerned.

32. We have, therefore, a company which is prosperous. The consumer price index has been soaring higher and higher. The employees have to get protection of their real wages. It is well settled that complete neutralisation of the rise of cost of living cannot be allowed except to the lowest category of employees. In the view of the National Commission on Labour

the only purpose of dearness allowance is to enable a worker in the event of a rise in cost of living to purchase the same amount of goods of basic necessity as before. This purpose would be served by an equal amount of dearness allowance to all employees irrespective of differences in their emoluments (Page 243).

It was strenuously submitted that this view of the Commission should be accepted by us. In other words we should first ascertain what is the minimum wage in this company at which a worker would require complete neutralisation of the cost of living and whatever amount is found to be necessary for him as a protection against his real wages should only be available to all other employees. We are not required to give our opinion about this submission for the simple reason that the management here has already introduced a scheme in which there is percentage system on salary slabs linked with the consumer price index and there is no dispute about it.

33. All that the management wants in this case in that D.A. must not go on rising with the soaring price index and a limit should be imposed. We have already observed that in view of the status of the company the capacity to pay will not alone be of moment in favour of removal of the ceiling. The problem will have to be viewed from the following important aspects :

(1) Condition of the wage scale prevalent in the company.

(2) Condition of the wage level prevalent in the industry and the region.

(3) The wage packet as a whole of each earner in the company with all amenities and benefits and its ability and potency to cope with the economic requirements of daily existence consistent with his status in society, responsibilities, efficiency at work and industrial peace.

(4) The position of the company viewed in relation to other comparable concerns in the industry and the region.

(5) Peremptive necessity for full neutralisation of the cost of living at the rock-bottom of wage scale if at or just above the subsistence level.

(6) the rate of neutralisation which is being given to the employees in each salary slab.

(7) Avoidance of huge distortion of wage differentials taking into reckoning all persons employed in the concern.

(8) Degree of sacrifice necessary even on the part of workers in general interest.

(9) The compulsive necessity of securing social and distributive justice to the workmen.

(10) Capacity of the company to bear the additional burden.

(11) Interest of national economy.

(12) Repercussions in other industries and society as a whole.

(13) The state of the consumer price index at the time of decision.

(14) Forebodings and possibilities in the foreseeable future as far as can be envisaged.

34. We should also add that revision of D.A. is not the same thing as revision of wages.

35. Having given our anxious thought to all the above aspects, which are not exhaustive, we are unable to come to the conclusion that removal of the ceiling in the present context will be justified. The company has been able to make out a case for imposition of a ceiling. At that particular mount there should be ceiling on D.A. is a matter which will have to be gone into by the Tribunal keeping in view the above principles. The financial capacity will have to be judged with regard to the commitment of the company as a whole towards all its employees.

36. We are unable to agree with the contention of the workers that unless there is ceiling on profits there cannot be a ceiling on D.A. The question of D.A. being intimately connected with the cost of living, the matter cannot be judged by the test of the aforesaid submission of the workmen.

37. There is, however, one thing which we must point out, lest there should be some misconception about it and that is that so far as the lowest paid employees at or just above the subsistence level are concerned, they are entitled to 100 per cent or at any rate not less than 95 per cent neutralisation of the rise in the cost of living and hence there should be no ceiling on dearness allowance payable to employees within the slab of first Rs. 100, unless it can be shown by the management that the rate of neutralisation in their case is more than 100 per cent. So far as the employees in the higher slabs are concerned, it would be for the Tribunal to consider, having regard to the aforesaid principles, whether a ceiling should be imposed at the second slab of Rs. 100 or only at the last slab of Rs. 201

to Rs. 500. The manner in which the the ceiling may be imposed would also have to be decided by the Tribunal in the exercise of its judicial discretion keeping in view the aforesaid principles. The ceiling may be fixed either by prescribing certain amount as the outside limit of the dearness allowance or by reference to the quantum of dearness allowance payable at a certain wage level. We do not wish to lay down as an invariable rule that in all cases there should be ceiling on D.A. Whenever a case of this nature comes for industrial adjudication it will always be a delicate task for the Tribunal to strike a balance keeping in view the above principles, weightage of each one of which being variable according to conditions obtaining. Whether or not there should be a ceiling on dearness allowance in a given case must depend on the facts and circumstances of that case. There can be no inexorable rule in that respect. We have formulated the various principles which must be taken into account by the Tribunal in determining this question but the most dominant of these must always be that of social justice, for that is the ideal which we have resolved to achieve when we farmed our Constitution.

38. In the result the award is set aside with regard to demand No. 2(a) relating to ceiling. The reference stands restored with regard to that specific matter and will be disposed of by the Tribunal as early as possible after giving opportunity to the parties. The appeals are partly allowed without costs.

9100119750501007

The Government Of Andhra Pradesh And Another

Vs

Hindustan Machine Tools Ltd.

Civil Appeal No. 1189 Of 1972

(Chandrachud, J.)

01.05.1975.

JUDGMENT

CHANDRACHUD, J. –

1. This is a tax dispute concerning the power of the second appellant, Kuthbullapur Gram Panchayat, to levy house-tax and permission fee on the respondent, The Hindustan Machine Tools Ltd. which is a Government of India undertaking. The first appellant is the Government of Andhra Pradesh.

2. The Kuthbullapur Gram Panchayat was established in 1959. In 1964 the Andhra Pradesh State Legislature passed the Andhra Pradesh Gram Panchayats Act, 2 of 1964, which with the exception of Chapter VII of the Act, came into force on January 18, 1964. The Act applies to the Kuthbullapur Gram Panchayat within whose geographical limits the respondent has established a factory for the manufacture of special apparatus machines, presses, etc. The construction of the factory began in 1964 and was completed in December, 1965. The factory was constructed without the permission of the Gram Panchayat. Considering the skeleton staff which means the Panchayat and its skeleton activities, the respondent's plea that it did not obtain the Panchayat's permission because it was not

aware of its existence is not implausible. But such awareness has no relevance on the respondent's liability to pay taxes and fees. In any event, on coming to know of the construction of the factory and the other buildings the Panchayat asked the respondent to obtain the requisite permission. The respondent asked for ex post facto permission in January, 1967.

3. In its meeting of May 8, 1967 the Panchayat passed a resolution for collecting permission fee from the respondent at 1/2% on the capital value of the factory buildings and at 1% on the capital value of other buildings. By a letter dated August 20, 1968 the Panchayat called upon the respondent to pay house-tax for the years 1966-67, 1967-68 and 1968-69 amounting to Rs. 1,83,750 at the rate of Rs. 61,250 per annum. On March 3, 1969 the Panchayat demanded from the respondent a sum of Rs. 1,65,000 by way of 'permission fee, Rs. 80,000 being for factory building and Rs. 85,000 in respect of the other buildings.

4. On November 25, 1969 the respondent filed a writ petition in the High Court of Andhra Pradesh challenging the levy of house-tax and the permission fee. By its judgment dated August 6, 1971 the High Court allowed the writ petition. It held that the buildings constructed by the respondent did not fall within the definition of a 'house' as contained in the Act and therefore no house-tax could be levied on the buildings. Regarding the permission fee, the High Court repelled the appellant's contention that the fee was in the nature of tax and held that since no service were rendered by the Panchayat to the respondent the levy of permission fee was illegal. The High Court has granted to the appellants a certificate of fitness under Article 133(1)(a) of the Constitution to appeal to this Court.

5. Section 69(1)(a) of the Act provides that a Gram Panchayat shall levy in the village a house-tax. By Section 2(15), as it stood when the High Court delivered its judgment, 'house' meant a building or hut fit for human occupation, whether as a residence or otherwise, "having a separate principal entrance from the common way", and included "any shop, workshop or warehouse or any building used for garaging or parking buses or as a bus-stand". The High Court held that buildings other than factory premises were not a 'house' within the meaning of the Act because their separate principal entrances were situated on the roads belonging to the respondent and not on the common way as required by Section 2(15). As regards the factory buildings, the High Court held that the Legislature had included shops, workshops and warehouses but not factories within the definition of a 'house' and therefore factory buildings were also not a 'house' within the meaning of the Act. The demand of house-tax was accordingly held illegal.

6. By the Andhra Pradesh Gram Panchayats (Amendment) Act, 16 of 1974, the State Legislature has amended the definition of 'house' with retrospective effect so as to eliminate the impediments on which the High Court rested its judgment. If the amendment is lawful and valid, it will be unnecessary to consider whether the High Court was right in reading the way it did the definition of 'house' as contained in the unamended Section 2(15).

7. Section 2 of the Amending Act provides :

2. For clause (15) of Section 2 of the Andhra Pradesh Gram Panchayats Act, 1964 (hereinafter referred to as the principal Act), the following clause shall be and shall be deemed always to have been substituted, namely :-

"(15) 'house' means a building or hut fit for human occupation, whether as a residence or otherwise, and includes any shop, factory, workshop or as a bus-stand, cattle shed (other than a cattle shed in

an agricultural land), poultry shed or dairy shed;"

8. Section 4(a) of the Amending Act provides :

4. Notwithstanding anything in any judgment, decree or order of any court or other authority, -

(a) anything done or any action taken, including any tax levied and collected, in the exercise of any power conferred by or under the principal Act shall be deemed, to be and to have always been, done or taken or levied and collected in the exercise of the powers conferred by or under the principal Act as amended by Section 2 of this Act, as if the principal Act as amended by this Act were in force on the date on which such thing was done or action was taken, or tax was levied and collected; and all arrears of tax and other amounts due under the principal Act as amended by this Act at the commencement of this Act, may be recovered as if they had accrued under the principal Act as amended by this Act;.

9. The new definition of 'house' which is to be read retrospectively into the Act meets effectively both the objections by reason of which the High Court held that the buildings constructed by the respondent were not a 'house'. By the amendment, the old clause : "having a separate principal entrance from the common way" is dropped and the definition of 'house' is re-framed to include a 'factory'. It is clear and is undisputed that the buildings constructed by the respondent - the colony buildings as well as the factory buildings - answer fully the description of a 'house' and are squarely within the new definition contained in Section 2(15).

10. We see no substance in the respondent's contention that by re-defining the term 'house' with retrospective effect and by validating the levies imposed under the unamended Act as if notwithstanding anything contained in any judgment, decree or order of any court, that Act as amended was in force on the date when the tax was levied, the Legislature has encroached upon a judicial function. The power of the Legislature to pass a law postulates the power to pass it prospectively as well as retrospectively, the one no less than the other. Within the scope of its legislative competence and subject to other constitutional limitations, the power of the Legislature to enact laws is plenary. In United Provinces v. Atiqa Begum (1904 FCR 110 : AIR 1941 FC 16), Gwyer, C.J. while repelling the argument that Indian Legislature had no power to alter the existing laws retrospectively observed that within the limits of their powers the Indian Legislatures were as supreme and sovereign as the British Parliament itself and that those powers were not subject to the "strange and unusual prohibition against retrospective legislation". The power to validate a law retrospectively is, subject to the limitations aforesaid, an ancillary power to legislate on the particular subject.

11. The State Legislature, it is significant, has not overruled or set aside the judgment of the High Court. It has amended the definition of 'house' by the substitution of a new Section 2(15) for the old section and it has provided that the new definition shall have retrospective effect, notwithstanding anything contained in any judgment, decree or order of any court or other authority. In other words, it has removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances. If the old Section 2(15) were to define 'house' in the manner that the amended Section 2(15) does, there is no doubt that the decision of the High Court would have been otherwise. In fact, it was not disputed before us that the buildings constructed by the respondent meet fully the requirements of Section 2(15) as amended by the Act of 1974.

12. In Tirath Ram Rajindra Nath v. State of U. P. ((1973) 3 SCC 585 : 1973 SCC (Tax) 300), the

Legislature amended the law retrospectively and thereby removed the basis of the decision rendered by the High Court of Allahabad. It was held by this Court that this was within the permissible limits and validation of the old Act by amending it retrospectively did not constitute an encroachment on the functions of the Judiciary.

13. The decisions on which the respondent relies are clearly distinguishable. In the Municipal Corporation of the City of Ahmedabad v. New Shrock Spg. & Wvg. Co. Ltd. (AIR 1970 SC 1292 : (1970) 2 SCC 280), the impugned provision commanded the Corporation to refuse to refund the amount illegally collected by it despite the orders of the Supreme Court and the High Court. As the basis of these decisions remained unchanged even after the amendment, it was held by this Court that the Legislature had made a direct inroad into the judicial powers. In Janapada Sabha, Chhindwara v. Central Provinces Syndicate Ltd. ((1970) 1 SCC 509), the Madhya Pradesh Legislature passed a Validation Act in order to rectify the defect pointed out by this Court in the imposition of a cess. But the Act did not set out the nature of the amendment nor did it provide that the notifications issued without the sanction of the State Government would be deemed to have been issued validly. It was held by this Court that this was tantamount to saying that the judgment of a court rendered in the exercise of its legitimate jurisdiction was to be deemed to be ineffective. The position in State of Tamil Nadu v. M. Rayappa Gounder ((1971) 3 SCC 1), was similar. In that case the reassessments made under an Act which did not provide for reassessments were attempted to be validated without changing the law retrospectively. This was considered to be an encroachment on the judicial functions.

