**CALCUTTA HIGH COURT**

Sudhangsu Mazumdar

Vs.

C.S. Jha, Commonwealth Secretary

C.O. No 811 (W) of 1966

(D. Basu, J.)

04.10.1966

**ORDER**

**D. Basu, J.**

1. As I said in my Order on the application for contempt arising out of the instant proceeding, earlier, the dispute to which the instant proceeding relates has behind it a history of constitutional importance, which must be recounted in order to appreciate the nature of the present proceeding.

2. It is a dispute relating to the division between India and Pakistan of the Berubari Union No. 12, a group of villages lying within the territory of India, for the purpose of ceding half of it to Pakistan in pursuance of the Agreement, which was entered into between the two Governments on the 10th September, 1958. Some doubts having arisen as to whether this could be effected without a proper legislation, the President referred the question for the opinion of the Supreme Court, under Article 143(1) of the Constitution and the Supreme Court gave its opinion as reported in AIR 1960 Supreme Court 845. The Supreme Court opined that since the Agreement between the two Governments, referred to earlier, involved "a cession of a part of the territory of India in favor of Pakistan" (p. 861 ibid.), it could be done only by an amendment of the Constitution under Article 368. As a result of this decision, Parliament enacted the Constitution (9th Amendment) Act, 1960, on the 28th December, 1960. The substance of this amendment was that the portion of the Berubari Union (one of the items included in the said Agreement), which was sought to be ceded to Pakistan, was to be demarcated and after this demarcation was made the Central Government would notify a date as the 'appointed day' from which the transfer would become effective and from that day item No. 14 of the First Schedule to the Constitution, which describes the territories of the State of West Bengal, would stand amended so as to exclude from the existing territories of the State, "the territories referred to in Part III of the First Schedule to the Constitution (9th Amendment) Act, 1960".

3. In short, the demarcation was to be made for the purpose of excluding from the territories of the State of West Bengal that portion of the Berubari Union which was sought to be ceded to Pakistan by the said Agreement. It would, in this context, be useful to refer to the definitions of "appointed day" and "transferred territory" as they appear in the Constitution (9th Amendment)

Act, 1960 :

> "(a) 'appointed day' means such date as the Central Government may, by notification in the Official Gazette, appoint as the date for the transfer of territories to Pakistan in pursuance of the Indo-Pakistan agreements, after causing the territories to be so transferred and referred to in the First Schedule demarcated for the purpose and different dates may be appointed for the transfer of such territories from different States and from the Union territories of Tripura;"
>
> "(c) 'transferred territory' means so much of the territories comprised in the Indo-Pakistan agreements and referred to in the First Schedule as are demarcated for the purpose of being transferred to Pakistan in pursuance of the said agreements."

4. The physical division of the Berubari Union in terms of the Agreement and a demarcation of the divided portions was, accordingly, necessary in order to implement the Constitution Amendment Act. Upon the passing of the Constitution Amendment Act, some of the inhabitants of the Berubari Union brought a petition under Article 226 of the Constitution, challenging the legality of the attempted transfer of the Berubari Union, as referred to in the said Agreement and the Constitution Amendment Act, on the ground, inter alia, that the division envisaged therein was impracticable and prayed for the issue of a writ of mandamus, commanding the Respondents, including the Union of India and the State of West Bengal, to forbear from proceeding any further with the survey and demarcation of the area of the Berubari Union or to make over possession any portion of the Union to Pakistan. The matter went up to the Supreme Court and the dismissal of the petition was upheld by the Supreme Court in the case of *Ram Kishore v. Union of India*[1], which decision was pronounced on the llth August, 1965.

5. The present Petitioners, who are also residents of the same Union, have now brought another petition under Article 226 of the Constitution on the llth June, 1966, challenging the validity of the proposed demarcation as unconstitutional on the grounds, inter alia, that they would be deprived of their right of citizenship which they have acquired under the Constitution of India and they would be deprived of their property, comprising their hearth and home, without payment of compensation, as required by Article 31(2) of the Constitution. It was alleged in the petition (paras 28, 29) that the Respondents (the Union of India, through its Commonwealth Secy.; the State of West Bengal; the Collector of Jalpaiguri; the Commissioner of the Presidency Division) were going to start survey work from the 9th June, 1966 and to construct 100 boundary pillars in the Berubari Union to effect the demarcation and to complete the transfer as envisaged by the Constitution (9th Amendment) Act. In view of the nature of the dispute and the series of litigation which has preceded, the Court did not issue a rule nisi outright but directed that the petitioners should serve a copy of their petition upon the Respondents whereupon it would be heard as a contested application to determine whether a rule should issue or not.

6. Affidavit-in-opposition to the application been submitted only by the Union of India and the learned Advocate General has argued the case on behalf of all the Respondents.

7. Though the questions involved in this Petition under Article 226 are mostly questions of law and learned counsel on either side have been heard at some length, learned Advocate General stated that he was not prepared to have the Petition determined on the merits at once and that he

would Iike to furnish further affidavit in case a Rule nisi was

[1] AIR 1966 SC 644

issued by the Court. The matter for my decision now is, therefore, exclusively confined to the question whether a Rule nisi should be issued or the Petition should be dismissed in limine. The usual practice of the Court is not to give reasons at this stage. But learned Advocate General urged that he would expect reasons in case the Court proposed to issue a Rule. There is some risk to the parties concerned as well as to the Court itself in giving reasons at this stage, because the Court may have to come to a different conclusion upon a consideration of further materials or further arguments.

8. I would, therefore, comply with the request of the learned Advocate General in giving my reasons, as briefly as possible, inasmuch as I propose to issue a Rule nisi, limited to Ground No. III, read with prayers in clauses (b) and (c) of the Petition, relating to Article 31(2) of the Constitution. Making it clear that nothing herein said will be deemed to be an expression of the views of the Court on the merits and will not preclude either party from contending otherwise upon the Ground and prayers in respect of which the Rule will be issued. The reasons given should not be taken to be either exhaustive or final. They are given for the purpose of raising, not deciding, the issues which the Respondents may have to meet in this return and at the final hearing.

