KERALA HIGH COURT

Narayanan Damodaran

Vs

Narayana Panicker

A.S. No. 542 of 1966, C. M.A. No. 124 of 1970 and O. P. No. 5360 of 1970

(T.C. Raghavan, Ag.C.J., K.K. Mathew and V.P. Gopalan Nambiyar, JJ.)

09.06.1971

JUDGMENT

Raghavan, Ag. C.J.

1. These cases have come before a Full Bench since the constitutional validity of Section 4A of the Kerala Land Reforms Act of 1963 (Act 1 of 1964) as amended has been impugned in these cases. In fact, clauses (a) and (b) of sub-section (1) of the section alone have been impugned in these cases and therefore, the discussion hereinafter will relate only to those two clauses. Since the constitutional validity of the section is impugned, the Advocate General of the State has also appeared.

2. In two of these cases some preliminary objection regarding the application of Section 4A has been raised. Under Section 108, Transitory Provisions. though some discussion has taken place at the bar, eventually the objection has been dropped; and I am not therefore considering the said objection. And I straightway proceed to consider the merits of the attack on the section. I may also observe at the very outset that the learned Advocate General has conceded before us that his attempt would only be to sustain the constitutional validity of the section under Article 31A of the Constitution and if that protective armour is not available, the section may be declared unconstitutional. Therefore, I need consider in these cases only whether Article 31A of the Constitution protects the section.

3. The Kerala Land Reforms Act was originally enacted in 1963 and there have since been three amendments to the Act, the first in 1966, the next in 1967 and the last, with which we are more concerned, in 1969 by Act 35 of 1969. The original Act of 1963 was put in the Ninth Schedule of the Constitution, so that the provisions of that Act are immune from attack. Section 4A was not in the original Act and was inserted for the first time in 1967 by the second amending Act. And by amending Act 35 of 1969 the Section was recast completely in its present form and substituted. Thus, the section has no claim in any form for protection of the Ninth Schedule.

4. There have already been three Full Bench decisions by this Court on the constitutional validity of the amended Land Reforms Act generally and of a few provisions therein particularly. The

first decision is *V. N. Narayanan Nair v. State of Kerala*[1]. the second is *Chami Chettiar v. Thirumandham Kunnu Bhagavathi Devaswom*[2], and the third is *Krishna Pillai Govinda Pillai v. Sankara Pillai Govinda Pillai*[3], The result of the cases before us will depend mostly upon the effect of these three decisions. In the first case, which was argued at considerable length for several days and in which a detailed discussion took place on the constitutional validity of the Act generally and on some of the sections in particular, the Full Bench held that the Act was generally valid and that some of its provisions were also valid. The Full Bench also held that some of the provisions of the Act were invalid and left the other provisions to be considered in appropriate cases since those sections were not impugned directly in the cases before the Full Bench. In the second Full Bench case, the constitutional validity of Section 7 and Section 7B (1) was challenged and these sections were held invalid since the protection of Article 31A was not available to them and since they offended Article 19 (1) (f) of the Constitution. In the third case, the constitutional validity of Section 106 was impugned; and the Full Bench held that the section was ultra vires the Constitution since it offended Article 19 (1) (f) and could not be saved as a reasonable restriction under Article 19 (5) since the section did not get the protection of Article 31A. I may also mention that in all these three Full Bench decisions one learned Judge took a different view regarding the constitutional validity of some of the sections: the learned Judge held that Sections 73, 7, 7B (1) and 106 were valid, while the majority held that they were unconstitutional.

5. The relevant portion of Section 4A, relevant for purposes of these cases, reads:

> "4A. Certain mortgagees and lessees of mortgagees to be deemed tenants. -
> (1) Notwithstanding anything to the contrary contained in any law or in any contract, custom or usage, or in any judgment, decree or order of court, a mortgagee with possession of land, other than land principally planted with rubber, coffee, tea or cardamom, or the lessee of a mortgagee of such land shall be deemed to be a tenant, if -
> (a) the mortgagee or lessee was holding the land comprised in the mortgage for a continuous period of not less than fifty years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969 : or
> (b) the mortgagee or lessee has constructed a building for his own residence in the land comprised in the mortgage and he was occupying such building for such purpose for a continuous period of not less than twenty years immediately preceding such commencement :
> Provided that a mortgagee or lessee falling under this clause shall not be deemed to be a tenant if he, or, where he is a member of a family, such family, was holding any other land exceeding two acres in extent on the date of publication of the Kerala Land Reforms (Amendment) Bill, 1968 in the Gazette."

6. Clause (1) (a) of Article 31A provides that notwithstanding anything contained in Article 13, no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be

[1](1970 Ker LT 659) : AIR 1971 Ker 98
[3](1971 Ker LT 87) : (AIR 1971 Ker 295 (FB))
[2](1970 Ker LT 897 (FB))

deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the

rights conferred by Article 14, Article 19 or Artclde 31. The two provisos to this clause are not relevant. Clause (2) (a) of the same Article lays down that the expression "estate" shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area. Then sub-clause (i) includes within the expression "estate" "any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right": sub-clause (ii) includes "any land held under ryotwari settlement": and sub-clause (iii) includes "any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans". Even at this stage I may point out that the Supreme Court has held that this sub-clause - sub-clause (iii) - should be read as "any land including waste land, forest land and land for pasture held or let for Purposes of agriculture or for purposes ancillary thereto, including sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans." And sub-clause (b) of clause 2 of Article 31A states that the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

7. As pointed out by the first Full Bench, the definition of "estate" in clause (2) (a) of Article 31-A is wide enough to cover all lands in the State and if the Article is read according to its apparent tenor it would mean that the fundamental rights saved by Article 19 (1) (f) Article 14 and Article 31 would be of no avail in respect of one form of property, land. That Full Bench also pointed out that it would virtually mean that the Constitution was taking away by Article 31A the rights it gave by Article 19 (1) (f), Article 14 and Article 31 in relation to land. That could not have been the intention of the legislature; and therefore, the Supreme Court, in a series of decisions, read into the Article that the protection of the Article would be available only for the purpose of agrarian reform. This led to a consideration as to what was "agrarian reform". And on this question also, though the Supreme Court originally laid down in *Kochuni v. States of Madras and Kerala*[4], that it was confined to land tenures, to the relation between landlord and tenant, the meaning of the expression was extended in the later cases, viz.. *Ranjit Singh v. State of Punjab*[5], and *Inder Singh v. State of Punjab*[6], so as to include anything pertaining to rural (agricultural) development Considering these decisions, the first Full Bench held that the expression "agrarian reform" had a flavor of egalitarianism in relation to the holding of land or an equitable distribution of land so as best to subserve the common good. The Full Bench also held that the provisions of the Land Reforms Act applied only to agricultural lands, lands held or let for purposes of agriculture or for purposes ancillary thereto including sites of buildings occupied by cultivators of land, agricultural laborers and village artisans. viz.. by persons having intimate connection with agriculture.

