BOMBAY HIGH COURT

Tan Bug Taim

Vs.

Collector of Bombay

O.C.J. Miscellaneous No. 26 of 1945

(Bhagwati, J.)

09.08.1945

JUDGMENT

Bhagwati, J.

1. The petitioners are partners carrying on business in partnership in the firm name and style of Kokwah Chinese Restaurant at Dhanraj Mahal, Apollo Bunder, Bombay. They have been occupying shops Nos. 1, 5 and 11 on the ground-floor of the Dhanraj Mahal and have been conducting the business of the restaurant since March 22, 1944, when they purchased the restaurant together with its paraphernalia and goodwill from the previous owners thereof on payment of a sum of L 42,000. The restaurant has been in existence in any event from and after May 1942 when the previous owners stopped their business of curios which they had been carrying on there along with the business of restaurant and converted the whole premises for their user as a restaurant. The restaurant employs about twenty-four servants and is fitted up with costly fixtures, fittings and furniture which has been installed therein. It also enjoys considerable goodwill in so far as it commands a great reputation and caters for a large clientele including members of the fighting forces of the Allied Nations. It has a large establishment and is one of the leading Chinese restaurants in Bombay.

2. It appears that the entire land and the building thereon known as the Dhanraj Mahal was requisitioned by the Collector of Bombay by his order dated April 7, 1942, and except the ground floor the upper floors have been since then in the actual occupation of the officers of the Royal Indian Navy and the members of their families. When such requisition was made the Government entered into the possession of the upper floors of Dhanraj Mahal and continued to manage the same through one Homiyar Dhanjishaw Broacha whose services were transferred by the owner of the Dhanraj Mahal to the Government. The shops on the ground floor appear, however, to have remained in the possession of the owner and he employed his own manager to look after the said shops who prepared the bills and recovered the rents from the tenants of the shops on the ground floor.

3. On or about May 31, 1944, a month's notice was served on the proprietor of the Kokwah Chinese Restaurant requiring the proprietor to vacate the premises at the end of June, 1944, as

the premises in his occupation were required reasonably and bona fide by the Government for the Royal Indian Navy. Correspondence thereafter ensued between the then attorneys of the proprietor of the Kokwah Chinese Restaurant and the Solicitors of the Central Government at Bombay on behalf of the Government. It seems to have been realized by the Government that they could not so terminate the tenancy of the proprietors of the Kokwah Chinese Restaurant and the intention of the Government to acquire possession of the premises of the Kokwah Chinese Restaurant came to an unnatural end. It appears that thereafter on October 21, 1944, the Collector of Bombay, the respondent herein, addressed a letter to the proprietor of the Kokwah Chinese Restaurant, Dhanraj Mahal, calling upon him under Rule 75A(5) of the Defense of India Rules, 1939, to furnish him within one week from date information on the various points therein mentioned with regard to the restaurant. This letter was addressed by the respondent in connection with the proposed requisition of the Kokwah Chinese Restaurant under the Defense of India Act. By his letter dated November 13, 1944, the first petitioner furnished the requisite information to the respondent wherein he disclosed the names of the petitioners as the proprietors of the said restaurant, pointed out that the fixtures, fittings, goodwill of the restaurant had been bought over by the petitioners from its previous owners in March, 1944, at a price of L 42,000, enclosed a list of crockery, furniture and provisions bought over at the time of the sale, also pointed out that since the premises were rented by the previous owners expenses had been incurred for the fitting up of kitchen, staircase and other fixtures and the premises had been decorated and fitted up for the purposes of a Chinese restaurant which expenses had been included besides the goodwill in the price paid by the present owners to the previous owners of the restaurant, and also intimated to the respondent the net monthly income of the restaurant which was estimated at L 1,000 per month.