14. In the instant case, the Amending Act of 1974 cures the old definition contained in Section 2(15) of the vice from which it suffered. The amendment has been given retrospective effect and as stated earlier the Legislature has the power to make the laws passed by it retroactive. As the Amending Act does not ask the instrumentalities of the State to disobey or disregard the decision given by the High Court but removes the basis of its decision, the challenge made by the respondent to the Amending Act must fail. The levy of the house-tax must therefore be upheld.

15. Under Article 246(3) read with Entry 49 in List II, Seventh Schedule of the Constitution, the State Legislatures have exclusive power to make laws with respect to "Taxes on lands and buildings". Section 69(1)(a) of the Act authorises Gram Panchayats to levy house-tax in the villages under their respective jurisdiction. The Gram Panchayat of Kuthbullapur has accordingly levied house-tax on the buildings constructed by the respondent including the factory buildings. It needs to be clarified that by Rule 6 of the "Rules relating to levy of House-Tax", machinery and furniture are to be excluded from consideration for the purpose of assessment to house-tax. Thus, the tax is on buildings only and does not transgress the scope of Entry 49.

16. This clarification became necessary in view of the respondent's contention that the State Legislature was no power under Entry 49, List II, to levy tax on the lands and buildings owned or occupied by a factory. Entry 36 in List III relates to "Factories" and Entry 47 in that List relates to "Fees in respect of any of the matters in this List, but not including fees taken in any court". It is urged on behalf of the respondent that these specific Entries in regard to the particular subject-matter exhaust the power to impose levies on factories and since the power is limited to the imposition of fees on factories, the Legislature has no competence to impose a tax on the lands or buildings of a factory. It is true that the various Entries in the legislative lists must receive a broad and liberal construction and Entry 36 in List III may therefore cover every aspect of the subject-matter of "Factories". But the State Legislature has not authorised the levy of house-tax on factories in the compendious sense. The new definition of "house" includes a 'factory' but the house-tax is

levied only on the buildings occupied by the factory and not on the machinery and furniture. The State Legislature has the legislative competence to do so under Entry 49 in List II.

17. It was urged by Mr. Naunit Lal on behalf of one of the interveners that 'Factory' is a compendious expression and since a factory consists of the building, the machinery and the furniture, the Legislature cannot split up the personality of the factory and tax one part of it only. There is no substance in this contention because the power to tax a building can be exercised without reference to the use to which the building is put and it is irrelevant that the building is occupied by a factory which cannot conduct its activities without the machinery and furniture. What falls legitimately within the scope of a legislative Entry can lawfully from the subject-matter of legislation.

18. We cannot entertain the respondent's argument that without a proper budget, the Gram Panchayat cannot impose a tax. Such an argument was not made in the High Court and it involves an investigation into the fact whether the Gram Panchayat had or had not prepared a budget. Nor can we entertain the respondent's submission that Section 4(b) and (c) of the Act of 1974 are invalid. Under clause (b), no suit or other proceeding is maintainable or can be continued in any court or before any authority for the refund of any tax. Under clause (c), no court shall enforce any decree or order directing the refund of any such tax. No suit has been filed by the respondent for the refund of tax and no decree or order has been passed by any court or any authority for the refund of any tax. This Court does not answer academic questions.

19. The position in regard to the so-called 'permission fee' is entirely different. In the first place, the Act of 1964 itself makes a distinction between the power to impose a tax and the power to impose a fee. Section 69(1) and Section 69(3)(i), (ii), (iii) empower the Gram Panchayats to levy taxes while Section 69(3) (v) and (vi) provide for the levy of fees. Sections 12, 109(2), 111, 121(5), 122 and Section 131 of the Act also provide for the imposition of specific fees. There is no provision in the Act empowering the Gram Panchayats to levy fees on the permission to construct a building, which is what the second appellant has purported to do in the instant case.

20. In fact, there is no provision in the Act under which it is necessary to obtain the permission of the Gram Panchayat for constructing a building. Section 131(2) of the Act which authorise the levy of fees for every licence or permission is therefore not attracted. Section 125(1) requires that the permission of the Gram Panchayat must be obtained for constructing or establishing a factory, workshop or work-place in which it is proposed to employ steam power, water power or other mechanical power or electrical power or in which it is proposed to install any machinery or manufacturing plant driven by steam, water or other power as aforesaid. This provision may possibly support a levy of permission fee on the factory buildings, but there is no provision in the Act at all requiring the permission of the Gram Panchayat for the construction of other buildings. Counsel for the appellants wanted to drive sustenance to the imposition of permission fee from the provision contained in Section 217(2)(xvi) but that clause only empowers the Government to make rules "as to the regulation or restriction of building and the use of sites for building". In the absence of any provision in the parent statute requiring the permission of the Gram Panchayat for the construction of non-factory buildings, the rule-making power of the Government cannot be exercised so as to impose the requirement of a permission, in respect of such buildings.

21. But there is a broader ground on which the levy of permission fee must be struck down. Fees are a sort of return or consideration for services rendered, which makes it necessary that there should be an element or quid pro quo in the imposition of a fee. There has to be a corelationship between the

fee levied by an authority and the services rendered by it to the person who is required to pay the fee. (Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar, 1954 SCR 1005 : AIR 1954 SC 282 and State of Maharashtra v. Salvation Army, (1975) 1 SCC 509 : 1975 SCC (Tax) 145) There is, in this case, not a word showing such a co-relationship. In the counter affidavit which the appellants filed in the High Court in reply to the respondent's writ petition, nothing at all was stated as to the expenses incurred or likely to be incurred by the Gram Panchayat in rendering any actual or intended service to the respondent. There may be something in the grievance of the Gram Panchayat that the mighty respondent and others following the respondent's lead have been persistently refusing to pay taxes which has made it impossible for the Gram Panchayat to render any services. But the true legal position as stated by Mukherjee, J. in the Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shriur Mutt (1954 SCR 1005, 1042 : AIR 1954 SC 282) is that "it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services". In total absence of any data showing such a co-relationship, the levy of permission fee has to fail.

22. One cannot take into account the sum-total of the activities of a public body like a Gram Panchayat to seek justification for the fees imposed by it. The expenses incurred by a Gram Panchayat or a Municipality in discharging its obligatory functions are usually met by the imposition of a variety of taxes. For justifying the imposition of fees the public authority has to show what services are rendered or intended to be rendered individually to the particular person on whom the fee is imposed. The Gram Panchayat here has not even prepared an estimate of what the intended services would cost it.

23. Learned Counsel for the appellants contended that the Gram Panchayat lays roads for providing access to new buildings, that it provides for drainage and lights and that it scrutinises the plans submitted for intended constructions and, if necessary, it advises the applicants in order that the proposed construction may conform to the regulations. We are unable to accept that these services are rendered individually to the respondent. The laying of roads and drainage or the supply of street-lights are a statutory function of public authorities and it is difficult to hold, in the absence of any material, that any of such services as have been mentioned to us have in fact been rendered to the respondent. The very circumstance that the permission fee is levied at a certain percentage of the capital value of the buildings shows that the Gram Panchayat itself never intended to correlate the fee with the services rendered or intended to be rendered by it. There is therefore no warrant for the levy of permission fee, not even on factory buildings, assuming for the sake of argument that the permission of Gram Panchayat is necessary for the construction of factory buildings.

24. It was alternatively contended on behalf of the appellants that the permission fee though called a fee is really in the nature of a tax on building and may be upheld as such. It is impossible to accept this contention. That the permission fee is not a tax on buildings is clear from the fact that the fee may be required to be paid even if a building does not eventually come into existence. The scheme under which the permission fee is attempted to be levied is that it becomes payable at the time when the permission to construct a building is applied for. The levy does not depend upon whether a building has been in fact constructed with the result that whether a building is constructed or not, the fee has to be paid. In other words, the permission fee is in the nature of a levy on a proposed activity and is not a tax on buildings.

25. Thus, the levy of house-tax is lawful but the levy of permission fee has to be struck down as being illegal. Accordingly the appeal is allowed partly but since the success is divided, there will be

no order as to costs.

9100119750303003

The Gandhi Faiz-E-Am College, Shahjahanpur

Vs

University Of Agra And Another

Civil Appeal No. 1611 Of 1969

(Krishna Iyer, J)

03.03.1975.

JUDGMENT

KRISHNA IYER, J-

1. Our essay in this appeal is to interpret and apply Article 30 of the Constitution, illumined by the ratio of the recent leading case on the constitutional rights of minorities vis-a-vis educational institutions where a Bench of 11 Judges handed down six opinions on the thorny issue. As we proceed to judgment, we are reminded of two famous American observations. Chief Justice Marshall, while deciding the celebrated McCulloch v. Maryland case (4 Wheaton 316, 407 : 4 L Ed 579 (1819)) made the pregnant remark : 'We must never forget that it is the Constitution we are expounding'. Governor Hughes, soon to ascend the U.S. Supreme Court, said : 'We are under a Constitution, but the Constitution is what the Judges say it is'. Reverentially guided and bound by great precedents but mindful of the luminous texts and goals of the Constitution itself, we have to attempt the task.

2. The facts of the present case are virtually admitted, the precedent that binds us is of fresh vintage but the legal test when applied to this concrete case-situation is fine, if not baffling. Of course, the only area of judicial exploration is to decoct the rule from the ruling and fit it to the admitted facts.

3. The appellant is a registered society formed by the members of the Muslim community at Shahjahanpur. Indubitably, the community ranks as a minority in the country and the educational institution run by it has been found to be what may loosely be called a 'minority institution', within the constitutional compass of Article 30. The earlier history of the institution need not detain us and a rapid glance at its evolution is enough. The A. V. Middle School was the offspring of the effort of the Muslim minority resident in Shahjahanpur district. It later became a high school and afterwards attained the status of an Intermediate college. Eventually it blossomed into a degree college affiliated to the University of Agra. In 1948, on the assassination of the Father of the Nation, this college was commemoratively renamed as Gandhi Faiz-e-am College. In August 1964, an application was made on behalf of the college management to the University for permission to start teaching in courses of study including Sociology, Sanskrit, Arabic, Military Studies, Drawing and Painting. The University entertained the thought that a new organisational discipline must be brought into the institution and insisted, as a condition of recognition of these additional subjects as course of study, on certain mutations in the administrative body of the college. The bone of contention before us, as was before the High Court, is that this prescription by the University, in

tune with Statute 14-A framed by it, is an invasion of the fundamental right guaranteed to the minority community under Article 30 of the Constitution of India. The High Court has negatived the plea of the management and the appeal issues from that decision.

4. What is the core of the restriction clamped down by Statute 14-A ? What is the conscience and tongue of Article 30 ? If the former is incongruous with the latter, it withers as void; otherwise, it prevails and binds. That is the crux of the controversy.

5. The minority college is administered by a three-tier body organised intra-murally by the society. No outsider has entered the precincts of management which has all along remained with the members only. The General Council with plenary powers, the governing body more circumscribed yet effective as policy-maker and the Managing Committee, the day-to-day administrative sub-agency - these are the organs vested with controlling power, under the relevant rules of the Society. The essential point is that the society is autonomous and its organs administer the institution.

6. The University directive backed by Statute 14-A, it is contended, forces two persons on the area of administration. This is argued to be a serious erosion of the great right guaranteed to cultural and religious minorities. Statute 14-A may, at the outset, be reproduced :

14-A. Each college, already affiliated or when affiliated, which is not maintained exclusively by Government must be under the Management of a regular constituted Governing body (which term includes Managing Committee) on which the staff of the college shall be represented by the Principal of the college and at least one representative of the teachers of the college to be appointed by rotation in order of seniority determined by length of service in the college, who shall hold office for one academic year.

Emboldened by this provision, the Registrar of the Agra University has made the impugned demand which runs thus :

Agra UniversityFrom Sri R. N. Pathak, Asst. Registrar (Affiliation), Agra University, Agra.To The Principal, G.F. College, Shahjahanpur.No. Affl/7965 Dated : Agra, 24 April, 1965##

Sir,

With reference to your application dated December 1, 1964 recognition in certain subjects upto the B.A. standard, I am to inform you that the Executive Counsel at its meeting held on April 10, 1965 after considering the report of the Inspectors on the inspection of your college and the recommendations of the relevant committee thereon decided that recognition applied for upto the B.A. standard be not granted to the college unless provisions is made in the constitution for representation of the Principal and one Head of Department to be chosen in order of seniority every year on the Managing Committee of the college and other conditions have been fulfilled. I am therefore to request you to take immediate steps to implement the aforesaid decision of the Council and let me know that you have done so. On receipt of your reply the matter will be further considered.