8. The second Full Bench held (or reiterated) that it was not enough that a provision

[4] AIR 1960 SC 1080
[5] AIR 1965 SC 632
[6] AIR 1967 SC 1776

was included in a statute which, by and large, was concerned with agrarian reform;
that the provision must itself pass the test or else form an integral part of the statute in the sense that it was necessary or desirable for the proper working of the statute: that Article 31A did not do away altogether with Article 19 (1) (f) in so far as agricultural land was concerned; and that

what it really did was to enlarge the scope of the saving in clause (5) of Article 19 so as to save measures of agrarian reform in the spirit of the preamble to the Constitution and also of Articles 38 and 39 for the furtherance of social and economic justice. This Full Bench observed further that the object of Article 31A was not to shield a law doing away with rights in agricultural land as it pleased; that its object was to protect laws for the equitable distribution of agricultural land and for the amelioration of those engaged in the pursuit of agriculture, and that the touchstone was still the interest of the general public. Again, the second Full Bench made it clear that peaceable progress in accordance with law could alone be in the interest of the general public and be regarded as a measure of reform. It was in this view that this Full Bench ultimately held that a rank trespasser or grabber of land could not be conferred tenancy right and such conferment of right by Sections 7 and 7-B (1) was not a measure of agrarian reform and hence bad for offending Article 19 (1) (f) of the Constitution.

9. And the third Full Bench held that, even accepting that the concept of agrarian reform included the raising of economic standards and bettering the rural health and social conditions, it should still be shown that the general scheme of the legislation was agrarian reform and under its provision something ancillary thereto in the interest of rural economy had to be undertaken to give full effect to the reform. And this last Full Bench observed that the constitutional validity of a statute or a provision thereof should not be made to depend upon the individual facts and circumstances disclosed in each case, and if it was allowed to so depend upon the facts and circumstances of each case, the danger to the administration of justice and to the principles of constitutional interpretation arising from the desire of judges to do justice in each individual case would inevitably introduce in such decisions an element of disconcerting unpredictability which was usually associated with gambling, and that that was a reproach which the judicial process must constantly and scrupulously endeavour to avoid. (Vide, in this connection, *Ramappa v. Bojjappa*[7])

10. It was suggested at the bar by the counsel who contended against the constitutional validity of Section 4-A that the provision referred to land, both agricultural and otherwise: that there was no reform in enacting the section, since it was not indicated how any public interest was furthered by the provision; that, at any rate, there was no agrarian reform achieved by the section; and that there was no method of applying the section within its constitutionally valid field alone, even if such mode of application was legal. The argument of the learned Advocate General in support of the validity of the section and those counsel who followed him may be summarized thus. The first Full Bench held that the Land Reforms Act could be applied validly to agricultural land. The cases before us involved agricultural land and the parties to the cases are also agriculturists or tillers of the soil. Consider these facts, namely, the subject-matter of the cases, the parties thereto and the other circumstances, and apply the provisions of Section 4-A to the cases. If by such

[7] AIR 1963 SC 1633

application agrarian reform results hold that the section is valid and do not hold that section is unconstitutional because there might be possible invalidity when applied to other cases with other facts and circumstances coming within its apparent compass. And such possible invalidity need not deter us from holding that the measure is a measure of agrarian reform when applied to the cases before us.

11. The well established principle underlying the interpretation of a provision in a statute is that, as far as possible, the court should try to hold in favor of its constitutional validity and the

provision need be declared unconstitutional only if it is not possible to salvage it. Even when it comes to a question of holding the provision unconstitutional, even then it must be considered whether the whole provision should be struck down if there are some words or expressions therein which are unconstitutional. In other words, should the rule "bad in part, bad in whole" be applied? The answer to this question is that it need not be done in all cases. If some words or expressions in a provision offend the Constitution and if the offending words or expressions can be excised. it can be done leaving the unoffending portion intact. (This applies also to a case where a particular provision or section or part of a statute offends the Constitution but the rest is good : in such a case the entire statute need not be declared void.) But, if the valid and invalid portions are so inextricably mixed up that it may not be possible to separate one from the other, then the invalidity of a portion must result in the invalidity of the whole: in other words, in such a case the rule "bad in part, bad in whole" applies. On the other hand, if the valid and invalid portions are separable, only the invalid portion need be struck down. In a case where the valid and invalid portions form part of one scheme and the invalid portion cannot be excised without affecting this scheme, then also the entire statute has to be struck down. Still further, if after excising the invalid portion what remains is so truncated as to be different from what it was when it emerged out of the legislature, then again the whole statute or provision has to be held invalid. This process of separating the valid from the invalid is what is called the rule of separability. And this rule is extended and the rule of separability in application or severability in application is evolved. Would the legislature have enacted the valid part if it had known that the rest of the statute was invalid? The answer that suggests is in the negative: and it is on this that the rule "bad in part, bad in whole" is based. But, there is another intention which has also to be imputed to the legislature: and it is on this that the doctrine of separability and excising the invalid part leaving the rest intact is built. The doctrine rests on a presumed intention of the legislature that, if a part of a statute turns out to be void. that should not affect the validity of the rest of it. And the doctrine of severability in application is an extension of this. The invalidity of a statute may depend upon the limitation on the powers of the legislature which enacts it: and such limitation may be of two kinds as pointed out by Venkatarama Ayyar J. in *R. M. D. Chamarbaugwalla v. Union of India*[8], The limitation may be with reference to the subject matter on which the legislature could legislate: or it may be with reference to the character of the legislation which it could enact. It may be incompetent for the legislature to legislate on a particular subject-matter: and there may also be some constitutional prohibition which prohibits it from enacting a particular measure.

12. In applying the principle of severability or separability in application, the field

[8] AIR 1957 SC 628

where the law can be validly applied must be separable. It should not be confused with applying the law to individual cases, as suggested by the learned Advocate General. This was pointed out by the Privy Council in *Punjab Province v. Daulat Singh*[9], Lord Thankerton observed.

> "The majority of the Federal Court appear to have contemplated another form of severability, viz., by a classification of the particular cases on which the impugned Act may happen to operate involving an inquiry into the circumstances of each individual case."

And Lord Thankerton said further that such a course was beyond the competency of the court:

and Venkatarama Ayyar J. observed in the R. M. D. C. case. AIR 1957 SC 628 that such a course was "an ad hoc determination with reference to qualifications of each alienee as distinguished from a distinct category with reference to the subject-matter". Therefore, this contention of the learned Advocate General and the other counsel who support him cannot be accepted. The question has to be decided on the footing whether there is severability in the field: severability in the sense that the provision may be applied to particular cases in which it could be applied is not what is contemplated by severability in application: that is no severability at all.

13. Now, A. S. No. 542 of 1966 is an appeal against a second appeal, and that, in execution. The appellant was the second defendant in a suit of 1122 M. E. (1946-47) for redemption of a mortgage. The mortgage property consisted of 1 acre and 47 cents of paddy land, two items, of which one item the mortgagors were holding as tenants under Palivam agreeing to Pay an annual michavaram of Rs. 12/-. There were two mortgages, one an otti (mortgage) of 1087 and the other a puravaipa (additional mortgage) of 1095. Under these documents the total mortgage amount was Rs. 332/- and the mortgagee was directed to pay the michavaram due to Palivam, appropriate the interest on the mortgage money and pay customary dues of 3½ fanoms (one rupee) for Onam. There was a provision enabling the mortgagee to demand the mortgage money and recover the same: and there was no prohibition for making improvements. In the suit it was contended, inter alia, that the mortgage was not redeemable, which contention was found against by the trial court, the appellate court and also in second appeal. Then execution proceedings were started: and in those proceedings it was again contended that the appellant, the second defendant, the one who is entitled to the mortgage right at present, was not liable to be evicted. This contention was also concurrently found against by all the three courts including this Court in second appeal. However, the second appellate Judge granted leave to appeal to a Division Bench, and hence the appeal. Before the Division Bench the appellant filed an affidavit claiming that he was entitled to protection under Section 4A of the Land Reforms Act as amended by Act 35 of 1969, when notice was issued to the Advocate General. The case was thereafter posted before a Full Bench.

