**ALLAHABAD HIGH COURT**

Atiqa Begam

Vs

Abdul Maghni Khan

(I Ahmad , J.)

11.03.1940

**JUDGMENT**

**Iqbal Ahmad, J.**

1. The question referred to this Full Bench for decision is, whether the U.P. Regularization of Remissions Act (14 of 1938) is or is not intra vires the Legislature of the United Provinces. The reference arises under the following circumstances: A suit for arrears of theka money with respect to the years 1339 to 1341 Fasli (1932 to 1934 A.D.) was brought by the plaintiffs-appellants against the defendants-respondents under Section 132, Agra Tenancy Act (3 of 1926). The plaintiffs claimed the arrears at the rate of the annual rent reserved by the lease. The defendants inter alia pleaded that remissions in rent were allowed by the local Government in the years in suit and that, in calculating the amount due to the plaintiffs, the remissions should be taken into account. The plaintiffs, while admitting that in pursuance of the directions issued by the local Government remissions in rent were granted to the tenants in the years in question, maintained that the orders as to remissions were invalid and contrary to law. This contention of the plaintiffs was based on Section 73(1), Tenancy Act, which runs as follows:When for any cause the local Government, or any authority empowered by it in this behalf, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land, whether such revenue is payable to an assignee or to the Government, a Collector, or, if so empowered by the local Government, an Assistant Collector of the First Class, may order that the rents of the tenants holding such land or any portion thereof, mediately or immediately from the landlord, shall be remitted or suspended for the period of such remission or suspension of payment of revenue, to an amount which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which the payment has been so remitted or suspended bears to the whole of the revenue payable in respect of such land.

2. In accordance with this Section the remission of revenue is to precede the remission of rent, and the proportion of the rent remitted must not be in excess of the proportion of the revenue remitted. It is however admitted in the present case that remissions in rent were ordered in violation of the provisions of Section 73. No order for remission of revenue was passed before the orders as to remissions of rent were issued, and the proportion of the rent remitted was much in excess of the proportion of the revenue subsequently remitted by the local Government. The plaintiffs therefore contended that the action of the local Government in remitting the rent was

ultra vires and the defendants were not entitled to the benefit of the remissions ordered. The Courts below relying on Section 74, Tenancy Act, disallowed the contention of the plaintiffs and, in calculating the arrears of theka money with respect to the years in suit, took the remissions into account. Section 74 runs as follows:74. (1) An order passed under Sub-section (1) or Sub-section (2) of Section 73 shall not be questioned in any Civil or Revenue Court.(2) A suit shall not lie for the recovery of any rent of which the payment has been remitted in accordance with the provisions of Section 73, or during the period of suspension of any rent of which the payment has been suspended in accordance with the provisions of Section 73.

3. The plaintiffs filed a second appeal in this Court. One of the points raised in the appeal was that the remissions in rent, being in violation of the provisions of Section 73, were invalid, and must therefore be ignored. During the pendency of the appeal the scope and effect of Sections 73 and 74, Tenancy Act, formed the subject of consideration in Muhammad Abdul Qaiyum v. Secy. of State (1938) 25 AIR All 158 by a Bench of this Court of which I was a member. It was held in that case that Section 73 provides that the remission or suspension of revenue must precede the remission or suspension of rent and the proportion of the rent remitted or suspended must not be in excess of the proportion of the revenue remitted or suspended. It was further held in that case that if remissions in rent are in violation of the provisions of Section 73 and not in accordance with that Section, Section 74(2) of the Act is no bar to a suit in the revenue Court for recovery of the remitted rent, or to a suit in the Civil Court for recovery of the excess revenue realized.

4. At the time of the hearing of the appeal filed by the plaintiffs, reliance was placed on their behalf on the decision in Muhammad Abdul Qaiyum v. Secy. of State (1938) 25 AIR All 158 and it was argued that, as the remissions in rent in the years in suit were contrary to the provisions of Section 73, the remissions should be ignored and the plaintiffs must be granted a decree for the arrears at the rate of rent reserved by the lease. The respondents' counsel, on the other hand, invoked to his aid the United Provinces Regularization of Remissions Act (14 of 1938) hereinafter referred to as the impugned Act. This Act was passed after the decision in Muhammad Abdul Qaiyum v. Secy. of State (1938) 25 AIR All 158 and received the assent of the Governor of the United Provinces on 13th September 1938, and came into force on 24th September 1938. It is set out in the Preamble that:Whereas it is necessary to regularize the remissions of rent made before the passing of this Act on account of the fall in prices: it is hereby enacted as follows:

5. The Act applies to the arrears to which the Agra Tenancy Act 1926, and the Oudh Rent Act 1886, applied. Section 2 of the Act inter alia provides that:Notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any Civil or Revenue Court.

6. The appellants' counsel then contended that; the impugned Act was ultra vires the local Legislature and, having regard to the importance of the question raised, the Bench hearing the appeal referred the question mentioned at the inception of this judgment for decision to a Full Bench. The learned Advocate General had notice of this reference and has appeared to support the validity of the impugned Act. The answer to the question referred depends on the

interpretation of certain Sections of the Government of India Act, 1935, and of certain entries in the Legislative Lists appended to that Act and, in construing those Sections and entries, the fundamental principle, that there is a presumption in favour of the legality of a statute and, that a statute should not be held to be unconstitutional or ultra vires unless it is clearly repugnant to the constitution, must be kept in view. The principles governing the construction of the Constitution Act have been laid down by the Federal Court In re C.P. Berar Sales of Motor Spirit and Lubricants Taxation Act 1938(1939)26 AIR FC 1 and, so far as this Court is concerned, those principles must govern the decision of the question under consideration. Gwyer C.J. observed that the Court should seek to ascertain the meaning and intention of Parliament from the language of the statute itself; but with the motives of Parliament it has no concern.... The Constitution is not to be construed in any narrow and pedantic sense.... A broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors.

7. The learned Chief Justice further observed that though the rules which apply to the interpretation of other statutes apply equally to the interpretation of a constitutional enactment, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting-to remember that it is a constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

8. Sulaiman J. quoted the following three principles governing the interpretation of Constitution Acts laid dawn by their Lordships of the Privy Council:

1. It will be wise to decide each case which arises, as best as they can without entering more largely upon an interpretation of the Statute than is necessary for the decision of the particular question in hand.
2. The true test must, as always, be the actual language used.... The problems of the constitution can only be solved as they emerge by giving effect to the language used.
3. One must "look to 'the pith and substance' of the Act in order to ascertain its 'true nature and character'. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province...the legislation will be invalid.