Yours faithfully, Sd/- R. N. Pathak, Asst. Registrar (Affl.).##

7. Maybe, we may as well mention the stand taken by the management of the College in the correspondence with the Registrar. In one reply it was represented :

#From The President, Managing Committee, G.F. College, Shahjahanpur.To The Deputy Registrar (Affl), Agra University.No. 660 Dated, Shahjahanpur, Nov. 22, 1965.##

Sir,

With reference to your letter No. Affl/1338, dated August 31, 1965 and subsequent reminder dated October 20, 1965, I have the honour to say that we are very grateful to the University for its acceptance of the minority status of our college.

While mentioning that the University has no legal power to interfere in our right to administer the institution, we are willing to make the inclusion of the Principal and one Head of Department by rotation obligatory in the Governing Body as proposed in the written legal opinion of our counsel, (relevant extract of which has been forwarded to us along with your letter under reference), simply for the reason that we are very anxious to keep up smooth and cordial relations with the University.

The learned Vice-Chancellor is, therefore, requested to grant us affiliation in all the new subjects in respect of which our applications are pending, at a very early date, to enable us to make the necessary preparations, which are likely to take sufficient time, to start the classes in those subjects from the beginning of the next session.

We undertake to amend our constitution suitably to give the proposal a practical shape within three months after the receipt of your kind reply.

An early disposal of this letter is solicited.

Yours faithfully, Sd/- ..... President, Managing Committee, G.F. College, Shahjahanpur.##

This concession was retracted allegedly because the University took no steps accepting it and a writ petition was filed challenging the vires of Statute 14-A and legality of the directive.

8. If reliance had been placed by the University on this concession of the management as amounting to a waiver of the fundamental right, thereby making short shrift of the dispute, if would have been difficult for us to accede to the plea. Indeed, wisely no plea of waiver of the fundamental right has been put forward and perhaps none can be, in this branch of constitutional jurisprudence. We are therefore concerned with discerning the parameter of 'minority' right in Article 30.

9. A stream of Supreme Court rulings commencing with the Kerala Education Bill case (In re the Kerala Education Bill, 1957, 1959 SCR 995 : AIR 1958 SC 956) and climaxed by St. Xavier's College case (Ahmedabad St. Xavier's College Society v. State of Gujarat, AIR 1974 SC 1389 : (1974) 1 SCC 717) has settled the law for the present, and the last refers to the precedential past. We will confine ourselves largely to the currently final pronouncement; but where did the Court draw the delicate line between unconstitutional conditions and constitutional regulations ? A certain thread of unanimity exists among the many opinions and that common ground - not individual deviations and differences - must be the basis of our judgment. Right at the beginning we must observe that the whole edifice of case law on Article 30 has been bed-rocked on the Kerala Education Bill case (supra).

10. The greatest common measure of agreement among the various opinions in that case [St. Xavier's College case (supra)] will have to be ascertained. Ray, C.J. following Das, C.J. (in the First Kerala case), has taken middle view, if one may say so with great respect. 'Hands-off administration

altogether' is a tall call today : but 'hand-cuff managements into uniformity' is also not the correct rule. A benignantly regulated liberty which neither abridges nor exaggerates autonomy but promotes better performance is the right construction of the constitutional provision. Such an approach enables the fundamental right meaningfully to fulfil its trust with the minorities' destiny in a pluralist polity. That is the authentic voice of Indian democracy. To regulate, it be noted, is not to restrict, but to facilitate effective exercise of the very right. The constitutional estate of the minorities should not be encroached upon, neither allowed to be neglected nor maladministered. This quintessence of the decision may now be aptly born out by pertinent excepts from the various judgments.

The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution. [St. Xavier's College case at AIR p. 1398, SCC p. 748, para 30].

Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions. [St. Xavier's College case, at p. 1398, SCC p. 748, para 31]

Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions .... The university will always have a right to see that there is no maladimistration. If there is maladministration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. [St. Xavier's College case, at p. 1399. SCC p. 750, para 41]

The 'inner voice' of the whole pronouncement should not be muffled while reading the particular result in the case and that is happily expressed thus :

The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C.J. in the Kerala Education Bill case (supra) summed up in one sentence the true meaning of the administer by saying that the right to administer is not right to maladminister. [St. Xavier's College case, at p. 1396, SCC p. 746, para 20]

11. Mr. Justice Jaganmohan Reddy summed up the law at the threshold :

The right of a linguistic or religious minority to administer educational institutions of their choice, though couched in absolute terms had been held by this Court to be subject to regulatory measures which the State might impose for furthering the excellence of the standards of education. [St. Xavier's College case, at p. 1401, SCC p. 753, para 51]

12. Mr. Justice Khanna stressed what is sometimes ill-remembered :

The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give the minorities a sense of security and a feeling or confidence. [St. Xavier's College case, at p. 1415, SCC p. 772, para 77]

The learned Judge, after visualising the abundant catholicity of the guarantee is favour of minorities in our multi-cultural country, insisted that regulations for the welfare of the institution were not constitutional anathema :

It is, in my opinion, permissible to make regulations for ensuring the regular payment of salaries before a particular date of the month. Regulations may well provide that the funds of the institution should be spent for the purposes of education or for the betterment of the institution and not for extraneous purposes. [St. Xavier's College case, at p. 1422, SCC p. 782, para 91]

And, after itemising, illustratively, other permissible constraints, observed :

A regulation which is designed to prevent maladministration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulations nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutional of their choice. [St. Xavier's College case, at p. 1422, SCC p. 783, para 92]

As observed by this Court in the case of Rev. Sidhajbhai Sabhai (Rev. Sidhajbhai Sabhai v. State of Bombay, ((1963) 3 SCR 837 : AIR 1963 SC 540), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. [St. Xavier's College case, at p. 1422, SCC p. 783, para 92]

In the context of affiliation of colleges, the learned Judge concertised the law thus :

The said authority can always can always prescribe regulations and insist that they should be complied with before it would grant affiliation or recognition to an educational institution. To deny the power of making regulations to the authority concerned would result in robbing the concept the affiliation or recognition of its real essence. [St. Xavier's College case, at p. 1423, SCC p. 784, para 94]

It would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spite of the unrestricted nature of the right. [St. Xavier's College case, at p. 1423, SCC p. 784, para 95]

13. In short, the view which appealed to Khanna, J. shows that the law, to be constitutional, should not impair the minorities' right but may be promotional in the sense of making the purpose of the institution more productive.

14. One of us, sitting on that Bench (Mr. Justice Mathew) has illumined the amplitude of the right under Article 30 but has not dissented from the validity of putting on that right regulatory harness. In a pithy statement, this point has been made by the learned Judge : 'No right, however absolute, can be free from regulation' [St. Xavier's College case, at p. 1441, SCC p. 810, para 172]. The spiritual seed of this thought is found in the Holmesian observation extracted by him :

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by

the neighbourhood of principles of policy which are other than those on than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. [St. Xavier's College case, at p. 1441, SCC p. 810, para 172]

With specific reference to 'affiliation' these guidelines fell from the learned Judge :

Recognition or affiliation creates an interest in the university to ensure that the educational is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation ..... In other words recognition or affiliation is a facility which the university grants to an educational institution. [St. Xavier's College case, at p. 1442, SCC p. 812, para 176]

15. Justices Beg and Dwivedi have stretched the regulatory power further than majority, holding that it is an illusion for a minority to claim absolute immunity. The thrust of the case is that real regulations are desirable, necessary and constitutional but, when they operate on the 'administration' part of the right, must be confined to chiselling into shape, not cutting down out of shape, the individual personality of the minority.

16. The discussion throws us back to a closer study of Statute 14-A to see if it cuts into the flesh of the management's right or merely tones up its health and habits. The two requirements the University asks for are that the managing body (whatever its name) must take in (a) the Principal of the College; (b) its seniormost teacher. Is this desideratum dismissible as biting into the autonomy of management or tenable as ensuring the excellence of the institution without injuring the essence of the right ? On a careful reflection and conscious of the constitutional dilemma, we are inclined to the view that this case falls on the valid side of the delicate line. Regulation which restricts is bad; but regulation which facilitates is good. Where does this fine distinction lie ? No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone and temper of the administration without forcing on it to a stronger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous management alone is asked for, the provision is salutary and saved, being not a diktat eroding the freedom of the freedom.

17. A dichotomy is sometimes drawn in this branch of juridical discussion. More plainly, the difference drawn is between creating a managing body by the minority community and regulation of the manner of its functioning to obviate maladministration. The former is ordinarily beyond the pale of legislative prescription while the latter is permissible as a preservative. Broadly, this is sound, but as a rigid logical formula, it breaks down. For, some regulations may impinge marginally upon the composition of the administrative organ though manifestly meant to save the institution from mismanagement. Just one or two examples. If the law says that a person sentenced for a prescribed period of imprisonment for breach of trust or an undischarged insolvent would be disqualified to be the treasurer or one who has been removed from public office or moral delinquency or has been punished for outraging the religious feelings of the very minority under Section 295-A, I.P.C. should not hold office on the governing body, such a regulation affects the structure of the governing body but is indubitably a protection against likely maladministration. Likewise, supposing the management has to award scholarships to students of merit, decide on courses of

study to be undertaken, regulate teacher-students comity and discipline, who but the Principal chose by the minority itself will be better on the Committee to guide it in these vital affairs ? These fine but real lines cannot be obfuscated by excessive emphasis on the character of the organ as against its method of working. Men matter in extreme situation.

18. This perspective helps us discern the points made by either side.

19. The pitch of Shri Frank Anthony's submission is that the command of the University to include even the Principal, the head appointed by that very management to be in plenary charge of the education imparted in college, is an invasion of the minority right. Freedom from any form of external pressure, however well-meant and beneficent, is the soul of the right to administer, if one may paraphrase his contention. This is simply countered by the words of Khanna, J. :

It would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spirit of the unrestricted nature of the right. [St. Xavier's College case, at p. 1423, SCC p. 784, para 95]

All the other learned Judges who are party to St. Xavier's College case (supra) and all the earlier rulings have negatived the untouchable absoluteness urged by the managements. Equally fallacious is the simplistic submission which appears to have appealed to the High Court that Article 30 is disturbed only when the right is destroyed, not when it is damaged. St. Xavier's College case has dispelled doubts in this behalf : Abridgment of the constitutional right is as obnoxious as annihilation. To cripple is to kill.

20. Steering clear of these unconstitutional shoals let us again feel our way through the controversy. First, the principal. In the eloquent words of one of learned Judges (Mathew, J.) in St. Xavier's College case (supra) : [SCC pp. 815-816, para 182]

It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance to discipline and its efficiency in teaching. The right to choose the principal and to have teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution.

The strategic appointee must be chosen by the management with sedulous care and his choice should not be 'externalised' by regulations. All right. But for the excellent reason that the principal is the vital, vibrant and luscent presence within the educational campus, no administration can bring out its best in the service of the institution sons the principal. To alienate him is to self-inflict wounds; to associate him is to integrate the academic head into the administrative body for the obvious betterment of managerial insight and proficiency. He is not stranger to the college but the commander appointed by the management itself. A regulation which requires his inclusion in the governing council imposes no external element nor exposes the college to the espionage of one with dual loyalties. He membership on the Board is a blessing in many ways and not a curse in any conceivable way. After all, the functions of the Managing Committee, as set down in bye-law 15, are :

15. The Managing committee shall -

(a) Dispose of applications for scholarships and concession, etc., received by the Secretary or any other person.

(b) Check and pass account kept by the treasurer, Secretary or Principal.

(c) Have powers to appoint, suspend, remove or otherwise punish or dismiss any servant of the school and college or give them promotion or make reductions in their salaries and grant them leave in accordance with the Agra University rules as the case may be :

Provided that in case of dismissal or removal or fine exceeding one month's pay or suspension for a period exceeding one month, an appeal shall lie to the governing Body whose decision shall be final. The period for filing the appeal shall be 15 days from the receipt of the order against which the appeal is to be preferred.

(d) See that the property of the institution, whether movable or immovable, is properly managed and kept.

(e) Generally supervise the work of all the Office-bearers.

(f) To pass the annual budget, annual report and dispose of the audit note.

(g) To sanction expenditure upto Rs. 25,000 in the course of one year, irrespective of the budget provision.

(h) To acquire by purchase, mortgage or otherwise immovable or movable property for the institution and to sell or otherwise dispose of movable property.