9. I. I shall first give my reasons for the rejection of the Grounds other than III :

10. Grounds I-II and V-X are not maintainable before this Court in view of the enactment of the Constitution (Ninth Amendment) Act, 1960, under Article 368 of the Constitution, in view of the decision of the Supreme Court in the Ref. by the President under Article 143, reported in AIR 1960 Supreme Court 845 (854). The question of title of India to the disputed territory was examined and, negativing the broad contention that there was no power under our Constitution to cede any part of the territory which was enshrined in Article 1 of the Constitution, read with the First Schedule, the Court held that cession could be effected if the First Schedule of the Constitution itself was amended to reduce the contents of the territory of India as referred to in Article 1, by excluding the ceded portion. This declaration of the law is binding in this Court under Article 141 of the Constitution and the Constitution (Ninth Amendment) Act having made the necessary amendment of the First Schedule, no argument against the cession founded on any alleged title of India to the disputed territory is available.

11. It is not necessary for me to pronounce any opinion as to whether any relief may be had from the International Court of Justice on any of these questions, but so far as this Court is concerned, the answer is clearly against the petitioners upon general principles relating to the jurisdiction of municipal courts, because it is well-settled that on the question of the extent of the territory of its own State and the limits of the boundaries thereof, a municipal Court is hound by the statement made by its own Sovereign (*Foster v. Neilson*[2], Willoughby; Constitution of the U.S. Vol. III, 1329). In the instant case, there has been not only an executive declaration by means of the Agreement in question but a legislative confirmation of that declaration by an amendment of the Constitution effected according to the procedure laid down in the Constitution.

12. The reasons for the rejection of Ground IV, relating to citizenship, will be stated hereafter.

[2](1829) 2 Pet 253

13. II. Before I proceed to give the reasons why I would issue a Rule in respect of Ground III relating to the alleged infringement of Article 31(2) of the Constitution, I should dispose of some preliminary objections which have been raised on behalf of the Union of India :

14. Firstly, it has been urged in paras. 3-4 of the counter-affidavit that "the entire matter has been set at rest and beyond controversy" by the decision of the Supreme Court in the case of AIR 1966 Supreme Court 644.

15. This contention cannot be accepted inasmuch as the question of the right of the inhabitants to compensation under Article 31(2) has not been raised or dealt with at any earlier stage of this dispute, not to speak of the two Supreme Court cases. In those cases, the question determined by the Supreme Court was whether the Union or India had the power to cede territory if so, what was the legitimate mode of doing it whether the agreement in question was capable of being implemented and whether any part of Berubari was liable to be divided and transferred in pursuance of the agreement and the Constitution Amendment Act which had been enacted to implement it.

16. As will be shown presently, though the power of a Sovereign (including the Union of India) to cede its territory is indisputable, the question whether compensation can be claimed by its citizens liable to be affected by the cession where the right to compensation is guaranteed by the Constitution, is a separate and independent question. The petitioners may not be able to resist the cession out yet they can insist that they must be paid compensation before the transfer can be effected, provided, of course, they can establish at the hearing on the merits, that the substantive conditions for the application of Article 31(2) of the Constitution are present in this case. The Respondents have not been able so far to cite any authority to establish that the exercise of the power of cession ipso facto overrides a constitutional guarantee of compensation.

17. But, the learned Advocate General contends secondly, that the contents of the petition are so vague that it deserves a rejection outright. The dictates of the Supreme Court, as I read them, are however to the contrary. Though the power of the High Court to dismiss in limine a petition under Article 226 of the Constitution has been acknowledged, the Supreme Court has repeatedly said that this should not be done where there is any 'arguable issue' *Himanshu v. Jyoti Prakash*[3], *Bishun Narain v. Income Tax Officer*[4], particularly when there is a complaint of infringement of a fundamental right *K. K. Kochunni v. State of Madras*[5], Numerous are the cases where, on appeal from an order of dismissal in limine, the Supreme Court has allowed the petition under Article 226 on the merits itself of. *Ramdayal Ghasirain Oil Mills and Partnership v. Labour Appellate Tribunal*[6], The Court has gone to the length of saying that where there is any arguable issue but the petition is defective, the High Court should, instead of dismissing it in limine, give the petitioner an opportunity of filing a better affidavit *Dwarka Nath v. Income Tax Officer*[7]

18. In the instant petition, (a) the wording of the averments in para 27 are not very happy,

[3] AIR 1964 SC 1636 (1641)
[4] C. A. No. 493 of 1964 (SC)
[5] AIR 1959 SC 725
[6](1963) Supp. (2) SCR 845 : ( AIR 1964 SC 567)
[7](1965) 2 SCA 868 (879): ( AIR 1966 SC 81)

but they suggest that the petitioner is challenging the validity of the Constitution (Ninth Amendment) Act, on the ground that it is inconsistent with Article 31(2); (b) Ground No. III, as it stands, is founded on a plea separate from the validity of the amendment of the Constitution. It

contends that because no provisions for compensation has been provided for in the Constitution Amendment Act itself, the Respondents cannot transfer the territory untill such provision is made, because the impugned act of transfer would be violative of Article 31(2), if it is effected without provision for payment of the compensation. These are two independent grounds both of which the petitioners are entitled to take and slight amendments in the body of the petition and Ground No. III may sustain both and I shall allow the petitioners to make proper amendments of the petition in this behalf before the Rule is issued. Respondents can have nothing to complain if such amendments are made before the Rule is issued.

19. III. In fact, so far as the challenge as to the validity of the Constitution (Ninth Amendment) Act on the ground of contravention of Article 31(2) is concerned, Respondent No. 1 has already understood the petition to involve this plea and in para 7 of the counter-affidavit, the plea has been denied as such.

20. There is, of course, great force in the contention of the learned Advocate General that so long as the decision of the Supreme Court in *Shankari Prasad v. Union of India*[8], stands, it is not open to the petitioners to challenge the validity of a Constitution Amendment Act on a substantive ground, such as the contravention of a Fundamental Right, which itself is not immune from amendment. It is, however, to be noted that in the later case of *Sajjan Singh v. State of Rajasthan*[9], two of the five learned Judges have expressed their disapproval of the foregoing proposition asserted in Shankari Prasad's case, AIR 1951 Supreme Court 458 and it has been stated before me that this very question is at present before a Full Bench of the Supreme Court. These considerations are sufficient to warrant that the issue is 'arguable and does not merit a dismissal in mine.