9. Similar principles of construction have been set out by Jayakar J. in his judgment. With these principles of interpretation as an infallible guide, I approach the consideration of the question of the validity or otherwise of the impugned Act. Part V of the Constitution Act deals with certain matters which are of the essence of a Federal Constitution. Chap. 1 of this Part deals with the distribution of legislative powers. It is of the essence of a Federal Constitution that the powers of the Federal Legislature and the Legislatures of the units constituting the Federation should be specifically enumerated, and it is for this reason that a Federal Constitution has been described to be Constitution of "enumerated powers." Section 99 in Chap. 1 of Part 5 defines the territorial limits of the Federal and the Provincial Legislatures and the subject matter of Federal and Provincial laws is then specified in Section 100. The effect of Section 100 is to prescribe the jurisdiction of the Federal and the Provincial Legislatures with regard to the matters enumerated in "Federal Legislative List" (List 1), "Provincial Legislative List" (List 2), and "Concurrent Legislative List" (List 3) of Sch. 7. Sub-section (1) of the Section gives to the Federal Legislature the exclusive jurisdiction to legislate with regard to any of the matters enumerated in the Federal

List and also provides expressly that the Provincial Legislature has no power to make laws with regard to any one of those matters. The jurisdiction vested in the Federal Legislature by Sub-section (1) is "notwithstanding anything in the two next succeeding sub-sections." By Sub-section (2) both the Federal Legislature and the Provincial Legislature are empowered to make laws with respect to any of the matters enumerated in the Concurrent List. But the power given to the Federal Legislature in this respect is notwithstanding the power vested in the Provincial Legislature by Sub-section (3) and the power of the Provincial Legislature is subject to the power of the Federal Legislature to legislate with respect to matters specified in the Federal List. Lastly, subject to the provisions of sub-ss. (1) and (2) the Provincial Legislature is, by Sub-section (3), given the exclusive jurisdiction to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial List.

10. A reference to the three Legislative Lists brings into prominence the laborious and careful enumeration of legislative subjects, and the evident desire to make the Lists as exhaustive as possible and, thus, to reduce the final assignment of residuary powers to irreducible minimum. It must however have been recognized that the three Legislative Lists could not exhaust the entire field of legislation and that matters outside the scope of those Lists may call for legislation and, accordingly, provision with respect to "residual power of legislation" was made by Section 104. It is manifest that, within the limits prescribed by Section 100, and, subject to the other relevant provisions of the Constitution Act, the Provincial Legislature has unfettered power to make laws with respect to matters enumerated in the Provincial and Concurrent Legislative Lists. It follows that if the impugned Act is with respect to a matter in one of those Lists it must be held to be intra vires the Provincial Legislature. The validity of the impugned Act in that case can be called into question only on the ground that it offends against some provision of the Constitution Act.

11. The counsel for the appellants has challenged the validity of the impugned Act on a variety of grounds. His argument based on Section 299(3), Constitution Act, has however only to be mentioned to be rejected. He contended that the impugned Act extinguished or modified the rights of landholders in land and could not therefore be introduced in either Chamber of the Provincial Legislature without the previous sanction of the Governor. Even if the premise on which this contention is based be assumed to be well founded (which it is not), complete answer to the contention is furnished by Section 109, Constitution Act, which inter alia provides that no Act of a Provincial Legislature shall be invalid by reason only that some previous sanction was not given if assent to that Act was given-(a) where the previous sanction or recommendation required was that of the Governor, either by the Governor....

12. The impugned Act received the assent of His Excellency the Governor and its validity cannot therefore be called into question on the ground that previous sanction to its introduction as required by Sub-section (3) of Section 299 was not obtained. To begin with the appellants' counsel contended that the impugned Act is not with respect to any of the matters specified in the Provincial or Concurrent List and is therefore ultra vires the Provincial Legislature. In the alternative he urged that it falls within entry 4 of the Concurrent List and, being repugnant to an "existing Indian law," was void in view of the provisions of Section 107, Constitution Act. Entry 4 in the Concurrent List is as follows:
Civil Procedure, including the law of limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act....

13. The Advocate General on the other hand maintained that the impugned Act was with respect to matters specified in entries 2 and 21 of the Provincial List. These entries are as follows:

Entry 2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; procedure in Rent and Revenue Courts.
Entry 21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents....

14. Further he argued that, even if the impugned Act is with respect to matters in entry 4 of the Concurrent List, it is not repugnant to any Federal or existing Indian law and is therefore perfectly valid. The appellants' counsel controverted the position taken by the Advocate General and urged in the alternative that, even if the impugned Act deals with matters set out in entries 2 and 21 of the Provincial List, it offends against the provisions of Sub-section (1) of Section 107 and is therefore void. Before considering the question whether the impugned Act falls within any and if so, under which, entry of the Provincial or the Concurrent List, it is convenient to deal with the argument of the appellants' counsel based on Section 107, Constitution Act. Sub-section (1) of Section 107 provides that:If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this Section, the Federal law, whether passed before or after the Provincial law, or as the case may be, the existing Indian law, shall prevail and the Provincial law, to the extent of the repugnancy, be void.

15. It is contended that the impugned Act is repugnant to Section 9, Civil P.C., and is therefore void. In connexion with this argument reference was made to the Full Bench decision of the Patna High Court in *Sadanand Jha v. Aman Khan*[1] In that case the Court overruled the argument that Section 107, Constitution Act, refers to repugnancy in relation to the Concurrent List alone and held that Sub-section (1) of that Section was applicable even to cases of repugnancy between a Provincial law with respect to the matters specified in the Provincial List and a Federal law with respect to the matters set out in the Federal or the Concurrent List. If I had to decide the question that formed the subject of consideration by the Patna High Court I would have respectfully dissented from that decision. Section 107 affects the relations between the Federal Legislature and the Provincial Legislature where the laws passed by the two Legislatures are among the subjects in the Concurrent Legislative List and are repugnant to each other. It has no application to cases of repugnancy due to overlapping found between the Provincial List on the one hand and the Federal and the Concurrent Lists on the other. If such an overlapping exists in any particular case the Provincial legislation will be ultra vires because of the non obstante clause in Sub-section (1) of Section 100 read with the opening words in sub-ss. (2) and (3) of Section 100. In such cases the Provincial legislation will fail not because of repugnance to Federal law but in consequence of being repugnant to the constitution itself. In the present case, however it is not argued that there is any repugnance between a law passed by the Federal Legislature (which according to Section 316, Constitution Act, means the present Indian Legislature) and a Provincial law, and, as such, the question decided in the Patna case does not arise. I am therefore relieved from the necessity of giving my reasons at length for the view that the repugnance contemplated by Sub-section (1) of Section 107 between Federal and Provincial law is only concerning matters in the Concurrent List.

16. All that is argued in the present case is that the impugned Act is repugnant to Section 9, Civil P.C., which is an "existing Indian law" as defined by Section 311(1), Constitution Act, and I now proceed to consider that argument. Section 9 provides:The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

17. It is urged that the effect of the impugned Act is to bar the jurisdiction of the Civil Courts from entertaining suits founded on a cause of action consequent on the arbitrary orders as to remissions passed by the Local Government and therefore there is repugnancy between the impugned Act and Section 9, Civil P.C. In my judgment there is no substance in this argument. The effect of Section 9 is to confer jurisdiction on Civil Courts to try such suits of a civil nature the cognizance of which is not either expressly or impliedly barred. It follows that Section 9 itself postulates the barring of jurisdiction of Civil Courts by a competent Legislature with respect to particular class of suits of a civil nature. It is therefore open to the Provincial Legislature to bar the jurisdiction of Civil Courts with respect to particular class of suits, provided in doing so it keeps itself within the field of legislation confided to its charge, and does not contravene any provision of the Constitution Act. It is therefore clear that the impugned Act, even if it makes provision about jurisdiction of Civil Courts (which in my opinion it does not) far from being repugnant, is in consonance with the provisions of Section 9, Civil P.C. Its validity cannot therefore be assailed on the ground of repugnancy with an existing Indian law.

