CALCUTTA HIGH COURT

Sugandha Roy

Vs.

Union of India

Matter No. 371 of 1983

(Bimal Chandra Basak, J.)

01.09.1983

ORDER

Bimal Chandra Basak, J.

1.In this application under Article 226 of the Constitution the petitioner is challenging the validity of two agreements dt. the 16th May, 1974 and 6th/7th Oct., 1982 entered into by and between the Government of India and the Government of Bangladesh.

2. This matter has been heard along with two other matters, being - *Nirmal Sen Gupta v. Union of India*[1] and - *Subrata Chatterjee v. Union of India*[2], where similar points have been raised.

3. Certain important points of law, including Constitutional and Public International Law, arising out of certain Treaties and Agreements entered into by and between India and Pakistan and thereafter India and Bangladesh are raised in this case. In the facts of this case it is necessary to give the background of this case with some details. These are admitted facts and these facts would also appear from various judgments of the Supreme Court.

4. The Indian Independence Act, 1947 (hereinafter referred to as the 1947 Act) was passed by the British Parliament. This Act was to come into force from August 15, 1947 which was the appointed day. As from the appointed day two independent Dominions were to be set up in place of the existing India, known respectively as India and Pakistan. Section 2 of the 1947 Act provided that subject to the provisions of sub-sections (3) and (4) of Section 2, the territories of India will be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India except the territories which under sub-section (2) of Section 2 were to be the territories of Pakistan. Section 3, sub-section (1) provided, inter alia, that as from the appointed day the Province of Bengal as constituted under the Government of India Act, 1935 shall cease to exist and there shall be constituted in lieu thereof two new provinces to be known respectively as East Bengal and West Bengal. Sub-section (3) of Section 3 provided that the boundaries of the new provinces as aforesaid shall be such as may be determined

[1] C.O. 4696
[2] C.O. 4537

whether before or after the appointed day by the award of a Boundary Commission appointed or to be appointed by the Governor General in that behalf. Certain provisions were made for the interim period until boundaries were so determined but we are not concerned with the same in the present case. On 30th June 1947 the Governor General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a Boundary Commission was appointed, inter alia, for Bengal consisting of Sir Cyril Radcliffe as the Chairman. So far as Bengal was concerned, the material terms of reference provided that the Boundary Commission should demarcate the boundaries of the two parts of Bengal on the basis of, inter alia, the contiguous areas of Muslims and non-Muslims. The Commission held its enquiry and made an award on August 12, 1947 i.e. three days before the appointed day (hereinafter referred to as the Radcliffe Award). The Chairman gave his decision regarding the demarcation of boundary line in respect of District of Darjeeling and Jalpaiguri in para 1 in Annexure-'A' which provided that a line is to be drawn in a particular manner. The Award directed that the District of Darjeeling and so much of the District of Jalpaiguri as lies north of this line shall belong to West Bengal but the Thana of Phatgram and any other portion of Jalpaiguri District, which lies to the East or South, shall belong to East Bengal. Problem arose subsequently regarding the Berubari Union No. 12 which was situated in the Police Station Jalpaiguri in the District of Jalpaiguri, which was at the relevant time a part of Rajsahi Division. After the partition, Berubari Union formed part of the State of West Bengal and has been governed as such. The Constitution of India was declared to be passed on 26th Nov., 1949. As provided by Article 394, only certain Articles came into force as from that date and the remaining provisions came to be in force from Jan, 26, 1950. Article 1 of the Constitution provided that India, that is, Bharat shall be a Union of States and that the States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule. West Bengal was shown as one of the States in Part A. It was further provided that the territories of the State of West Bengal shall comprise the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. As already pointed out in view of the said award. Berubari Union No. 12 was treated as part of the Province of West Bengal and as such has been treated and governed on that basis. Subsequently, certain boundary disputes arose between India and Pakistan and a Tribunal was set up for the adjudication and final decision of the said disputes. However, the same has nothing to do with the present case and the question of Berubari Union or the Cooch Behar enclaves or Pakistani enclaves in the east was not the subject- matter of the same but the said question was raised by the Government of Pakistan in the year 1952. Admitted position is that during the whole of this period, the Berubari Union continued to be in the possession P> of the Indian Union and was governed as a part of West Bengal. In 1952 Pakistan alleged that under the award the Berubari Union should really have formed part of East Bengal.

5. So far as Cooch Behar Enclaves are concerned the position is as follows. Cooch Behar became a part of the territory of India on Sept. 12, 1949 and accordingly included in the list of Part C States at Serial No. 4 in the First Schedule to the Constitution. Thereafter under the States. Merger (West Bengal) Order provision on was made for administration of the State in all respect as if it formed part of the province of West Bengal and, accordingly, on the 1st Jan., 1950 the erstwhile State of Cooch Behar was merged with West Bengal and began to be governed as if it was part of West Bengal. As a result of this merger Cooch Behar was taken out of the list of Part C States in the First Schedule of the Constitution and added to West Bengal in the same Schedule and the territorial description of West Bengal as prescribed in the First Schedule was amended by

the addition of the clause which referred to the territories which were being administered as if they formed part of that Province. In other words, after the merger of Cooch Behar the territories of West Bengal included those which immediately before the commencement of the Constitution were comprised in the Province of West Bengal as well as those which were being administered as if they formed part of that Province.

6. Certain areas which formed part of the territories of the former Indian State of Cooch Behar and which had subsequently become a part of the territories of India and then of West Bengal became after the partition 'enclaves in Pakistan. Similarly certain Pakistan enclaves were found in India. Dahagram and Angaroota, which are the subject-matter of these Writ Petitions, are two of these Pakistan (now Bangladesh) enclaves in India. The problem arising from the existence of these enclaves in Pakistan and in India along with other border problems was being considered by the Governments of India and Pakistan for a long time. The two Prime Ministers decided to solve the problem of the said enclaves and Berubari Union and entered into agreements settling some of the border disputes including the Berubari Union and the enclaves in the East Pakistan (hereinafter referred to as the 1958 Agreement).

7. I may refer to only two items in para 2 of the said Agreement which are Items Nos. 3 and 10 :

Item 3 - Berubari Union No. 12.

> "This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The Division of Berubari Union No. 12 will be horizontal, starting from the north-east corner of Debigani Thana. The division should be made in such a manner that the Cooch-Behar enclaves between Pachagar Thana of East Pakistan and Berubari Union No. 12 of Jalpaiguri Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch-Behar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan."

Item 10.

> "Exchange of old Cooch-Behar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to."

8. Subsequently there was a doubt as to whether the implementation of the 1958 Agreement relating to Berubari Union and the exchange of Enclaves requires any legislative action either by way of a suitable law of Parliament relatable to Article 3 of the Constitution or in accordance with the provisions of Article 368 of the Constitution or both. Accordingly in exercise of the powers conferred upon him by Clause (1) of Article 143 of the Constitution, the President of India referred the following three questions to the Supreme Court for its consideration (hereinafter referred to as the Berubari Union case):-

> "(1) Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?

(2) If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary in addition or in the alternative?
(3) Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the agreement relating to the exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose in addition or in the alternative?"

9. The Supreme Court answered the said questions in the following manner :

"Q. 1. Yes -
Q. 2. (a) A law of Parliament relatable to Article 3 of the Constitution would be incompetent:
(b) A law of Parliament relatable to Article 368 of the Constitution is competent and necessary.
(c) A law of Parliament relatable to both Article 368 and Article 3 would be necessary only if Parliament chooses first to pass a law amending Article 3 as indicated above, in that case Parliament may have to pass a law on those lines under Article 368 and then follow it up with a law relatable to the amended Article 3 to implement the agreement.
Q. 3. Same as answers (a), (b) and (c) to Question 2."

10. I shall refer to some portions of the judgment of Supreme Court in this connection (Presidential Reference under Article 143 reported in AIR 1960 Supreme Court 845). Reading the relevant portions of the 1958 Agreement the Supreme Court observed that it is difficult to escape the conclusion that the parties to it came to the conclusion that the most expedient and reasonable way to resolve the dispute would be to divide the area in question i.e., Berubari Union No. 12, half and half. It was held that every one of the clauses in this Agreement clearly and unambiguously shows that, apart from, and independently of, the award. it was agreed to divide the area half and half and the method of effecting this division was specifically indicated by making four material provisions on that behalf. It was held that the Agreement was not based on any conclusion based on the interpretation of the award and its effect. It was held that it was an agreement by which a part of the territory of India had been ceded to Pakistan and the question referred to the Court in respect of this Agreement must, therefore, be considered on the basis that it involved cession or alienation of a part of Indian territory. It was further pointed out that what is true about the Agreement in respect of Berubari Union No. 12 was still more emphatically true about the exchange of Cooch-Behar Enclaves. It was further held that since it has been held that the Agreement in respect of Berubari Union No. 12 itself involved the cession of the territory of India a fortiori the Agreement in respect of exchange of Cooch-Behar enclaves did involve the cession of Indian territory. It was further held that is why the question about this exchange must also be considered on the footing that a part of the territory of India has been ceded to Pakistan. It was pointed out that it is clear that unlike question 1 and 2 the third question which had reference to this exchange, postulates the necessity of legislation. Negativing the argument of the learned Attorney-General it was held that since the award was announced. Berubari Union has remained in possession of India and has always been a part of West Bengal and governed as such.

Accordingly it was held that in view of this factual position there should be no difficulty in holding that it falls within the territories which immediately before the commencement of the Constitution were comprised in the Province of West Bengal. It was, accordingly, held that, therefore, as a result of the implementation of this Agreement the boundaries of the State of West Bengal would be altered and the content of Entry 13 in the First Schedule to the Constitution would be affected.