21. An activist principal is an asset in discharging these duties which are inextricably interlaced with academic functions. The principal is an invaluable insider - the management's own choice - not an outsider answerable to the Vice-Chancellor. He brings into he work of the Managing Committee that intimate acquaintance with educational operations and that necessary expression of student-teacher aspirations and complaints which are so essential for the minority institution to achieve a happy marriage between individually and excellence. And the role of the seniormost teacher, less striking may be and more unobstrusive, is a useful input managerial skills, representing as he does the teachers and being only a seasoned minion chosen by the management itself. After all, two creatures of the society on a 16-member Managing Committee can bring light, not tilt scales. Moreover, the Managing committee itself is subject to the hierarchical control of the governing body and the General Council.

22. We see no force in the objection to the two innocuous insiders being seated on the Managing Committee.

23. The various decisions of this Court where legislative fetters have been struck down are cases in contrast. There the rules maim; here they improve. There the input upsets the balance : here the addition is minimal and strengthens from within. There, are external mandates to approve; here an internal principal is proposed to be dovetailed to make administration more proficient without injury to independent action. In the Kerala University Act case (State Kerala v. Very Rev. Mother Provincial, ((1971) 1 SCR 734 : (1970) 2 SCC 417) the vice of Sections 48 and 49, summarised by Ray, C.J., in St. Xavier's College case (supra) was stated thus :

Those sections were found by this Court to have effect of displacing the administration of the college and giving it to a district corporate body which was in no way answerable to the institution. The minority community was found to lose the right to administer the institution it founded. The

governing body contemplated in those sections was to administer the colleges in accordance with the provisions of the Act, statutes, ordinances, regulations, bye-laws and orders made thereunder. The powers and functions of the governing body, and removal of the members and the procedure to be followed by it were all to be prescribed by the statues. These provisions amounted to vesting the management and administrations of the institution in the hands of bodies with mandates from the University. [St. Xavier's College case, at AIR p. 1397, SCC p. 747, para 27]

Likewise in Rev. Fr. W. Proost (Rev. Father W. Proost v. State of Bihar, ((1969) 2 SCR 73 : AIR 1969 SC 465) the mischief was summed up in the latest case [St. Xavier's College case (supra) by Ray, C.J. in these words :

This Court in Rev. Fr. W. Proost case held that Section 48-A of the Bihar Universities Act which came into force from March 1, 1962, completely took away the autonomy of the governing body of St. Xavier's College established by the Jesuits of Ranchi. Section 48-A of the said Act provided inter alia that appointments, dismissals, removals, termination of service by the governing body of the college were to be made on the recommendation of the University Service commission and subject to the approval of the University. There were other provisions in that section, viz., that the Commission would recommend to the governing body names of persons in order of preference and in no case could the governing body appoint a person who was not recommended by the University Service Commission. [St. Xavier's College case, at p. 1397, SCC PP. 746-747, para 24]

Again, the same judgment pinpoints in these brief words, the unconstitutional sting in the Bihar viz, Rt. Rev. Bishop Patro (Rt. Rev. Bishop S. K. Patro v. State of Bihar, ((1969) 1 SCC 863 : (1973) 1 SCR 172) :

In Rt. Rev. Bishop S. K. Patro v. State of Bihar the State of Bihar requested the Church Missionary Society School Bhagalpur to constitute a managing committee of the school in accordance with an order of the State. This Court held that the State authorities could not require the school to constitute a managing committee in accordance with their order. [St. Xavier's College case, at AIR p. 1397, SCC p. 747, para 25]

In Gujarat case of St. Xavier's College (supra) is a study in contrast, at stated earlier. Sections 40 and 41 and Section 38 shackled the management, trenching seriously upon the right to administer. The law, as now expounded, regards this excess as unconstitutional.

24. In all these cases administrative autonomy is imperilled transgressing purely regulatory limits. In our case autonomy is virtually left intact and refurbishing not restructuring, is prescribed. The core of the right is not gouged out at all and the regulation is at once reasonable and calculated to promote excellence of the institution - a text book instance of constitutional conditions.

25. To project in bold relief the intrusion into the administration of the provisions in the Second Kerala case (State of Kerala v. Very Rev. Mother Provincial) (supra), and D.A.V. College case (D. A. V. College v. State of Punjab, ((1971) 2 SCC 269 : 1971 Supp SCR 688) and St. Xavier's College case (supra) as against the innocuous prescriptions bearing on management in the present case, we may make a vivid comparison of the clauses. A chart may speak with eloquent clarity :

Kerala University Act (State of Kerala v. Very Rev. Mother Provincial)----------
---------- 1----------##

S.48. Governing body for private college not under corporate management. - (1) The educational

agency of a private college, other than a private college under a corporate management, shall constitute in accordance with the provisions of the statutes a governing body consisting of following members, namely :

(a) the principal of the private college;

(b) the manager of private college;

(c) a person nominated by the university in accordance with the provisions in that behalf contained in the statutes;

(d) a person nominated by the Government;

(e) a person elected in accordance with such procedure as may be prescribed by the Statutes from among themselves by the permanent teachers of the private college; and

(f) not more than six persons nominated by the educational agency.

(2) The governing body shall be a body corporate having perpetual succession and a common seal.

(3) The manager of the private college shall be the chairman of the governing body.

(4) A member of the governing body shall hold office for a period of four years from the date of its constitutions.

(5) It shall be the duty of the governing body to administer the private college in accordance with the provisions of this Act and the statutes, Ordinances, Regulations, Rules, Bye-laws and Orders made thereunder.

(6) The powers and functions of the governing body, the removal of members thereof and the procedure to be followed by it, including the delegation of its powers, shall be prescribed by the Statutes.

(7) Notwithstanding anything contained in sub-section (6) decisions of the governing body shall be taken at meetings on the basis of simple majority of the members present and voting.

S.49. Managing council for private colleges under corporate management -

(a) one principal by rotation in such manner as may be prescribed by the Statutes;

(b) the manager of the private college;

(c) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes;

(d) a person nominated by the Government;

(e) two persons elected in accordance with such procedure as may be prescribed by the Statutes from among themselves by the permanent teachers of all the private colleges; and

(f) not more than fifteen persons nominated by the educational agency.

(2) The managing council shall be a body corporate having perpetual succession and a common seal.

(3) The manager of the private colleges shall be the chairman of the managing council.

(4) A member of the managing council shall hold office for a period of four years from the date of the constitution.

(5) It shall be the duty of the managing council to administer all the private colleges under the corporate management in accordance with provisions of this Act and the Statutes, Ordinances, Regulations, Bye-laws and Orders made thereunder.

(6) The powers and functions of the managing council, the removal of members thereof and the procedure to be followed by it. Including the delegation of its powers, shall be prescribed by the Statutes.

(7) Notwithstanding anything contained in sub-section (6), decisions of the managing council shall be taken at meetings on the basis of simple majority of the members present and voting.

S.63. Power to regulate the management of private colleges -

(4) If the governing body or managing council, as the case may be, disapproves any decision taken by the University in connection with the management of the private college the matter shall be referred by the governing body or managing council, as the case may be, to the Government, within one month of the date of receipt of the report under sub-section (3) who shall thereupon pass such order thereon as they think fit and communicate the same to the governing body or managing council and also to the University.

(6) The manager appointed under sub-section (1) of Section 50 shall be bound to give effect to the decisions of the University and if at any time, it appears to the University that the manager is not carrying out its decisions, it may, for reasons to be recorded in writing and after giving the manager an opportunity of being heard, by order remove him from office and appoint another person to be the manager after consulting the educational agency.

#----------Guru Nanak Gujarat University Statute 14-AUniversity Act (St. Xavier's (impugned in theStatutes College Case) instant case)(D.A.V.College case)---------- 2 3 4----------Status 2(1)(a) 33A. (1) Every college 14A. Each college,A college applying (other than a Gover- already affiliatedfor admission to nment college which is notthe privileges of or college maintainedthe University maintained exclusivelyshall send a by the Government) must be underletter of appli- affiliated before the Managementcation to the the commencement of of a regularRegistrar and the Gujarat Univer- constitutedshall satisfy sity (Amendment) governing body (whichthe Senate : Act, 1972 term includes Managing (hereinafter in Committee) on which(a) That the College this section he staff of theshall have a regula- referred to as college shall berly constituted 'such commencement') - represented by thegoverning body (a) shall be under Principal of theconsisting of not the management of college and atmore than 20 pers- a governing body least one represe-ons approved by the which shall ntative of theSenate and including, include amongst teachers of theamong others, 2 repr- its members the college to beesentatives of the Principal of the appointed by rotationUniversity and the college, a repre- in order of seniorityprincipal of the sentative of the determined by lengthCollege ex officio : University nominated of service in the he

Vice-Chancellor college, who shall and three representatives hold office for one of the teachers of the academic year. College and at least one represe- ntative each of the members of the non-teaching staff and the students of the college, to be elected respect- ively from amongst such teachers, members of the non-teaching staff and students; and (b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include - (1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor, and (2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member. (2) Every college referred to in sub-section (1) shall, - (a) within a period of six months after such commencement, constitute or reconstitute its governing body in conformity with sub-section (1), and (b) as and when occasion first arises after such commencement, for recruitment of the Principal and teachers of the College, constitute or reconstitute its selection committee so as to be in conformity with sub-section (1). (3) The provisions of sub-section (1) shall be deemed to be a condition of affiliation of every college referred to in sub-section (1)##

In the chart aforesaid, we have confined our attention to the 'management' facet of the case but may mention that while in the earlier cases even the power to appoint the principal and staff was controlled, in the instant case it is a refreshing contrast.

26. First the D.A.V. College. He who runs and reads will discover that Statute 2(1) (a) insists upon (a) a limit to the strength of the governing body; (b) the approval of the Senate of the University for the constitution of the governing body; and (c) the inclusion of two representatives of the University as also the Principal of the college ex officio. To legislate for the governing body a rigid restriction on its numbers is to deprive the minority of its free play in organising its management. To compel approval by Senate - and outside instrumentality - before the governing body can have legal status, is a violent violation of Article 30. To foist two representatives of the University - rank outsiders - is again an infringement of the autonomy of the minority institution. The Court, in that case [D.A.V. College case, (supra)], upheld the complaint of the college authorities thus : [SCC p. 283, para 37]

In our view there is not possible justification for the provisions contained in Clauses 2(1) (a) and 17 of Chapter V of the statues which decidedly interfere with the right of management of the petitioners' Colleges. These provisions cannot therefore be made as conditions of affiliation, the non-compliance of which would involve disaffiliation and consequently they will have to be struck down as offending Article 30(1).

27. It is impossible to predicate from the above observations that this Court regarded as obnoxious the inclusion of the Principal of the very college. On the other hand, the more serious encroachment which caved into the independent management of the College consists in the first three provisions which are deprivatory in character. The present case is a graphic contrast. No ceiling on 'membership; no unbidden guests, nominees of the University, fobbed off on the Managing Committee. The solitary but inconsequential similarity of circumstance that there is reference to the Principal, there an here, cannot approximate the two cases from the constitutional angel at all, what with complete hold on staff appointment in the former and none in the latter.

28. The Second Kerala case [State of Kerala v. Very Rev. Mother Provincial (supra)], as the table (pp. 296-97) shows, insists on the appointment of the Principal himself being controlled, displaces the minority's Managing Committee by imposing an admixed governing agency of statutory concoction wresting authority from the minority. A different entity with legislatively limited

functions robs the religious group of its right of administration. The distance between the Kerala University Act provisions and those of the Agra University Act is considerable and the constitutional import too obvious for argument.

29. The manacle regulations of the Gujarat University Act are also tell-tale. Its metamorphic impact is best summed up in the terse words of Ray C.J. The minority character of the college is lost. Minority institutions became part and parcel of the University. Why ? Because :

The provisions contained in Section 33-A(1)(a) of the Act, state that every college shall be under the management of the governing body which shall include amongst its members, a representative of the university nominated by the Vice-Chancellor and representatives of teaches, non-teaching staff and students of the college ....

* * *##

In State of Kerala v. Very Rev. Mother Provincial (supra) this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would be displaced. This court also said that situations might be conceived when they might have a preponderating voice. That would also affect the autonomy in administration. The provisions contained in Section 33-A(1)(a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will hot not only be disturbed but also mixed. These provisions in Section 33-A(1)(a) cannot therefore apply to minority institutions. [St. Xavier's College case, at p. 1399, SCC pp. 750-51, paras 40-41].

The features of the Agra University Act vis-a-vis the minority institutions are conspicuously different and leave almost unaffected the total integrity of the administration by the religious group, save in minimal inclusion of two internal entities namely the principal of their own choice and the seniormost lecturer independently appointed by them.

30. We are satisfied that the regulatory clauses challenged before us improved the administration and do not inhibit its autonomy and are therefore good and valid.

31. We therefore hold that the statute impugned is not vulnerable nor void. The appeal has to be and is dismissed, but without costs in the circumstances of this case.