18. The question then arises whether the impugned Act falls within any of the above mentioned entries in the Provincial or the Concurrent List. The answer to this question is beset with difficulties of varying intensity. It is manifest that, in appending the three Legislative Lists to the Constitution Act the predominant intention of the Parliament was to prescribe separate water-tight compartments within which the Federal and the Provincial Legislatures could operate either in exclusion to, or concurrently with, each other. This is clear from the exhaustive enumeration and the elaborate scheme of distribution of powers between the two Legislatures. But the wealth of details that characterizes the three Lists makes overlapping inevitable, if the words in each entry are given their ordinary meaning. To do so would be to frustrate the very purpose of the enactment and this course, for obvious reasons, has to be avoided. The Court must therefore as observed by the learned Chief Justice of the Federal Court in the case cited above, construe the legislative power defined or prescribed by one entry or the other in a more restricted sense than...it can theoretically possess.

19. In other words, in construing the entries, the scheme of the Act is not to be lost sight of, and departure from the ordinary meaning of the words used is permissible to give effect to that scheme. This is the first difficulty. If the three Lists embraced the entire field of possible legislation, the only task confronting the Courts would have been to so interpret the entries as to make the three Lists mutually exclusive of each other and thus avoid conflict. But the scheme embodied in the Act is not so. There is the residual power of legislation provided for by Section 104. This Section demonstrates that there may be legislation with respect to matters not covered by either of the three Lists. One has therefore to approach the question under consideration not on the hypothesis that the impugned Act must be within the purview of some entry in one or the other List. The possibility of it being outside those Lists has also to be kept in view. In this connexion it must however be noted that the argument, that it is outside the three Lists and therefore within the residual powers of legislation, is to be accepted only as a last resort. This is

also because the three Lists are so exhaustive as to leave very little for the residuary field. That field nevertheless exists and cannot be ignored. The result is that while, on the one hand, the legislative power given by the entries in the three Lists is to be construed in a restricted sense with a view to avoid conflict of jurisdiction between the Federal and the Provincial Legislatures, that power, on the other hand, is not to be construed in such an extended sense as to entirely annihilate the residuary field of legislation. This is the second difficulty.

20. Now in order to decide whether the impugned Act falls within any of the entries above referred to and, if so, under which entry, one has to ascertain the true nature and character of the enactment its "pith and substance," and it is the result of this investigation, not the form alone which the statute may have assumed under the hand of the draughtsman, that will determine within which of the Legislative Lists the legislation falls and for this purpose the legislation must be scrutinized in its entirety: vide *A.G. for Ontario v. Reciprochal Insurers*[2] The facts stated in the beginning of this judgment give a clue to the genesis of the Act.

21. The decision in Muhammad *Abdul Qaiyum v. Secy. of State* [3]puts it beyond doubt that the land-holders in the province of Agra could ignore the illegal orders as to remission of rent and could sue the tenants in the Revenue Court for the recovery thereof. Further they could bring suits in the Civil Courts under Section 183, Land Revenue Act, (Local Act III of 1901). The impugned Act obviously owes its origin to a desire to deprive the landholders of the right of suit against the tenant or the United Provinces Government. The object of the Act as disclosed by the Preamble is "to regularize the remissions of rent made before the passing of" the Act. It is clear that one can regularize or validate only such acts as are irregular and invalid. The idea underlying the Preamble, therefore, is that the orders as to remission were irregular and invalid. It is to be noted here that those orders were even with respect to period before Part III of the Constitution Act came into force. Section 2 of the impugned Act goes even beyond the Preamble and embraces orders as to remissions of rent passed before or after the operation of the Act and provides that such orders cannot be called in question in any Civil or Revenue Court. Here again the substance of the Act, apart from its form, is to regularize and validate irregular and invalid orders as to remissions of rent passed by the Provincial executive. There is, therefore, no escape from the conclusion that by the impugned Act validity is given to wholly arbitrary and invalid orders already passed or to be passed in future by the executive authorities. This being the substance of the impugned Act, I find it impossible to hold that it comes within entry 2 of the Provincial List so far as that entry defines the power to legislate about "jurisdiction and powers of all Courts except the Federal Court..." In *Amritrav Krishna v. Balkrishna Ganesh*[4] West J. observed that:Jurisdiction, according to the exact conception of it formed by the Roman lawyers, consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon them.

22. The impugned Act, in my judgment, neither creates jurisdiction in nor denies jurisdiction to either Civil or Revenue Courts. There is nothing in the impugned Act debarring the Courts from taking cognizance of suits with respect to remitted rent. If a suit for recovery of the remitted rent was filed in the Revenue Court, that Court could not, on the basis of the impugned Act, hold that it had no jurisdiction to entertain the suit. It would, after taking cognizance of the suit, while determining the jural relation between the parties, no doubt debar the plaintiff from impugning the validity of the order as to remission and dismiss the suit on that ground. In other words, the suit will be dismissed, not on the ground that the Revenue Court has no jurisdiction but, on the

ground that the plaintiff, because of the impugned Act cannot question the validity of the order granting remissions. The decision will be a decision on the merits by a Court of competent jurisdiction. "Jurisdiction" means the power to hear and determine a cause and the impugned Act does not take away this power either from the Civil or the Revenue Court. Jurisdiction is either territorial, personal, pecuniary or depending on the nature of the suit. Further, there may be appellate or revisional jurisdiction. The impugned Act does not deal with any of these matters. The word "power" in the two entries last referred to, though not used necessarily in contradistinction to the word "jurisdiction," is a word of wider import than the word "jurisdiction." It embraces the authority to enforce compliance with processes, to levy execution etc. The impugned Act makes no provision about such matters. I, therefore, hold that the impugned Act is not with respect to the jurisdiction and powers of Courts within the meaning of entry 2 of the Provincial List. The question, whether provision is made by the impugned Act with respect to "procedure in Rent and Revenue Courts" within the meaning of entry 2 of the Provincial List, will be considered when I deal with the question whether the impugned Act is with respect to "civil procedure" within the meaning of entry 4 of the Concurrent List. The impugned Act, in my judgment, is also outside the scope of the legislative power defined in entry 21 of the Provincial List. The entry runs thus:Land, that is to say, tights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land....

23. The Advocate-General contended that provision was made by the impugned Act about "the collection of rents." I am unable to accede to this contention. The power to legislate about procedure in Rent and Revenue Courts is within entry 2 of the Provincial List. The power to legislate about the Procedure of Criminal and Civil Courts falls within entries 2 and 4 of the Concurrent List. In order to avoid overlapping, entry 21 must be so construed as to exclude from its purview the power to legislate about the procedure of the Criminal, Civil and Revenue Courts. The power of legislation given by entry 21 must therefore have reference to substantive law with respect to the matters in that entry. The true nature of the distinction between substantive law and the law of procedure is thus summarized in Salmond on Jurisprudence, Edn. 8, p. 495:The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions-jus quod ad actions pertinent-using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law is concerned with affairs inside the Courts of justice; substantive law deals with matters in the world outside.