21. IV. Even without challenging the constitutionality of the Constitution Amendment Act itself, it is open to the petitioners to challenge the constitutionality of the act of demarcation, which is obviously an executive act which is liable to be restrained until Article 31(2) of the Constitution is complied with, either by paying them compensation in terms of an existing law of land acquisition or by making a law which provides for such compensation, as required by that clause of the Article. The mere passing of the Constitution (Ninth Amendment) Act to effect the transfer as advised by the Supreme Court, may not operate as a pro tanto repeal or abrogation of Article 31(2) so far as the petitioners are concerned. Whether the petitioners would succeed on this ground is a question to be decided on the merits.

22. Thirdly, it has been argued by the learned Advocate General that the transfer sought to be made by the agreement followed by the Constitution Amendment Act constitutes an 'Act of State' as against which the petitioners cannot pursue any claim before this Court, whatever might be the moral obligations of the Union of India towards the petitioners.

23. With respect to the learned Advocate General, this is the weakest of all the arguments

[8] AIR 1951 SC 458

[9] AIR 1965 SC 845

advanced by him. I need only refer to the English decision in *Johnstone v. Pedlar*[10] which laid down that the plea of 'Act of State' is not available to a Sovereign as against his own subjects, a proposition which had been suggested by the earlier decision in *Walker v. Baird*[11], see also Halsbury, 3rd Ed., Vol. 7. P. 280, para 594; Hood Phillips, Constitutional Law 1962 p. 266. So far

as India is concerned it has been reiterated by the Supreme Court in *Virendra Singh v. State of U. P*[12]*.,* and all the cases cited by the learned Advocate General are cases which deal with the relationship between a Sovereign and the subjects of a foreign State.

24. The decision in Virendra's case, 1955-1 SCR 415: ( AIR 1954 Supreme Court 447) (ibid.) is instructive for the purposes of the instant case. It was held that where the Government had resumed the property of a person after he had become a citizen of India, by an executive act, without making a law under Article 31(1), the plea of 'Act of State' was not available in a proceeding under Article 226 brought by such person to challenge the constitutionality of the wrongful act. The Court issued a writ "restraining the State of U. P. from giving effect to the orders complained of and directing it to restore possession to the petitioners if possession had been taken". The contention of the petitioners before me is similarly founded upon Article 31(2).

25. The petitioners are, prima facie, entitled to claim a fundamental right as citizen of India, for the following reasons :

26. Since the decision of the Supreme Court in the Reference under Article 143, AIR 1960 Supreme Court 845 (853-4), it has been authoritatively laid down that at the time when the Prime Minister of India entered into the agreement in question, the Government was under an impression that there was a dispute as to whether Berubari was situated within the true boundaries of India; that dispute had been settled by the Radcliffe Award and that the implementation of that Award, accordingly, constituted an ascertainment or settlement of boundaries and not a cession of territory. In fact, this argument was advanced by the learned Attorney-General on behalf of the Union of India before the Supreme Court (p. 851 of the Report). But the Court held that Berubari had all along been within the territory of India, that there never was any dispute as to boundaries regarding it and that even the agreement in question did not attempt to solve any boundary dispute but plainly sought to cede Indian territory to Pakistan to buy peace. The relevant observations of the Court are :-

> 'There is no trace in the agreement of any attempt to interpret the award or to determine what the award really meant. The agreement begins with the statement of the decision that the area in dispute will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. In other words, the agreement says that, though the whole of Berubari Union No. 12 was within India, India was prepared to give half of it to Pakistan in a spirit of give and take in order to ensure friendly relations between the parties (853).....

Therefore, we cannot accede to the argument urged by the learned Advocate General that it does no more than ascertain and determine the boundaries in the light of the award. It is

[10](1921) 2 AC 262
[11](1892) AC 491
[12](1955) 1 SCR 415 (436): ( AIR 1954 SC 447 at p. 454)

an agreement by which a part of the territory of India has been ceded to Pakistan (854)

27. In view of the above decision, together with the averments in paras 1 and 2 of the petition which are not contradicted so far, there is prima facie ground to hold that the petitioners were citizens of India at the time of the agreement and will continue to be so until the 'appointed day',

referred to in Section 2(a) of the Constitution (Ninth Amendment) Act is notified in the Official Gazette.

28. V. Before coming to the text of Article 31 (2), it would be useful to refer to the general principles relating to the right of an individual to compensation in relation to the Sovereign's right to cede territory, in England and the United States of America, from which countries the framers of our Constitution drew precedents in the matter of drafting it.

29. A. Definite materials on the present question, however, cannot be had from England for two reasons :-

> (i) There is in England no constitutional guarantee of compensation for deprivation of property to fetter executive and legislative action as in the U.S. A. or India.
> (ii) The other is the fact, as stated by Mr. Fitzarnes Stephens on behalf of the counsel in the case of *Damodhar v. Deoram*[13], (vide p. 617 of British International Law Cases, Vol. II), which may be of interest to many of us -
> "This country has been more in the habit of receiving than of making cessions .

30. The decision in this case has been relied upon on behalf of the Respondents. But the only thing that goes in favour of the Respondents if the doubt expressed by the judicial committee (pp. 373-4, ibid.) as to the correctness of the proposition asserted by the High Court of Bombay that "it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power". The actual decision was that the Court refused to hold that a 'cession' of the territory had been effected by the executive Agreement because "such a cession would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts."

31. Notwithstanding the doubts expressed by the Judicial Committee in the year 1876, there is a consensus of opinion amongst jurists today that while it was conventional in the 19th century to consult Parliament before ceding British territory to a foreign power has become the law to-day, because convention is one of the sources of English Constitutional Law and that, consequently, a Treaty concluded by the Executive, in the exercise of the Prerogative of the Crown, cannot affect private rights without Parliamentary sanction. Thus observes Prof. Hood Phillips in his Constitutional and Administrative Law (3rd Ed., pp. 266-7) :-

> "Doubt has been expressed whether the Crown can by virtue of the prerogative cede territory, so as to deprive British subjects of their nationality and perhaps

[13](1876) 1 AC 332

> property and contract rights.....The Crown was persuaded to seek Parliamentary approval for the cession of Heligoland to Germany in 1890 and since then it has been the practice to ask Parliament to confirm cessions ... Whatever the law may be, this seems to be now the convention. Indeed, convention probably demands that Parliament should be consulted beforehand - for example, the cession of Jubaland to Italy in 1927."

32. To the same effect are the observations at p. 288 of para 607 of Vol. 7 of Halsbury's Laws of England, 3rd Ed., namely, that –

> "... where the existing law is affected or where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown.....and the plea of an act of state, or that the matter involves the construction of treaties, affords no valid defense to an action against officers of the Crown for interference with the private rights of a British subject or of a resident alien friend."