4. After the exchange of this correspondence between the proprietors of the Kokwah Chinese Restaurant and the respondent in October-November, 1944, the respondent served on the proprietors of the Kokwah Chinese Restaurant an order being order No. MILY-86 tearing date February 16, 1945. It was marked "Very Urgent", intimating to them that in the exercise of the powers conferred by Sub-rule (2) of Rule 75-A of the Defense of India Rules, read with notification of the Government of India, Defense Co-ordination Department, No. 1336/OR/1/42, dated April 25, 1942, the respondent requisitioned the said property and directed possession thereof to be delivered to the Commander 167 1 of C sub-area forthwith, subject to certain conditions therein mentioned. On the second page of the said order were printed instructions to the owner and tenant, viz. the proprietors of the Kokwah Chinese Restaurant, that in the event of failure on their part to hand over possession of the requisitioned property on this date, steps to enforce compliance with the above order would be taken through the police without further warning to them, that the police had instructions to use such force as may in their opinion be reasonably necessary for securing compliance with the said order, vide Rule 132 of the Defense of India Rules, and that non-compliance with the order was moreover an offence punishable with imprisonment which may extend to three years or with fine or with both, vide Rule 75-A(7) of the Defense of India Rules. This order dated February 16, 1945, was served on the proprietors of the Kokwah Chinese Restaurant immediately thereafter. The petitioners therefore filed this petition on February 19, 1945, asking that the respondent be ordered and directed by an order and injunction of this Court under Section 45 of the Specific Relief Act, 1877, to forbear from enforcing and or executing the requisition order dated February 16, 1945, and/or enforcing delivery of possession of the premises as directed by the requisition order, and or from taking any other steps or proceedings under or in respect of the order; for costs, and further and other reliefs. An application for an interim injunction in terms of prayer (b) of the petition was made on the

very same day, February 19, 1945, to me and on that application, I granted a rule nisi and interim injunction in terms of prayer (b) of the petition, making it returnable on Friday, February 23, 1945.

5. In paragraph 5 of their petition the petitioners contended that Rule 75A of the Defense of India Rules appears to have been framed by the Central Government in the exercise of its powers under Section 2(2)(xxiv) of the Defense of India Act, that "requisition" was a distinct and separate category of legislative powers, that requisitioning of property was not covered by or included in any entry in the three lists contained in Schedule VII to the Government of India Act, 1935, that the Central Legislature was not competent and had no authority to legislate in respect thereof, and that therefore the said order had no legal foundation in law, was ultra vires, bad and inoperative in law. Without prejudice to their contentions, the petitioners contended in paragraph 6 of their petition that by means of the order which purported to be made under Rule 75A and apparently referred to and was issued in respect of the premises, the real and true aim of the respondent was to aim at and affect their business and undertaking which they had been carrying on at the premises, that the object of the respondent was realty and truly to curb, control and proceed against the business and undertaking of the petitioners and that he had therefore no jurisdiction, power or authority to proceed under Rule 75A, the only way in which he could have acted in the matter having been to proceed under Rule 81 of the Defense of India Rules, and that therefore the order of the respondent being without jurisdiction, power or authority was illegal, ultra vires, invalid and inoperative in law. The petitioners also contended in paragraphs 7 and 8 of their petition that by reason of the various allegations made in paragraph 7, the order had been issued by the respondent not for the bona fide purpose mentioned in the order, viz. efficient prosecution of the War, but for the purpose of stifling and limiting the business of Chinese Restaurant-keepers in the Fort area and that the order had not thus been made bona fide for the purpose for which it purported to have been made, but was passed for a collateral purpose, and that therefore the same was illegal, void and inoperative in law. The petitioners lastly contended in paragraph 9 of the petition, without prejudice to all their other contentions, that the order was passed requiring the petitioners to hand over possession "forthwith" and no reasonable or proper time was granted to them for the purpose of delivering the premises under the order, that the respondent was bound to act in such a manner as to interfere with the ordinary avocations of life and enjoyment of property as little as possible, that the respondent had acted in such a way as to cause the greatest inconvenience and hardship to the petitioners and that therefore having disregarded the provisions of Section 15 of the Defense of India Act, the order was in any event illegal, void and inoperative in law. It was on the basis of these contentions, which I have herein set out, that the petitioners submitted that their case fell within the provisions of Section 45 of the Specific Relief Act and asked for an order and injunction of this Court in terms of prayer (a) of their petition.

6. The rule nisi was served on the respondent and he filed an affidavit in reply on March 1, 1945. The respondent contended in the first instance that the petition was misconceived and incompetent. Without prejudice to this contention he denied the several allegations and contentions set out in the petition. He denied that he or the Government desired to discriminate against the owners of Chinese restaurants, but stated that on the contrary the premises were bona fide required by the Government for the purpose stated in the requisition order. He further stated that although the order required the petitioners to hand over possession "forthwith" of the premises in their occupation, he would, as in other cases, have given a reasonable time to the