24. Now, tested in the light of these observations the impugned Act does not embody substantive law with respect to "the collection of rents." By the authority given to it to make laws about "the collection of rents" the Provincial Legislature is, in my judgment, authorized to provide about payment of rent in cash or in kind, to fix the instalments in which rent is to be collected, to make provision about abatement and enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which rent is to be collect ad and to legislate about kindred matters. The impugned Act however is not with respect to any such matter. It is therefore outside the scope of entry 21 of the Provincial List.

25. It remains to consider whether the impugned Act is with respect to "procedure in Rent and Revenue Courts" and "civil procedure" and thus falls partly within entry 2 of the Provincial and partly within entry 4 of the Concurrent List. I confess that I have had some, if no considerable, difficulty in deciding this question. Prima facie, by the impugned Act, provision is made about the regulation of procedure in Revenue and Civil Courts in suits for arrears of rent or under Section 183, Land Revenue Act, (Local Act 3 of 1901). Section 2 of the Act debars a litigant from questioning the validity of an order as to remission of rent either in the Revenue or in the Civil Court. In other words, it "regulates the conduct and relations of Courts and litigants in respect of the litigation itself." It must therefore be conceded that in form the impugned Act is within the legislative power of the Provincial Legislature defined by entry 2 of the Provincial and entry 4 of the Concurrent List. But in the decision of the question under consideration it is not the form but "the pith and substance" of the enactment that is the decisive factor. It follows that the true nature and character of the impugned Act is to be ascertained irrespective of its form.

26. It is well settled that a legislation must be scrutinized in its entirety in order to determine its character: *vide Madden v. Nelson, etc. Ry. Co*[5]. and *Canadian Pacific Ry. Co. v. Notre Dame Bonsecours*[6] Now a scrutiny of the impugned Act as a whole leads to the irresistible conclusion that it was designed to, and does in substance, though not in form, validate the invalid orders as to remission passed by the Provincial executive. Its unmistakable genesis, its declared object as disclosed by the Preamble, and the provisions of Section 2, all point to the conclusion that its effect and substance is to regularize irregular executive orders passed in violation of the just rights of the landholders. In short the impugned Act, though disguised as an enactment regulating procedure, is in fact and in substance, an enactment regularizing illegal executive orders. It is a disguised and colourable legislation intended to serve the purpose indicated above, and this is not permissible. "What cannot be done directly cannot be done indirectly" by the Provincial Legislature: vide *Great West Saddlery Co. Ltd. v. The King*[7] By no entry either in the Provincial or the Concurrent List the Provincial Legislature has been given the power to make laws for validating invalid executive orders and the impugned Act is not therefore intra vires the Legislature of the United Provinces. The impugned Act is outside the scope of the three Legislative Lists and therefore falls within the residual powers of legislation defined by Section 104, Constitution Act. I now proceed to consider the appellants' argument that the impugned Act contravenes the provisions of Section 292, Constitution Act, and is therefore void. In my judgment the argument is well founded and must prevail. Section 292 runs as follows:Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

27. The general principle is that when a parent Act is repealed, all the laws passed under that Act stand repealed unless there is saving provision in the repealing enactment. It may therefore be taken for granted that some provision had to be made to bar the application of this general principle to the laws enacted and in force when the present Constitution Act came into force. But Section 292, in my opinion, is more than a mere preserving Section. Its effect is not merely to declare that the repeal of the Government of India Act, 1915, will not affect the validity of the laws passed under that Act. It proceeds further and enjoins that all the law in force in British India immediately before the commencement of Part III shall continue in force until altered or

repealed or amended. This provision, in my judgment, amounts to a direction that the alteration, repeal or amendment of any law in force at the time of the commencement of Part III cannot be with a retrospective effect. The provisions of Section 292 are no doubt subject to the provisions of Section 100 and it is therefore legitimate to argue that the Federal and the Provincial Legislatures, while exercising the power of legislation vested in them, have the power to repeal an existing enactment. But the power to repeal or amend with a retrospective effect is taken away by the mandatory provisions of Section 292. This follows from the use of the word "until" in the last mentioned Section. This word puts a time limit on the power of the Federal and the Provincial Legislatures to alter, repeal or amend the law referred to in Section 292. A comparison of Section 130, Government of India Act, 1915, with Section 292 of the present Constitution Act points to the conclusion that Section 292 is more than a mere saving Section.

28. The Provincial Legislature while making law with respect to any of the matters specified in the Provincial or the Concurrent List has no doubt the power to repeal or amend an enactment relating to that matter, but this can be done only with prospective and not with retrospective effect. The power given by Section 100 must be so exercised as not to contravene any other provision of the Constitution Act. It follows that the alteration, repeal or amendment of the law referred to in Section 292 cannot be done retrospectively. Now the impugned Act does in substance repeal Section 73 with a retrospective effect, and to this extent, offends against the provisions of Section 292, Constitution Act. The impugned Act is therefore void.

29. In arriving at this conclusion I have not overlooked the fact that the impugned Act is in form an enactment relating to procedure and that there is no vested right in procedure. It may very well be that it was with a view to sail clear of Section 292 that the impugned Act was drafted in the form of an enactment relating to procedure. But its validity, as already stated, has to be judged by reference to its substance and not to its form. For the reasons given above, my answer to the question referred is as follows: The U.P. Regularization of Remissions Act (14 of 1938) is not intra vires the Legislature of the United Provinces.

**Bajpai, J.**

30. This appeal came for hearing before a Bench of two Judges. One of the questions that was argued was whether the U.P. Regularization of Remissions Act, Local Act 14 of 1938, was or was not intra vires the Legislature of the United Provinces. They felt that the question was not free from difficulty and was one of great importance. The case was therefore directed to be laid before the Hon'ble the Chief Justice for the constitution of a Full Bench for the decision of the said question, and that is how the matter has come before us. It was realized that the Provincial Government also might be interested in our decision and therefore notice was issued to the Advocate-General as well. One of the appellants engaged Mr. Gopi Nath Kunzru and both points of view have been placed before us with great ability and thoroughness. It is not necessary for me to state the facts giving rise to the present appeal, for they do not in any manner have any bearing on the decision of the question before us and they have been given at length in the judgments of my learned brethren.

31. Where an Act is impugned on the ground that it is ultra vires, it is usual to discuss the pith and substance of the Act, but before I proceed to do so I would like to point out the genesis of the Act. On 13th May 1937, this Court decided the case in *Muhammad Abdul Qaiyum v. Secy. of*

*State*[8] The importance of Sections 73 and 74 of the Agra Tenancy Act, Local Act 3 of 1926, came up for discussion. Section 74 provides as follows:

(1) An order passed under Sub-section (1) or Sub-section (2) of Section 73 shall not be questioned in any Civil or Revenue Court. (2) A suit shall not lie for the recovery of any rent of which the payment has been remitted in accordance with the provisions of Section 73, or, during the period of suspension of any rent of which the payment has been suspended in accordance with the provisions of Section 73.