33. This opinion was expressed by Sir Robert Phillimore as early as 1879 in the case of Parliament Belge and the soundness of this opinion was not questioned by the Court of Appeal, though the decision was reversed on appeal (1880) 5 P. D. 197. It also follows from the decision of the Judicial Committee in (1892) AC 491, where the Commander of a British ship took possession of the plaintiff's factories in pursuance of a treaty with France. In a suit or damages and injunction by the Plaintiff, it was held that the plea that the defendant was acting under the orders of the Crown to implement a treaty was no defense.

34. If such a Treaty is presented before Parliament for approval, it would certainly stipulate for proper safeguards for the protection of the property rights of the affected individuals or pay compensation, in view of two principles of English constitutional law :-

(a) The Crown is not entitled at common law by virtue of the royal prerogative to take possession of a subject's property for reasons of state without paying compensation,- a proposition which stands as a rock since the pronouncement of the House of Lords in *Att. General v. De Keyser's Royal Hotel*[14]*,*

(b) The other proposition was asserted by the House of Lords in the case of *Central Control Board v. Cannon Brewery Co., Ltd*[15]*., (H. L.)* that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.

35. The result is, that if a Treaty which seeks to take private property is brought before Parliament, Parliament would be obliged to provide for compensation, for, to expressly negative the payment of compensation in such circumstances would be so much irreconcilable with English democrary of to-day as to be unimaginable, at least, where the Treaty is not the result of capitulation to a victorious power.

[14](1920) A. C. 508 (H. L)

[15](1919) A. C. 744 (753)

36. B. In the U.S. A., though it has been held that compensation under the Fifth Amendment is not payable where property is destroyed by War in which the United States is engaged *U.S. v. Pacific R. Co*[16]*.,* or in exercise of the War power of the *Government Juragua Iron Co. v. U. S*[17]*.,* because it does not constitute taking or appropriation of the property by the Government but its destruction in the interests of the safety of the State, - at the same time, it has been held that compensation is payable if property is appropriated for the use of the Armed forces or other War

purposes *Seery v. U. S*[18]*.,* Bernard Schwartz, Constitution of the U. S., (1963), Vol. II, p. 140, e. g., where property is requisitioned for such purposes *U.S. v. General Motors*[19]*, U.S. v. Pewee Coal Co*[20]*.,*

37. It is thus well-established that the exercise, of the War power Art. I, Section 8(11) is no exception from the guarantee of compensation for the 'taking' of private property, e. g., a merchant vessel, by the *Government U.S. v. Russel*[21]*,*

38. Not only the 'War power' Art. I, Section 8(11), but all the other powers vested in the Congress by the Constitution "are subject to all the limitations imposed by such instrument and among them is that of the 5th Amendment .....as has been held by the Supreme Court in a case relating to exercise of the 'Commerce power' [Art. I, Section 8(3) ] - *Monongahela Navigation Co. v. U. S*[22]*.,*

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment and can take only on payment of just compensation."

39. The question to be determined is whether the 'Treaty' power of the President [Art. II, Section 2(2) ] which includes the power to cede territory to a foreign State constitutes such exception.

40. Learned Advocate-General, on behalf of the Opposite Parties, has seriously endeavoured to establish that, on general principles, no compensation is payable to a private owner when the territory within which the property is situate is ceded to a foreign State inasmuch as the property rights of the owner are available in the same manner and to the same extent against the foreign State. In support of this proposition, he relies on the observations of the American Supreme Court in *U.S. v. Chaves*[23]*,* We cannot, however, overlook the two assumptions made in this decision –

> (a) "... It is the usage of civilised nations of the world, when territory is ceded, to stipulate for the property of its inhabitants."
> (b) ". . The rule of the law of nations, that private property ceded by one nation to another, when held by a title vested before the act of cession, should be respected."

41. In formulating the second proposition, the Court relied upon the earlier dictum of Chief Justice Marshall in *U.S. v. Percheman*[24]*,*

[16](1887) 120 U.S. 227(234)
[17](1909) 212 U.S. 297(1952) 344 U.S. 149
[18](1955) 127 F. Supp. 601
[19](1945) 323 U.S. 373
[20](1951) 341 U.S. 114 : 95 Law Ed 809
[21](1871) 13 Wall. 623 (630)
[22](1892) 37 Law Ed 463(471)
[23](1895) 159 U.S. 452 (457-464)
[24](1831-34) 31 U.S. 7

> ".....It is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country.....that sense of justice and of right which is acknowledged and felt by the whole civilised world would be generally confiscated and private rights annulled . . .If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of

territory?"

42. One thing to be noted about these American cases is that the cession in these cases was in favour of the United States by some of the erstwhile colonies which formed the federal State, not an alien institution in any sense, - and that the claim was raised by citizens of the ceding State against the new Sovereign; the American Supreme Court held that the property rights of the claimants must be respected because of the rule of International law as well as because the property rights were safeguarded by express stipulation in the treaty of cession between the two States, e. g., that "the property of every kind belonging to Mexicans .....shall be inviolably respected . . .as if the same belonged to citizens of the United States."

43. Let us now see how far the two propositions referred to above will be of any avail to the Petitioners us against the new Sovereign, namely, Pakistan :

(a) So far as the rule of International law is concerned, a British specialist says that 'there is neither uniformity of juristic opinion nor uniformity of International practice (Phillipson, Termination of War, p. 290)and as to the enforceability of a rule of law of nations in a municipal court, it has been held in a number of decisions of our Supreme Court that (e. g., *State of Gujral v. Vora Fiddali*[25],) though as a matter of practice the new Sovereign acquiring a territory by cession, may recognise the property rights of the inhabitants of the ceded territory, there is nothing in municipal law to bind it inasmuch as the act of cession is an Act of State as between the citizens of the ceded territory and the new Sovereign, so that the subjects of the ceding State may enforce against the new Sovereign in the latter's Courts only those rights which the new Sovereign voluntarily recognises and this proposition has been reiterated in subsequent decisions such as *State of Rajasthan v. Shyamlal*[26], and *Pema v. Union of India*[27], This principle is not new but had been enunciated by the Privy Council in a number of cases, such as *Cook v. Spring*, *(1899) AC 572*; *Seoy. of State v. Rajbai*[28], *Vajesinghji v. Secy, of State*[29], *Secy. of State v. Rustam Khan*[30], It is evident that, whatever might be the position at International law, the petitioners would have no relief against the Government of Pakistan in the municipal courts of that country if, in fact, Pakistan refuses to recognise the property rights of the petitioners in an inch of the ceded territory. There are, of course, decisions (such as German Settlers in Poland at p. 140 of Green's International Law through the Cases) which hold that under modern International law, the State which acquires territory by cession is bound to respect the property rights of the inhabitants of the ceded territory. But these cases, it cannot be forgotten, are cases under International law and before the International Court of Justice. The municipal courts of the acquiring State cannot