10-A. It was further held that Article 1(3)(c) does not confer power or authority on India to acquire territories. It was pointed out that there could be no doubt that under the International Law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favor of a foreign State. It was further held as follows :-

> "x x x What Article 1(3)(c) purports to do is to make a formal provision for absorption and integration of any foreign territory which may be acquired by India by virtue of its inherent right to do so. It may be that this provision has found a place in the Constitution not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of Indian territory which, at the date of the Constitution, continued to be under the dominion of foreign States; but that is not the whole scope of Article 1(3)(c). It refers broadly to all foreign territories which may be acquired by India and provides that as soon as they are acquired they would form part of the territory of India. Thus on a true construction of Article 1(3)(c) it is erroneous to assume that it confers specific power to acquire foreign territories. The other answer to the contention is provided by Article 368 of the Constitution. That Article provides for the procedure for the amendment of the Constitution and expressly confers power on parliament on that behalf. The power to amend Constitution must inevitably include the power to amend Article 1 and that logically would include the power to cede national territory in favor of a foreign State; and if that is so, it would be unreasonable to contend that there is no power in the Sovereign State of India to cede its territory and that the power to cede national territory which is an essential attribute to sovereignty is lacking in the case of India."

It was further held that the acquisition of foreign territory by India in exercise of its inherent right as a sovereign State automatically makes the said territory a part of the territory of India. After such territory is thus acquired and factually made a part of the territory of India the process of law may assimilate it either under Article 2 or under Article 3(a) or (b). It was further pointed out that the effect of Article 4 is that the laws relatable to Article 2 or Article 3 are not to be treated as constitutional amendments for the purpose of Article 368 which means that if legislation is competent under Article 3 in respect of the Agreement, it would be unnecessary to invoke Article 368. On the other hand, it is equally clear that if legislation in respect of the relevant topic is not competent under Article 3, Article 368 would inevitably apply. On the question as to the problem whether Parliament can legislate in regard to the Agreement under Article 3, it was held that *prima facie* Article 3 may appear to deal with the problems which would arise on the reorganisation of the constituent States of India on linguistic or any other basis but that is not the entire scope of Article 3. Broadly stated it deals with the internal adjustment *inter se* of the

territories of the constituent States of India. There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under Article 1(3)(c) is included in the last clause of Article 3(a) and that such territory may, after its acquisition, be absorbed in the new State which may be formed under Article 3(a). Accordingly Article 3(a) deals with the problem of the formation of a new State and indicates the modes by which a new State can be formed.

11. Thereafter the Supreme Court pointed out that having held that the Agreement amounts to a cession of a part of the territory of India in favor of Pakistan, and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution. Acting under Article 368 Parliament may make a law to give effect to, and implement, the Agreement in question covering the cession of a part of Berubari Union No. 12 as well as some of the Cooch Behar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory in favor of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Article 3 to implement the Agreement in question. On the other hand, if necessary law is passed under Article 368 itself that alone would be sufficient to implement the Agreement. It was further pointed out that the amendment of Article 1 of the Constitution consequent upon the cession of any part of the territory of India in favor of a foreign State does not attract the safeguard prescribed by the proviso to Article 368 because neither Article 1 nor Article 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso.

12. Thereafter, in view of the decision in Berubari case the Constitution (Ninth Amendment) Act 1960 (hereinafter referred to as the 9th Amendment) was enacted by the Parliament, the relevant provisions of which are set out herein below :-

> "2. In this Act -
> (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 territory of Tripura;
> (b) "Indo-Pakistan agreements" mean the Agreements dated the 10th day of September, 1958, the 23rd day of October, 1959 and the 11th day of January 1960, entered into between the Governments of India and Pakistan, the relevant extracts of which are set out in the second Schedule :
> (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.
>
> 3. As from the appointed day in the First Schedule to the Constitution :-
> (a) in the para relating to the territories of the State of Assam the words, brackets and figures "and the territories referred to in Part I of the First Schedule to the Constitution

(Ninth Amendment) Act, 1960" shall be added at the end;

(b) in the para relating to the territories of the State of Punjab the words, brackets and figures "but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added at the end.

(c) in the para relating to the extent of the Union territory of Tripura, the words, brackets and figures "but excluding the territories referred to in Part IV of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added at the end.

THE FIRST SCHEDULE

(See Sections 2(a) and (c) and 3)

Part I

The transferred territory in relation to Item (7) of para 2 of the Agreement dt. the 10th day of Sept. 1958 and Item (i) of para 6 of the Agreement dated the 23rd day of Oct. 1959.

Part II

The transferred territory in relation to item (i) and item (iv) of para 1 of the Agreement dated the 11th day of Jan1960.

Part III

The transferred territory in relation to item (3), item (5) and item (10) of para 2 of the Agreement dated the 10th day of Sept., 1958 and para 4 of the Agreement dated the 23rd day of Oct. 1959.

Part IV

The transferred territory in relation to Item (8) of para 2 of the Agreement dt. the 10th day of Sept., 1958.

THE SECOND SCHEDULE

(See Section 2(b))

1. EXTRACTS FROM THE NOTE CONTAINED IN THE AGREEMENT DATED THE 10TH DAY OF SEPTEMBER, 1958.

* * * * * * * * * *

2. As a result of the discussions, the following agreements were arrived at :-

(3) Berubari Union No. 12. This will be so divided as to give half the area to Pakistan the other half adjacent to India being retained by India. The division of Beruberi Union No. 12 will be horizontal, starting from the north-east corner of Debiganj thana.

The division should be made in such a manner that the Cooch Behar enclaves between Pachagar thana of East and Berubari Union No. 12 of Jalpaiguri thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch Behar enclaves lower down between Boda thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan.

* * * * *

(10) Exchange of old Cooch Behar enclaves in Pakistan and Pakistan enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to."

13. This question of Berubari Union again came up before the Supreme Court in the case of *Ram Kishore Sen v. Union of India reported in*[1] The allegation made by the petitioners in the said writ petition was to the effect that the respondents were attempting or taking steps to transfer a portion of Berubari Union No. 12 and the village of Chilahati to Pakistan and they urged that the said attempted transfer was illegal. It was alleged that the language of the 9th Amendment so far as it relates to Berubari Union No. 12 is concerned is involved and confused and is incapable of implementation. Alternatively, it was urged that if the division of Berubari Union No. 12 was made as directed by the said 9th Amendment, no portion of Berubari Union No. 12 would fall to the south of the horizontal line starting from the north-east corner of Diabiganj Thana and so no portion of the said Union can be transferred to Pakistan. In regard to the village of Chilahati, the appellants' case was that the said village was not covered either by the 1958 Agreement or by the Ninth Amendment Act. It was alleged that this village was a part of West Bengal and it was not competent for the respondents to transfer it to Pakistan without adopting the course indicated in that behalf by the opinion of the Supreme Court in the Berubari Union case. These contentions were rejected by Supreme Court which held that the division as contemplated by the 1958 Agreement or by the Ninth Amendment had to be so made that the southern portion goes to Pakistan and the northern portion which is adjacent to India remains with India. It was pointed out that when it is said that the division will be horizontal starting from the north-east corner of Berubari Thana, it was not intended that it should be made by a mathematical line in the manner suggested by the appellants. It was pointed out that the provision does not refer to any line as such; it only indicates broadly the point from which the division has to begin east to west and it emphasizes that in making the said division, what has to be borne in mind is the fact that the union in question should be divided half and half. It was pointed out that even this division of half and half cannot be half and half in a mathematical way. Regarding Chilahati the Supreme Court held that it was common ground that the village of Chilahati in the Debiganj Thana was allotted to Pakistan and it appears that through inadvertence, a part of it was not delivered to Pakistan on the occasion of partition which followed the Radcliffe Award. It was pointed out that that the Union of India proposed to do, was to transfer to Pakistan the area in question which really belongs to her. The Supreme Court rejected the contention that having regard to the provisions contained in Entry 13 in the First Schedule to the Constitution, it must be held that even though a portion of Chilahati which is being transferred to Pakistan may have formed part of Chilahati allotted to Pakistan under the Radcliffe Award, it has now become a part of West Bengal and cannot be ceded to Pakistan without following the procedure prescribed by the Supreme Court in the Berubari Union case. The Supreme Court held that the expression "as if" in the context that "the territories which were being administered as if they formed part of that province", have a special significance. They referred to territories which originally did not belong to West Bengal but which became a part of West Bengal by reason of merger agreements. It was held that chilahati might have been administered as a part of West Bengal; but the said administration cannot attract the provisions of Entry 13 in the First Schedule because it was not administered as if it was a part of West Bengal within the meaning of that entry. It was pointed out that the clause "as if" was not intended to take in cases of territories which were administered with the full knowledge that they did not belong to West Bengal and had to be transferred in due course to Pakistan. The said clause was clearly and specifically intended to refer to territories which merged with the

[1] AIR 1966 SC 644

adjoining States at the crucial time, and so, it cannot include a part of Chilahati that was administered by West Bengal under the circumstances referred to. It was held that the area did

not form a part of P> West Bengal within the meaning of Entry 13, Sch.1.

14. Thereafter another attempt was made to defer the transfer of the southern portion of the Berubari Union to Pakistan. In June 1966 a writ petition was filed in the Calcutta High Court challenging the validity of the proposed demarcation on the ground, inter alia, that the petitioners would be deprived of their right of citizenship and also of their property without payment of compensation. The constitutional question involved was whether compensation under Article 31(2) of the Constitution has to be provided for in respect of the petitioners before demarcation in implementation of the 9th Amendment, Calcutta High Court passed a judgment in favor of the petitioners *Sudhangshu Mazumdar v. Union of India*[2], Being aggrieved by the same the Union of India preferred an appeal before the Supreme Court. It was held by Supreme Court that in order to constitute acquisition or requisition, within the meaning of Article 31, there must be 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 was held that the effect of the 9th Amendment, by which the southern part of Berubari Union was to be ceded to Pakistan, cannot be regarded as a transfer of the ownership or right to possession of any property of the respondents to the State within the meaning of Article 12. It was further pointed out that mere deprivation of property, unless it amounts to acquisition or requisition within the meaning of Clause 2(A) of Article 31, will not attract Clause (2) and no obligation to pay compensation will arise thereunder. Accordingly the judgment of the Calcutta High Court was reversed and the writ petition was dismissed. *(Union of India v. Sudhangshu Mazumdar*[3]*).*

15. In spite of such 1958 Agreement, Berubari Union case and the 9th Amendment, the southern part of Berubari Union was not transferred to Pakistan and there was no implementation of the same and there was also no exchange of enclaves as I have pointed out in details later. In 1971 a sovereign independent nation known as Bangladesh, emerged which comprised of the territory previously known as Eastern Pakistan. In the year 1974 there was an Agreement between the two Prime Ministers of India and Bangladesh (hereinafter referred to as 1974 Agreement). I shall set out only the relevant portions of the said 1974 Agreement with which we are concerned in this case :-

ARTICLE – I

> The land boundary between India and Bangladesh in the areas mentioned below shall be demarcated in the following manner.
>
> ....
>
> 12. Enclaves
>
> The Indian enclaves in Bangladesh and the Bangladesh enclaves in India should be exchanged expeditiously, excepting the enclaves mentioned in paragraph 14 without claim to compensation for the additional area going to Bangladesh.
>
> 14. India will retain the southern half of South Berubari Union No. 12 and the adjacent enclaves, measuring an area of 2.64 square miles, approximately, and in exchange, Bangladesh will retain the Dahagram and Angarpota enclaves. India

[2] AIR 1967 Cal 216. (See also 72 Cal WN 349)

[3] AIR 1971 SC 1594

> will lease in perpetuity to Bangladesh an area of approximately 178 metres x 35

metres near 'Teen Bigha' to connect Dahagram with Panbari Mouza (P.S. Patgram) of Bangladesh.