14. C. M. A. No. 124 of 1970 is against an order of remand passed by the Subordinate Judge remanding an application under Section 132 of Act 1 of 1964 to reopen the decree in the suit and allow the respondents fixity of tenure. The suit was on a mortgage wherein a decree for eviction was passed in January 1956 overruling the

[9] AIR 1946 PC 66

contention of the respondents that the suit transaction was a lease. After the coming into force of Act 1 of 1964, the respondents filed an application under Section 132 thereof for reopening the decree and considering their contention regarding fixity of tenure. This petition was rejected by the executing court, but allowed by the Subordinate Judge who remanded the petition to the executing court for fresh consideration under amended Act 1 of 1964. One of the plaintiffs, the assignee from the original mortgagor, filed the miscellaneous appeal: and in the appeal, the respondents claimed that they were entitled to protection under Section 4A of Act 1 of 1964. This case again was placed before a Full Bench for considering the constitutional validity of Section 4A.

15. O. P No. 5360 of 1970 is by the plaintiff in a suit for redemption of a mortgage. The suit property belonged to the family of the petitioner and was mortgaged in 1076 M. E.: and there was an additional mortgage of 1084. In 1103 the rights under the mortgage and the additional

mortgage were assigned in favor of the predecessor-in-interest of respondents 2 and 3 who thus came into possession of the property. In a partition arrangement in the family of the petitioner, the property came to his branch and therefore he filed the suit for eviction in 1967. In March 1969, the suit was decreed by the Munsif overruling the contention of respondents 2 and 3 that the transaction was a lease. Respondents 2 and 3 filed an appeal before the Subordinate Judge; and the said appeal is pending. In the writ petition filed by the plaintiff, the constitutional validity of Section 4A has been challenged: and the writ petition has been placed before us. In the meantime, the appeal filed by respondents 2 and 3 before the Subordinate Judge is stayed.

16. In the Land Reforms Act there are other provisions like Section 12, for instance, which give any person in terested in any land the right to prove that a transaction purporting to be a mortgage is in substance a transaction by way of lease; and a transferee under such a transaction is entitled to fixity of tenure. There are also decisions of this Court including Full Bench decisions laying down that a transferee for enjoyment of , the land transferred is a tenant entitled to fixity of tenure. And Section 4-A applies only to cases which do not come within the aforesaid provisions, i. e- to cases of transactions which are not leases and which cannot be proved to be leases.

17. Now, we are concerned in these cases only with the constitutional validity of Section 4A: and I have considered that question hereinbefore. I have already indicated that Section 4A can apply only to agricultural lands: and I find that the lands involved in the three cases before us are all agricultural lands. I have also indicated that, for the application of Article 31A of the Constitution. there should be the further fact that the impugned section is intended to bring about agrarian reform; and in finding out whether there is agrarian reform, I have held the principle of severability. both of particular words, expressions or provisions of the law to be excised - particular parts of the law and also severability in application, has to be applied. There is no question of excising any par ticular word or expression from the impugned section so as to leave a constitutionally valid remainder which can be applied. The only possibility of salvaging the section, if it can be done, is by applying the test or priciple of severability in application. I have already indicated that for such application the field in which the section can be validly applied must be severable or separable from the field in which, if it is applied, it will offend the Constitution. Such severability or separability - severability or separability in the field - does not obtain in these cases. Again as already indicated, the argument of the learned Advocate General and the other counsel who have supported the validity of the section has been that the section must be applied to the particular cases before us taking into consideration the particular facts and the circumstances in them and that, if the section can be applied to these cases without any constitutional invalidity, the possibility of other cases in which if the section is applied, constitutional invalidity may result, should not deter us from applying the section to the cases before us. This contention, I have already pointed out, is not an application of the principle of severability or separability in application, but is an attempt to apply the section, ad hoc as it were, to the cases before us. This method has not been approved by the Privy Council and the Supreme Court and, as pointed out by the third Full Bench, this will lead to uncertainty as in the case of gambling. Therefore, the contention has to be rejected.

18. In the result, I hold that clauses (a) and (b) of Section 4A(1) are unconstitutional as they do not get the protective mantle of Article 31A of the Constitution. And I strike them down.

19. The result is that A. S. No. 542 of 1966 and O. P. No. 5360 of 1970 are dismissed and C. M. A. No. 124 of 1970 is allowed and the order of remand set aside. Since the question raised was one of constitutional validity of a provision of a statute. I pass no order regarding costs.

Mathew, J.

20. This appeal was referred to a Full Bench for an authoritative pronouncement on the question whether Section 4A(1) (a) of the Land Reforms Act. Act 1 of 1964, as amended by Act 35 of 1969 (for short the Act) is constitutionally valid.

21. The facts of the case are briefly as follows : The plaintiff executed an otti in favor of the 2nd defendant on 19-10-1087 for Rs. 282/-. Thereafter on 23-8-1095 he executed a puravaipa. By these documents the 2nd defendant was put in possession of two items of properties having a total extent of 1 acre and 47 cents. A suit for redemption of the otti and puravaippa was filed by the plaintiff and a decree was passed: When the decree holder sought to execute the decree, the 2nd defendant contended among other things that he was a tenant and so he was not liable to be evicted. That contention was overruled by the execution court. The appeal from that order and the second appeal to this court were dismissed. This appeal has been filed by the 2nd defendant with leave of the learned single Judge.

22. The appellant filed an affidavit in this appeal stating that he was in possession of the properties for a period of more than 50 years immediately preceding the commencement of the amending Act and therefore he is a deemed tenant under Section 4-A (1) (a) of the Act, which runs as follows:

> "(1) Notwithstanding anything to the contrary contained in any law or in any contract, custom or usage, or in any judgment, decree or order of court a mortgagee with possession of land, other than land principally planted with rubber, coffee, tea or cardamom or the lessee of a mortgagee of such land shall be deemed to be a tenant if -
> (a) the mortgagee or lessee was holding the land comprised in the mortgage for a continuous period of not less than 50 years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969 or" I agree with the conclusion of my learned brethren that the document created a debtor and creditor relationship, and therefore, the transaction does not partake to any extent the character of a lease.

23. There is no dispute that item No. 1 is jenmom land, and is therefore, an 'estate' within the definition of the term in Article 31A of the Constitution. So any right in or over the property created by the jenmi would also be an 'estate'. (See *Atma Ram v. State of Punjab*[10],). And any modification or extinguishment of the right would be a modification or extinguishment of an interest in an 'estate' and would be protected by Article 31A, provided that the modification or extinguishment is in pursuance of a measure of agrarian reform. Mr. N. K. Varkey, appearing for the respondents, contended that in Item No. 2 the mortgagor had only a kanom or leasehold right and as the mortgage was created on that right an extinguishment of the right by virtue of Section 4A (1) (a) would not be an extinguishment of any right or interest in an estate and would not be protected by Article 31A. I think that a modification or extinguishment of the mortgage right

created on the kanom or leasehold interest of the mortgagor would be an extinguishment or modification of an interest in an estate and would be protected by Article 31 A.