MATHEW, J. (dissenting) - The question is whether Statute 14-A framed by the University of Agra abridges the fundamental right guaranteed under Article 30(1) of the Constitution of the Muslim community of Shahjahanpur a religious minority, to administer the Gandhi Faiz-e-am College, Shahjahanpur, established by it.

33. In August, 1964, an application was made on behalf of the college management to the University for permission to start teaching in courses of study including Sociology, Sanskrit, Arabic, Military Studies, Drawing and Painting. The University insisted that as condition for recognition of these additional subjects as courses of study, the Managing Committee of the college must be reconstituted in conformity with Statute 14-A by including the Principal and the seniormost member of the staff in it. Statute 14-A provides :

14-A. Each college, already affiliated or when affiliated, which is not maintained exclusively by government must be under the Management of a regular constituted Governing Body (which term

includes Managing Committee) on which the staff of the college shall be representative of the teachers of the college to be appointed by rotation in order of seniority determined by length of service in the college who shall hold office for one academic year.

34. In the writ petition filed before the High Court, the appellant contended that Statute 14-A abridged its fundamental right under Article 30(1). But the High court negatived the contention holding that even in State 14-A is implemented by the religious minority, the right of the minority to administer the educational institution would not be taken away or destroyed and dismissed the writ petition.

35. I should have thought that the matter was concluded by the decision of this is Court in Ahmedabad St. Xavier's College Society v. State of Gujarat (supra). Section 33A(1)(a) of the Gujarat University Act, 1949, which fell for consideration in that case, among other matters, read :

33A (1). Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement') -

(a) shall be under the management of a governing body which shall include amongst its members the Principal of the college, a representative of the University nominated by the Vice Chancellor, and three representatives of the teachers of the college and at least one representative each of the member of the non-teaching staff and the students of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students.

This provision was challenged in that case as violating the fundamental right under Article 30(1) of the minority community in question there. This Court held by a majority that the provision was bad as it offended the fundamental right of the religious minority under Article 30(1) to administer educational institution. The reason was that the provision required the inclusion, in the governing body of the college, of persons whom the religious minority did not want to include. When Article 30(1) speaks that a religious or linguistic minority has the right to administer educational institutions of its choice, it means that the right to carry on the administration of the institution must be left to the managing body consisting of person in whom the religious or linguistic minority has faith and confidence.

36. The learned Chief Justice, speaking for himself and Palekar, J. after referring to the provisions of Section 33A(1)(a) said in that case that the right to administer is the right to conduct and manage the affairs of the institution and that this right is exercised "through a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy in that sphere". He further said that the right to administer is subject to permissible regulatory measures and that permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the institution and without displacing the management. He was of the view that if the administration has to be improved, it should be done through the agency or the instrumentality of the existing management and not by displacing it. The learned Chief Justice further observed that autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions, that the right of administration means day to day administration and that the choice in the personnel of management is a part of the administration. He concluded by saying : [SCC p. 751, para 41]

The provisions contained in Section 33A(1)(a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The clam waters of an institution will not only be disturbed but also mixed. These provisions in Section 33A(1)(a) cannot therefore apply to minority institutions.

37. Jaganmohan Reddy, J. speaking for himself and Alagiriswami, J. agreed with the view expressed by the learned Chief Justice on the question of the validity of Section 33A(1)(a) in its application to the minority.

38. Khanna, J. in his concurring judgment said that the argument that a law or regulation could not be deemed unreasonable unless it was totally destructive of the right of the minority to administer educational institutions was fallacious and was negatived by this Court by its previous decisions and that a law which [SCC p. 788, para 101-102]

..... interferes with the minorities choice of a governing body or management council would be violative of the right guaranteed by Article 30(1). This view has been consistently taken by this Court in the cases of Rt. Rev. S. K. Patro, Mother Provincial and D.A.V. College (affiliated to the Guru Nanak University) (supra).

Section 33-A which provides for a new governing body for the management of the college and also for selection committees as well as the constitution thereof would consequently have to be quashed so far as the minority educational institutions are concerned because of the contravention of Article 30(1).

39. On behalf of Chandrachud, J. and myself, I said : [SCC p. 815, para 181]

The requirement that the college should have a governing body which shall include persons other than those who are members of the governing body of the Society of Jesus would take away the management of the college from the governing body constituted by the Society of Jesus and vest it in a different body. The right to administer the educational institution established by a religious minority is vested in it. It is in the governing body of the society of Jesus that the religious minority which established the college has vested the right to administer the institution and that body alone has the right to administer the same. The requirement that the college should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage the educational institution. That it is desirable in the opinion of the Legislature to associate the Principal of the college or the persons referred to in Section 33A(1)(a) in the management of the college is not a relevant consideration. The question is whether the provision has the effect of divesting the governing body as constituted by the religious minority of its exclusive right to administer the institution. Under the guise of preventing maladministration, the right of the governing body of the college constituted by the religious minority to administer the institution cannot be taken away.

40. In State of Kerala v. Mother Provincial (supra) this Court said that "Administration" means management of the affairs of the institution, that the management must be free of control so that the founders or their nominees can mould the institution according to their way of thinking and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served and that no part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right. Sections 48 and 49 of the Kerala

University Act, 1969 which came up for consideration in that case respectively dealt with governing body of private colleges not under corporate management and the managing council for private colleges under corporate management. Under the provisions of these sections, the educational agency or the corporate management was to establish a governing body or a managing council respectively, The sections provided for the composition of the two bodies. It was held that the sections had the effect of abridging the right to administer the educational institution of the religious minority in question there. One of the grounds given in the judgment for upholding the decision of the High Court striking down the sections is that these bodies had a legal personality distinct from governing bodies set up by the educational agency or the corporate management and that they were not answerable to the founders in the matter of administration of the educational institution. The Court said that a law which interferes with the composition of the governing body or the managing council as constituted by the religious or linguistic minority is an abridgment of the right of the religious minorities to administer the educational institution established by them [see also W. Proost v. Bihar (supra) and Rev. Bishop S. K. Patro v. Bihar (supra)].

41. The determination of the composition of the body to administer the educational institution established by a religious minority must be left to the minority as that is the core of the right to administer. Regulations to prevent maladministration by that body are permissible. As the right to determine the composition of the body which will administer the educational institution is the very essence of the right to administer guaranteed to the religious or linguistic minority under Article 30(1), any interference in that area by an outside authority cannot be anything but an abridgment of that right. The religious or linguistic minority must be given the freedom to constitute the agency through which it proposes to administer the educational institution established by it as that is what Article 30(1) guarantees. The right to shape its creation is one thing : the right to regulate the manner in which it would function after it has come into being is another. Regulations are permissible to prevent maladministration but they can only relate to the manner of administration after the body which is to administer has come into being.

42. The provisions of Statute, 14-A are in pari materia with those of Section 33A(1)(a) of the Act which fell for consideration in Ahmedabad St. Xavier's College case (supra) except that only the principal and the seniormost member of the staff alone are required to be included in the managing committee of the college in question here. But, in principle, that makes no difference. The principle, as I said, is that the minority community has the exclusive right to vest the administration of the college in a body of its own choice, and any compulsion from an outside authority to include any other person in that body is an abridgment of its fundamental right to administer the educational institution.

43. It is, no doubt, true that it is upon the principal and the teachers that the whole temper and the tone of college depend. But that does not mean that the principal and the teachers should be members of the governing council of a college. It was only in the context of the right of the religious or linguistic minority to appoint the principal and teachers of the college established by it that we said in Ahmedabad St. Xavier's College case (supra) : [SCC pp. 815-816, para 182].

It is upon the principal an teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the 'right' to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection

Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection committee for recruiting the members of the teaching staff. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them.

44. While affirming the correctness of the observation in the context in which it was made, I think it necessary to repudiate its relevance and application here.

45. I would, therefore, allow the appeal without any order as to costs.

ORDER

In accordance with the opinion of the majority, the appeal is dismissed without and order as to costs.

9100119750418001

Krishna Chandra Gangopadhyaya And Others

Vs

The Union Of India And Others

Writ Petitions Nos. 357-359 Of 1970

(Krishna Iyer, J.)

18.04.1975.

JUDGMENT

KRISHNA IYER, J. –

The central issue in these petitions deals with the question whether a statute and a rule earlier declared by the Court unconstitutional or otherwise invalid, can be retroactive through fresh validating legislation enacted by the competent Legislature. More pointedly, the constitutionality of Rule 20(2) framed by the Bihar Government under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (Act LXVII of 1957) (for short the Central Act) and the second proviso the Section 10(2) of the Bihar Land Reforms Act, 1950 (for Brevity, the Bihar Act) has been challenged on various grounds in the petitions, a validating statute by Parliament transforming them into Central legislation, as will be presently explained. The subject of the litigation is minor mineral and the right of the petitioners adversely affected by the impugned legislation, is to quarry stones, etc., on the strength of leases granted to them by erstwhile proprietors whose ownership vested in the State of virtue of the Bihar Act. By the combined operation of the section proviso to Section 10(2) of the Bihar Act and Rule 20(2) (framed by the State Government) of the Bihar Minor Mineral Concession Rules, 1964 (hereinafter called the Rules) the petitioners were called upon to pay certain rents and royalties in respect of mining operations, but the power of the State, clothed by these provisions was put in issue in the first round of litigation by lessees of quarries, which culminated disastrously against the State in Baijnath Kedia v. State of Bihar ((1970) 2 SCR 100 : (1970) 1 SCC 838). This Court, in that case, held that the

Bihar Legislature had no jurisdiction to enact the second proviso to Section 10(2) of the Bihar Act, because it went further to hold that section 15 of the Central Act, read with Section 2 thereof, had appropriated the whole field relating to minor minerals for parliamentary legislation. This court proceeded to lay down that the second sub-rule, added by the Notification dated December 10, 1964 to Rule 20 of the Rules did not affect leases in existence prior to the enactment of the Rules. The upshot of the decision was that the action taken by the Bihar Government in modifying the terms and conditions of the leases which were in existence anterior to the Rules and the levy sought to be made on the strength of amended Bihar Act and rule were unsustainable. Thereupon the State persuaded Parliament to enact the Validation Act of 1969 with a view to remove the road-blocks which resulted in decision in Kedia' case (supra). The preamble and the short Act (now impugned) provide thus :

An Act to validate certain provisions contained in the Bihar Land reforms Act, 1950, and the Bihar Minor Mineral Concession Rules, 1964, and action taken and things done in connection therewith.

Section 1 gives the title of the Act. Section 2 of the Act runs thus :

2. Validation of certain Bihar State laws and action taken and things done connected therewith. - (1) the laws specified in the schedule shall be and shall be deemed always to have been, as valid as if the provisions contained therein had been enacted by Parliament.

(2) Notwithstanding any judgment, decree or order of any court, all actions taken, things done, rules made, notifications issued or purported to have been taken, done, made or issued and rents or royalties realised under any such laws shall be deemed to have been validly taken, done, made issued or realised, as the case may be, as if this section had been in force at all material times when such action was taken, things were done, rules were made notifications were issued, or rents or royalties were realised, and no suit or other proceeding shall be maintained or continued in any court for the refund of rents or royalties realised under any such laws.

(3) For the removal of doubts, it is hereby declared that nothing in sub-section (2) shall be construed as preventing any person from claiming refund of any rent or royalties paid by him in excess of the amount due from him under any such laws.

In the Schedule, Section 10 of the Bihar Reforms Act, 1950 (Bihar Act XXX of 1950), as amended by the Bihar Land Reforms (Amendment) Act, 1964 (Bihar Act VI of 1965) and by Bihar Land Reform (Amendment) Act, 1965 (Bihar Act VI of 1965), and two other sections, namely Section 10-A and 31, of the Bihar Land reforms Act 1950, as amended by the various amending Acts, are mentioned. Sub-rule (2) of Rule 20 of the Bihar Minor Mineral Concession Rules, 1964, as inserted by the Bihar Minor Mineral Concession (First Amendment) Rules, 1964, published under the Bihar Government Notification No. A/MM-109964 (Pt.) 7700/M dated December 19, 1964, in the Gazette of Bihar (Pt. II), dated December 30, 1964 is also mentioned therein.

2. The legal question canvassed before us is as to whether the amending Act is question has been an exercise in futility because of an unconstitutional easy and foggy drafting or has achieved the purpose set by Parliament which is transparent from the legislative history. Shri A. K. Sen Counsel for the petitioner has turned the focus mainly on one or two deficiencies in the enactment of the Act by Parliament. Shri Sen's submission is that notwithstanding the validating measure, the right claimed by the State to alter the terms of the lease or to impose a new levy has not been validly acquired.