ARTICLE – 2

The Governments of India and Bangladesh agree that territories in adverse possession in areas already demarcated in respect of which boundary strip maps are already demarcated in respect of which boundary strip maps are already prepared, shall be exchanged within six months of the signing of the boundry strip maps by the Plenipotentiaries. They may sign the relevant maps as early as possible after this Agreement has been ratified by the two Governments. Early measures may be taken to print maps in respect of other areas where demarcation has already taken place. Those should be printed by 31st May 1975 and signed by the plenipotentiaries thereafter in order that the exchange of adversely held possessions in these areas may take place by the 31st December, 1975. In sectors still to be demarcated, transfer of territorial jurisdiction may take place within six months of the signature by plenipotentiaries on the concerned boundary strip maps.

ARTICLE – 3

The Governments of India and Bangladesh agree that when areas are transferred, two people in these areas shall be given the right of staying on where they are, as nationals of the State to which the areas are transferred pending demarcation of the boundary and exchange of territory by mutual agreement, there should be no disturbance of the status quo and peaceful conditions shall be maintained in the border regions. Necessary instructions in this regard shall be issued by the local authorities on the border by the two countries.

ARTICLE – 4

The Governments of India and Bangladesh agree that any dispute concerning the interpretation or implementation of this Agreement shall be settled peacefully through mutual consultations.

ARTICLE – 5

The Agreement shall be subject to ratification by the Governments of India and Bangladesh and Instruments of Ratification shall be exchanged as early as possible. The Agreement shall take effect from the date of the exchange of the Instruments of Ratification."

16. It will be seen that the sum total of this 1974 Agreement, so far as we are concerned in this

case, is that the 1958 Agreement regarding the transfer of the southern part of Berubari Union in respect of which 9th Amendment was made but which was till then not being given effect to, was modified by allowing India to retain the said portion and in consideration of the same Bangladesh was allowed to retain Dahagram and Angarpota enclaves. An exception was made in respect of these two enclaves while the exchange of other enclaves was confirmed. It was further provided that India will grant a "lease in perpetuity" to Bangladesh of an area near Teen Bigha. It was stated that this was so done to connect Dahagram with Panbari Mouza of Bangladesh.

17. In October 1982 an understanding was reached between the Governments of India and Bangladesh in connection with the so-called "lease in perpetuity" in terms of Item 14 of Article 1 of the 1974 Agreement by exchange of letters between the two Foreign Ministers of the two Governments (hereinafter referred to as 1982 Agreement). This was described as "Terms of lease in perpetuity of the Tin Bigha". It was further provided in the said letters that the exchange of the said letters shall constitute an agreement between the two Governments in respect of the "leased area" and will be an integral part of the said 1974 Agreement. I shall set out the terms of the same :

> "1. The lease in perpetuity of the aforementioned area shall be for the purpose of connecting Dahagram and Angarpota with Panbari Mouza (P.S. Patgram) of Bangladesh to enable the Bangladesh Government to exercise her sovereignty over Dahagram and Angarpota.
> 2. Sovereignty over the leased area shall continue to vest in India. The rent for the leased area shall be Bangladesh Tk. 1/- (Bangladesh Taka one) only per annum. Bangladesh shall not, however, be required to pay the said rent and the Government of India hereby waives its right to charge such rent in respect of the leased area.
> 3. For the purposes stated in para 1 above Bangladesh shall have undisturbed possession and use of the area leased to her in perpetuity.
> 4. Bangladesh citizens including police, paramilitary and military personnel along with their arms, ammunition, equipment and supplies shall have the right of free and unfettered movement in the leased area and shall not be required to carry passports or travel documents of any kind. Movement of Bangladesh goods through the leased area shall also be free. There shall be no requirement of payment of customs duty, tax or levy of any kind whatsoever or any transit charges.
> 5. Indian citizens including police, paramilitary and military personnel along with their arms, ammunition, equipment and supplies shall continue to have the right of free and unfettered movement in the leased area in either direction. Movement of Indian goods across the leased area shall also be free. For the purpose of such passage the existing road running across it shall continue to be used. India may also build a road above and/or below the surface of the leased area in an elevated or subway farm for her exclusive use in a manner which will not prejudice free and unfettered movement of Bangladesh citizens and goods as defined in paras 1 and 4 above.
> 6. The two Governments shall co-operate in placing permanent markers along the perimeters of the leased area and put up fences where necessary.

7. Both India and Bangladesh shall have the right to lay cables, electric lines, water and sewerage pipes etc. over or under the leased area without obstructing free movement of citizens or goods of either country as defined in paras 4 and 5 above.

8. The modalities for implementing the terms of the lease will be entrusted to the respective Deputy Commissioners of Rangput (Bangladesh) and Cooch Behar (India). In case of differences, they will refer the matter to their respective Governments for resolution.

9. In the event of any Bangladesh/Indian national being involved in an incident in the leased area, constituting an offence in law. He shall be dealt with by the respective law enforcing agency of his own country in accordance with its national law. In the event of an incident in the leased area involving nationals of both countries, the law enforcing agency on the scene at the incident will take necessary steps to restore law and order. At the same time immediate steps will be taken to get in touch with the law enforcing agency of the other country. In such cases, any Indian national apprehended by a Bangladeshi law enforcing agency shall be handed over forthwith to the Indian side and Bangladeshi national apprehended by an Indian law enforcing agency shall be handed over forthwith to the Bangladesh side. India will retain residual jurisdiction in the leased area."

18. Being aggrieved by the said 1974 and 1982 Agreements, this writ petition has been filed. In this writ petition it is stated, inter alia, as follows :

It is stated that the petitioners are the citizens of India. Petitioners Nos. 1 and 2 have permanent residents at Village Upanchauki Kuchlibari, P.O. Kuchlibari, within the Police Station Mekliganj, in the District of Cooch- behar and Mekliganj Town P.S. Mekliganj, District, Cooch-behar respectively. It is stated that the Kuchlibari Anchal is situate on the South-eastern corner near the Indo-Bangladesh Border and a metalled road which runs from Mekliganj to Kuchlibari Anchal is the only line of communication and the channel of trade and commerce between Mekliganj Anchal, Mekliganj Town is only 3 furlongs from the border of Angarpota adjacent to Dahagram, both enclaves of Bangladesh. It is further stated that there are Indian enclaves in Bangladesh and the Bangladesh enclaves in Jalpaiguri-Cooch-behar District, more specifically, Indian enclaves in Bangladesh are 130 in number, measuring an area of 32.745 Sq. miles and Bangladesh enclaves are 95 in number, comprising an are of 19.202 sq. miles.

It is stated that Teen Bigha, a border area within Indian territory, holds a very important position inasmuch as the said area is the only connecting link and a channel at communication between Kuchlibari Anchal on the South-east and the Mekliganj on the South-west of the District of Cooch-behar through a metalled road running between the two areas. The inhabitants at Kuchlibari Anchal numbering 32,000 persons more or less depend absolutely on Mekliganj, a sub-divisional town, for the business, trade, commerce, service, security, court-matters etc. and it is essential that the said line of communication through Teen Bigha should remain undisturbed and unaffected. It is further stated that Tinbigha holds a strategic position from the geo-political point of view as well, inasmuch as the said area is situate in-between Dahagram and Angarpota,

the Bangladesh enclaves on the west of Tinbigha and Panbari Mouza within the Police Station Patgram of Bangladesh on the east of the same. By transferring a large portion of Teen Bigha under the expression "lease in perpetuity" India, under the said 1974 and 1982 agreements has provided to Bangladesh a permanent corridor for enabling her to cross over the Indian territory and to have political control over Dahagram and Angarpota enclaves, which factually are already part of India inasmuch as people living there are dependent on Mukligunj and Kuchlibari for their livelihood, education, medical treatment and as the Indian Currency and not Bangladesh Currency is the medium of exchange there. Such a passage is not innocent passage but a passage which is prejudicial to peace, good order or security and contrary to Geneva Convention.