24. The learned Advocate General sought to support Section 4A(1)(a) only on the ground that it is a measure for agrarian reform. Therefore, the question is whether the provision is a measure of agrarian reform.

25. In the Full Bench case in 1970 Ker LJ 638 : (AIR 1971 Kerala 98 (FB)) the scope of agrarian reform was considered and the majority said :

> "We have been taken through various reports by experts and expert bodies, both Indian and international, and through the definitions of the word, 'agrarian' in a number of dictionaries in an attempt to show what exactly is comprised within the expression 'agrarian reform'. We think it unnecessary to refer to them, but, we might say that the following definitions of the word 'agrarian' in some of the standard dictionaries, indicate the true scope of the expression 'agrarian reform'.
> 'Of, relating to, or connected with cultivated land, or its cultivation : pertaining to the advancement of agricultural groups : relating to the redistribution of landed property'.

To put it in a nutshell, the slogan, "land for the tiller' seems to have informed the article - as far as possible, the means of production should be in the hands of actual

[10]AIR 1959 SC 519

producer". The primary idea behind agrarian reform is that the ownership of agricultural land should not ordinarily be dissociated from the one who cultivates it. This idea is sought to be realized in part by enacting that a person who has been in occupation of the land as a mortgagee for a period of 50 years before the commencement of the amendment Act should have fixity of tenure. There is nothing violent in the presumption of the legislature that a mortgagee in possession of agricultural land would be cultivating it. A mortgagor who slept over for a period of 50 years to redeem and thus failed to reduce the property to his possession, has Practically ceased to have a live interest in its cultivation or improvement.

26. The fact that the original relationship between the parties was one of debtor and creditor is of no consequence because the aspect from which the legislature has viewed the relationship is different, the aspect being that the mortgagee has been in possession and cultivating the land for a period of fifty years. For the purpose of agrarian reform the aspect that is material is lawful possession and cultivation of the land. Looking at the question from a wider perspective I see no reason why a measure which gives fixity of tenure to a tenant should be a measure of agrarian reform : and why a measure giving fixity of tenure to a mortgagee who has been in occupation and cultivation of the land for fifty years should not be. In the one case the landlord is deprived of his right to recover the property at the end of the term, and in other the mortgagor is denuded of his right to redeem. If the aspect that is material for adjudging whether a measure is agrarian reform is lawful possession and cultivation of agricultural land, the fact that in the one case the transaction originated in a debtor and creditor relationship is immaterial.

27. In paragraphs 2 and 3 of the counter-affidavit filed on behalf of the State the reasons which prompted the legislature to enact the provision are given. They are as follows :

> "It is submitted that the mortgagees with possession and verumpattomdars (Section 2 (62) of Cochin area referred to in Sections 5 and 6 of the Act) were recognized as tenants by Section 4 of the Cochin Proclamation VII of 1124 (12-1-1949). They continued to receive protection under subsequent tenancy legislation as well under the principal Act.

In certain parts of the State, thousands of cultivators of land have been in possession of land for a long number of years under mortgages. In many cases in order to defeat the purpose of tenancy legislations, tenancies were converted into mortgages by the execution of mortgage deeds in the place of the lease deeds under which the lands were earlier held. In many cases properties are held under timeold mortgage documents and the mortgagees in possession have effected valuable improvements, but have no protection for their improvements. In thousands of cases documents acted upon as tenancies were capable of being interpreted as mortgages. Before the advent of tenancy legislation tenants themselves had taken and preferred to take mortgages with possession for the obvious reasons that these were then considered as a more secure form of enjoyment of property, and conferred higher rights on them, than in the case of tenancies pure and simple".
These averments have not been specifically controverted. If. in the circumstances disclosed in the counter-affidavit the legislature thought that the mortgagees of agricultural land in possession and cultivating it for a period of fifty years should be protected from eviction. I do not think that this court can say that it is not a measure of agrarian reform. When the legislature seeks to deprive a mortgagor of his right to redeem, we are apt to consider it as a wanton intrusion by the legislature into the sacred realm of contractual relationship of debtor and creditor and a savage invasion of the right of the debtor to redeem. We are only acclamatised with legislations which interfere with the right of the creditor by reducing or wiping out altogether the debt due to him. So the question is asked how it is possible to regard a measure which takes away the right of the debtor to redeem, and is therefore one to his detriment, be regarded as agrarian reform? As I have said, when we are considering whether a measure is one for agrarian reform, what is important is the aspect from which the transaction has to be viewed. Though the debtor is the favorite of the modern ameliorative legislations, the hard fact that the creditor has been in possession and cultivating the land for more than a generation and the dislocation involved in uprooting him from the land to which he has been wedded for such a long time, has greater importance from the point of view of rural economy.

28. It was argued that Section 4A is couched in a language wide enough to include both agricultural and non-agricultural lands, and therefore, the section cannot be saved as a measure of agrarian reform even in respect of agricultural land as it is incapable of separable application. Although the wording of the section is wide enough to take in non-agricultural land, the section is severable in its application to agricultural land. Counsel for the respondent relied on the dictum in *Romesh Thappar v. State of Madras*[11]. and contended that the section is not capable of separable application. I think, this question is concluded by the decision in AIR 1971 Kerala 98 where the majority said :

> "Some of the impugned provisions, it is pointed out. are on their wording wide enough to apply to non-agricultural land and such application, it is urged, being unrelated to agrarian reform, cannot have the protection of Article 31A. That being so, the impugned provisions must pass the test of Articles 14, 19 and 31 in their application to non-

agricultural land and must submit itself to such a test even at the instance of a person who holds only agricultural land. If it fails, then, it must be struck down in entirety. This contention is illustrative of the argument, "bad in part, bad in whole" we have already noticed, and we see no reason why. if that be necessary, the operation of a provision should not. despite the width of its language, be confined to agricultural lands. Supposing two separate statutes were framed in similar terms, one applicable to agricultural land, the other, to non-agricultural land. Would the one be struck down because the other was bad? Supposing there are separate sets of similar provisions in the same statute, the one set applicable to agricultural land the other to non-agricultural land. Would the one set be struck down because the other was bad unless it cannot stand without the other or unless it is manifest that it was not intended to stand by itself? Why should the position be different because both agricultural and non-agricultural lands are dealt with

[11] AIR 1950 SC 124

by the same provision? So long as the field is severable, why should not a provision be allowed to operate in the unforbidden portion of the field and barred only from the forbidden portion?" In my judgment in the case I said :

"It is said that agrarian reform must be confined to agricultural land and a legislation like the Act which applies to non-agricultural land also would not be protected by Article 31A, as the provisions of the Act are not severable or capable of separable application. I think, the provisions of the Act must by the doctrine of separable application be read as applicable to agricultural lands alone. The question of severability falls into two classes. One relates to a situation in which some applications of the same language in a statute are valid and other applications invalid, the other two statutes containing particular language, whether words, phrases, sentences or sections, which is invalid and other language entirely constitutional. These two aspects of the problem will have to be kept separately in dealing with a question of this nature. The first aspect relates to separable application, and the second to the problem of separable language. Cooley in his treatise on 'Constitutional Limitations'. 2nd Edn. at page 250 said :

'A legislative act may be entirely valid as to some classes of cases, and clearly void as to others .... In any such case, the unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it. that it would not have been passed at all. except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.'