32. Section 73(1) provides as follows:

When for any cause the Local Government, or any authority empowered by it in this behalf, remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land...a Collector...may order that the rents of the tenants holding such land or any portion thereof...shall be remitted or suspended for the period of such remission or suspension of payment of revenue, to an amount which shall bear the same proportion to the whole of the rent payable in respect of the land, as the revenue of which the payment has been so remitted or suspended bears to the whole of the revenue payable in respect of such land.

33. It was held in that case that Section 73, Agra Tenancy Act, provides that the remission or suspension of revenue is to precede the remission or suspension of rent and the proportion of the rent remitted or suspended must not be in excess of the proportion of the revenue remitted or suspended and where remissions in rent were in violation of the provisions of Section 73 of the Act and not in accordance with that Section, then in that case Section 74 of the Act was no bar to a suit.

34. The Provincial Government realized-and in fact it is conceded before us by the learned Advocate-General-that in certain instances the remission of rent has been out of proportion to the remission of the land revenue and therefore the United Provinces Regularization of Remissions Act, Local Act 14 of 1938, was brought upon the Statute Book and it received the assent of the Governor of the United Provinces on 16th September 1938 and was published under Section 75, Government of India Act, 1935, on 24th September 1938. This is what I call the genesis of the Act. The impugned Act consists of a Preamble and two Sections. The Preamble says that:Whereas it is necessary to regularize the remissions of rent made before the passing of this Act, on account of the fall in prices; It is hereby enacted as follows:

35. The first Section deals with the title, extent and commencement of the Act. Section 2 of the impugned Act provides as follows:Notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any Civil or Revenue Court.

36. There are two provisos and an Explanation to Section 2, but they are not of much importance for the purposes of the present question and the Act has no other Section. It is clear that the object of the Act is to regularize the remissions of rent made before the passing of the Act, and the effect of the Act is that any order of the Provincial Government or any authority empowered

by it in that behalf remitting rents on account of any fall in the price of agricultural produce which took place before the commencement of the Act, whether such order was passed before or after the commencement of the Act, becomes sacrosanct, and its validity cannot be questioned in any Civil or Revenue Court. The Act therefore attempted to do away with the ruling of this Court in Muhammad *Abdul Qaiyum v. Secy. of State (1938) 25 AIR All 158(Supra).*

37. The rent payable by a tenant to his landlord is ordinarily fixed on the basis of a contract or according to the provisions of the Agra Tenancy Act or the Oudh Rent Act and the revenue payable by the landlord bears some relation to the rent realized by the landlord. Section 73, Agra Tenancy Act of 1926, was intelligible when it provided that if the landlord had to pay a lesser revenue he would be entitled to realize proportionately a lesser amount of rent from the tenantry, but although with the wisdom of the Legislature we, as Judges, are not concerned, an enactment like the present one, which makes an order of the Provincial Government final under whatever circumstance it may be passed and however harshly it may affect the landlord, appears on the first glance a little out of the common run of ordinary enactments even if we were to suppose that the order would not be passed arbitrarily and even if it be conceded that a Legislature is not bound to exercise its powers with discretion. The pith and substance of the impugned Act is therefore to regularize an order of the Provincial Government in connexion with the remission of rents in spite of anything that might be contained in the Agra Tenancy Act of 1926 or the Oudh Rent Act of 1886 or even in any other law for the time being in force.

38. I have now got to see whether the appellant is right in his contention that the Act is ultra vires or whether the Advocate-General is right in his contention that the Act is intra vires. I may mention at the very outset that, although the Act received the assent of the Governor of the United Provinces, it did not receive the sanction of the Governor-General of India. It may also be taken for granted that Courts should have a leaning towards holding an enactment intra vires rather than ultra vires. The presumption should therefore be against the invalidity of an Act. This has been held in a number of cases, but I might refer only to the case in *D'Emden v. Peddar*[9]*,* where Griffith C.J. remarked:It is, in our opinion, a sound principle of construction that Acts of a sovereign Legislature, and indeed of subordinate Legislatures, such as a Municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative.

39. In the Federal Court in In re C.P. Berar Sales of Motor Spirit and Lubricants Taxation Act 1938(1939)26 AIRFC 1 Gwyer C.J., and Sulaiman and Jayakar JJ. have laid down the principles governing the interpretation of the Constitution Act, and bearing all those principles in view I propose to discuss the present enactment. The Constitution Act (the Government of India Act, 1935), Part III, deals with the Governors' Provinces and Part V deals with Legislative powers. Section 99 says that subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

40. Section 100, Sub-section (1) provides that ...the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch.7 to this Act (hereinafter called the Federal Legislative List').

41. It then goes on to say in Sub-section 2 that notwithstanding anything in the next succeeding

sub-section, the Federal Legislature, and subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

42. In Sub-section 3 it provides that subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').

43. In Sub-section 4 it is said that the Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

44. It would thus appear that three Lists are given in Sch. 7 to the Act and whereas List I enumerates the matters within the competence of the Federal Legislature, List II enumerates the matters within the competence of the Provincial Legislature and List III enumerates the matters which are within the competence both of the Federal Legislature and of the Provincial Legislature. It is therefore necessary to see whether the present enactment comes within List II or within List III-it is conceded that it does not come within List I-and it is further to be seen that if it comes in List III, whether the provisions of Section 107 of the Act have not in any way been contravened.

45. The contention of the learned Advocate-General is that the impugned Act has reference to entry No. 2 read with entry No. 21 in List II and is not in any way repugnant to any provision of an existing Indian law. The Federal Legislature has not yet begun to function. "Existing Indian law" means according to Section 311(2), Constitution Act any law, ordinance, order, bylaw, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bylaw rule or regulation.

46. Part III of the Act came into force on 1st April 1937 and at that time the Civil Procedure Code of 1908 and the Agra Tenancy Act of 1926 were in force.

47. The contention of Mr. Gopi Nath Kunzru is that the present enactment in a way relates to entry No. 4 in List III which is as follows:Civil Procedure including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act; etc., etc., and as it is repugnant to the Civil Procedure Code of 1908 the existing Indian law, namely the Civil Procedure Code shall prevail and the Provincial law shall to the extent of the repugnancy, be void inasmuch as the conditions laid in Sub-section 2 of Section 107 of the Act have not been complied with and the Act did not receive the assent of the Governor-General.

48. It is said that as the impugned Act provides that no order for remission of rent, whether passed before or after the commencement of the Act, that is to say any order passed even before 1st April 1937, shall be called in question in any Civil or Revenue Court, it is repugnant to Section 9, Civil P.C., which provides that the Civil Courts shall have jurisdiction to try all suits of a civil nature, and a suit asking for a declaration that a certain order of the executive Government is illegal is a suit of a civil nature. But the self-same Section makes an exception with regard to

suits of which the cognizance is either expressly or impliedly barred, and Section 4(1), Civil P.C., provides that in the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.

49. The result of Section 4 and the exception contained in Section 9 is that it is open to a special or local law to direct that certain suits of a civil nature shall not be tried by Civil Courts. It is not necessary therefore for me to discuss the meaning of the word "repugnancy" or to discuss the cases where the word "repugnancy" has been construed, for whatever meaning be given to the word "repugnancy" the impugned Act cannot be said to be repugnant to Section 9, Civil P.C.