19. In this case an affidavit has been affirmed on behalf of the Union of India wherein it is stated, inter alia, as follows :- The enclaves consisting of Dahagram and Angarpota was originally part of East Pakistan and is now a Bangladesh enclave within Indian territory. A boundary dispute existed between India and Pakistan in respect of Berubari which was sought to be resolved by the Nehru-Noon Agreement of 1958, whereby the Southern half of Berubari was to go to Pakistan. In addition four enclaves in Cooch Behar District which would become separated from India as a result of the partition of Berubari were also to go to Pakistan on the basis of the agreed principle of transfer of enclaves due to contiguity of territory. In order to give constitutional sanction to the above agreement on the advice rendered by the Supreme Court on a Presidential Reference, the Constitution (Ninth-Amendment) Act was passed by Parliament in Dec. 1960. In order to connect Dahagram with Panbari Mauza on the Bangladesh main land, India agreed to lease in perpetuity to Bangladesh an area of 178 x 85 mtrs. near Teen Bigha and the terms of lease Agreement was concluded on 7th Oct., 1982. This Agreement provides for Indian sovereignty over the corridor and explicitly provides that "Indian citizens including police, para-military and military personnel along with their arms, ammunition, equipment and supplies shall continue to have free and unfettered movement in the leased area in either direction. Movement of Indian goods across the leased area is also to be free. It has further been provided in the Agreement that sovereignty over the leased area shall continue to vest in India. It is stated that following the accession to India of the princely State of Cooch Behar, India acquired 130 enclaves belonging to the Maharaja of Cooch Behar with an approximate total area of 84.82 Sq. Kms. Four of these enclaves were contiguous to India where the Indian Government exercised control and three enclaves fell within Bangladesh enclaves in the Cooch Behar District, which would eventually merge with India. The effective number of Indian enclaves in Bangladesh was further reduced by four following the exercise of Indian sovereignty over South Berubari as e result of the 1974 India Bangladesh Land Boundary Agreement. There are at present 119 Indian enclaves in the Rangpur and Dinajpur Districts of Bangladesh with an approximate total area of 69.414 Sq. Kms. which will merge with bangaladesh. There are 96 Bangaldeshi enclaves in India. Out of these 21 fall within India enclaves in Bangladesh and will eventually merge with trial country. In terms of the 1974 Indo-Bangladesh Land Boundary Agreement, Bangladesh will retain the enclaves of Dahagram and Angarpota. 73 Bangladeshi enclaves, comprising an area of approximately 29.006/- Sq. Kms. will therefore merge with India. These enclaves will be exchanged with the exception of South Berubari which will be retained by India and the enclave of Dahagram and Angarpota which will be retained by Bangladesh. It is further stated that in terms of size the portion of South Berubari together with four enclaves which will be retained by India would be approximately 18.13 Sq. Kms. and the total area of Dahagram and Angarpota would be approximately 18.67 Sq. Kms. It was stated that it is not correct to say that Dahagram and Angarpota are parts of India. It was however, admitted that because of the difficulties of

exercising administrative control, the residents of India enclaves in Bangladesh use Bangladesh currency for their daily purchase from the nearest Bangladesh Markets. Similarly, the residents of Bangladesh enclaves in India use Indian currency for their purchase from the Indian markets nearest to the enclaves. The residents of Dahagram and Angarpota enclaves are accordingly dependent on Mekliganj in India for buying their daily necessities.

20. It was denied and disputed that the 1974 or 1982 Agreement was invalid or illegal for any reason at all.

21. Mr. T.K. Biswas appearing on behalf of the petitioner has made the following submissions; He has submitted that the Government of India or the Prime Minister has no power to cede any territory which is part of India without an amendment of the Constitution. In this context he has referred to the decision of the Supreme Court in the Presidential Reference in the case of Berubari Union reported in AIR 1960 Supreme Court 845. He has submitted that "cession" of any territory would include sale, lease or license of any Indian territory in favor of any foreign state. According to him if the transaction concerned contemplates alienation of any right in respect of an Indian territory then that would amount to "cession"; it would amount to transfer of the sovereignty.

22. He has firstly submitted that by virtue of the 1958 Agreement itself and even without any reference to the 9th Amendment, the two enclaves namely, Dahagram and Angarpota (hereinafter referred to as the two enclaves) became part of the Indian territory. By virtue of the 1974 and 1982 Agreements these two enclaves are being ceded to Bangladesh inasmuch as these two subsequent agreements treat these two enclaves as a part of Bangladesh territory. In any event he has submitted that in view of the 9th Amendment which provides for exchange of enclaves these two enclaves have become a part of the territory of India. He has submitted that in any event the 1974 Agreement amounts to cession of territory by providing for, under Clause 14, a lease in perpetuity in respect of Teen Bigha, which is admittedly an Indian territory. He has submitted that the 1982 Agreement provides the terms and conditions of such lease in perpetuity as provided for by Clause 14 of the 1974 Agreement. He has submitted that this "lease in perpetuity" amounts to ceding a territory. In any event he has submitted that if the different Clauses of the 1982 Agreement are examined, it would be clear that this amounts to giving up the Sovereignty so far as 'Teen Bigha' is concerned. With reference to Clause 2 of the said Agreement he has submitted that describing it as a lease is a misconception; it amounts to practically a gift. Referring to Clause 3 he has stated that it provides for undisturbed possession and use by Bangladesh in respect of Teen Bigha. Clause 6 provides for fencing. It affects the right of free movement of Indian nationals. It also takes away the exercise of Sovereignty by India in respect of this admitted Indian territory. He has drawn my attention to Clause 9 and has stated that by this Clause the jurisdiction of the Governments in India and the Sovereignty of India is being given a go-by for ever. Even if a Bangladeshi commits any offence according to the Indian law, he cannot be dealt with by Indian Police or tried by Indian courts in accordance with Indian law.

23. He has further submitted that the 1974 agreement being an agreement for a "lease in perpetuity" in respect of "Teen Bigha" if the 1982 terms and conditions are interpreted in a manner which is not in consonance with a "lease in perpetuity", then and in that event, 1982 agreement is inconsistent with 1974 agreement and therefore it is illegal and invalid.

24. It was also submitted that there is a necessity of a referendum in the facts of this case.
25. He has further submitted that the 1958 Agreement provides for the transfer of southern portion of Berubari Union in favor of Pakistan and the exchange of enclaves. He has submitted that the 1974 and 1982 Agreements, so far as they modify or give a go-by to the earlier 1958 Agreement regarding Berubari Union and those enclaves, are invalid and illegal. It was also submitted that these two subsequent agreements cannot terminate the earlier 1958 Agreement and that at least a notice has to be given and the earlier Agreement denounced before 1974 and 1982 Agreements can be given effect to. He has submitted that there is no automatic termination of 1958 Agreement by virtue of emergence of Bangladesh. He has submitted that the termination of treaty by act of parties can be made by mutual agreement or by act of denunciation. He has also submitted that in the case of *Ramkishore v. Union of India reported in*[4] it has been finally decided by the Supreme Court that Berubari should go to Pakistan and this position cannot be changed by sacrifice of an Indian territory namely Teen Bigha. He has thereafter raised the question as to whether 1974 and 1982 agreements relating to Teen Bigha amount to lease or agreement to lease. He has also referred to Article 51(c) of the Constitution to contend that the 1958 Agreement must be given effect to as it is binding on the Government of India. He has further submitted that 1974 Agreement provides for a "lease in perpetuity" in respect of Teen Bigha and that no term or condition other than those in respect of and in consonance with a lease in perpetuity can be agreed to later. The subsequent 1982 Agreement is subordinate to 1974 Agreement and it cannot go beyond the parent treaty of 1974.

26. In support of his contentions Mr. Biswas has also relied on the following: - Berubari Union Presidential Reference case; *Ramkishore v. Union of India reported in*[5] *Union of India v. Sudhangshu Mazumdar*[6]*; State of Gujarat v. Vora Fiddali reported in*[7] *Maganbhai v. Union of India*[8]*, (Head Note 'C' and para 44)*; *Kesavananda Bharati v. State of Kerala*[9]*, AIR 1973 Supreme Court 1461 at p. 1948 (paras 1714 to 1719)*; *Minerva Mills v. Union of India, AIR 1980 Supreme Court 1789 (Paras 114 to 116)*; *Shri Tarkeshwar Sio Thakur Jiu v. B.D. Dey and Co., AIR 1979 Supreme Court 1669*; Oppenheim-International Law, Vol. I, 7th Edn. page 498; Starke-Introduction of International Law 8th Edition pages 182 and 183; Oppenheim International Law 8th Edn. page 894 Article 503; page 548 Article 216; Starke-Introduction of International Law 4th Edn. page 315; Ian Brownlie 2nd Edn. page 117.

27. It may be pointed out that in the other two writ petitions referred to above, Mr. Dutt Majumdar (followed by Mr. Chakraborty) and Mr. Sengupta sought to make some submissions. However I need not refer to the same because they were merely repetitive of the submissions already made by Mr. Biswas and in some cases amounting to mere agitation of political grievances.

28. The learned Solicitor General (who is at present the Attorney-General of India), appearing on behalf of the Union of India has made the following submissions :

> Regarding the 1958 Agreement, he has submitted that after the decision of Supreme Court in Berubari Union Reference case, the Constitution 9th

[4] AIR 1966 SC 644 [6] AIR 1966 SC 644 [8] AIR 1964 SC 1043 (Para 155)
[5] AIR 1960 SC 845 [7] AIR 1971 SC 1594 (paras 6 to 8 and 10) [9] AIR 1969 SC 783 (para 44)

> Amendment Act was enacted. He placed in details the relevant provision of the 9th

Amendment Act. However, he has submitted that so far as the "appointed day" is concerned, in respect of Berubari Union and the exchange of enclaves, no such "appointed day" has been fixed and no notification fixing such "appointed day" has been published. Drawing my attention to sub-section (c) of Section 2 of the 9th Amendment, he has submitted that the question of "transferred territory" would only arise after demarcation. There has been no demarcation so far as Eastern India is concerned. With reference to Section 3(c) he has drawn my attention to the fact that the Amendment of the Constitution specified therein would be with effect from the "appointed day" and as there has been no "appointed day" in respect of the territories of the State of West Bengal is concerned. Such Constitutional Amendment has not yet come into effect. I should point out that though at first he submitted that the 9th Amendment was enacted for what was necessary, i.e. cession and not for what was unnecessary, i.e., acquisition, subsequently he did not press the same in view of his submission that the 9th Amendment has not yet come into effect so far as the territory in the Eastern India is concerned and that the position remains as it was before the 9th Amendment Act was enacted. He has submitted that Dahagram and Angarpota enclaves have not been made part of the Indian territory up to now and, therefore, the question of cession of the same does not arise. He has submitted that in any event a Treaty or an Agreement can be changed by another Treaty or Agreement. However, when such change involves a cession, an amendment of the Constitution is necessary as pointed out by Supreme Court. However, that is not necessary in the case of accession. He has admitted that the statement made in para 6 of the affidavit-in-opposition affirmed on behalf of the Union of India to the effect that the "appointed day" within the meaning of the 9th Amendment was the 17th January 1961, is a mistake. This reference to the "appointed day" was in respect of the territories in the West of India and not in the Eastern India because no appointed day has yet been notified in respect of Eastern India.