When a court is confronted with statutory language applying to situations both within and without the legislative power, the question whether to sustain the valid application of the law is very similar to that of whether to sustain the constitutional provisions of a statute containing invalid language. But the judicial technique to be applied is somewhat different. When particular words or sections of a statute are unconstitutional, a court may excise them from the law in order

to save the remainder. When statutory language is too broad, however, there is nothing to be severed. The question before the court in such a case is whether it should construe the language employed as limited to its constitutional applications. in accordance with the maxim that a statute should not be given an unconstitutional construction". I then considered the important rulings of the Supreme Courts of America and India and said that the ultimate test of separability in application is the intention of the legislature.

> "The test for severability clearly must be whether the legislature would have intended the valid parts of applications of a statute to stand if it had known when the law was enacted of the invalidity of the remainder : or more accurately, since presumably the legislative body would not have enacted the statute in a form known to be invalid, would it have passed the law at all with the constitutional defects removed? Difficult problems of statutory construction generally arise because the legislature has not thought of the particular situation which has come before the court, and accordingly had no real intention as to how the law should be construed with respect to it. When the problem is one of separating valid and invalid applications of statutory language, no difficulty can generally arise as to whether the valid application standing alone can be given legal effect, and accordingly the intention of the legislature would appear to be the only standard remaining to guide the court in determining such questions."

What we are concerned with here is whether sub-section (1) (a) of Section 4A in its application to the facts of the case. is a measure of agrarian reform. As Justice Holmes said "the decisions are clear that the Court will not nullify a state tax statute because of the invalidity of possible applications of the law not before the court, notwithstanding the seeming logic of the position that it must do so. because if for any reason, or as against any class embraced, the law is unconstitutional, is void as to all. It was said by counsel for the respondents that the doctrine of separability in application is confined to taxing statutes and cannot be applied to non-taxing statutes. That this principle would be applicable to legislations dealing with subjects other than tax has been specifically held by the Supreme Court in R. M. D. Chamarbaugwala case. AIR 1957 SC 628 :

> "The petitioners contend that the rule of severability in enforcement laid down in the above passage, following the decision in *Bowman v. Continental Oil Co*[12].,.........is confined in American law to taxing statutes, that it is really in the nature of an exception to the rule against severability of laws which are partially unconstitutional and that it has no application to the present satute. We are unable to find any basis for this argument in the American authorities. That the decision in (1921) 256 US 642 related to a taxing statute is no ground for limiting the principle enunciated therein to taxing statutes. On the other hand, the discussion of the law as to severability in the authoritative textbooks shows that no distinction is made in American Jurisprudence between taxing statutes and other statutes. Corpus Juris Secundum, Vol. 82, dealing with the subject of severability, states first the principles applicable generally and to all statutes, and then proceeds to consider those principles with reference to different topics, and taxation laws form one of

those topics".

The land in question here is admittedly agricultural land, and if the sub-section is a measure of agrarian reform in its application to the land, the question, whether it will be a measure of agrarian reform when applied to non-agricultural land is quite immaterial for the decision of the case here. The invalidity of the sub-section when applied to types of land not before the court need have no repercussion on the decision of the case here.

29. Counsel for the respondents also relied on the majority decision of the Full Bench in 1971 Ker LT 87 : (AIR 1971 Kerala 295 (FB)) for the proposition that Section 4A (1) (a) cannot be severed in respect of its application to agricultural land by applying the doctrine of severability in application. In that case the question was whether Section 106 was severable in its application to a class of lessees who were really intended to be protected from eviction by the legislature. The majority said that it was

[12](1921) 256 US 642

impossible to bifurcate the class, and confine the application of the section to persons really intended to be protected by the legislature and save the section as a measure of agrarian reform. The section was therefore declared to be bad, even though it could have been saved as a measure of agrarian reform in respect of a class of lessees intended to be protected from eviction by the legislature In that case I said :

> "The test for severability clearly must be whether the legislautre would have intended the valid application to stand if it had known when the law was enacted of the invalidity of the remainder. When the problem is one of separating the valid and invalid applications of statutory language no difficulty generally can arise as to whether the valid application standing alone can be given legal effect and accordingly the intention of the legislature would appear to be the only standard remaining to guide the court in determining such questions. See 'Separability and Separability Clauses' by Robert L. Stern. 51 Harvard Law Review, page 76 at 99. I have dealt with this question in my judgment in (1970 Ker LT 659) : AIR 1971 Kerala 98. This was the approach made in AIR 1957 SC 628. In that case the court came to the conclusion that the provisions of Sections 4 and 5 of the Prize Competitions Act (42 of 1955) were severable. Those provisions were challenged on the ground that prize competition as defined in Section 2 (d) of the Act included not merely competitions that were of a gambling nature, but also those in which success depended to a substantial degree on skill. The court having regard to the declared object of the legislation and its history and the wording of the statute, came to the conclusion that the competitions which were said to be controlled and regulated by the Act were only those competitions in which success did not depend upon any substantial degree on skill. The court also said that even on the assumption that the prize competition as defined in Section 2(d) of the Act included those in which success depended to a substantial degree on skill as well as those in which it did not so depend, the doctrine of severability can be applied; and laid down certain rules for construction. On the application of these rules the court held that the impugned provisions were severable in their application to competitions in which success did not depend to any substantial degree on skill."

I do not think that the reasoning of the majority in that case, even if correct, can be applied to the facts here. Here, there is no difficulty in separating "the sheep from the goats". In other words, there is no difficulty by applying the doctrine of severability in aplication, to confine the application of Section 4 (1) (a) to agricultural land alone. I would therefore, hold that Section 4-A (1) (a) is valid in its application to agricultural lands. Its possible invalidity when applied to non-agricultural land need not prevent its application here.

30. The application for execution filed by the decree-holder must be dismissed, and this appeal allowed. I would do so without any order as to costs.
C. M. A. No. 124 of 1970.

31. This is an appeal against a remand order. The facts of the case have been stated in the judgment of my learned brother. T. C. Raghavan. Ag. C. J. The appellate court remanded the case to find whether the facts of the case would attract the application of Section 4A (1) (b). In this C. M. Appeal the appellant-plaintiff contends that Section 4A (1) (b) is invalid and prays for setting aside the remand order. I do not think that this court should pronounce upon the question of the constitutional validity of Section 4A (1) (b) in this proceeding. One of the grounds in the appeal memorandum is that the facts of the case would not attract the application of Section 4A (l) (b). Until this question is decided, the constitutional validity of the sub-section need not be decided. It is only when it is found that the facts of the case attract the operation of the sub-section that its constitutional validity should be decided. No court would without first deciding or finding whether the facts of a case would attract the applicability of an impugned section in a statute pronounce upon its constitutional validity. As the appellant contends in the appeal that the facts would not attract the operation of the sub-section and as that question has yet to be decided by the court. I decline to pronounce upon its constitutional validity.