petitioners to vacate and give possession of the premises to the Commander 167 L of C sub-area if the petitioners had requested him to that effect instead of rushing to the Court. He submitted that the action taken by him was perfectly legal and proper under the Defense of India Act and the Defense of India Rules, that the petitioners had entirely misconceived their remedy and prayed that the petition should be dismissed with costs. The petitioners filed an affidavit in rejoinder reiterating their allegations and contentions with regard to the alleged discrimination by the respondent exercised by him against the owners of the Chinese restaurant keepers and also stating that when the previous Chinese restaurants had been requisitioned the respondent had been approached with a request to give reasonable time when the respondent had stated that it was not in his hands to do so and suggested that the Chief Secretary to the Government of Bombay might be approached in that behalf. It was also stated that on the present occasion the Chinese Consul whose assistance was sought by the petitioners spoke on 'phone to the Chief Secretary to the Government of Bombay who, however, expressed his inability to do anything in the matter. It was submitted that the requisition order was void, inoperative, illegal and ultra vires and should be set aside.

7. The rule came on for argument before me on March 24, 1945, when Mr. Jhaveri appeared for the petitioners and Mr. G.N. Joshi appeared for the respondent. At that hearing Mr. Jhaveri applied for an adjournment for hearing upon testimony of witnesses to be examined in like manner as in a suit under Rule 582 of the High Court Rules. He said that he wanted to prove (a) that two Chinese restaurant-keepers were served with such notices and their premises were requisitioned and that the petitioners' was the third Chinese restaurant requisitioned by the respondent, and (b) that the respondent served notices on only Chinese restaurant keepers and not on others belonging to any other nationality with a view to discriminate against the Chinese restaurant keepers. There being a dispute as to the facts between the petitioners and the respondent, I adjourned the matter for hearing upon testimony of witnesses to be examined in like manner as in a suit and fixed the rule for hearing on Tuesday, April 3, 1945. The rule accordingly came on for hearing before me on April 3, 1945, when Mr. Jhaveri appeared for the petitioners and Sir Jamshedji Kanga appeared for the respondent. After Mr. Jhaveri had read the petition and affidavits Sir Jamshedji Kanga applied that the question whether the petition lies under Section 45 of the Specific Relief Act should be tried as a preliminary issue. I directed that that issue be tried as a preliminary issue and thereupon Sir Jamshedji Kanga addressed arguments in support of his contention. Whilst the arguments had proceeded for some time, I asked Mr. Jhaveri whether, in view of the fact that, the petitioners had contended in paragraph 5 of their petition that the enactment of Section 2, Sub-section (2), Clause (xxiv), of the Defense of India Act and Rule 75A of the Defense of India Rules was challenged as ultra vires the Central Legislature, it may not be necessary to make the Central Government a party to this petition. Mr. Jhaveri stated that he would consider that aspect of the question but wanted time in order to enable him to do so. I also pointed out to counsel appearing for both the parties that under Rule 584, of the High Court Rules I had the power to direct that the present petition and rule should be served on the Central Government in view of the contentions taken by the petitioners in paragraph 5 of their petition. Sir Jamshedji Kanga then stated that the Solicitor to the Central Government at Bombay who was then in Court and was instructing him on behalf of the respondent was prepared to waive service of the rule and was willing to instruct counsel on behalf of the Central Government to argue the rule if the Court was of opinion that the rule should be served on the Central Government under Rule 584 of the High Court Rules. I then adjourned the rule to the Monday following, i.e., April 9, 1945, to enable Mr. Jhaveri to make up

his mind whether he would make the Central Government a party to this petition.

8. The rule ultimately came on for hearing and final disposal before me on June 13, 1945, when Mr. Taraporewalla appeared with Mr. Jhaveri and Mr. C.N. Daji for the petitioners and the Advocate General and Mr. G.N. Joshi appeared for the respondent. At the very commencement of the hearing Mr. Taraporewalla stated that he had considered the position and had come to the conclusion that neither the Government of Bombay nor the Central Government were necessary parties to the petition and his client did not want to serve the rule on them. In view of the above statement of Mr. Taraporewalla I also did not think it necessary to direct that the rule should be served on the Central Government and put the petitioners to the risk of having had to pay their costs in the event of the petition being dismissed.

9. The Advocate General for the respondent continued the arguments on the preliminary issue as to whether the petition lies under Section 45 of the Specific Relief Act. He adopted all the arguments which had been advanced on the previous occasion by Sir Jamshedji Kanga and made a further submission that the petitioners were not entitled to maintain this petition under Section 45 based on the alternative submission like the one which the petitioners had made in paragraph 6 of the petition, and that if the petitioners wanted to urge their main contention which they had set out in paragraph 5 of the petition, viz. that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules was ultra vires the Central Legislature, they could not fall back upon the alternative contention which they had set out in paragraph 6 of their petition. He submitted that the petition disclosed no cause of action, was misconceived and should be dismissed with costs.