50. As I said before the impugned Act does not come in List I and as I have just now discussed the impugned Act is not in any way repugnant to Civil Procedure which is at entry No. 4 in List III, therefore the only question is whether it comes in List II or it does not come in any list at all, for Section 104, Constitution Act, deals with the authority of the Governor-General by public notification to empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the lists in Sch. 7, and this clearly means that in spite of the three lists which have attempted to exhaust the entire field of legislation, it is possible that some matters may have escaped the notice of the framers of the Act and an emergency may arise when the Governor-General may have to act under Section 104 of the Act.

51. It is therefore possible to hold that Local Act No. 14 of 1938 does not come within any of the lists in Sch. 7 and that it could be enacted only under the residual powers of the Legislature as contemplated by Section 104 and not having been so done is ultra vires, but in construing an enactment of a Provincial Legislature we must assume that this legislative body was acquainted with its powers and that it did not intend to exceed them. I am for the present not considering the argument based on Section 292, Constitution Act, on which great reliance was placed by Mr. Gopi Nath Kunzru and to which reference will be made in the judgment later on, but I am at the present moment only dealing with the question whether on a broad and liberal construction without perverting the language of the enactment and simply for the purpose of supplying omissions or of correcting supposed errors, these are the words of Gwyer C.J. In re C.P. Berar Sales of Motor Spirit and Lubricants Taxation Act 1938(1939)26 AIR FC 1 it is possible to hold that the impugned Act comes within any of the entries in List 2. Entry No. 2 in List 2 has reference to the jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list and Entry No. 21 has reference to land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents. Without therefore being pedantic or hypercritical, is it not possible to say that when Section 2 of the impugned Act was enacted it dealt with the jurisdiction and powers of Civil and Revenue Courts with respect to the collection of rents by the landlord from the tenant and had reference to a matter included in the relationship existing between landlord and tenant? I think it is so possible. I am therefore of the opinion that the U.P. Regularization of Remissions Act, 1938, comes within Entry No. 2 read with Entry No. 21 of List 2, Sch. 7, Government of India Act.

52. I have so far dealt with the argument based on Section 107, Constitution Act, and with the question as to whether the enactment in dispute comes within List 2, which is the Provincial Legislative List, or not. It was contended that the present legislation was of a confiscatory nature

and was opposed to Section 299, Government of India Act, inasmuch as landlords had been deprived to a certain extent of their properties without the payment of any compensation. Even if I were to assume that the present enactment was of such a nature, it is clear that although the previous sanction of the Governor was not obtained, as contemplated by Sub-section 3 of Section 299, the legislation would not be invalid on this ground alone, because the assent to the Act was given by the Governor of the United Provinces on 16th September 1938, and the defect, if any, was cured under Sub-section 2 of Section 109, Government of India Act.

53. There remains only the discussion of Section 292, Government of India Act. That Section provides that notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

54. The submission of the appellant is that the Agra Tenancy Act of 1926 was in force before 1st April 1937 when Part III of the present Government of India Act came into force, and therefore Sections 73 and 74, Agra Tenancy Act, shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority. The result of Section 2 of the amended Act is that Sections 73 and 74, Agra Tenancy Act of 1926, become a dead letter, for the Preamble of the Act shows that it was necessary to regularize the remissions of rent made before the passing of the Act, that is prior to 16th September 1938, and might well embrace orders passed prior to 1st April 1937, but under Section 292, Government of India Act, the aforesaid Sections 73 and 74, Agra Tenancy Act, remained on the Statute Book unaltered, unrepealed and unamended. I am aware that it is open to a legislation to say that it will have a retrospective operation and where the intention and the words are clear such an operation will follow, but ordinarily a statute ought to be construed as prospective only, more particularly where it affects an existing right or obligation and does not affect merely matters of procedure. The Act pretends to deal with procedure only, for it attempts to regularize the remissions of rent and says that certain orders of the Provincial Government shall not be called in question in any Civil or Revenue Court, but this is only a masquerade and the real purport of the Act is to take away the rights of the landlords which were contained in Sections 73 and 74, Agra Tenancy Act, as interpreted by this Court in Muhammad *Abdul Qaiyum v. Secy. of State (1938) 25 AIR All 158(supra)* I therefore feel inclined to hold that the Act does not deal merely with matters of procedure but deals with substantive rights as well.

55. Apart from that, the words of Section 292 are mandatory and provide that although the parent Act, namely the Government of India Act of 1915, has been repealed, all the law in force in British India before the commencement of Part III of the present Constitution Act shall continue in force in British India until altered etc. Some importance has to be attached to the words "continue in force" and "until" and giving to these words their proper importance it is clear that the impugned Act has attempted to do something indirectly which it could not do directly, and this cannot be countenanced.

56. It might be interesting to mention that Sections 73 to 75, Agra Tenancy Act, 1926, were repealed by Section 2, U.P. Rent and Revenue (Relief) Act, U.P. Act, 17 of 1938, which received the assent of the Governor of the United Provinces on 17th December 1938. If the last mentioned Act was passed by a competent Legislature or other competent authority-and no arguments were

advanced before us to the contrary and indeed it was not necessary to do so-then Sections 73 to 75, Agra Tenancy Act, were repealed in terms of Section 292, Government of India Act, only on 17th December 1938 and until then they continued in force. It is true that Section 292, Government of India Act, is a saving or a preserving Section, but what it saves and what it preserves has to remain saved and preserved in terms of the Section and can be destroyed only in terms of the Section and not in the manner adopted by the U.P. Regularization of Remissions Act 1938.

57. It was not argued before us that there was a valid portion in the impugned enactment, namely regularizing the orders regarding remissions of rent passed after the commencement of the Act and therefore this portion should be separated and should be declared intra vires, but even if such an argument be advanced, I would repel it, because to my mind the valid and invalid portions of the Act cannot be separated and the whole Statute is ultra vires. In fact the Preamble says and I have indicated when discussing the genesis of the Act that the whole object of the enactment is to regularize remissions of rent made before the passing of the Act, and the Provincial Legislature would, I venture to think, have not enacted the good portion of the statute without the bad. My answer to the question referred to us is that the U.P. Regularization of Remissions Act, 14 of 1938, is not intra vires the Legislature of the United Provinces.

**Mohammad Ismail, J.**

58. The facts that have given rise to this reference to the Full Bench have been set out in detail by my learned brother Iqbal Ahmad J. I need not recapitulate them at length. The suit was brought for the recovery of certain sum of money, against the defendants who are thekadars. The suit was resisted inter alia on the ground that in consequence of the remissions of rent granted to tenants by an executive order of the Provincial Government the liability of the thekadars was reduced to the extent of the remissions. The suit was partially decreed by the trial Court and the defendants were given credit for the remissions of rent allowed to the tenants. The decree of the trial Court was affirmed on appeal by the learned District Judge. A second appeal to this Court was preferred. During the pendency of the appeal the U.P. Regularization of Remissions Act, 14 of 1938, (hereinafter called the Act) was passed by the Provincial Legislature. Section 2 of the Act provides:Notwithstanding anything in the Agra Tenancy Act, 1926 or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order whether passed before or after the commencement of this Act, shall not be called in question in any Civil or Revenue Court.