Case History

3. Mines and minerals, as topics of legislation, fall under the Union and the State Lists. Under our scheme of distribution of legislative powers, particularly when subjects of national and provincial concern are involved, an interlocking arrangement is provided whereby the Union has a dominant say and the States a lesser role, the present case of mines and minerals being an instance in point. The relevant entries in the Seventh Schedule are Item 54 of List I and Item 23 of List II. The latter is expressly made subject to the provisions of List I with respect to regulation and development under the control of the Union and the Union's powers extend to regulation and development of mines and minerals 'to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest. In the exercise of the above power, the Union Parliament passed the Central Act which covered not merely the field of major minerals but also occupied the area of minor minerals, as is evident from Sections 15 and 16 of the Act. (The necessary declaration visualised in Entry 54 of List I is made by Section 2 of the Central Act). Although the legislation was made by parliament, Section 15 conferred power on the State Government as its delegate to make rules in respect of minor minerals.

4. The Bihar State which had on its statute book a land reforms law, sought to acquire control over mines and minerals and in that behalf added a second proviso to Section 10(2) which reads thus (Bihar Act 4/65) :

Provided further that the terms and conditions of the said lease in regard to minor minerals as defined in the Mines and Minerals (Regulation and Development) Act, 1959 (Act LXVII of 1957) shall, in so far as they are inconsistent with the rules of that Act, stand substituted by the corresponding terms and conditions by those rules and if further ascertainment and settlement of the terms will become necessary then necessary proceedings for that purpose shall be under taken by the Collector.

5. The apparent legal result was that the State Government could shape the terms and conditions of the leases granted by the quondam proprietors and this was done by framing rules under Section 15 of the Central Act as the delegate of Parliament. Faced with a demand for higher levy put forward by the State which had been armed by the amendment of the Land Reforms law and the rules under Section 15 of the Central Act, mineral prospectors and quarriers moved petitions under 226 of the Constitution in the Patna High Court. Although those petitions were dismissed, appeals were carried to this Court which, as earlier stated, ended in success. It is important to note the reasons which weighed with this Court in striking down the two pieces of legislation, one amending the Bihar Act and the other, adding a sub-rule under the Central Act, so that an insight into the infirmities of the said legislations may be gained and the need and object of the validation appreciated.

6. Hidayatuallah, C.J. in Baij Nath Kedia (supra), speaking for the Court, pointed out that the declaration contemplated by Entry 54 of List I was contained in Section 2 of Act 67/57 and thus the Central Government assumed control over regulation of mines and mineral development to the extent provided in the Central Act. Since Section 15 of the Central Act went on to state that the State Government may makes rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith, the whole subject of legislation regarding minor mineral was also covered by the Central Act and, to that extent, the powers of the State Legislature stood excluded. No scope was therefore left for the enactment of the second proviso to Section 10(2) of the Bihar Act which related to mining and minerals and was for that reason ultra vires. The fate of sub-rule 20(2) was no better, according to the learned Chief

Justice. Vested interests cannot be taken away except by law made by a competent Legislature. Since the Bihar Legislature had lost power to legislate about minor minerals, Parliament was the sole source of power in this behalf. Rule 20(2) of the Bihar Minor Minerals Concession Rules, 1964 was ineffective for modifying leases granted earlier. It could not derive sustenance on the second proviso to Section 10(2) of the Bihar Act which had been held ultra vires nor could legislative support be derived from Section 15 of the Central Act since the rule-making power conferred by that provision did not contemplate alteration of terms of leases already in existence before the Act was passed.

7. The direct lessons from Kedia (supra) were drawn by Parliament and suitable legislative action taken, according to the Solicitor General, resulting in the present Validation Act. So much so the purpose of the enactment was obvious, the law laid down by this court was obeyed and the resultant referential legislation must therefore be interpreted to further and fulfill - not to frustrate or foil - the intendment of retroactive validation of earlier inoperative legislative and executive action taken by the Bihar State.

Statutory conspectus and meaning

8. Substantially this history of the impugned Act is not under serious challenge. The vital conflict is as to whether, whatever may have been in the mind of Parliament, the Court can speculate on presumed intent and read that object with implicit sense. According to Sri Sen, what has been legislated has to be judged on the language used which, in his view, was hardly adequate to create power to vary the leases or cast liability to pay larger rents and royalties retrospectively.

9. We listen largely to the language of the statute but where, as here, clearing up of marginal obscurity may make interpretation surer if light from dependable sources were to beam in, the Court may seek such aid. What has been described as the sound system of construction, excluding all but the language of the text and the dictionary as the key, hardly holds the field especially if the enactment has a fiscal or other mission, its surrounding circumstances speak and its history unfolds the mischief to be remedied. The Court, in its comity with the Legislature, strives reasonably to give meaningful life and avoid cadeveric consequence. We have set out the story of the rebirth, as it were, of the law of minor mineral royalty levy to drive home the propriety of this method of approach. No doubt, there is some remissness in the drawing up of what professes to be a validating law and the neglected art of drafting bills is in part the reason for subtle length of submissions where better skill could have made the sense of the statute luscent and its validity above-broad. Informed by a realistic of the statute but guided primarily by what the Act has said explicitly or by necessary implication we will examine the meaning and its impact on Counsel's contentions.

The main propositions of law

10. Kedia's case (supra) has held void both proviso 2 to Section 10 of the Bihar Act and Rule 20(2) made under the Central Act. Shri A. K. Sen did not dispute the legislative competence of Parliament, by specific enactment, to validate retroactively otherwise invalid legislation or incorporate into a Central Act a void State legislation since mines and minerals, minor and major, had been taken over by the Centre. His chief submission was that the well-known legislative mechanics to resurrect statutorily earlier Acts or rules declared dead by Court had not been adopted here, so much so the fiction introduced by the deeming provision has failed to achieve what is being claimed by the State as the legislative object. Mr. Sen's proposition, shortly stated, is :

If a law is void as being passed by an incompetent Legislature, validation by a subsequent Act passed by a competent Legislature can only be effected by the subsequent law enacting the provisions of the old Act expressly or by incorporation. It cannot be done by a competent Legislature laying down in the subsequent Act that the former Act passed by the incompetent Legislature is deemed to be valid.

What is moot is not the proposition but its application to our legislative situation.

11. Reliance for this proposition was placed, inter alia, on Jaora Sugar Mills v. State ((1966) 1 SCR 523, 531 : AIR 1966 SC 416); Jawaharmal v. State of Rajasthan ((1966) 1 SCR 890, 899, 901, 904 : AIR 1966 SC 764); Shama Rao v. Pondicherry ((1967) 2 SCR 650, 662 : AIR 1967 SC 1480 : (1967) 20 STC 215) and Gwalior Rayon Mills v. Assistant Commissioner, S. T. (AIR 1974 SC 1660, 1681 : (1974) 4 SCC 98, 125-26 : 1974 SCC (Tax) 226) To take the last case first, we may state that the problem tackled there related to excessive delegation and abdication of legislative power and did not bear upon the issue of legislation by reference or incorporation. Of course, there is consideration of Shama Rao (supra) in the judgment of Mathew, J., but it is difficult to make out how the observations to which our attention was invited bear upon the issue before us.

12. The learned Judge's containment of the principle in Shama Rao (supra) with which we respectfully concur, may be set out here (p. 1679) : [SCC p. 124 : SCC (TAX) p. 252, para 64]

We think that the principle of the ruling in (1967) 2 SCR 650 (viz, Shama Rao) must be confined to the facts of the case. It is doubtful whether, there is any general principle which precludes either Parliament or a State Legislature from adopting a law and the future amendments to the law passed respectively by a State Legislature or Parliament and incorporating them in its legislation. At any rate, there can be no such prohibition when the adoption is not of the entire corpus of law on a subject but only of a provision and its future amendments and that for a special reason or purpose.

The kernel of Gwalior Rayon (supra) is the ambit of delegation by Legislatures, and the reference to legislation by adoption or incorporation supports the competence and does not contradict the vires of such a process - not an unusual phenomenon in legislative systems nor counter to the plenitude of powers constitutional law has in many jurisdictions conceded to such instrumentalities clothed with plenary authority. The Indian Legislatures and courts have never accepted any inhibition against or limitation upon enactment by incorporation, as such.

13. The dispute is not whether Parliament can legislate into validity a State Act which is outside the State List. If Section 2 of impugned Act merely validates invalid State law by Parliament's action, it is doomed to fail. It is for the Constitution, not Parliament, to confer competence on State Legislatures. The observations in Jaora Sugar Mills (supra) on which Shri A. K. Sen laid great stress, silence the question :

..... If it is shown that the impugned Act purports to do nothing more than validate the invalid State statutes, then of course, such a validating Act would be outside the legislative competence of Parliament itself. Where a topic is not included within the relevant List dealing with the legislative competence of the State Legislatures, Parliament, by making a law, cannot attempt to confer such legislative competence on the State Legislatures.

It is a far constitutional cry from this position to the other proposition that where Parliament has power to enact on a topic actually legislates within its competence but, as an abbreviation of

drafting, borrows into the statute by reference the words of a State Act not qua State Act but as a convenient shorthand, as against a longhand writing of all the sections into the Central Act, such legislation stands or falls on Parliament's legislative power, vis-a-vis the subject viz., mines and minerals. The distinction between the two legal lines may sometimes be fine but always is real. Jaora Sugar Mills illumined this basic difference with reference to Section 3 of the Act challenged there, by observing :

..... What Parliament has done by enacting the said section is not to validate the invalid State statutes, but to make a law concerning the cess covered by the said statutes and to provide that the said law shall come into operation retrospectively. There is a radical difference between the two positions. Where the Legislature wants to validate an earlier Act which has been declared to be invalid for one reason or another, it proceeds to remove the infirmity from the said Act and validates its provisions which are free from any infirmity. That is not what Parliament has done in enacting the present Act. Parliament knew that the relevant statutes were invalid, because the State Legislature did not possess legislative competence to enact them. Parliament also knew that it was fully competent to make an Act in respect of the subject-matter covered by the said invalid State statutes. Parliament, however, decided that rather than make elaborate and long provisions in respect of the recovery of the cess, it would be more convenient to make a compendious provision such as is contained in Section 3. The plain meaning of Section 3 is that the material and relevant provisions of notifications, orders, and rules issued or made thereunder are material times in it. In other words, what Section 3 provides is that by its order and force, the respective cesses will be deemed to have been recovered because the provisions in relation to the recovery of the said cesses have been incorporated in the Act itself. Then command under which the cesses would be deemed to have been recovered would, therefore, be the command of Parliament, because all the relevant sections, notifications, orders and rules have been adopted by the parliamentary statute itself.

No parliamentary omnipotence to redraw legislative lists in the Seventh Schedule can be arrogated to confer on the State competence to enact on a topic where it is outside its lists. But if Parliament has the power to legislate on the topic, it can make an Act on the topic by any drafting means, including by referential legislation.

14. The learned Solicitor General, in the course of his submissions made it clear that he did not want to vindicate the levy by any validation of the invalidated portion of Section 10 of the Bihar Act. He based his case on the success with which Parliament had legislated for itself, although adopting a shorthand form of incorporation referentially of a State Act and subordinate legislation given in the Schedule to the Validation Act. He also made it clear that Rule 20(2) had nothing to do with the Bihar Legislature but was the product of parliamentary legislation by delegation in favour of State Government. Thus, in his view, the Parliament legislated for itself and statutorily adopted for itself the second proviso to Section 10 of the Bihar Act and the otherwise ultra vires sub-rule (2) of Rule 20. If the re-enacting technique adopted for the referential or incorporating legislation was insufficient in law, the failed. Otherwise, the Act and Rules referred to in the Schedule to the Validation Act revived and became operational, retroactively. There is force in the submission that taking a total view of the circumstances of the Validation Act Parliament did more than simply validate an valid law passed by the Bihar Legislature but did re-enact it with retrospective effect in its own right adding an amending Central Act to the Statute book.

15. Shri A. K. Sen pressed passages from Jawaharmal (supra), but some care in scrutiny will reveal that Jawaharmal does not clash with Jaora Sugar Mills (supra).

16. We may briefly deal with that decision and explain it. Article 255 of the Constitution insists on Presidential assent for certain Acts of the State Legislature, although subsequent assent is curative of the infirmity caused by absence of previous assent. In Jawaharmal (supra), one of the points that fell for decision was the efficacy of a legislative declaration that an earlier invalid Act (for want of Presidential assent) be deemed to be valid by re-enactment and subsequent assent of the President to the second Act. This Would virtually mean that by the re-enacting device, Presidential assent could be by-passed by the Legislature. Negativing this submission, the Court observed, with reference to the Rajasthan Act which attempted this unconstitutional exercise :

In other words, the Legislature seems to say by Section 4 that even though Article 255 may not have been complied with by the earlier Finance Acts, it is competent to pass Section 4 whereby it will prescribe that the failure to comply with Article 255 does not really matter, and the assent of the President to the Act amounts to this that the President also agrees that the Legislature is empowered to say that the infirmity resulting from non-compliance with Article 255 does not matter. In our opinion, the Legislature is incompetent to declare that the failure to comply with Article 255 is of no consequence; and, with respect, the assent of the President to such declaration also does not serve the purpose which subsequent assent by the President can serve under Article 255 ....