32. I would dismiss the appeal, but without costs.
O. P. No. 5360 of 1970

33. I agree that this petition has to be dismissed without costs.

Gopalan Nambiyar, J.

34. I agree with the Officiating Chief Justice that clauses (a) and (b) of sub-section (1) of Section 4-A of the Kerala Land Reforms Act 1 of 1964, as introduced by Act 35 of 1969 have to be declared unconstitutional and void. Whatever observations I have made, however generally couched, should be understood as having been made with reference to these provisions only.

35. Three Full Bench decisions of this Court have previously considered the constitutionality of the provisions of the Act in general, and certain specific provisions thereof. On the reasoning of the majority in the third and last of these decisions, in 1971 Ker LT 87 : (AIR 1971 Kerala 295 (FB)) the conclusion that the provisions now impugned are unconstitutional, seems inescapable, and the grounds for declaring them so, appear to be stronger. The impugned provisions have been quoted in the judgment of the Officiating Chief Justice. In substance they confer fixity of tenure on a mortgagee with possession of land if the mortgagee was in continuous possession for a period of not less than 50 years immediately preceding the commencement of Act 35 of 1969

or had constructed a building for his own residence in the mortgaged property and was occupying the same for a continuous period of not less than 20 years before the commencement of the Act. (I am leaving out the provisions relating to lessee from the mortgagee). The conferment of fixity of tenure on mortgagees is not necessarily dependent on cultivation of the land but on continuous occupation for fifty years (cultivation perhaps being presumed) or on the construction of a residential house, together with the occupation of the same for twenty years. In the course of the arguments I asked the learned Advocate General whether the land reform legislation in any State in this country has gone to the extent of regarding transactions of pure mortgages as tenancies. Our attention was not called to any such legislation. While the novelty of the experiment is by itself no ground to regard the measure as of doubtful validity, and to deny our State its right to be a pioneer in matters of land reform or certain aspects thereof. I cannot but give some weight to this circumstance, especially in view of the observations of the Supreme Court in *Dahya Lala v. Rasul Mohammed Abdul Rahim*[13]. That case was concerned with the validity of certain provisions of the Bombay Tenancy and Agricultural Lands Act of 1948. It was observed :

> "A mortgagee in possession is excluded from the class of deemed tenants on grounds of public policy : to confer that status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. A transferee of the totality of the rights of a mortgagee in possession may also be deemed to be a mortgagee in possession. But a tenant of the mortgagee in possession is inducted on the land in the ordinary course of management under authority derived from the mortgagor and so long as the mortgage subsists, even under the ordinary law he is not liable to be evicted by the mortgagor. It appears that the Legislature by restricting the exclusion to mortgagees in possession from the class of deemed tenants intended that the tenant lawfully inducted by the mortgagee shall, on redemption of the mortgage be deemed to be tenant of the mortgagor." (underlining mine)

Be it noted that the Kerala Land Reforms Act, by Section 12, gives any person interested in any land the right to prove that a transaction purporting to be a mortgage etc. is in substance a transaction of tenancy entitled to fixity of tenure in accordance with the Act. It is where this rule of construction fails that the mortgage is deemed to be a tenancy under the provisions of Section 4-A.

36. The learned Advocate-General conceded that if the protective mantle of Article 31A of the Constitution be not available to the impugned provisions, he would make no attempt to save them, and that they may be regarded as unconstitutional and invalid. I think he was quite right in the stand that he took, as it is obvious that the impugned provisions violate the fundamental right under Article 19 (1) (f) of the Constitution and cannot be saved as reasonable restrictions in the interests of the general public under Article 19 (5) thereof.

37. The question therefore elaborately debated before us was whether the impugned provisions can be saved as a measure of agrarian reform. On the side of those who attacked the provisions, it was maintained that they constitute no 'reform' at all. much the less any 'agrarian' reform. The learned Advocate-General and Counsel who sought to sustain the provisions contended that the

provisions answered both the conceptions. Our attention was called to the observations in Mulla's Transfer of Property Act (5th Edn. at page 471) to the effect that mortgagors as a class required protection against oppression and that therefore the right of redemption is not made subject to any contract to the contrary, whereas the mortgagee's right of foreclosure may well be curtailed by such a contract. (Compare Sections 60 and 67 of the Transfer of Property Act). The legislative consciousness, it was emphasized, also reflected the same view, and provided for relief of agricultural indebtedness by allowing redemption by

[13] AIR 1964 SC 1320

mortgagors, of usufructuary mortgages, even before the expiry of the period of the mortgage, on payment of a scaled proportion of the mortgage money immediately, and the rest, in installments or on similar favorable terms. The provisions of Section 9-A of the Madras Agriculturists Debt Relief Act 4 of 1938 and of Section 11 of the Kerala Act 31 of 1958, repealed and re-enacted by Act 11 of 1970 are in point. The earlier of the Kerala Acts, it is true, excluded mortgagees who constructed buildings on the mortgaged property from the purview of Section 11, and the later one, excluded mortgagees covered by the impugned provision (Section 4-A). But they still left the right of redemption under the Transfer of Property Act unimpaired and proceed on the general principle that mortgagors as a class stand in need of relief. The conferment of fixity of tenure on mortgagees by Section 4A impairs the right of redemption and reverses the trend of thought. Whether a legislative measure of this type is a reform or a retrograde step may well a matter of difficulty and debate : but to characterize the measure as one of agrarian reform, especially in the light of the considerations to follow, appears to me to be far more difficult, and indeed impossible. And. if. as pointed out by the Full Bench in Chami Chettiar's case. 1970 Ker LT 897 paragraph 8 what Article 31A of the Constitution does is to enlarge the scope of Article 19 (5), and to save measures of agrarian reform conceived in the spirit of the Constitution and especially of Articles 38 and 39 thereof, we have been told little as to how the provisions are to be regarded as in the interest of general public. The inequity appears strikingly from the facts of one of the cases argued before us - C. M. A. 124 of 1970 - in which if section 4A (1) (b) were to apply, as claimed, a mortgagee for rupees fifty, of nearly two and a half acres of lands is to be granted fixity, and the mortgagor to be deprived of his property.