[25] AIR 1964 SC 1043
[26] AIR 1964 SC 1495
[27] AIR 1966 SC 442 (444)
[28] 42 Ind App 229 : (AIR 1915 PC 59)
[29] 51 Ind App 357: (AIR 1924 PC 216)
[30] 68 Ind App 109: (AIR 1941 PC 64)

enforce these property rights unless their Sovereign acknowledges these rights of the erstwhile citizens of the foreign State, as against whom the act of cession constitutes an

'Act of State'. The distinction between municipal and international law was amply explained by the King's Bench in *West Rand Central Gold Mining Co. v. The King*[29], and, still more clearly, by the Privy Council in the earlier case in (1899) AC 572, where the claim of a person to enforce against the State a proprietary right granted by a Chief ceding the territory to the British Crown was rejected in these words :-

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of state and treating Sigcau as an independent sovereign-which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which man, cipal courts administer.

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. and if there is either an express or a well-understood bargain between the ceding potentate and the government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure."

(b) The above is the precarious position in which the Petitioners have been abandoned and their helplessness is heightened by the fact that it may not be possible even for the Government of India to move against Pakistan on an international level on the basis of the treaty of cession, because that treaty, as embodied in the Constitution Ninth Amendment Act, is conspicuous by its silence as to any safeguard to protect the Petitioners either as to their citizenship or rights of property.

44. It is true that even if stipulations in favor of the petitioners had been made in the disputed agreement, the petitioners would have been powerless to enforce these stipulations against Pakistan in her own courts, because as between the petitioners and Pakistan, the act of cession is an act of State and the treaty would have given the petitioners no rights enforceable in the courts of Pakistan (vide 51 Ind App 357 (360) : (AIR 1924 PC 216 at p. 217).) But then if there were such stipulations, the Union of India would have been in a position, in case of a disregard of the terms of the treaty by Pakistan, raised the question at a diplomatic level or before the International Court of Justice, which it cannot effectively do, as matters stand.

45. The absence of any such stipulation in the disputed agreement becomes conspicuous when we remember the observations of the American Supreme Court that –

[29](1905) 2 KB 391

"it is the usage of civilized nations of the world, when territory is ceded, to stipulate for the property of its individuals", together with the fact that the cession in question was not

> wrested by a victorious power from one fallen in War, but was a voluntary renunciation of territory made to purchase the friendship of a neighboring State, apparently because it was boisterious.

46. If we refer to text-book writers on International law, we find the reasons why it is the usage of a ceding State to stipulate for the rights of its erstwhile citizens who are liable to be affected by the cession. Nobody questions the power of a sovereign State to cede territory to a foreign State; the question is whether it should have any consideration for its own citizens, whose rights the ceding State is bound to protect and maintain under its own municipal law. As I have stated in other contexts, the right of private ownership of a citizen to a particular piece of property under the municipal law must be distinguished from the ultimate title of the State as a sovereign over every inch of its territory, as an international person. This is explained at pp. 52-53 of Hall's Treatise on International Law (1924) :

> "It cannot be denied that the immediate property which is possessed by individuals is to be distinguished from the ultimate property in the territory of the Slate,. . .which is vested in the State itself. .....As between nations, the proprietary character of the possession enjoyed by a State is logically a necessary consequence of the undisputed facts that a State community has a right to the exclusive use and disposal of its territory as against other States and that in international law., the State is the only recognized legal person . . . Internationally, moreover, a full proprietary right on the part of the State is not only a reasonable deduction of law, but a necessary protection for the proprietary rights of the members of a State society. The community and its members, except in their State form, being internationally unrecognized, any rights which belong to them must be clothed in the garb of State rights before they can be put forward internationally. A right of property consequently, in order to possess international value, must be asserted by the State as a right belonging to itself."

47. It follows that though in the international sphere, the State has the unquestionable power to dispose of the territory which immediately belongs to its citizens, there is no reason why the State should be indifferent to the domestic rights of property which its citizens have under its own municipal law and more so where there is a guarantee of a Bill of Rights in an organic law sanctifying the right of property of an individual against the State. If a State could be allowed to be indifferent in this matter, there would be no logical basis for individuals to form a political society, because, as just observed by the international jurist and by Political Scientists, without exception, a political Society is formed for the belter protection of the rights of its individuals, both against other individuals and against other Nations, since such rights would have no security in a lawless and disorderly society.

48. Historically, the position is so much clear that there was a time when it was acknowledged that a State had no right to cede its territory without the express consent of its citizens by means of a plebiscite and there are a number of instances of treaties of cession which had been ratified by such plebiscite (Hall, Op. cit., p. 53; Phillipson, Termination of War and Treaties of Peace, pp. 278, 282-284), Modern International law, however, does not recognize this consideration as a

legal limitation upon the power of a Sovereign to cede its territory, as an independent legal person.

49. But though International law does not recognize the right of the citizens of a ceding State to vote the international act of its Sovereign by plebiscite, the private rights of the citizens are still protected in two ways:

> (i) The ceding State, as a matter of practice (which the American Supreme Court describes as 'the usage of civilized Nations') safeguards the nationality and property rights of its citizens by express stipulations in the Treaty of cession.

In the Treaty of Constantinople, 1913, there was even a stipulation for exchange of Moslem and Bulgarian population and properties (ibid., p. 289), as it should be where there are cultural and religious disparities as in the case of India and Pakistan.