* * * * *##

..... We have tried to read Section 4 as favourably as we can while appreciating the argument of the learned Advocate-General; but the words used in all the three parts of Section 4 are clear and unambiguous; they indicate that the Legislature thought that it was competent to it to cure, by its own legislative process, the infirmity resulting from the non-compliance with Article 255 when it passed the earlier Finance Acts in question, and it was probably advised that such a legislative declaration would be valid and effective provided it received the assent of the President. In our opinion, the approach adopted by the Legislature in this case is entirely misconceived. The Legislature, no doubt can validate an earlier Act which is invalid by reason of non-compliance with Article 255 and such an Act may receive the assent of the President which will make the Act effective. The Legislature cannot, however, itself declare by a statutory provision that the failure to comply with Article 255 can be cured by cured by its own enactment, even if the said enactment received the assent of the President. In our opinion, the even the assent of the President cannot alter the true constitutional position under Article 255. The assent of the President cannot, by any legislative process, be deemed to have been given to an earlier Act at a time when in fact it was not so given. In this context there is no scope for a retrospective deeming in regard to the assent of the President. It is somewhat unfortunate that the casual drafting of Section 2 leaves the period covered by Act 11 of 1962 and the notification issued thereunder as unenforceable as before, and the omnibus and general provisions of Section 4 are of no help in regard to the said period.

In dismissing a similar contention based on Jawaharmal, to challenge the identical statute with which we are here concerned, the Patna High Court observed, in Bhalbhum T&I Ltd. v. Union of India (AIR 1972 Pat 364, 373) :

In that case, the validating law merely declared that the original invalid legislation was valid in spite of the contravention of Article 255 of the Constitution. In the instant case, Parliament has not sought to declare that the failure to comply with the requirements of Article 255 of the Constitution is of no consequence.

17. The crucial demarcation between Jaora Sugar Mills (supra) and Jawaharmal (supra) is important

and cannot be overlooked. The latter case dealt with a State Legislature ineffectually overcoming invalidity caused by absence of Presidential assent. Validation by a Legislature must necessarily be what it could validly have done and not of what someone else had to do. The assent of the President could not be made up for by the validating process adopted by the Legislature. So it was that Jawaharmal suffered from Legislative incompetence a second time.

18. It is important to notice, however, that the alleged vice of the legislation in the present case relates to a radically different area. What is within the competence of Parliament it seeks to do - validation by incorporation of a legislation on a topic within its purview. The device adopted of re-enacting by validation is familiar to the Indian draftsman as to his Anglo-American counterpart. We have no doubt that incorporation of Acts is permissible in the absence of other disabling factors. It is one thing to say that retroactive validation by a competent Legislature is impermissible; it is another to contend that there has not been a valid execution of this process - or rather Parliament has not, in the present case, done what the draftsman ought to have done to effectuate the ostensible purpose of creating a new power to levy royalty and to alter the terms of the mining leases and then to give such newly created liability anterior effect.

19. The controversy now shifts to the effectiveness or otherwise of the legislative device in achieving retroactive validation. We have already noticed that the second proviso to Section 10(2) of the Bihar Act and sub-rule (2) of Rule 20 of the Mineral Concession Rules, 1964 were void, as held by this Court. We have therefore to treat them as non est. We have already held that the Bihar Act qua Bihar legislation could not be resuscitated by Parliament conferring such power through a law. The position may be different so far as Rule 20(2) is concerned since that is a rule framed by Parliament through its delegate, the State Government, although the rule itself being in excess of the power conferred by Section 15 of the Central Act was ultra vires. In this invalidatory situation, Parliament passed on Act to validate the void provision of the Bihar Land Reforms Act, 1950 and the ultra vires sub-rule of Rule 20 of the Mineral Concession Rules as well as the action taken and things done in connection therewith. The Act is itself short and consists of two sections, of which the latter is the only important one. It validates the laws specified in the schedule by a deeming device. Secondly, it bring into force, back-dating it, all action taken, rents and royalties realised and rules made 'notwithstanding any judgment, decree or order of any Court'. The problem before us is whether the Act has achieved its purpose of creating retrospective liability for rents, royalties, etc., and validating retrospectively the impugned provisions of the Bihar Act and the Mineral Concession Rules.

20. Shri A. K. Sen's criticism has to be noticed in this background; for he urges that in the light of the rulings of this Court no liability to levy rent or royalty can be created retroactively without two clear stages or steps : firstly, a law must be enacted creating the liability; next, such provision should be made retrospective. This two-stage procedure is absent in the statute under attack and therefore the purpose, whatever it be, has misfired, argues Mr. Sen. In plain terms the present case raises the question of enactment by reference and incorporation. It is correct to contend that curative statutes and validating exercises, unless the process is explicit enough and permissible otherwise, cannot be given ex post facto effect by courts. What is the intention of Parliament is mainly to be gathered from the language used, tested by approved canons of construction.

21. The profusion of precedents touched upon at the Bar leaves us with a few which were stressed as having direct pertinence to the points in debate. The power of a Legislature to pass a law obviously includes the power to pass it retrospectively. Minor minerals, as explained already, being a topic withdrawn and confided to Parliament for legislation, the validating Act cannot fail for

incompetence. But before a levy ex post facto is made, the legislation must first create the fiscal liability and then project it retrospectively. This is the broad trend of Sri A. K. Sen's submission. He relies heavily on Kamrup (Deputy Commr. and Collector, Kamrup v. Durga Nath Sarma, (1968) 1 SCR 561 : AIR 1968 SC 394) to urge that a legislation cannot by a simple 'deeming' device render valid what is unconstitutional.

22. The following observations were emphasized by Counsel (p. 580 of the report) :

It is to be seen that the core of Assam Act 21 of 1960 is the deeming provision of Section 2 under which certain lands are deemed to be acquired under the earlier Act. As this deeming provision is invalid, all the other ancillary provisions fall to the ground along with it. The later Act is entirely dependent upon the continuing existence and validity of the earlier Act. As the earlier Act is unconstitutional and has no legal existence, the provisions of Act No. 21 of 1960 are incapable of enforcement and are invalid.

The ratio is apt to be misunderstood for, in its essence, the judgment merely holds that where the later Act is entirely dependent upon the valid continuance of the earlier Act, which has been held unconstitutional, the deeming provision cannot produce the desired effect. The learned Solicitor General, however, argues that the situation in the present case is altogether different. The earlier Bihar Act or the rules framed by the State Government under the Act do not have to be valid for sustaining the amending Act made by Parliament. The constitutionality of the earlier law has not to be posited for the survival of the Central Amending Act. In this submission the learned Solicitor General is right and so the proposition in Kamrup (supra) is inapplicable here.

23. In Hari Singh (Hari Singh v. Military Estate Officer, ((1973) 1 SCR 515 : (1972) 2 SCC 239), Kamrup (supra) was approved but there is no quarrel over the correctness of the proposition there, its application being inept in the context of the present case. However, Ray, J. (as he then was), made certain observations which were pressed before us by Mr. Sen : [SCC p. 247, para 17]

The ratio is that the 1960 Act has no power to enact that an acquisition made under a constitutionally invalid Act was valid. The 1960 Act did not stand independent of the 1955 Act. The deeming provision of the 1960 Act was that land was deemed to be acquired under the 1955 Act. If the 1955 Act was unconstitutional, the 1960 Act could not make the 1955 Act constitutional.

With great respect we agree with the position but, as earlier stated, the statutory complex confronting us is something different. In the present case, the Bihar Legislature is not legislating into validity, by a deeming provision, what has been declared ultra vires by the Court. It is Parliament, whose competency to legislate on the topic in question is beyond doubt, that is enacting the 'deeming' provision. It follows that Hari Singh (supra) also cannot salvage the appellant.

24. We reach the twilight of legislative area when we move into West Ramnad Electric Distribution Co. case (West Ramnad Electric Distribution Co. Ltd. v. State of Madras, ((1963) 2 SCR 747 : AIR 1962 SC 1753) which also dealt with a validating Act. The Madras Electricity Supply Undertakings Act, 1949 clothed the State with power to acquire electricity supply undertakings. The validity of the said Act was challenged and this Court held the law ultra vires. In consequence, the Madras Legislature passed Madras Act 29/54 which incorporated the impugned provisions of the earlier Act of 1949 and purported to validate the action taken under the earlier Act. The affected appellant assailed the new Act to the extent to which it purported to validate the act done under the earlier Act of 1949 which had been declared inoperative by the Court. The facet of that decision which relates

to the point under discussion before us establishes that validation, with retrospectivity super-added, is perfectly competent for the Legislature. Gajendragadkar, J. (as he then was), observed :

The argument is that there is no specific or express provision in the Act, which makes the Act retrospective and so, Section 24, even if it is valid, is ineffective for the purpose of sustaining the impugned order by which possession of the appellant concern was obtained by the respondent.

* * * * *##

Before dealing with this argument, it would be necessary to examine the broad features of the Act and understand its general scheme. The Act was passed because the Madras Legislature thought it expedient to provide for the acquisition of undertakings other than those belonging to and under the control of the State Electricity Board constituted under Section 5 of the Electricity (Supply) Act, 1948 in the State of Madras engaged in the business of supplying electricity to the public. It is with that object that appropriate provisions have been made by the Act to provide for the acquisition of undertakings and to lay down the principles for paying compensation for them. It is quite clear that the scheme of the Act was to bring within the purview of its material provisions undertakings in respect of which no action had been taken under the earlier Act and those in respect of which action had been so taken.

* * * * *##

It is thus clear that the Act, in terms, is intended to apply to undertakings of which possession had already been taken, and that obviously means that its material and operative provisions are retrospective. Actions taken under the provisions of the earlier Act are deemed to have been taken under the provisions of the Act and possession taken under the said earlier provisions is deemed to have been taken under the relevant provisions of the Act. This retrospective operation of the material provisions of the Act is thus writ large in all the relevant provisions and is an essential part of the scheme of the Act. Therefore, Mr. Nambiar is not right when he assumes that the rest of the Act is intended to be prospective and so, Section 24 should be construed in the light of the said prospective character of the Act. On the contrary, in construing Section 24, we have to bear in mind the fact that the Act is retrospective in operation and is intended to bring within the scope of its material provisions undertakings of which possession had already been taken.

* * * * *##

The third part of the section provides that the statutory declaration about the validity of the issue of the notification would be subject to this exception that the said notification should not be inconsistent with or repugnant to the provisions of the Act. In other words, the effect of this section is that if a notification had been issued properly under the provisions of the earlier Act and its validity could not have been impeached if the said provisions were themselves valid, it would be deemed to have been validity issued under the provisions of the Act, provided, of course, it is not inconsistent with the other provisions of the Act. The section is not very happily worded, but on its fair and reasonable construction, there can be no doubt its meaning or effect. It is a saving and validating provision and it clearly intends to validate actions taken under the relevant provisions of the earlier Act which was invalid from the start. The fact that Section 24 does not use the usual phraseology that the notifications issued under the earlier Act shall be deemed to have been issued under the Act, does not alter the position that the second part of the section has and is intended to have the same effect.

* * * * *##

We have no doubt that Section 24 was intended to validate actions taken under the earlier Act and on its fair and reasonable construction, it must be held that the intention has been carried out by the Legislature by enacting the said section. Therefore, the argument that Section 24 even if valid, cannot effectively validate the impugned notification, cannot succeed.

25. The ratio of West Ramnad (supra) is clear. The legislature can retrospectively validate what otherwise was inoperative law or action. Unhappy wording, infelicitous expression or imperfect or inartistic drafting may not necessarily defeat, for that reason alone, the obvious object of the validating law and its retrospective content.

26. In fairness to Counsel for the appellant, we must state that the proposition in Jadao Bahuji's case (Mst. Jadao Bahuji v. Municipal Committee, Khandina, ((1962) 1 SCR 633 : AIR 1961 SC 1486) about the powers of the Legislature, including within itself the power to make retrospective laws, was not canvassed. Indeed, to urge that Indian Legislatures 'were subject to a strange and unusual prohibition against retrospective legislation' is as late as it is presumptuous. However, Jadao Bahuji (supra) itself contained some valuable observations of relevance for this case which we may here extract (p. 640) :

Retrospective laws, it has been held, can validate an Act, which contains some defect in its enactment. Examples of Validating Acts which rendered inoperative, decrees or orders of the Court or alternatively made them valid and effective, are many. In Atiqa Begum's case (United Provinces v. Atiqa Begum, 1940 FCR 110 : AIR 1941 FC 16 : 192 IC 138), the power of validating defective laws was held to be ancillary and subsidiary to the powers conferred by the Entries and to be included in those powers.