38. What is more, the scheme of the Act, appears to me to make it impossible to pass the impugned provisions as a measure of agrarian reform, Section 3 of the Act, exempts certain classes of leases and tenancies (the words are used indiscriminately) from the provisions of Chapter II, which confers fixity. The impugned provisions apply to mortgages in respect of all categories of lands, except lands principally planted with rubber, coffee, tea or cardamom, and to that extent it covers even many of the categories exempted under Section 3. The result is that while lessees of the exempted categories of lands are denied fixity of tenure altogether, whatever be the length of time for which the lease has enured or the nature of the constructions put up by them on the lands leased, a mortgagee, even of these types of lands, gets fixity under the impugned provisions either by fifty years' continuous occupation or by construction of a house for residence together with occupation for 20 years. May be in regard to a few of these exempted categories of lands such as lands belonging to or vested in the Government (Section 3 (i).) or plantations exceeding thirty acres in extent, the idea of a mortgage or security on the lands cannot be readily countenanced. But the difficulties presented are not insuperable and the prospect of mortgages even in regard to them cannot be excluded altogether. To illustrate, leases of lands or buildings or both. specifically granted for industrial or commercial purposes, are exempted from Chapter II under Section 3 (iii). Section 106 granted fixity of tenure to such leases if a building

had been constructed for such industrial or commercial purpose : but the section was declared unconstitutional in Govinda Pillai's case. 1971 Ker LT 87 : (AIR 1971 Kerala 295 (FB)). But a mortgagee of a commercial site gets fixity of tenure by continuous occupation for fifty years prior to the commencement of the Act or by construction of a residence together with occupation of the same, for 20 years prior to the commencement of the Act. The same anomaly can be posited with respect to the tenancies of land granted by the Administrator General exempted from the provisions of Chapter II by Section 3 (iv). A mortgage of such lands will qualify for fixity if the requirements of the provisions herein impugned are satisfied. The same is the position in regard to lands covered by Sections 3 (vii). 3 (x) and 3 (xi) (I have chosen the non-controversial clauses). To place tenancies of the exempted categories of lands under Section 3 absolutely outside Chapter II, and to provide that mortgagees of the same types of the land would qualify for fixity under certain conditions and circumstances appears difficult for me to follow. And to accept it as agrarian reform passes my comprehension.

39. The same difficulties which confronted us in Govinda Pillai's case. 1971 Ker LT 87 : (AIR 1971 Kerala 295 (FB)) in clearing Section 106 as a measure of agrarian reform, appear to emerge here also. In Govinda Pillai's case. (AIR 1971 Kerala 295 (FB)) speaking for the majority, it was observed that we can by no means be sure that what prompted the legislation was not the interests of the rich and the privileged persons at the expense of the poorer section, namely the land owners. We took note of the matters of common knowledge and experience, that a number of commercial sites had been granted for erecting petrol bunks or hotels and business houses, and that sites adjoining river bunks had been granted for Purposes of the timber floating trade : and that amidst these industrial and commercial operations of considerable magnitude there might also be petty traders and village artisans in possession of such sites. We were unable, in the circumstances, to hold that the section was intended to promote rural economy and village uplift rather than to feed the trade and to promote the industrial potentialities of business magnates. We saw no means to restrict the operation of the section to the one category and exclude it from the other. The section did not, it was pointed out, admit of any such dissection : and the decision in Romesh Thappar's case. AIR 1950 SC 124 was against performing any such judicial surgery. The same considerations appear to me to apply to the provisions herein impugned. My experience, and that of the Counsel who appeared before us were both deplorably poor of instances where a village artisan such as a black-smith, a carpenter or a potter or an agriculturist has figured as the Banker or financier of the village economy, taking properties on mortgage and advancing money on security. But our experience was rich enough, of moneylenders, out to exploit agriculturist folk by lending money on security of their hard-earned property, and eventually knocking off the same on favorable terms. I know of no device to confine the application of the impugned provisions to agriculturists and village artisans and the like and exclude its operation with respect to money-lenders.

40. Legal subtleties and refinements apart, the section appears wide enough to cover a mortgage granted to a business man or an industrialist who puts up, say, a two-storied building and uses for the requisite period one of the flats for purposes of residence while running the other as a petrol bunk or a godown or a hotel or a business house. It covers again, a mortgagee of lands for purposes of the timber floating trade who has constructed residential quarters on the land and occupied the same for 20 years, or who without any such construction had remained in continuous possession for over 50 years. It seems hardly a satisfactory answer to point out that it is unlikely that money would be expended on construction of business houses and the like on

mortgaged property. I have made my illustrious modest, and limited the constructions only to two storeys, out of regard for this argument. But it seems to me that the insecurity which threatens such constructions during the first 20 years of the transaction is as much in the case of construction for residence as one for purpose of trade, commerce or industry; and the loss or detriment to the mortgagor at the end of that period is the same in the case of both. And, as far as constructions already completed for over 20 years after the mortgage and before the commencement of Act 35 of 1969 are concerned. to the extent to which the section has application to them. it applies alike to both types of constructions.

41. Like Section 106. Section 4A also is couched in terms wide enough to cover both agricultural and non-agricultural lands. Dissection or severance of the Section so as to confine it to one class of lands alone is impossible. The Act itself seems to contain sufficient indication that where it intended to denote agricultural lands, it has taken care to say so specifically. (See for instance Section 5 (a) and Section 6 (a)). Section 111-A of the Act is yet another indication that no sort of splitting up of the land into agricultural and non-agricultural portions was contemplated. The said section enacts that in cases to which Section 4A applies the mortgagor shall not be liable to return the mortgage money "or anyportion thereof"to the mortgagee or the person entitled.

42. In Chami Chettiar's case. (1970 Ker LT 897) (FB) a Full Bench of this Court considering the validity of Sections 7 and 7-B (1) of the Act, recognised that the benefit of the section might be available to rank trespassers or land grabbers as well as to *bona fide* trespassers and that the conferment of fixity on the latter might well amount to agrarian reform, but felt that the subject-matter of the field was inseverable and the separation of the "sheep from the goats" depending on imponderables, was impossible. On similar reasoning again, the later Full Bench in Govinda Pillai's case, (1971 Ker LT 87) : (AIR 1971 Kerala 295 (FB)) found it impossible to salvage Section 106 by confining it to leases of commercial sites granted to village artisans or to subserve the purpose of agrarian reform and exclude its operation to leases in favor of the industrial and business magnates for promoting trade and industry. These considerations seem to apply equally to the impugned provisions.

43. To get over the difficulties noticed, certain arguments were advanced which I may briefly notice. It was said that the legislature in its wisdom had declared its policy to treat certain mortgages referred to in the impugned provisions as leases, and that was sufficient for the courts to regard them as a measure of agrarian reform. I am quite unable to accept this argument. Giving due allowances for the wisdom of the legislature, to the presumption of validity as to the laws enacted by it. and to its awareness of the needs of the public. I am not prepared to abdicate the responsibility cast upon the courts, to find out. on ultimate analysis, whether any particular provision is a measure of agrarian reform, and if not. whether it trenches on the fundamental rights guaranteed under Article 19.

44. It was said that the lands involved in the cases before us are "estates" within the meaning of Article 31A (2) (a) (i); and there was no need to resort to Article 31A(2) (a) (iii). In other words, the point made was that if a law provides for acquisition by the State of an "estate" or of any rights therein, or extinguishment or modification of such rights, and the definition of "estate" as given in Article 31A (2) (a) (i) is satisfied, nothing more need be looked into. On the terms of Article 31A this may well seem to be so. But the decisions of the Supreme Court itself are numerous, which have laid down that a law. to pass the test of Article 31A, must relate to

agrarian reform. The article itself furnishes no guide as to what is agrarian reform. The Full Bench of this Court, in 1970 Ker LT 659 : AIR 1971 Kerala 98 on an analysis of the various clauses of the Article, by its majority judgment, found no reason why the qualifications in sub-clause (iii) of clause (2) (a) of the Article should not apply to lands described in the earlier part : and thought that so far as land reforms are concerned, protection of the Article extends to lands 'let or held for purpose of agriculture or for purposes ancillary thereto".