29. With reference to the 1974 Agreement he has drawn my attention to Article 5 thereof, wherein it has been stated that the said Agreement shall be subject to ratification by the Governments of India and Bangladesh and that Instruments of Ratification shall be exchanged as early as possible. It was further provided that the said Agreement shall take effect from the date of the exchange of the Instruments of ratification. He has stated that there has not yet been any such Ratification. The only thing which has been done in 1982 is to settle the terms and conditions regarding such "lease in perpetuity" contemplated by 1974 Agreement.

30. Next Mr. Solicitor General has taken me through the 1982 Agreement in details. At the outset he has made it clear that the stand of the Government of India is that the transaction contemplated by the 1974 and 1982 Agreements, so far as Teen Bigha is concerned, does not amount to or contemplate a lease far less "lease in perpetuity" even if the expression "lease in perpetuity" has been used in these two agreements. He has submitted that in fact it is a bare license. He has submitted that no exclusive possession in respect of this area is contemplated in favor of Bangladesh by virtue of the 1974 Agreement which is to be read with the 1982 Agreement but that the Bangladesh Government and the Bangladeshis have been only allowed to

use the said area as corridor between the main land of Bangladesh and these two enclaves. Certain facilities in respect of the same for certain limited purposes have been permitted by these two Agreements which they would not otherwise have been entitled to but this is without affecting the sovereignty of India. The whole agreement is for the purpose of enabling Bangladesh Government to exercise its sovereignty over these two enclaves which is allowed to remain as a part of the territory of Bangladesh.

31. Thereafter he has made detailed submissions in respect of the individual clauses of 1982 Agreement as follows :-

> In respect of clause (1) he has drawn my attention to the words "to enable" and submitted that it is merely permissive and not conferring any right on the Government of Bangladesh or the Bangladeshis.

32. Regarding Clause (2) he has said that it has been made clear there that the sovereignty in respect of this territory remains in India.

33. Regarding the expression "undisturbed possession and use" in Clause (3) he has submitted that though the expression "undisturbed possession" has been used but in fact the subsequent clauses and the other clauses of the said Agreement would show that it is not in fact the case of an undisturbed possession. It is merely giving permission to do something in respect of the land in question.

34. With reference to Clause (4) and the expression "free and unfettered movement in the leased area" used therein, he has submitted that this is controlled by Clause (1). However, he has made it clear that Bangladeshi national or personnel are not to be allowed to station themselves in or roam about this area. This is only for the purpose of their ingress or egress and in any event it is not a right in exclusion of others particularly the Indian nationals.

35. Regarding Clause (5) he has made similar submissions. He has submitted that there is no exclusive possession given to Bangladesh. In this connection he has drawn my attention to the expressions "the existing road to continue", "road above or below" and "may also" and he has pointed out that this makes it clear that the Indian nationals or personnel have not been deprived of the use of the already existing road in this corridor. He has also relied on the general principles that anything above the earth and below the earth belongs to the owner of the earth. He has submitted that no exclusive possession has been given to Bangladesh or its nationals.

36. With reference to Clause (6) he has submitted that the markings are for the control of the Bangladeshi and not Indian nationals. The right of the Indian citizen is not in any way restricted so far as this corridor is concerned.

37. With reference to Clause (7) he has submitted that no exclusive possession is to be handed over.

38. Regarding Clause (9) he has submitted as follows:

So far as the first sentence is concerned, he has submitted that this involves a case where the persons involved, i.e., both "offending" and "offended", belong to India or Bangladesh. In case, they are Bangladeshi nationals, they are to be handed over to the appropriate authority of Bangladesh. Regarding the second sentence, he has submitted that this applies where the persons involved are mixed nationals and only in the case of law and order problem and not where it also amounts to an offence. He has submitted that so far as the law and order problem is concerned, that is to be dealt with by the respective authorities in the manner specified in the second sentence and the sentences thereafter. However, when it is not merely a law and order situation but it also amounts to an offence, the Government of India retains its full jurisdiction over the persons involved irrespective of these nationals and that is also made clear by the last sentence of this clause.

39. Regarding sovereignty, he has made submissions that in this case the implementation of this Agreement would not amount to giving up the sovereignty of India in any manner whatsoever.

40. In support of his submissions he has relied on the following: *State of West Bengal v. Union of India*[10], *Associated Hotels v. Kapoor*[11], *K. Ramamurty v. Gopi Nath*[12], *Associated Hotels v. Sardar Ranjit Singh*[13], Poulose International Law - P58 Starke - International Law, 8th Edn. P. 113: Ian Brownlie, - 2nd Edition, para 12; Saunders - "Words and Phrases", 2nd Edn. Page 92.

41. I should also point out that appearing on behalf of the State of West Bengal, Mr. S.K. Acharya, Advocate General, adopted the arguments of the Learned Solicitor General.

42. The first question to be decided in this case is whether the said two enclaves, namely, Dahagram and Angarpota, formed part of the Indian territory at the time of the said 1974 or 1982 Agreement. If they did form a part of the Indian territory at the relevant time, then there cannot be any doubt that implementation of the said two Agreements, would amount to cession of an Indian Territory and accordingly will require amendment of the Constitution as it was done by way of 9th amendment of the Constitution pursuant to Berubari Union Reference Case. It is not disputed that in spite of the earlier Agreement of 1958 and the 9th Amendment, the 1974 and 1982 Agreements provide that though other enclaves are to be exchanged but not these two. It is not disputed before me that originally, that is, before 1958 Agreement, these two enclaves did not form part of the Indian territory and that therefore they were not included within the First Schedule to the Constitution. It is not disputed that before the 1958 Agreement these two enclaves formed part of the territory of Pakistan and that they were administered and governed as such. The question is whether subsequently, by virtue of the 1958 agreement or the 9th Amendment, these two enclaves ceased to be a part of the territory of Pakistan (subsequently Bangladesh) and formed part of India.

43. Before I go into this question, in this context I shall refer to the affidavit-in-opposition affirmed and filed on behalf of the Union of India in this case, wherein it has been stated as follows :

[10] AIR 1963 SC 1241 at page 1252 (paras 27 to 32)
[11] AIR 1959 SC 1262 (para 27)
[12] AIR 1968 SC 919
[13] AIR 1968 SC 93

"5. The enclave consisting of Angarpota and Dahagram is today a Bangladesh enclave within the territory of India."

"6. The people of this enclave are not Indian citizens. They are citizens of Bangladesh and are exercising rights as such citizens. They voted in the Bangladesh Presidential Elections in June 1978, and Nov. 1981 and in the General Election, held in Feb. 1979. This is because this enclave was to become a part of Indian territory only after the implementation of the Indo- Pakistan Agreement familiary known as the Nehru-Noon Agreement in terms of the provision providing for the merger of India enclaves in East Pakistan with Pakistan and the merger of Pakistan enclaves in India with India. The Constitution (Ninth Amendment) Act, 1960 provided for its implementation. Section 2(a) of the said Amendment defined the appointed day for transfer as such date as the Central Government may by notification in the official gazette appoint as a date for the transfer of territories to Pakistan in pursuance of the Indo-Pakistan Agreement. The appointed day was 17-1-1961. However, in view of certain legal proceedings instituted before the Calcutta High Court and certain interim orders passed by the said High Court, the Nehru-Noon Agreement was not implemented with regard to East Pakistan. The said cases related to Berubari. The last of such cases relating to Berubari was disposed of by the Supreme Court on 29-3-1971 and is reported in AIR 1971 Supreme Court 1954. By that time there was serious civil strife in East Pakistan and the people of the present Bangladesh were then struggling for establishing independence from Pakistan which they eventually obtained. In so far as the present Bangladesh is concerned they treat 26th March 1971 as the date of their Independence. India recognized Bangladesh on 6th Dec., 1971."

In this context I may point out that as I have already noted, the learned Solicitor General has frankly admitted before me that mentioning of "appointed day" being "17-1-1961" in the affidavit referred to above is the "appointed day" only with regard to Western India as it would appeal from the notification quoted above.

44. The first question is whether merely by virtue of the 1958 Agreement these two enclaves became part of the territory of India. By the 1958 Agreement, it was agreed by the two Governments that there would be exchange of enclaves which means that these two Pakistani enclaves along with other Pakistani enclaves would thereafter form part of the Indian territory, whereas the Cooch Behar enclaves (part of Indian territory) would become part of Pakistan.

45. It is true that, as pointed out by Supreme Court in the Berubari Union case, in case of an accession to a State it is not necessary to enact any law. Such law is required only for the purpose of cession. However, from the facts of this case it is clear that the 1958 Agreement, so far as these two enclaves are concerned, was never given effect to and they remained to be governed and were in fact governed by the Government of Pakistan and thereafter by the Government of Bangladesh as before. Merely by an Agreement there cannot be any automatic accession when it is clear that the 1958 Agreement was not implemented at least so far as the exchange of enclaves are concerned. When a treaty comes into existence, it has to be implemented. In this context I

may refer to the relevant provisions of the Constitution which refers to Treaties and Agreements with foreign countries and making any law for the purpose of implementation of the same.
46. Article 253. Legislation for giving effect to international agreements. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."
Sch. VII.

47. List 14. "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

48. In the case of *Maganbhai v. Union of India reported in*[14] it was observed by Supreme Court as follows :

> "A treaty really concerns the political rather than the judicial wing of the State. When a treaty or an award after arbitration comes into existence, it has to be implemented and this can only be if all the three branches of Government to wit the Legislature, the Executive and the Judiciary, or any of them, possess the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some jurisdictions the treaty or the compromise read with the Award acquires full effect automatically in the Municipal Law, the other body of Municipal Law notwithstanding. Such treaties and awards are "self-executing". Legislation may nevertheless be passed in aid of implementation but is usually not necessary" (para 25).
>
> "The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power." (Para 82)
>
> "The treaty of cession must be followed by actual tradition of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition the cession being completed by ratification of the treaty of cession and thus enabling the new owner to cede the acquired territory to a third State at once without taking actual possession of it. But of course the new owner-State

cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory", (Oppenheim on International Law 8th Ed. Article 217).