50. The helplessness of the ceding State and of its erstwhile citizens as against the succeeding foreign State will be evident from the following passage in Phillipson's book (op. cit., p. 282), which would also meet the argument advanced by the learned Advocate General that the inhabitants of the ceded territory have nothing to lose inasmuch as they will have everything left to them in situ. The learned Author (Phillipson, p. 282) observes :

> "But so far as the ceding State is concerned, the cession is an act of a purely divestitive character. By renouncing its authority thus over a portion of its territory, it contracts no obligation of guarantee - subject of course, to any stipulations in the treaty of peace - towards the annexing State, or foreign powers, or towards the inhabitants of the transferred territory. It does not and cannot guarantee the sentiments of the alienated population - sentiments due to the subtle influences of national character, customs, traditions, intellectual and moral development, political constitution - will become assimilated to these of the people of the cessionary. State . . . The cession remains nothing more than a fact for the annexed population as well as for foreign Governments."

51. It is because of this helplessness of the inhabitants of the ceded territory as against the acquiring or succeeding State that the ceding State usually stipulates in the treaty of cession for an option being given to these inhabitants as regards their nationality and property, I cannot help quoting certain passages from Phillipson (p. 291 et seq.) as to the consequences which have resulted from the omission of the Union of India to make any stipulations in this behalf in the Agreement in question :

> "The generally accepted rule is (subject to certain exceptions) that the annexation of territory by treaty implies collective denationalisation of its people on the one hand and collective naturalisation on the other. . . .The matter is now-a-days invariably settled by agreement; the ceding State, losing a portion of its dominions, seizes the last opportunity afforded it for the protection of its former subjects by stipulating in their behalf as favourable conditions as possible and obtaining guarantees from the cessionary Power, in regard to their nationality, their persons and their property (292) ..... Now in order that a

new nationality and a new bond of allegiance may not be imposed on the inhabitants against their will, a practice of option is adopted.

In treaties of cession, then, various classes of persons are permitted to preserve their old nationality and allegiance, provided they satisfy certain given conditions (294)..... In either event, .... the actual value of the right or privilege of option depends on the ability of the inhabitants concerned to find homes elsewhere. In every instance where territory is transferred there are many people who do not exercise the option conceded to them, when it necessitates also removal. But their acquiescence does not necessarily imply their willing consent to be invested with the new nationality; it may well be the result of their helplessness and of the hopeless view they take of an emigration enterprise (295).....As a general rule, the right of option ought to be granted to persons whose nationality would be changed by the fact of annexation."

52. Where no such stipulation is made, there is risk of inhabitants of the ceded territory being rendered 'Stateless' as the Petitioners apprehend, because the annexing State, as pointed out by Hall (op. cit, p. 687, foot-note) has the liberty of refusing to accept such inhabitants or any of them as its subjects. Of course, if the Petitioners are then obliged to come back to India, they could not be denied their citizenship of India. But what will then happen to their property left in the ceding State? Certainly, the Union of India has no legal obligation to give them property within the territory of India in lieu of their property in the ceded territory any more than the obligation of the Union towards the hundreds and thousands of people who have been displaced by the political partition of India and are still moving into India in an unceasing stream. The question of compensation raised by the Petitioners arise in this way. They urge that they are entitled to be compensated under Article 31(2) before the demarcation takes place, because this act and the implementation of the Agreement would constitute a deprivation of their property, in the circumstances just referred to.

53. Of course, the foregoing observations of Phillipson primarily refer to treaties of cession entered into by a vanquished party in a War but as the learned Author (p. 305, op. cit.) and other writers on International Law say, the law and practice as to voluntary cession are not different. In fact, in the case of voluntary cession in times of peace, the ceding State has a greater freedom and opportunity, at the time of making the treaty or agreement and yet the affidavit of the Opposite Party before me does not suffice to show whether the Union of India applied its mind to the foregoing considerations at the time of entering into the disputed Agreement.

54. The answer would be available only if a Rule is issued and a further Affidavit is obtained on this issue raised herein.

(ii) The rule of municipal law that a Treaty does not affect the private rights of the citizens as against their Sovereign under the municipal law, which includes constitutional rights under a law superior to the ordinary municipal law.

In Phillipson's Termination of War (ibid., p. 278), it is thus observed:

"Every sovereign and independent State is entitled to cede a portion of its territory; and its treaty of cession, or stipulation in the peace treaty to cession, is valid and binding on the

nation, if its municipal regulations on the subject have been observed."

55. In the United States, the right to compensation for private property being taken for public use is guaranteed by the Fifth Amendment to the Constitution.

56. It may be contended that if the power of a State to cede is subject to the constitutional obligation to compensate its citizens owning property in the territory which is sought to be ceded, why should we not get a single reported American decision where this has been directly laid down. The answer, to my mind, is offered by various circumstances:

> (a) Though invited by me, either side in the instant proceeding, has failed to cite a single instance where the United States has ceded an inch of its territory to a foreign State. I do not know whether further research may reveal any such instance, but as at present advised, I must say that there has been no such instance.
> (b) If there were any such instance, the Senate, without whose concurrence the President cannot make a Treaty (Art. II, Section 2) would have insisted that the property rights of its affected citizens should be safeguarded by express stipulations in such Treaty, following "the usage of civilized nations" as referred to by its Supreme Court; or that compensation must be paid to its citizens under Amendment V.
> (c) Whatever might have been earlier interpretation of the supremacy of the Treaty power under Art. VI of the American Constitution, it has been laid down in recent cases that it is subject to the limitations imposed by the Constitution in the defense of private rights and that, at least, the municipal Court would refuse to enforce it if a particular Treaty offends against the Bill of Rights.

Article VI(2) is as follows:

> . . .all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

57. The current interpretation of this Article is that it gives to the federal Treaty-making power, the further jurisdiction to encroach upon the federal distribution of powers in favour of the States, because the power to make treaties must be given a paramount importance in order to serve the national interests in relation to foreign States (*Edye v. Robertson*[30], *Missouri v. Holland*[31].

58. But this does not, as Holmes, J. explained in (1920) 252 U.S. 416 (ibid), "mean to imply that there are no qualifications to the treaty-making power" or that it would be immune from "prohibitory words... found in the Constitution."

[30] 1840) 14 Pet 540(569)
[31] (1920) 252 U.S. 416)

59. In fact, Field, J. had pronounced this view in the earlier case of *Geofrey v. Riggs*[32],

> "It would not be contended that the treaty power extends so far as to authorise what the Constitution forbids, or a change in the character of the government or that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

60. Field, J. was presumably drawing his conclusion as regards the alteration in the boundaries of a State without its consent from the provisions in Art. IV, Section 3 (1) and Article V which deals with amendment.