59. At the hearing of the appeal it was contended on behalf of the appellant that the Provincial Government have no authority to grant remission of rents except in accordance with the provisions of the Agra Tenancy Act of 1926 and that the Act was ultra vires the Legislature The Bench in view of the importance of the point raised in appeal referred the following question to the Full Bench:Whether the U.P. Regularization of Remissions Act 14 of 1938 is or is not intra vires the Legislature of the United Provinces?

60. Learned counsel for the appellant has challenged the validity of the Act on several grounds. They may be summed up as follows: (a) that the impugned Act is invalid because it is not with

respect to any of the matters enumerated in List 2 or List 3 of Sch. 7, Government of India Act, 1935. (b) That even if it falls within List 3 it is void as the provisions of the Provincial law are repugnant to the existing Indian laws and that the Provincial law has not received the assent of the Governor-General or of His Majesty as required by Section 107(2), Government of India Act. (c) That the Act is void as it offends against Sections 292 and 299, Government of India Act.

61. Before considering the objections a reference to the relevant portion of Section 100, Government of India Act, will be helpful. Under the above Section a distribution of the powers to the Provincial and Federal Legislature has been made: (1) The Provincial Legislature has been given no power over the subject enumerated in List I. (2) It enjoys concurrent power over List III subject to the exclusive power of the Federal Legislature over List I. (3) It has got exclusive power over List II subject to the powers of the Federal Legislature over Lists I and III. If any provision of a Provincial Legislature is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to any matters enumerated in the Concurrent Legislative List then, subject to the provisions of this Section, the Federal law whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law, to the extent of the repugnancy, be void (Section 107(1)). Sub-section 2 of Section 107 provides a procedure in case of repugnancy with respect to Concurrent Legislative List. It runs thus:Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty, the Provincial law shall in that province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter.

62. It would appear therefore that the Provincial Legislature enjoys unfettered power to legislate within its exclusive list but the power with respect to Concurrent List is subject to the restrictions mentioned above. Ordinarily a tenant is bound to pay rent for his holding on the basis of recorded rent. A tenant on being admitted to the occupation of land is liable to pay such rent as may be agreed upon between him and his landholder (S. 43, Act 3 of 1926). If the tenant fails to pay the agreed rent the landholder is entitled to recover the same by suit, or by distraint, or by notice to the Tahsildar, in accordance with the provisions of the Agra Tenancy Act (see Section 132). In special circumstances the rent may be enhanced or abated. This can be done only by registered agreement or by decree or order of a Revenue Court (S. 50). The Court making a decree in a suit for arrears of rent may allow remission of rent to the tenant when it appears to the Court that area of the holding was decreased by diluvion or otherwise or that the produce thereof was so diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrear is claimed. Such a remission however will be subject to the sanction of the Collector. When remission of rent is granted the revenue authorities shall on the report of the Court grant a remission of revenue in proportion to the rent remitted for the corresponding area belonging to the same landlord (S. 72).

63. Similarly, when the Local Government for any cause remits or suspends for any period the payment of the whole or any part of the revenue payable in respect of any land it may order that the rents of the tenants holding such land or any portion thereof mediately or immediately from the landlord shall be remitted or suspended for the period of such remission or suspension of payment of revenue to an amount which shall bear the same proportion to the whole of the rent

payable in respect of the land as the revenue of which the payment has been so remitted or suspended bears to the whole of the revenue payable in respect of such land (S. 73). There are some other provisions of similar nature which empower Government to grant remissions of rent. There is however no provision in the Act which empowers the Local Government to interfere with the contractual obligation of a tenant by an executive order. In every case that a tenant is relieved of his liability to the landlord a corresponding relief is given to the landlord with respect to land revenue. In the present case it is conceded that the remission of rent granted to the tenants during the period in dispute was not authorized by law. The executive order of the Government therefore was manifestly irregular and could be challenged in a Court of law. To obviate such a position the Provincial Legislature enacted Act 14 of 1938. By that Act no amendment in the provisions of Act 3 of 1926 was made. It is argued on behalf of the appellant that the right of the landlord to realize rents from the tenants on the basis of contractual rates remained unaffected. The Act begins with a Preamble which says:
Whereas it is necessary to regularize the remissions of rent made before the passing of this Act on account of the fall in prices: it is hereby enacted as follows.

64. In the body of the Act however no legal sanction is given in clear terms to the executive order of the Government. Section 2 merely bars the aggrieved party from questioning the order of the Provincial Government, or any authority empowered by it in that behalf remitting rents, in any Civil or Revenue Court. The question that falls to be decided is whether it is within the competence of the Provincial Legislature to pass such an Act. The decision of this question will depend on the decision of the further question whether the Act relates to one of the subjects enumerated in List II as contended by the Advocate-General or falls within List III as urged by learned Counsel for the appellant. It is not necessary to cite many authorities in support of the proposition that the presumption is in favour of the validity of the Act. I may only quote the observations of the learned Chief Justice of the Federal Court, In re C.P. Berar Sales of Motor Spirit and Lubricants Taxation Act 1938 (1939)26 AIR FC 1 at page 15:The Judicial Committee have observed that a constitution is not to be construed in any narrow and pedantic sense, per Lord Wright in James v. Commonwealth of Australia (1936) AC 578 at p. 614. The rule which may apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment but their application is of necessity conditioned by the subject-matter of the enactment itself; especially is this true of a federation constitution with its nice balance of jurisdiction. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory or even for the purpose of supplying omissions or correcting supposed errors.

65. It is in this spirit that we have to approach the consideration of the Act. I now proceed to examine the contention of learned Counsel for the appellant. It is argued by him that the impugned legislation does not fall either within List II or List III. In the alternative it is contended that it falls within Entries 4 and 15 of List III (Concurrent Legislative List). Entry 15 deals with civil procedure, including the law of Limitation and all matters included in the Civil Procedure Code at the date of the passing of this Act. It is argued that by virtue of Section 9, Civil P.C., the Civil Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is urged that at the date of the passing of the Government of India Act the jurisdiction of the Civil Courts to try suits in which the remissions of rent granted by the Provincial Government could be questioned was neither expressly nor

impliedly barred and that the effect of Section 2 of the Act is that such a jurisdiction is impliedly if not expressly taken away. According to learned Counsel this provision is repugnant to the existing Indian law, namely the Civil Procedure Code, and is therefore void. In my opinion the argument of learned Counsel is untenable. Section 9 confers only a qualified right upon a litigant to institute suits in Civil Courts. The Section itself contemplates that suits of a civil nature may be barred by other enactments. Section 4 of the Code provides:
In the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.

66. If the Provincial Legislation is otherwise valid it will not become invalid because it debars the Civil Courts from questioning the legality of the remissions. Learned Advocate-General argues that the "pith and substance" of the impugned legislation is to regularize the executive order of Government with respect to collection of rent. It is contended that the Provincial Government has been given exclusive powers to legislate with respect to land, that is, rights in or over land, land tenure including the relation of landlord and tenant and the collection of rents...(Entry 21 List II). Under this entry the Provincial Legislature has been given very wide powers with respect to matters enumerated in the entry. The matters that are governed by the Tenancy Act would fall within the ambit of this entry. The division of the classes of tenure, the time for payment of rent, the rate of rent and other allied subjects are governed by the Tenancy Act. The remission granted to tenants and the Courts empowered to entertain suits for recovery of rent would similarly be governed by the Tenancy legislation. The Act has in effect attempted to regularize the remission of rents granted to tenants. If such legislation can come under any entry it should fall within Entry 2, List 2. In my opinion the impugned Act is in substance with respect to land and as such is within the competence of the Provincial Legislature and does not trench upon an occupied field.