[14] AIR 1969 SC 783

In this context it should be remembered that in the present case there is a question of exchange of enclaves. The accession of some enclaves is the consideration of the cession of other enclaves. It cannot be said that the 1958 Agreement provides for accession and cession separately for these enclaves. There is only one transaction involved i.e. exchange. The 1958 Agreement, at least so far as exchange of enclaves is concerned, remained executory. This question now stands concluded in view of the decision in the Berubari Union case which provides that legislation is required for such exchange of enclaves. As a matter of fact in view of such decision, the 9th Amendment was enacted which provides for such exchange of enclaves. Accordingly, it is clear that by the 1958 Agreement itself the said two enclaves did not become a part of the territory of India. The 1958 Agreement, so far as it related to Berubari Union and the exchange of enclaves, was not implemented, either in fact or in law.

49. The next question is whether these two enclaves formed a part of the Indian territory after and in view of the 9th Amendment of the Constitution. I have already set out the 9th Amendment. It is clear that in view of the decision of the Berubari Union case (AIR 1960 Supreme Court 845) if the 9th Amendment had come into effect and if the First Schedule to the Constitution stood amended in accordance with such 9th Amendment, then obviously these two enclaves formed part of the Indian territory and a part of West Bengal because of such amendment. If the 9th Amendment had come into effect, the definition of the territory of West Bengal within the meaning of First Schedule of the Constitution has undergone a change and the First Schedule to the Constitution stands amended as provided in the said Agreement, which, inter alia, provides that there will be exchange of these enclaves. But the crucial question is whether the 9th Amendment has in fact come into effect so far as these enclaves are concerned before 1974 or 1982. As already noticed the relevant section is Section 3 of the 9th Amendment which provides that from the 'appointed day', in the First Schedule to the Constitution in the paragraph relating to the territories of the State of West Bengal, the words, brackets and figures "but excluding the territories referred to in Part III of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added to the end. The territories referred to in Part III of the First Schedule to 9th Amendment is the transferred territory in relation to item (3), item (5) and item (10) of para 2 of the 1958 Agreement. The item No. 10 of the 1958 Agreement provides for exchange of old Cooch Behar enclaves in Pakistan and Pakistan enclaves in India without claim to compensation for extra area going into pakistan. Admittedly these two enclaves come into the ambit of the same. Therefore, if the 9th amendment has come into effect, so far as exchange of enclaves is concerned, and if the First Schedule to the Constitution stands amended in the manner stated, then these two enclaves have since the Ninth Amendment to the Constitution coming into effect, formed a part of the Indian territory being a part of the State of this West Bengal. However in the facts of this case these two enclaves did not form part of the territory of India or West Bengal as a result of such amendment because the 9th Amendment, at least so far as it relates to the exchange of enclaves and the transfer of the southern portion of Berubari Union, has not yet come into effect. It is to be noticed that such amendment is to come to effect from the 'appointed day'. The 'appointed day' within the meaning of Section 2 (a) of the

9th Amendment 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. It was further provided that different dates may be appointed for the transfer of such territories from different States and from the Union territory of Tripura. The learned Solicitor General has produced before me two notifications regarding the 'appointed day' which are as follows :-

> "Part II, Section 3, sub-section (i) New Delhi, the 14th January, 1996
> NOTIFICATIONS
> G.S.R. 73 - In exercise of the powers conferred by Clause (a) of Section 2 of the Constitution (Ninth Amendment) Act, 1960, the Central Government hereby appoints the 17th (Seventeenth) day of January 1961, as the date for the transfer from the State of Punjab to Pakistan for the territories referred to in Part II of the First Schedule to that Act.
> (No. 4 (5)-Pak. III/60 (i))
> G.S.R. 74 - In exercise of the powers conferred by clause (b) of Section 2 of the Acquired Territories (Merger) Act, 1960 (64 of 1960) the Central Government hereby appoints the 17th January, 1961, as the date for the merger in the State of Punjab of the acquired territories referred to in Part II of the First Schedule to that Act.

(No. 4 (5)-Pak III/60 (ii)).
Y.D. Gundevia Secy."

He has stated that apart from these, there is no other Gazette a Notification fixing any other "appointed day" within the meaning of 9th Amendment and that in respect of the Eastern India, particularly the Berubari Union and the (Pakistani) enclaves, no such Notification has yet been issued. This is not challenged on behalf of the petitioner and nothing is produced to contradict such a statement. From the aforesaid it is clear that the said 9th amendment, so far as it relates to exchange of the enclaves, has not come into effect by virtue of the said Ninth Amendment in view of the fact that it is expressly provided in the said 9th Amendment that only from the "appointed day" the Schedule to the Constitution shall be amended and there being no "appointed day" in respect of the territories in the Eastern India, the First Schedule to the Constitution remains unamended so far as the Eastern India is concerned particularly the Berubari Union and the enclaves. Therefore, either in fact or in law there was no accession to India in respect of these two enclaves. They remained a part of Pakistan (now Bangladesh) as they were before.

50. Therefore, it is clear that in spite of such 1958 Agreement and in spite of such Ninth Amendment, these two enclaves have all along been and particularly at the time of 1974 and 1982 Agreements, a part of Pakistan (now Bangladesh) and they have been administered and treated as such. At no point of time these two enclaves were administered by the Government of India or by the Government of West Bengal. At no point of time they were treated as a part of the territory of India. Therefore, the implementation of the 1974 and 1982 Agreements which provide, inter alia, that these two enclaves would not be exchanged, would not amount to cession of any Indian territory which would require any Constitutional amendment. These two enclaves, up to now, never formed a part of the Indian territory and accordingly it is not necessary to enact any amendment of the Constitution to implement the said 1974 and 1982 Agreements so far as

these two enclaves are concerned. Accordingly I reject the contention of Mr. Biswas to this effect.

51. I am unable to accept the contention of Mr. Biswas that it was not open to the Government of India to enter into such Agreements in 1974 and 1982 relating to Berubari Union and these two enclaves in view of such 1958 Agreement which, according to him, was binding on them. Parties to a treaty may terminate the same by mutual agreement in the same way as they concluded it. The treaty obligations may also be terminated by denunciation. The term "denunciation" denotes the notification by a State to the other State parties that it intends to withdraw from the treaty. In the absence of a provision in the treaty itself enabling such denunciation, the other party must as a rule, consent to such denunciation (Starke Introduction to International Law 4th Ed. page 315).

52. Termination of or withdrawal from a treaty, may take place by consent of all parties. Such consent may be implied. In particular a treaty may be considered as terminated if all the parties conclude a later treaty which is intended to supplant the earlier treaty or if the later treaty is incompatible with its provisions. (Ian Brownlie Principles of Public International Law 2nd Edn. p.596).

53. It is to be remembered that there was an emergence of a new sovereign State namely Bangladesh in 1971 in respect of the territory previously known as Eastern Pakistan which was a part of the territory of Pakistan. Treaties may be affected when one State succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive depend on many factors including the precise form and origin of the succession and the type of treaty concerned. Changes of this kind may, of course, terminate treaties apart from categories of State Succession (Ian Brownlie Principles of Public International Law 2nd Edition page 595). In this context I may also refer to a passage from T.T. Poulose on "Succession in International Law" as follows:

"Personal and Real Treaties"

"Treaties are classified into personal and real in order to determine their binding character when there is a change of territorial sovereignty. As already explained, personal treaties are of a personal nature such as the old treaties of alliance and friendship or those guaranteeing the throne or the dynasty of a ruler. Such treaties are binding on the rulers personally and their performance requires the continued existence of the ruler. Then there are personal treaties of a political, economic or administrative character. When there is a change in the international person or when it disappears, both types of personal treaties are extinguished.

A real treaty survives a change of sovereignty because it imposes obligations of an indestructible character. The rights created by such treaties are regarded as rights in rem running with the land. When there is a change of territorial sovereignty the successor State is bound to respect the rights. Boundary treaties belong to this category of treaties.

The essential difference between a personal and a real treaty is this : the former is in the nature of a contract whereas the latter is in the nature of conveyance. The binding character of a contract disappears when one of the parties to the contract is extinguished.

> But the conveyance, being an executed agreement, continues in spite of the change of sovereignty."

However, even I proceed on the basis that the 1958 Agreement, entered into by and between India and Pakistan, so far as it relates to the territories on the Eastern India, remained effective and valid even after the emergence of Bangladesh, it was open to India and Bangladesh to enter into a fresh treaty modifying the 1958 Agreement. This is actually what has happened in the present case. India and Bangladesh have, by the said 1974 and 1982 Agreements and to the extent indicated therein, terminated and/or modified the earlier Treaty of 1958 in respect of inter alia, southern portion of Berubari Union and these two enclaves.

54. The argument of Mr. Biswas based on Article 51 (c), which is included in Part IV of the Constitution, has no merits. The said Article is set out herein below.

Article 51. The State shall endeavor to –

> (c) foster respect for International law and treaty obligations in the dealings of organized peoples with one another; and

55. The scope of the Directive Principles as laid down in Part IV of the Constitution is now well settled. It cannot override the fundamental rights conferred by Part III. State should implement the Directive Principles but that it should be done in such a way that its laws do not take away or abridge the fundamental rights. Although the provisions of Part IV are expressly made unenforceable by Article 37 that does not affect its fundamental character. Enforcement by a Court is not the real test of a law. If a State voluntarily were to implement the Directive Principles, a Court would be failing in its duty if it did not give effect to the provisions of the law at the instance of a person who has obtained a right under the legislation. When the State, in pursuance of its fundamental obligations, makes a law implementing the Directive Principles, it becomes the law of the land and the Judiciary will be bound to enforce the law. Judicial process is State action. Judiciary is also a State within the meaning of Article 12. The Judiciary is bound to apply the Directive Principles in making its judgment, *(Kesvananda Bharati v. State of Kerala*[15]*,* Judgment of Mathew, J.) In the case of *Minerva Mills Ltd. v. Union of India, reported in*[16] after quoting Article 37, it was observed that the Directive Principles are not excluded from the cognizance of the Court, but they are merely made non- enforceable by a Court of law. But merely because they are not enforceable by judicial process does not mean that they are of subordinate importance to any other part of the Constitution. Simply because the Directive Principles do not create rights enforceable in a Court of law, it does not follow that they do not create any obligation or duties binding on the State. The crucial test is whether the Directive Principles impose any obligation or duties, even though no corresponding right is created in any one which can be enforced in a Court of law.