45. The argument that under Article 31A (2) (a) (i) "estate" includes any

> "jenm right" and that therefore any law providing for extinguishment or modification of rights in jenm land under Article 31A (1) (a), without more, will receive protection of the Article, seems to me to miss the principle laid down in numerous decisions that any law for acquisition of "estates" or for modification or extinguishment of rights therein, howsoever the term "estate" be understood, whether in its primary, inclusive or residual sense, must satisfy the general requirement that it must relate to agrarian reform. I do not think that the Constitution Seventeenth Amendment has made any difference to this position. (See for instance Seervai's Constitutional Law of India paragraph 15, 44 at pages 543-544). In *State of Uttar Pradesh v. Raja Anand Brahma Shah*[14]. the question raised was whether Pargana Agori directed by Government notification to be vested in the Government under the U. P. Land Reforms Act was an estate, and if so, under which part of Article 31A, after its Seventeenth Amendment. Pargana Agori comprised large tracts of forest land. It was held by the Supreme Court that it was a grant similar to a Jagir or inam under Article 31A (2) (a) (i). The court also considered whether it would fall within Article 31A (2) (a) (iii). as land "let or held for purpose of agriculture". It held that this requirement in clause (iii) applies also to forest land. It was noticed that there was no dispute that the cultivated portions of forest land would fall within clause (a) (iii) of the Article above noticed. On the finding that the lands formed an "estate" under Article 31A (2) (i) an argument was advanced that the acquisition was not for agrarian reform, and was met thus :
> "Mr. A. K. Sen further urges that the acquisition of the estate was not for the purpose of agrarian reforms because hundreds of square miles of forest are sought to be acquired. But as we have held that the area in dispute is a grant in the nature of Jagir or inam, its acquisition like the acquisition of all Jagirs, inams or similar grants was a necessary step in the implementation of the agrarian reforms and was clearly contemplated in Article 31A".

To me this is ununderstandable if the acquisition of an estate failing under Article 31A (2) (a) (i) does not have to further pass the test of agrarian reform to qualify for the protection of the Article.

[14] AIR 1967 SC 661

46. The argument that the impugned provisions can be severed by confining them to mortgages of agricultural land meant to implement or further agrarian reform was again strongly pressed. I have earlier adverted to the reasons why such a severance is not possible. The Full Bench

decision in Govinda Pillai's case. 1971 Ker LT 87 : (AIR 1971 Kerala 295 (FB)) is directly in point that the provision cannot be saved by such severance. But it was said that the first Full Bench decision of this Court in Narayanan Nair's case. 1970 Ker LT 659 : AIR 1971 Kerala 98 had sustained the Act generally with respect to its application to agricultural lands and for purposes of agrarian reform. I am unable to find any such finding in the said Full Bench decision. In paragraph 20 of the K. L. T. report of the majority judgment it was observed :

> "20. Some of the impugned provisions, it is pointed out. are on their wording wide enough to apply to non-agricultural land and such application, it is urged, being unrelated to agrarian reform, cannot have the protection of Article 31A. That being so, the impugned provisions must pass the test of Articles 14, 19 and 31 in their application to non-agricultural land and must submit itself to such a test even at the instance of a person who holds only agricultural land. If it fails, then, it must be struck down in entirety. This contention is illustrative of the argument, "bad in part, bad in whole" we have already noticed, and we see no reason why, if that be necessary, the operation of a provision should not. despite the width of its language, be confined to agricultural lands. Supposing two separate statutes were framed in similar terms, one applicable to agricultural land, the other, to non-agricultural land. Would the one be struck down because the other was bad? Supposing there are separate sets of similar provisions in the same statute, the one set applicable to agricultural land the other to non-agricultural land. Would the one set be struck down because the other was bad unless it cannot stand without the other or unless it is manifest that it was not intended to stand by itself? Why should the position be different because both agricultural and non-agricultural lands are dealt with by the same provision? So long as the field is severable, why should not a provision be allowed to operate in the unforbidden portion of the field and barred only from the forbidden portion?"

On the above reasoning, the provisions of the Act generally were considered only in their application to agricultural land, and paragraph 21 of the report makes it clear that no opinion was expressed on the validity of the provisions in their application to non-agricultural land. (See also paragraph 58 of the majority judgment). I am unable to discern any pronouncement generally that the provisions of the Act are valid in their application to agricultural land, or to matters connected with or ancillary to, agrarian reform. Indeed, if such a finding had been entered by the Full Bench in Narayanan Nair's case. AIR 1971 Kerala 98 the specific consideration of the validity of Sections 7 and 7B (1) in the second Full Bench decision in Chami Chettiar's case 1970 Ker LT 897 (FB) seems quite unnecessary.

47. Since the judement in Govinda Pillai's case. AIR 1971 Kerala 295 (FB). I have again examined the decision of the Supreme Court in *Gulabbhai Vallabbhai Desai v. Union of India*[15]. It seems to support the conclusion that the principle of severance

[15] AIR 1967 SC 1110

cannot be applied to these cases. The facts there were that five writ petitions had been filed by five different purchasers. in each case, of a whole village, for purpose of cultivation. They attacked the provisions of Section 3 of the Daman (Abolition of Proprietorship of Villages) Regulation 1962. Section 3 of it vested. the proprietary right, title and interest of every proprietor

in his village or villages in the Government. It was held that the villages purchased by the five petitioners could not be regarded as "estates" within the main part of Article 31A. Nor could they be regarded as Jagirs within the inclusive part under Article 31A (2) (a) (i) : but it was held that they were all lands "let or held for purpose of agriculture". under sub-clause (iii) of clause (a), and therefore, "estates". The villages contained portions of non-agricultural lands. For instance, the first village which consisted of a total extent of 334 acres comprised 14 acres of road etc., which were non-cultivable lands. It was held that as the village, as a whole was predominantly agricultural, the whole of it was an "estate". In the second case, the village consisted of a total extent of 13,000 acres, out of which 152 acres was hilly land and 225 acres salt lands "both unfit for agricultural operations. It was held that the Regulation would operate on that portion of lands in the village other than the hilly lands and the salt lands. In regard to the third case it was held that the whole village was affected by the Regulation. In the fourth case, the village consisted of a total extent of 300 acres. 100 acres of which was salt lands and 30 acres consisted of hills. These were directed to be excluded from the purview of the Regulation. In the fifth and last case, the extent of the village was 963 acres, out of which, 100 acres were in the municipal area, and contained residential house, markets, and a cemetry. This extent of about 100 acres was directed to be excluded from the purview of the Regulation. Looking to the facts of the case, it seems to me the unit which the Supreme Court was dealing with was a whole village, with respect to which. the principle of severability could easily be applied. But in the present cases, for purpose of the impugned provisions, the entire State is the unit. I am of the opinion that the field itself being inseverable, there is no scope for applying the principle of severability.

48. In the result I would hold that Section 4A (1) (a) and (b) of Act 1 of 1964 as introduced by Act 35 of 1969 are unconstitutional and void.
BY THE COURT

49. Pursuant to the majority opinion, clauses (a) and (b) of Section 4-A (1) are declared unconstitutional and void. A. S. No. 542 of 1966 and O. P. No. 5360 of 1970 are consequently dismissed and C. M. A. No. 124 of 1970 is allowed and the order of remand set aside. Since the question involved is a constitutional question, we pass no order regarding costs.
Order accordingly.