67. There is yet another argument against the contention of learned Counsel for the appellant. The Code of Civil Procedure deals with several matters, e.g. questions of procedure pure and simple, right of appeal, power to issue commissions, injunctions, etc. Part 1 deals with the jurisdiction of Civil Courts, Section 9 falls under the heading of jurisdictions. A perusal of Entry 4 shows that it relates to that part of the Code which deals with questions of procedure only. Entry 15 of Concurrent Legislative List is limited to matters enumerated in List 3. If this interpretation is correct, it follows that the Provincial Legislature was competent to legislate with respect to jurisdiction of Civil Courts barring certain class of suits (vide Entry 2 and Entry 21.) Any other interpretation would give rise to conflict between the two Legislatures and would render Entry 2 of List 2 redundant. The principle of construction has been dealt with by Sulaiman, T. in Case No. 2 of *Shyamakant Lal v. Rambhajan Singh*[11] It is observed:When the question is whether a provincial legislation is repugnant to an existing Indian law the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption of its validity and every effort should be made to reconcile them and construe them both so as to avoid their being repugnant to each other and care should be taken to see whether the two do not really operate in different fields without encroachment. Further repugnancy must exist in fact and not depend merely on a possibility.

68. In my opinion therefore the Act falls within Entry 2 and Entry 21 of List 2 and not within

Entry 4 and Entry 15 of List 3. The next point I proceed to consider relates to Section 299, Government of India Act. It is argued that the Provincial Government had no right to extinguish or modify the rights of the landholders with respect to land owned by them. Even if the argument is sound, it does not affect the validity of the Act because the sanction of the Governor has been obtained as required by Section 299, Sub-section 3. The sub-section no doubt says that the previous sanction is necessary and in this case there is nothing to show that the direction given in the Section was strictly complied with. The defect however is cured by Section 109, Sub-clause (2) which provides:No Act of the Federal Legislature or a Provincial Legislature and no provision in any such Act shall be invalid by reason only that some previous sanction or recommendation was not given if assent to that Act was given-(a) where the previous sanction or recommendation required is that of the Government, either by the Governor or by the Governor-General or by His Majesty.

69. This objection therefore has no force. The third point which has been strenuously argued by learned Counsel for the appellant relates to Section 292, Government of India Act. The Section provides:Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act all the law in force in British India immediately before the commencement of Part. 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

70. It is said that until the Act received the assent of the Governor, that is, September 1938, Act 3 of 1926 remained in force and under the provisions of the said Act the landholder could bring a suit for the enforcement of his right in a Revenue Court. The Act according to learned Counsel may bar certain class of suits from the date of the passing of the Act, but the Provincial Legislature has absolutely no right to legislate with respect to a period anterior to the passing of the Act when another valid Act was in force. It is manifest that indirectly the rights of a landholder which accrued long before the passing of the Act were prejudicially affected by the Act. The rents which fell due before 1938 with respect to which remissions were allowed could have been recovered through a Court of law. Since the passing of the Act such rights cannot be enforced with the result that for all practical purposes the rents had been reduced to the extent of the remissions. Learned counsel referred to Maxwell on Interpretation of Statutes p. 86, Edn. 7. The following passage from a judgment of Wright J. in In re Athlumney (1898) 2 QB 547 at pp. 551 and 552, was relied upon:No rule of construction is more firmly established than this that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only.

72. The same learned author relying upon *In re Williams and Stepney*[11] *Stead v. Carey*[12] and *Bell v. Bilton*[13] says:It is hardly necessary to add, whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed, even though the consequences may appear unjust and hard.

73. It is argued by the Advocate-General that the Act is not retrospective because the suits on the basis of agreed rent finally disposed of before the passing of the Act were not affected by the operation of the Act and that the direction contained in the Act apply to future claims only or to

the claims that may be pending at the time of the passing of the Act. In my opinion, this contention is not well founded. It is our duty to look to the substance and not only to the form of the Act. The natural result that flows from the Act is that the rents which had fallen due prior to the passing of the Act could not be recovered through a Court of law. In other words, the rights that had already accrued were taken away by this Act. It follows therefore that the operation of the Act is retrospective. This however is no ground for holding that the Act is invalid. If the Provincial Legislature has the power to pass the Act it will not cease to be valid merely because it affects vested rights or may appear' to be unjust or hard.

74. Lastly, it is contended that the Provincial Legislature is not empowered to disregard any of the provisions of the Government of India Act. It is urged that under Section 292 all the laws in force at the time of the commencement of Part III, Government of India Act continued in force until altered or repealed. As the Agra Tenancy Act (3 of 1926) or any of the provisions of the said Act were neither repealed nor altered at the time the Act was passed the Provincial Legislature was not competent to nullify the provisions of the subsisting Acts until they were repealed according to law. There is no doubt that the rights that were enjoyed by a litigant under Act 3 of 1926 were materially affected by the new Act. The action of the Provincial Legislature created an anomalous situation. While it allowed the old Tenancy Act to remain operative it took away the benefits of the Act by introducing Act 14 of 1938. In other words, two parallel Acts diametrically opposed to each other remained on the Statute Book. The Provincial Legislature could undoubtedly repeal or alter the old Tenancy Act but it could not take away the rights conferred by the old Act without repealing or altering that Act. I have already held that the Act falls within Entry 2 and Entry 21 of List II, but in my opinion it offends against the direction laid down in Section 292. The Provincial Legislature is not empowered to abrogate the provisions of the parent Act from which it derives its authority. I may mention that Section 73 of Act 3 of 1926 was repealed in December 1938. The old Tenancy Act itself was repealed recently. It was open to the Provincial Legislature to have repealed or altered the relevant Sections of the Tenancy Act at the time of granting remissions. This however was not done. The executive orders were passed granting remissions irregularly. As stated above the legal rights of the land-holders were not affected by such an order as the local law, namely Act 3 of 1926, authorized the landholders to institute suits for recovery of rent in spite of the remissions. That right could not be taken away without repealing or altering the Act itself. Any other interpretation would defeat the provisions contained in Section 292, Government of India Act. My answer to the reference is that the D.P. Regularization of Remissions Act, 14 of 1938, is not intra vires the Legislature of the United Provinces.

75. The answer to the question referred is that the U.P. Regularization of Remissions Act (14 of 1938) is not intra vires the Legislature of the United Provinces.

Cases Referred.

1(1939) 26 AIR Pat 55
2(1924) AC 328 at p. 337
3(1938) 25 AIR All 158
4(1887) 11 Bom 488
5 (1899) AC 626
6(1899) AC 367.

7(1921) 8 AIR PC 148
8(1938) 25 AIR All 158
9(1904) 1 C LR 91 at p. 119
10(1939) 26 AIR FC 74 at p. 83
11(1891) 2 QB 257
12(1845) 1 CB 496
13(1822-24) 4 Bing 615