27. We have said enough to establish that no substantial objection to the Act in question can be pressed on the strength of incompetence of inoperative retrospectivity. That is why the appellant's submission was switched largely on the gross inadequacy of the language of Section 2 of the impugned Act to confer power on the State Government to validate the Rule 20(2) or Section 10 of the Bihar Act. To be precise, the highlight of Sri Sen's arguments runs thus :

The core of the Act on which the State Government might issue rules is Section 15 of the Central Act, 1957. Section 15 of the 1957 Act did not authorise the State Government to enact Rule 20 for modifying the existing leases as was found in the earlier case. The present Section 2 does not confer any such power nor does it enact the provisions of the Bihar Act to this effect. It only provides that the Bihar Act shall be considered to be valid as if it were passed by Parliament. Section 2 being a core of the present Act and that being invalid and being found not to amount to any incorporation of the Bihar Act, action taken under Rule 20 or Rule 20 itself passed under the old Act would still remain void and inoperative.

In this connection, considerable emphasis was placed on Jawaharmal (supra) and on Shama Rao (supra).

28. Passing reference was also made to Jagannath v. Authorized Officer, Land Reforms ((1971) 2 SCC 893).

29. The first of these decisions [Jawaharmal (supra)] seemingly supports Mr. Sen's proposition, although the others fall wide off the mark. In West Ramnad (supra), referred to by Counsel, this

Court made some observations which have relevance to the topic under discussion. There a legislative validation, retrospective in operation, was challenged. The latter legislation used the expression 'hereby declared. The observations made by this Court in that connection are instructive and may be extracted :

The second part of the section provides that the notifications covered by the first part are declared by this Act to have been validly issued; the expression 'hereby declared' clearly means 'declared by this Act' and that shows that the notifications covered by the first part would be treated as issued under the relevant provisions of the Act and would be treated as validly issued under the said provisions. The third part of the section provides that the statutory declaration about the validity of the issue of the notification would be subject to this exception that the said notification should not be inconsistent with or repugnant to the provisions of the Act. In other words, the effect of this section is that if a notifications had been issued properly under provisions of the earlier Act and its validity could not have been impeached if the said provisions were themselves valid, it would be deemed to have been validly issued under the provisions of the Act, provided, of course, it is not inconsistent with the other provisions of the Act. The section is not very happily worded, but on its fair and reasonable construction, there can be no doubt about its meaning or effect. It is saving and validating provision and it clearly intends to validate actions taken under the relevant provisions of the earlier Act which was invalid from the start. The fact that Section 24 does not use the usual phraseology that the notification issued under the earlier Act shall be deemed to have been issued under the Act, does not alter the position that the second part of the section has and is intended to have the same effect.

It follows that, variant phraseology apart, the meaning and intent must be unmistakable. In the present case we are fully satisfied that Parliament desired to validate retrospectively what the Bihar legislation had ineffectually attempted. It has used words plain enough to implement its object and therefore the Validating Act as well as the consequential levy are good.

30. Rule 20(2) of the Mineral Concession Rules, which had been validated by Section 2 of sub-section (1) and figures as Item 4 of the Schedule to the impugned enactment, stands on an assured footing. This sub-rule is made by the Bihar Government purely as a delegate of Parliament, though beyond the scope of the delegation. Therefore Parliament could validate it and has done so. The source of the authority for rule-making being of Parliament, it is indubitable that the power to give it life retroactively exists. Thus the impugned legislation, levy and other actions are good.

31. For the reasons set out above, we dismiss the writ petitions, but, in the circumstances, without costs.

9100119750721004

Rikhi Ram And Another

Vs

Ram Kumar And Others

Civil Appeal No. 1642 Of 1974

(Untwalia, J.)

21.07.1975.

JUDGMENT

UNTWALIA, J. –

1. This appeal by special leave arises out of a suit for pre-emption filed by the appellants under Section 15 of the Punjab Pre-emption Act, 1913 - hereinafter called the Pre-emption Act. The suit land is situated in the State of Haryana to which the provisions of the Act aforesaid are still applicable. The land belonged to Smt. Shanti, respondent No. 3. The appellants were the tenants of the disputed land under her. She sold the land to respondents Nos. 1 and 2 on June 21, 1965. The land sold measured 176 kanals 4 marlas. The plaintiffs claimed the right of pre-emption in respect of the agricultural land in suit in accordance with clause 'Fourthly' of Section 15(1)(a) of the Pre-emption Act. The suit was resisted by the vendee-respondents on several grounds. It was decreed by the trial Court on June 20, 1967 in respect of a portion of the land, measuring 157 kanals 2 marlas. The vendees' appeal in the first appellate Court failed on April 20, 1968. They succeeded, however, in the High Court of Punjab and Haryana on the basis of the decision of this Court in Bhagwan Das (dead) by LRs v. Chet Ram ((1971) 2 SCR 640 : (1971) 1 SCC 12). A learned Single Judge of the High Court allowed the second appeal filed by respondents Nos. 1 and 2 and dismissed the plaintiffs' suit.

2. We may state a few more facts before noting down the points urged on behalf of the appellants. In the appellants' suit on order of injunction was made on July 11, 1966 restraining the defendants from dispossessing the plaintiffs from any portion of the suit land. But before the order of injunction was passed respondents Nos. 1 and 2 had filed an application before the revenue authorities under Section 9 of the Punjab Security of Land Tenures Act, 1953 - hereinafter called the Land Tenures Act - for ejectment of the appellants. An order of eviction was passed by the first authority on May 22, 1967; that is to say, about a month prior to the passing of the decree by the trial Court. The appellants' appeal from that order of the Assistant Collector was dismissed by the Collector on September 14, 1967. The High Court took the view that since the appellants had ceased to be the Land Tenures Act, 1953 - hereinafter called the Land Tenures Act - tenants of the land prior to the passing of the decree of pre-emption by the trial Court, they were no longer qualified to get such a decree.

3. Mr. S. C. Agarwal, learned Counsel for the appellants made the following submissions :

(1) That the decision of this Court in Bhagwan Das's case (supra) is distinguishable or in any view of the matter requires reconsideration by a larger bench.

(2) That the High Court committed errors of record and law in relying upon the order of eviction without bringing the copy of the order on record.

(3) That the order of eviction was in respect of about 3 standard acres of land only and a decree for pre-emption in any event ought to have been made in respect of the land measuring about 9 standard acres.

4. Section 15(1) of the Pre-emption Act says :

The right of pre-emption in respect of agricultural land and village immovable property shall vest -

(a) where the sale is by a sole owner

* * * *##

Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;.

Under the general law of pre-emption it is firmly established that the decisive date as regards the right of pre-emption to pre-emption the sale was the date of the decree. In other words the pre-emptor who claims the right to pre-emption the sale on the date of the sale must continue to possess that right till the date of the decree. If he loses that right before the passing of the decree, decree for pre-emption cannot be granted even though he may have had such right on the date of the suit. In several cases coming up before the Punjab and Haryana High Court a question arose whether the same rule applies to a person who claims to pre-emption the sale under Section 15(1)(a) Fourthly of the Pre-emption Act. In quite a large number of cases the answer given by the High Court was that it does not, while in a few, a contrary view was expressed. One of such cases from the majority line, viz Kashmiri Lal v. Chuhar Ram (72 Punj LR 325) was expressly overruled by this Court in Bhagwan Das's case (supra). The facts of Bhagwan Das's case are somewhat different. Yet the ratio is aptly applicable to the facts of the instant case also. In the former case the pre-emptor had been evicted in pursuance of the decree of eviction prior to the institution of a suit for pre-emption. But the decision of this Court was not given treating this a decisive factor. The first rule of the general law of pre-emption was applied thus :

In the presence of the above principle which is firmly entrenched in the law of pre-emption it is difficult to conceive that the legislature intended to depart from it is Section 15(1)(a) Fourthly nor has any reason been suggested for doing so. The language employed is not very happy but the clear requirement is that the tenant must hold the land as such.

And finally it was said at page 643 :

It must be remembered that sale alone does not and cannot divest the tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the vendor. But if his tenancy is determined by decree for eviction he loses his status of a tenant. He then does not satisfy the first requirement of Section 15(1) Fourthly that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit or during its pendency and before the date of the decree. This would be so by applying the well established rule which, as stated earlier, has become a part of the law relating to pre-emption.

5. Mr. Agarwal suggested a reason to depart from the general principle of the law of pre-emption in Section 15(1)(a) Fourthly. Counsel submitted that under the general law of pre-emption the qualification of the pre-emptor cannot be lost at the instance of the vendee whereas in the case of tenant claiming pre-emption under Section 15(1)(a) Fourthly of the Pre-emption Act the vendee and defeat the tenants, right of pre-emption by his own action. The reason suggested for making a distinction appears to be attractive but was not forceful enough to persuade us to take the view that the decision of this Court in Bhagwan Das's case (supra) requires reconsideration. The landlord could not determine the tenancy by his unilateral action under the Land Tenures Act. An order of eviction was necessary to be obtained under Section 9. The relationship of the landlord and the tenant ceases to exist between the parties after the passing of an order of ejectment against the

tenant. Dispossession in execution of the order is not necessary for determination of the tenancy. In the instant case the appellants did not obtain an order of injunction in their suit to restrain the defendants from proceeding with their application for eviction. The order of injunction was confined to a restraint on dispossession. In a given case the landlord may be prevented from obtaining an order of ejectment against the tenant so that the latter's right to pre-empt the sale made in favour of the former may not be defeated. We think two views of the law may be reasonably possible on the point at issue. It is, therefore, not expedient or advisable to send this case to a larger bench for reconsideration of the view expressed in Bhagwan Das's case nor is that case distinguishable.

6. The second grievance of the appellant is to some extent justified but the submission does not stand final scrutiny. Respondents Nos. 1 and 2 had filed an application in the first appellate Court under Order 41 Rule 27 of the Code of Civil Procedure for admitting the order of eviction dated May 22, 1967 as an additional evidence in the case. That court rejected that application. The proper course for the High Court, therefore, was to admit the order as an additional evidence if it thought it fit in law to do so. But then, the fact that there was an eviction order was not disputed before the High Court as it appears from its judgment. Of course, the High Court was not right when it said that on the date when the land was sold a decree for ejectment against the tenant had been passed and this decree had become final in appeal. The decree was not passed on the date of sale but surely it was passed before the decree for pre-emption was made by the first Court. In the circumstances of this case therefore we are not inclined to accept the second submission made on behalf of the appellants.

7. The third point urged on behalf of the appellants is also not fit to succeed. A copy of the order of eviction passed by the Assistant Collector was incorporated in the supplementary paper book and placed before us. The order shows that eviction was allowed from the entire land. The appellants were directed to be ejected forthwith from a portion and their actual eviction from the rest of the land was deferred till the allotment of the surplus land. We are, therefore, of the view that the appellants did not continue to be tenants of any portion of the land sold to respondents Nos. 1 and 2 on the date the decree for pre-emption was passed in their favour. Hence the decree was not sustainable in respect of any portion of the land.

8. For the reasons stated above, we dismiss this appeal but without costs.

9100119750722003

Shri Hemendra Prasad Baruah

Vs

The Collector Of Sibsagar, Assam, Respondent.

Civil Appeal No. 1264 Of 1969

(Krishna Iyer, J.)

22.07.1975.

JUDGMENT

KRISHNA IYER, J. –

1. The concurrent conclusions of fact reached by both the courts below regarding the quantum of compensation payable to the appellant on the acquisition of his land for a public purpose by the appellant on the acquisition of his land for a public purpose by the State are assailed by Shri D. Mukherjee before us on the ground that the a mount is grossly inadequate. Having heard him in the light of the High Courts, reasonings, we are persuaded to affirm the finding.

2. 100 bighas of land belonging to the appellant (a tea planter) were first requisitioned by Government to settle landless people and the owner 'gladly' agreed to surrender the area which, on his own showing, was lying unused. Later, the State proceeded to acquire the land under Section 7(1A) of the Assam Land (Requisition and Acquisition) Act, 1948 (Assam Act XXV of 1948). The sole dispute turns on whether the lesser scale of compensation 7(1) is attracted to the situation. The simple statutory test that settles the issue is to find out whether the land acquired is lying fallow or uncultivated. If it is, a small compensation alone is awardable, as laid down in Section 7(1A) of the Act. On the other hand, if it is tea garden the quantum is an under Section 23 of the Land Acquisition Act, 1894. The decisive factor lends itself to easy decision, because a plethora of evidence, to most of which the appellant is a party, proceeds on the basis that the land in question is fallow. The High Court has collected and considered the prior statements and other materials leading to the reasonable holding that Section 7(1A) appropriately applied to this case. It follows that the appeal has no merit and deserves to be dismissed.

3. We order both parties to bear their respective costs. Subject to this direction, the appeal is dismissed.

</html