61. The question still remains whether in exercise of its treaty-power, the United States may override the Bill of Rights embodied in the first Ten Amendments of the Constitution. The question is answered clearly in the negative by Black, J. in *Reid v. Covert*[33], after quoting the text of Art. VI –

> "There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.....It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights - let alone alien to our entire constitutional history and tradition - to construe Article VI as permitting the United States to exercise power under an international agreement. Without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."

62. It is enlightening to hear from the majority in (1957) 354 U.S. 1:

> "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."

63. VI. Let us now come to Article 31(2) of our Constitution. This provision, as the Supreme Court explained during the early days of the Constitution [*State of Bihar v. Kameshwar Singh*[34], embodies the power of Eminent Domain, which is an incident or attribute of Sovereignty and thus inheres in every sovereign political authority. In the American Constitution, there is no express grant of this power, namely the power to take private property for a public purpose, because, as an American writer has pointed out, "since such authority is an incident of sovereignty, it requires no explicit constitutional recognition"

[32] (1890) 133 U.S. 258

[33](1957) 354 U.S. 1

[34](1952) SCR 889 (927, 969) : ( AIR 1952 SC 252 at pp. 270, 282)

(Pritchett, American Constitution, 1959, p. 658). It follows, therefore, that even without an

express embodiment of this power in Article 31(2), read with the relevant entries in the 7th Schedule, the Union of India would have this power over the private property vested in its citizens by municipal law. Though the American Constitution contains no express grant of this power to Congress, the 5th Amendment to the Constitution, assuming this power to be in existence, subjects it to the constitutional obligation to pay compensation to individuals who would be affected by an exercise of the power of Eminent Domain, by providing: "... .nor shall private property be taken for public use, without just compensation."

64. This power of Eminent Domain subject to the above constitutional obligation has been embodied in Article 31(2) of our Constitution. Hence, the general principles deduced in the U.S. A. regarding this power, as discussed above would be applicable to India, except in so far as they are abridged; or taken away by the express provisions of our Constitution to the contrary. In fact, the scope of the constitutional obligation to pay compensation has been abridged by a number of amendments adopted in our Constitution since 1950. Of these, the learned Advocate-General relies on clause (2A), as introduced by the Constitution (Fourth Amendment) Act, 1955 and urges that since the disputed transfer of territory to Pakistan does not involve any transfer of the Petitioners' property to the Union of India, the Petitioners cannot be heard to complain that the proposed demarcation of the territory to implement the transfer to Pakistan cannot be made without providing for the payment of compensation to the Petitioners. The relevant clauses of Article 31, as they stand after the Fourth Amendment of the Constitution are:

> "(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

65. The issues to be decided at the hearing on the Rule proposed would be:

> (i) Whether there was an obligation to compensate a private owner of property situated within a territory which is ceded by the State to a foreign power, prior to the insertion of Clause (2A).
> (ii) In case the answer to (i) be in the affirmative, whether that obligation has been taken away by the insertion of Clause (2A).

66. These being the issues to be tried on the merits, I should not hazard any opinion at this stage, but I would indicate some of the questions which must be answered in order to determine the issues, so that both parties may direct their attention to these questions in addition to those raised earlier and also to indicate why I cannot agree to the contention of the learned Advocate -General

that the petition should be dismissed at once as not maintainable in view of the insertion of Clause (2A). These considerations are - As pointed out by the Supreme Court in Kameswar's case, (1952) SCR 889 (927, 969) : AIR 1952 Supreme Court 252 at pp. (270. 282), just as the power of Eminent Domain is an incident of sovereignty and does not require any express constitutional provision, so also is the liability to compensate the deprived owner is an inseparable incident or concomitant of the exercise of the power of Eminent Domain. As Das, J. said :

> "The State's power to acquire private properly is, in essence, a power to compel the owner to sell his property when the public interest requires it."

67. Cogetit reasons and ampler evidence than already on the record are necessary to come to the conclusion that, having adopted the power of Eminent Domain in Article 31(2), the makers of our Constitution or our Parliament, in its constituent capacity, has earlier before or after the insertion of Clause (2A), separated the inseparable obligation to compensate from the right to take.

> (b) There is nothing in the provisions of the Constitution itself to indicate that we have departed from the general concepts of jurisprudence so far discussed in this judgment. The only provision in Article 253 merely gives the Union Parliament to override the federal distribution of powers to implement treaties and international agreements, which, I have pointed out earlier, is the position in the U.S. A. as well. But Article 253 does not silence Article 31(2) or any of the other guarantees in Part III of our Constitution.
> (e) The directive in Article 51 only indicates what should be the policy of our State in the international sphere and does not enable it to override constitutional guarantees, contained in Part III of the Constitution. So far as our municipal courts are concerned, Article 51 does not take us to anywhere beyond what was indicated by the English Court in the West Rand case, (1905) 2 KB 391.
> (d) In so far as the Objects and Reasons for the Amendment Bill offer a guide as to the scope of the amendment effected by it, if is clear that the Fourth Amendment, which introduced Clause (2A), was effected to override the decisions in the twin cases of Sobodh Gopal, AIR 1954 Supreme Court 92 and Dwarkadas, AIR 1954 Supreme Court 119, which sought to give an extended interpretation to the word 'acquisition' in the light of the American view of 'taking' as expressed in certain American decision, According to that American view, compensation was payable even when the use of a property was restricted by the State in the exercise of its regulatory power (known as the 'Police power') in cases where the restriction was of such degree that it amounted substantially to a deprivation of the owner of the property. Apparently, therefore, the object of the Amendment was to make it clear that in no case would compensation be payable, whether it amounts to a total prohibition or destruction of a property, when it takes place in the exercise of the regulatory powers of the State as are indicated in Article 19(5) of the Constitution. Whether Clause (2A) has gone beyond this is to be debated on ampler materials and on further arguments.

(e) If it be contended that the impugned act of cession does not transfer the property of the Petitioners to the Union of India for any use to be made by itself or its agents, it is open to the Petitioners to raise the following contentions:

(i) Under general principles, it is not necessary for the application of the doctrine of compensability under the exercise of Eminent Domain that the Government, after the acquisition, must use the property itself and the wording of Clause (2A) does not give any indication to the contrary. Our Supreme Court has already held that even the transfer of A's land to B may come under Article 31(2), provided there is a public purpose behind it (of, *State of Bombay v. R. S. Nanji*[35], *Sri Ram Ram Narain v. State of Bombay*[36], *K. K. Kochunni v. States of Madras and Kerala*[37],

(ii) It it be contended that by the impugned act, the property is sought to be transferred to Pakistan outright, without first making a transfer to the Union of India itself, the Petitioners may, prima facie, refer to the doctrine of 'fraud on the Constitution' which is based on the wider maxim that one cannot do indirectly that he cannot do directly.