56. In my opinion, these observations of the Supreme Court do not assist the petitioner. Even if it may be said that it was the obligation of the Government of India to make endeavour to foster respect of the 1958 treaty as contemplated by Article 51 (c), that did not prevent the Government of India in entering into the 1974 and 1982 Agreements and modifying the earlier treaty particularly having regard to the fact that the 1958 Agreement, so far as it relates to transfer of southern portion of Berubari Union and the

[15] AIR 1973 SC 1461 at 1948, paras. 1714 to 1719

[16] AIR 1980 SC 1789
exchange of enclaves, was not given effect to at any time and the 9th Amendment to that effect was never brought into force.

57. The main question before me is whether the implementation of the 1974 and 1922 Agreements, so far it relates to Teen Bigha, will amount to cession of Indian territory. The admitted position is that Teen Bigha is an Indian Territory and it is part of West Bengal within the meaning of Item 13 of the First Schedule to the Constitution. The question is whether by virtue of these two Agreements, the sovereignty of India in respect of this territory is sought to be transferred to Bangladesh.

58. What is sovereignty and what amounts to cession or transfer of sovereignty is an important part of International Law and had been the subject-matter of various treaties and judicial decisions.

59. The concept of sovereignty has a much more restricted meaning today than in 18th and 19th Centuries when, with the emergence of powerful highly States, few limits on State autonomy were acknowledged. At the present time there is hardly a State which in the interests of the international comity, has not accepted restrictions on its liberty of action (Starke 8th Ed. p. 113).

60. In the case of the Arantzazu Mendi, 1939 AC 256 Lord Atkin observed as follows :-

> "By 'exercising de facto administrative control' or 'exercising effective administrative control', I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government, and for the purpose of international law as a foreign sovereign State."

The relevant passages from Starke and Lord Atkin are also quoted in Saunders "Words and Phrases legally defined" (Second Ed. Vol. 5-P. 92)

61. In Berubari Union case (AIR 1960 Supreme Court 845) the Supreme Court observed as follows:-

> ".....it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of its territory in favor of a foreign State, and this can be done in exercise of its treaty making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner-State in favor of another State .... But though from the human point of view great hardship is inevitably involved in cession of territory by one country to the other there can be no doubt that a sovereign State can exercise its right to cede a part of its territory to a foreign State. This power it may be added, is of course subject to the limitations which the

Constitution of the State may either expressly or by necessary implication impose in that behalf; in other words, the question as to how treaties can be made by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the constitution of the country. Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself." (Para 31).

62. In this connection reference may be made to the following passages from Oppenheim International Law (8th Ed.).

> "Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law. But if such municipal rules contain constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by Heads of States or Governments as violate these restrictions are not binding." (P. 547-Article 213).
>
> "The object of cession is sovereignty over such territory as hitherto already belonged to another State. As far as the law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State." (P. 548-Article 215).

As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding States become *ipso facto* by the cession subjects of the acquiring State. (page 551 Article 219).

63. In the case of *Union of India v. Sudhangshu*[17] the Supreme Court referred to the aforesaid passages from Openheim.

64. A cession of a territory can take place by way of a lease also (Oppenheim International Law 7th Edn. Vol. I P. 498). Any transaction (such as gift, sale, or exchange) will be valid as a cession which sufficiently indicates an intention to transfer sovereignty from one State to another. (Starke p. 192). In the case of a lease sovereignty is exercised by the lessee-State, while the lessor-State possesses sovereignty in the reversion. (Starke 8th Edn. page 183). But such sovereignty in the reversion is in name only when it is a lease in perpetuity. A licence can be terminated but a grant in perpetuity cannot. (Brownlie 2nd Ed. p. 117). However, restrictions on use of territory, accepted by treaty, do not affect territorial sovereignty as a little, even when the restriction

concerns matters of national security and preparation of defence (Ian Brownlie 2nd Ed. p. 117 para 12).

[17] AIR 1971 SC 1594 (Para 6)

65. It is to be pointed out that both the 1974 and 1982 Agreements describe the said arrangements regarding Teen Bigha as "Lease in perpetuity". I ought to point out that at the end of the submission of Mr. Biswas appearing for the petitioner, upon my enquiry to that effect and after pointing out the legal effect of a transaction which is really and in the substance in the nature of a "lease in perpetuity", Mr. Solicitor General (as he then was) after due consideration of the matter, frankly stated before me that though such an expression is used in the said two agreements, the transaction contemplated thereby is not actually a lease, far less a lease in perpetuity, but that it was a bare licence. In my opinion, irrespective of the use of such expression "lease in perpetuity" or the very fair statement of Mr. Solicitor General, I have to independently examine in detail the provisions of the said 1974 and 1982 Agreements to ascertain the true nature of the same and to ascertain whether any transfer of sovereignty amounting to cession is contemplated by the said two Agreements. If the intention of the said two Agreements in respect of Teen Bigha is really a lease and particularly a "lease in perpetuity" then I would have had no hesitation to hold that this would amount to cession of an Indian territory concerned and transfer of the sovereignty so far as this particular area is concerned and that it will require amendment of the Constitution, as pointed out in the case of Berubari Union, before these two agreements may be implemented. If these two agreements really contemplate a lease of this area i. e. handing over exclusive possession of the same in perpetuity, then in my opinion, it would amount to cession or a transfer of sovereignty for all times to come.

66. However, in my opinion, the mere use of the expressions 'lease' or 'lease in perpetuity' in a document is not enough. For the purpose of deciding whether a particular grant amounts to a lease or license it is essential to look to the substance and essence of the agreement and not its form *(Board of Revenue v. A. M. Ansari, reported in[18]).* In the case of *Associated Hotels of India v. R. N. Kapoor reported in[19]* it was observed as follows :-

> "The following propositions may, therefore, be taken as well-established. (1) To ascertain whether a document creates a license or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties - whether they intended to create a lease or a license, (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property of which the legal possession continues with the owner, it is a license; and (4) if under the document a party gets exclusive possession of the property, 'prima facie', he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

67. This passage was quoted with approval in subsequent decision of Supreme Court in the case of *K. Ramamurty v. Gopinath reported in[20]*

68. In the case of *Associated Hotels of India v. Ranjit Singh reported in[21]* it was observed by Supreme Court that whether occupier of a separate apartment is a licensee or tenant, the test is has landlord retained control over the apartment?

69. It is not necessary for me to consider the case of *Shri Tarakeshwar Sio Thakur v. B.*

D. Dey reported in[22] cited by Mr. Biswas, because the subject-matter therein was the scope of the right to enjoy property under a "Mining lease"

18 AIR 1976 SC 1813
[19] AIR 1959 SC 1262 at p. 1269 (Para 27)
[20] AIR 1968 SC 919 at p. 921 (para 8)
[21] AIR 1968 SC 933 at p. 936 (para 7)
[22] AIR 1979 SC 1669

within the meaning of Mines and Minerals (Regulation and Development) Act 1957 which definition is wider than the expression "lease" under the Transfer of Property Act.

70. What is to be considered is whether by virtue of these two Agreements the Bangladesh Government will have exclusive possession in respect of Teen Bigha. What will have to be considered is whether by virtue of these two agreements the rights which have been conferred on Bangladesh and its nationals, are of such a nature, that it amounts to transfer of sovereignty to Bangladesh in respect of this area. I shall also have to consider whether this is merely a permission to Bangladesh and its nationals to do something in respect of this admittedly Indian territory, which otherwise they would not have the power to do, but that it does not amount to conferment of power to the exclusion of India and its nationals and that is neither a lease nor does it amount to transfer of the sovereign rights of India. It is to be pointed out that Clause 12 of the 1974 Agreement provides for the exchange of the Indian enclaves in Bangladesh and the Bangladesh enclaves in India excepting Dahagram and Angarpota. Under Clause 14 of the said Agreement it is provided that Bangladesh will retain the Dahagram and Angarpota enclaves. This clause also provides for "lease in perpetuity" to Bangladesh in respect of an area of approximately 178 metres x 85 metres near Teen Bigha to connect Dahagram with Panbari Mouza (P. S. Patgram) of Bangladesh.

71. In this context I shall at the first instance deal with the contention of Mr. Biswas appearing for the petitioner that 1974 Agreement which merely provides for a "lease in perpetuity", without anything else, in respect of Teen Bigha, amounts to cession and transfer of sovereignty and that the 1982 Agreement cannot be read together with 1974 agreement. In my opinion 1982 agreement is pursuant to 1974 agreement and it is contemplated by the same. Accordingly these two agreements are to be read together. To ascertain the true scope and effect of the "lease in perpetuity" referred to in 1974 Agreement, I shall have to consider the scope and effect of the terms of such "lease" as agreed to in 1982.

72. Clause I of the 1982 Agreement makes it clear that the so called "lease in perpetuity" was to enable the Bangladesh Government to exercise her sovereignty over Dahagram and Angrapota. By virtue of the 1958 Agreement these two enclaves, Dahagram and Angrapota along with other enclaves of Pakistan, were to be exchanged with Indian enclaves and they were to become a part of Indian territory. However, by virtue of the 1974 Agreement it was agreed that though there will be such exchange of all other enclaves but in respect of Dahagram and Angrapota they would remain as Bangladesh territory. Though a constitutional amendment was enacted to give effect to 1958 Agreement in toto, which provided for exchange of all enclaves, it did not come into force because no "appointed day" has been notified in relation to the same as I have already held. In this context it may be pointed out that in spite of 1958 Agreement for transfer of southern portion of Berubari Union, it was agreed in 1974 that this portion shall remain with India. Bangladesh Government was entitled to exercise her sovereignty over Dahagram and Angrapota which was a part of its territory but being enclaves, the effective exercise of that sovereignty in full was difficult. Now that it was decided that these two enclaves would not be

exchanged but that they would remain as part of Bangladesh, some provisions had to be made so that Bangladesh could exercise its sovereignty in full in respect of these two enclaves.
73. Clause 2 makes it clear that the sovereignty of the area in question, that is, Teen Bigha, shall continue to vest in India. This is in categorical terms. There is no question of any lease or exclusive possession having regard to the fact that sovereignty over the said area is being retained by India.