68. It is by the application of the above doctrine that our Supreme Court has entered into the arena of the adequacy of the quantum of compensation notwithstanding the introduction of the words, at the end of Clause (2) of Article 31, by the same Constitution (Fourth Amendment) Act, -

> ".... .no such law shall be, called in question in any court on the ground that the compensation provided by that law is not adequate" (vide *Union of India v. Metal Corpn. of India*[38], *Vajravelu v. Special Dy. Collector*[39], *Jeejeebhoy v. Asstt. Collector, Thana Prant*[40], an arena which seemed to be, prohibited when the Amendment wasmide.

69. In this context, what is to be considered is the real nature of the mode of deprivation from the standpoint of the Petitioner as well. If the Government of India sought to transfer the disputed lands to the State of Pakistan or a member of the Ruling family thereof as a consideration of an inter-State marriage effected to promote amity and friendship, by means of a deed of gift, it could have done that only after acquiring the lands from the Petitioner's by a transfer of title to itself on payment of compensation under Article 31(2) and if there was no law in existence according to which the Petitioners could be deprived of their property for such purpose. Government would have been obliged to make a law to that effect, and, at once, the provisions of Clause (2) of that Article would have been attracted. The question is whether Government can avoid that consequence by omitting to enact a law to acquire the lands of the Petitioners or to apply an existing law relating to land acquisition, for the purpose and by resort to an Agreement or treaty? The answer is suggested by the observations of the Supreme Court in *U.S. v. Lynah*[41], a case relating to taking for the purpose of improving navigation. In this case, a distinction was made between Government property and private property: As regards property vested in the Government itself, e. g., a military arsenal, no question of payment of compensation arises to make any use of it. Even as regards

[35](1956) SCR 18 : ( AIR 1956 SC 294)
[36] AIR 1959 SC 459 (470)
[37] AIR 1960 SC 1080
[38] C. A. No. 1222 of 1966 : ( AIR 1967 SC 637)
[39](1965) 1 SCR 614 : ( AIR 1965 SC 1017)
[40] C. A. No. 775 of 1962 : ( AIR 1965 SC 1096)
[41](1902) 188 U.S. 445 : 47 Law Ed 539 (546-47)

property vested in a private individual, the Government has an overriding power to take it for Governmental purposes and that is known as the Sovereign's right of Eminent Domain; but in the United States, the exercise of the power of Eminent Domain is subject to the constitutional limitation to compensate the private owner under the 5th Amendment, which cannot be avoided even by omitting to make a law of Congress authorizing the appropriation of the private owners' rights. So said the Supreme Court through Justice Brewer - "..... there is a vast difference between a proprietary and a Governmental right. When the Government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership. Very different from this proprietary right of the Government in respect to property which it owns is its Governmental right to appropriate the property of individuals. All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of properly . . ..... So, the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when this Governmental right of appropriation .....this asserted paramount right .....is exercised it shall be attended by compensation. The Government may take real estate for a post office .....; or in time of war it may take marchaut vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its Governmental rights it takes porperty the ownership of which it concedes to be of an individual, it impliedly promises to pay therefor ..... That which the officers did is admitted by the answer to have been done by authority of the Government and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the Government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the Government....."

70. Nobody will contend that what the Union of India is doing in the instant case is otherwise than in the exercise of its "Governmental rights"; therefore, before we can conclude that the principle laid down in the foregoing American decision as well as those referred to earlier shall be inapplicable in India, we must ponder further and on better materials. As I have already said, the Ninth Amendment cannot, prima facie, be taken as a pro tanto repeal or abrogation of Article 31(2), so far as the petitioners are concerned. Apparently, for that purpose, some provision similar to Article 31 (A) may be necessary, if the Union does really intend to deprive the petitioners of their properly without compensation. VII. On behalf of the petitioners, it may be urged that if the Court is inclined to issue a Rule on Ground III, relating to Article 31(2), why should not the Rule include Ground IV, relating to citizenship, when the Union has similarly failed to stipulate in the disputed Agreement, for the nationality or citizenship rights of the petitioners. The answer is that citizenship, under our Constitution, is not a guaranteed fundamental right such as the right to compensation under Article 31(2). The impugned act of the Respondents cannot, therefore, be restrained on the ground that the Union has failed to reserve proper safeguards in the agreement to protect the citizenship of the petitioners.

71. VIII. In the result, I would first give an opportunity to the petitioners to make clarificatory amendments to the petition on the points referred to in para II p. 8 of this judgment, by the 30th of November, next. Upon such amendments being effected, a Rule nisi will issue upon the Respondents, limited to Ground III, read with prayer clauses (b) and (e) of the petition, relating to Article 31(2) of the Constitution.

72. IX. Before I close, J cannot but refer to a small collateral matter in the interests of the administration of justice and the dignity of this Court as a Court of Record. I have already indicated in this judgment that the promotion of international amity is a laudable object which is enshrined in our Constitution itself in Article 51 but that the question whether compensation is to be paid under Article 31(2) for any act done in pursuance of this laudable object is a different question altogether. It appears that the Under Secretary to the Government of India, who swore the affidavit-in-opposition, was so much animated with this laudable object that he did not hesitate to use the word "indulgence" (para 3 of the counter-affidavit) towards the petitioners, in opposing the prayer for interim injunction. Small as this word may seem, it is explosive in its implication when used in relation to a Court of Justice and no litigant, however, big he may be, can be permitted to utter any such suggestion even unwittingly, either in his pleading or in arguments submitted through counsel. The Court holds a non-magnetic scale of justice which has not the slightest inclination towards either party to a cause and yields only to the weight of solid law, I do not, however, propose to take any further cognizance of it as I am sure in my conviction that the Government of India has not instructed the Under Secretary to use this word in the affidavit and I am equally strong in my conviction that the Govt. of India will issue proper instructions to subordinates of such rank, who are usually entrusted with the business of filing affidavits in Courts, remembering always that a Court of Record, in particular, is established by and as a defender of, the very Constitution by which everyone in authority has to swear from the footman to the President of India,

73. There will be no costs for this hearing.
Order accordingly.