74. It is true that in Clause 3 it is provided that Bangladesh shall have "undisturbed possession and use" of the area leased to her in perpetuity, but it must be read in the background of the expression, "for the purpose of connecting Dahagram and Angrapota with Panbari Mouza (P. S. Patgram) of Bangladesh to enable the Bangladesh Government to exercise her sovereignty over Dahagram and Angrapota" as made clear by Clause 1. The expression 'undisturbed possession and use' does not mean exclusive possession to the exclusion of others but it merely means that there will be no interference with the exercise of rights conferred by these Agreements on the Bangladesh Government and its nationals. No transfer of possession of the area in question is contemplated.

75. Clause 4 confers a right on the Bangladesh Citizens including police, para-military and military personnel along with their arms, ammunition, equipment and supplies to have the right of free and unfettered movement in the area in question. In my opinion, the learned Solicitor General has stated correctly that they shall not have any right of any free and unfettered movement in the sense that they can stay in the area concerned or station themselves therein permanently or roam about this area at their sweet will. As I have already indicated and as it is made clear by clause 1 all these conferment of rights are for the purpose of enabling the Bangladesh Government to exercise her sovereignty over Dahagram and Angrapota which shall continue to be part of Bangladesh. This right of free and unfettered movement in this area is merely for the purpose of enabling the Bangladesh Government to exercise her sovereignty over Dahagram and Angrapota. This means that right of free and unfettered movement in the area is a right to move freely from the main land of Bangladesh to the enclaves and from these enclaves to the main land of Bangladesh and not otherwise. The rest of the provisions in this clause are in aid of the same. This permission which is of limited nature, does not amount, in my opinion, to any transfer of sovereignty partially or otherwise, by India. It merely gives certain permission to use this land as a corridor and not otherwise. Sovereignty is retained.

76. Clause 5 of the agreement provides that Indian citizens including police, para-military and military personnel along with their arms and ammunition, equipment and supplies shall continue to have the right of free and unfettered movement in the 'leased area' in either direction. It provides that the movement of Indian goods across the leased area shall also be free. It is also stated that India may also build a road above or below the surface of the leased area in an elevated or subway form for her exclusive use in a manner which will not prejudice free and unfettered movement of Bangladeshi citizens and goods as defined in paras 1 and 4 above. In my opinion this not only clarifies the right of movement conferred on Bangladeshi citizens by clause (4) but also makes it clear that this agreement does not in any way curtail the freedom enjoyed by the Government of India and Indian citizens in the said area as it was enjoyed before and that the Indian citizens shall continue to have the same right as before. Movement of Indian goods shall also be free. The existing road running across it shall continue to be used. This shall not in any way be curtailed by the right conferred on Bangladeshi nationals by Clause 4. It has merely

recorded that the said agreement will not prevent India to build a road above or below the surface. But this is not in substitution or in derogatory of the existing rights and privileges enjoyed by the Government of India and its citizens. This is merely an additional provision and this is also optional. India may or may not build such road above or below the surface of the area in question which continues to be the part of India but it is made clear that if it is done, India shall be in exclusive use of the same. This clause makes it clear that not merely there is no question of handing over possession, far less exclusive possession, to Bangladesh in respect of the area in question but that there is no question of any transfer of sovereignty in respect of this area either.

77. Clause (6) of the agreement provides that the two Governments shall co- operate in placing permanent markers along the perimeters of the "leased area" and putting up fences where necessary. I accept the contention of the learned Solicitor General that the fences are to be put up to see that the Bangladesh nationals or their officials do not transgress or misuse the right conferred on them. They are merely entitled to use these areas for free movement from and to the main land of Bangladesh. They are not entitled to use this area otherwise than for the purpose of using this as a corridor between the main land of Bangladesh and these two enclaves. I agree with the learned Solicitor General that the fences to be put up would not and cannot amount to any detriment or hindrance to the free movement of Indian citizens in this area but the only purpose is to confine Bangladeshi citizens and the personnel of their Government within a narrow limit.

78. Clause (7) allows both India and Bangladesh to have the right to lay cables, electric lines, water and Sewerage pipes over or under the "leased area" without obstruction of free movement of citizens or goods of either country as defined in paras 4 and 5 above. This in my opinion, does not amount to handing over possession of the land in question or transfer of the sovereignty in respect of the land to Bangladesh. It merely means that certain facilities will be utilized.

79. Some difficulty is created by Clause (9) of the agreement and having regard to the same, particularly having regard to the fact that I do not accept the contention of Mr. Solicitor General on this aspect in to, I shall deal with the same in details. In my opinion this clause make it clear that when there is an incident in the area which amounts to an offence under the Indian Law, if the parties involved, that is, both 'offending' and 'offended', are Indian nationals, they will be dealt with by the law enforcing agency of India and according to Indian Law. If it involves Bangladeshi nationals only, it would be dealt with by the law enforcing agency of Bangladesh alone in accordance with the law of Bangladesh alone so far as the Bangladeshi nationals are concerned even though it is committed in the Indian territory of Teen Bigha and even it amounts to an offence under any Indian Law. If it involves both Indian and Bangladeshi nationals, whether as "offending" and "offended" persons, so far as the Bangladeshi nationals are concerned they will be dealt with by Bangladesh law enforcing agency according to Bangladesh Law. I do not agree with the interpretation of the said clause as put forward by the learned Solicitor General to the effect that second and third sentences of that clause only contemplate that where the incident involves breach of law and order, without constituting any offence under the Indian Law, the said provisions would apply, that is, the law enforcing agency of Bangladesh would be entitled to intervene so far as their own nationals are concerned but if the incident also amounts to an offence within the meaning of any Indian Law, the law enforcing agency of India shall have the total jurisdiction over the matter even in respect of the Bangladeshi nationals. It is true that

the last sentence used in this clause provides that India will retain residual jurisdiction in the "leased area" but it merely means that the jurisdiction which has not yet been otherwise expressly provided for in the earlier part of Clause (9). However, in my opinion what the clause provides is that where the nationals of both the countries may be involved either being the "offending" or "offended" persons, in an incident or in the case of an offence under the Indian law, in that case the same is to be dealt with by the particular law enforcing agency depending on the nationality of the persons involved. In my opinion Clause (9) provides that in a case where the persons concerned, whether "offended" or "offending" are all Indian nationals, then it would be taken up by the Indian law enforcing agency. If it consists of Bangladeshi nationals only, then it will be dealt with by the Bangladesh law enforcing agency only. But where it is a mixed group, whether "offending" or "offended", then the law enforcing agency of each particular national will take up the matter to the exclusion of other. This undoubtedly amounts to conferring certain important rights on Bangladesh and taking away some of the important rights of Indian citizens and Indian Government and its law enforcing agencies and the Courts in India because according to the existing Indian Penal Code, the Criminal Procedure Code and other relevant Indian Law, the law enforcing agency of India and the Indian Courts alone has at present the total jurisdiction over any such person irrespective of their nationality to the exclusion of any such right of any other State in respect of any offence committed in the said area. The position is that if the said Agreement is implemented, in future, so far as the Bangladeshi nationals are concerned, the machinery under the existing Indian law cannot be enforced so far as Bangladeshi nationals are concerned. This amount's to conferment of a very important power and giving up of a very important right. When it is said that a particular State is independent, in a concrete way it is attributed to that State a number of rights, powers and privileges at International Law. One of the examples of the rights associated with a State's independence is the sole jurisdiction over crimes committed within its territory. (Starke-8th Ed. Pages 113 and 114). If Clause 9 is implemented then India shall not have the jurisdiction over Bangladeshi nationals in respect of any crime committed in the area concerned. However, having P> regard to the other provisions of this Agreement, I am of the opinion that conferment of this power on Bangladesh and abdication of such power by India cannot by itself amount to transfer of sovereignty in respect of this area. However, I ought to point that the conclusion I have arrived at, does not mean that I am of the view that merely by virtue of this agreement and without any amendment of any Indian law, it is possible to take away the jurisdiction of the law enforcing agency of India or the Court in India in respect of any of its power or jurisdiction conferred upon them by any Indian law in respect of any offence committed in the said area.

80. For the aforesaid reasons, upon reading of the 1974 Agreement with all the Clauses of the 1982 Agreement together and upon consideration of the true scope effect and the substance of the same, I accept the contention of the learned Solicitor General. In my opinion, the implementation of these two Agreements would not involve cession of any territory to Bangladesh in respect of Teen Bigha. In my opinion not merely that no exclusive possession of this area is sought to be transferred to Bangladesh, but no legal possession at all is being transferred. There is no question of transfer of sovereignty, wholly or partially, in respect of the said area. What has merely been done is to enable the Government of Bangladesh and its nationals to exercise certain rights in respect of the said area which otherwise they would not have been entitled to do. Only certain privileges have been conferred on the Bangladesh Government and its nationals which otherwise they would not have been entitled to enjoy. This is being so allowed because instead of exchange of this enclaves along with others as contemplated

by 1958 Agreement, it is agreed that these two enclaves would remain as part of Bangladesh. It is clear that the reason is that in spite of the 1958 Agreement and in spite of the 9th Amendment, which has not been given effect to, the southern portion of Berubari Union is to be retained by India. As these two enclaves are to remain as part of Bangladesh territory, these two agreements have made some provisions to enable Bangladesh to exercise its sovereignty in full over these two enclaves. This is also clear by 1982 Agreement. In my opinion the implementation of these two Agreements, so far as Teen Bigha is concerned, does not amount to cession of the said territory or transfer of sovereignty in respect of the some and does not require any constitutional Amendment. In spite of such Agreements, India would still retain its sovereignty, ownership and control of Teen Bigha.

81. That disposes of all the contentions raised herein. Accordingly these Writ petitions are dismissed. There will be no order as to costs.

82. Before I conclude, I must express my appreciation of the manner in which this case has been argued before me by Mr. T. K. Biswas appearing on behalf of the petitioner and Mr. Parasaran, the learned Solicitor General (now the Attorney General) appearing on behalf of the Union of India. This case involves some important and interesting questions of law including Constitutional and Public International Law. Though it has some political background also but Mr. Biswas has steered clear of mere political approach and confined his submissions on legal basis only. He has argued ably. So far as the learned Solicitor General is concerned, not only that he has argued very ably, he has also argued this case very fairly.
Petitions dismissed.