10. Mr. Taraporewalla in reply urged that there was no provision of law which prevented him even in a petition under Section 45 of the Specific Relief Act from relying upon alternative contentions and submissions for the purpose of the relief which he prayed for under that section. He also pointed out that in any event in paragraphs 7 and 8 of their petition the petitioners had challenged the said order dated February 12, 1945, as issued by the respondent for a collateral purpose and mala fide and that under the authority of a decision of the Calcutta High Court in *Prosad Chunder De v. Corporation of Calcutta1*[1] he was entitled to an order under Section 45 if the allegations and contentions set out in paragraph 8 of the petition were substantiated by him. He further stated that even under paragraphs 9 and 10 of his petition the petitioners were entitled to contend that the order was illegal, void and inoperative in law as offending the provisions of Section 15 of the Defense of India Act and that in no event was there any justification for the Court's holding that the petition could not lie under Section 45 or was misconceived as contended by the respondent. On a further discussion the Advocate General agreed with this point of

[1] I.L.R (1913) 40 Cal. 836

view and stated that in view of the decision of the Calcutta High Court in *Prosad Chunder De v. Corporation of Calcutt* cited by Mr. Taraporewalla, he would not contend that the Court could decide the matter on the preliminary issue, and accordingly I ordered that the matter should proceed on the merits.

11. Apart from the arguments which were advanced before me by both the parties in an elaborate and exhaustive manner on the various points of law arising on this petition and which I shall deal with hereafter, there were two questions of fact on which evidence was led by both the parties, viz. (1) whether there was any goodwill attaching to the Kokwah Chinese restaurant, and (2)

whether the respondent was guilty of any discrimination as against the owners of Chinese restaurants.

12. As regards the first question, whether there was a goodwill attaching to the Kokwah Chinese Restaurant, the first petitioner gave evidence himself and also called Chen Hin Hong who is the manager of the Chinese Museum situate at Apollo Bunder in the building next door to the Dhanraj Mahal. The first petitioner stated that he had purchased this restaurant from the previous owner thereof in March, 1944, for a consideration of L 42,000. He produced a document executed by the previous owner in his favor on March 23, 1944. He also deposed to the fact that his restaurant commanded a very good clientele, had a central situation and was situated in the building the upper floors of which were occupied by Naval employees and was very popular. The Advocate General tried in his cross-examination of the first petitioner to show that this restaurant had a majority of its clients from the military personnel, that it was only after the present war that there was a brisk demand for restaurants and in particular those serving Chinese food, that there was besides the business of the restaurant which was taken over by the petitioners from the previous owners thereof a business of selling curios the value of which was also comprised in the sum of L 42,000 paid by the petitioners to the previous owners, and that therefore there was nothing like a goodwill attached to the Kokwah Chinese Restaurant which the petitioners could claim. Chen Hin Hong, the manager of the Chinese Museum, deposed to the fact that the restaurant was run side by side with the curios shop up to about five or six months after the advent of the war, but that the business of the restaurant having been found to be a flourishing one the then owners had stopped the business of selling curios and the business that was thereafter conducted was mainly that of a restaurant though some remnants of the curios which they already had used to be there in the shop. He also stated that the Kokwah Chinese Restaurant enjoyed a very good clientele and was run on a fairly large scale, meaning thereby that a considerable goodwill was attached to the Kokwah Chinese Restaurant. In the cross-examination of this witness also the Advocate General tried to show that the increase in the custom was mainly due to the increase of the military personnel visiting the shop during the present war, and further elicited that people associated with nice decoration and good food the name "Kokwah" intending thereby that there was no goodwill attached either to the premises or the name of the Chinese Kokwah Restaurant. In the re-examination of this witness when Mr. Taraporewalla asked the witness if "people went to the Kokwah Chinese Restaurant because of the name Kokwah or because the Chinese restaurant was situated in those premises?", the Advocate General objected to that question being asked by Mr. Taraporewalla to the witness, saying that the witness was not the person who could say why people visited the particular restaurant, and it was only the people visiting the restaurant who could say that or it was only the persons connected with the conduct of the restaurant who could say that, but certainly not the witness. While upholding the objection of the Advocate General to this question I could not help remarking that the objection also went to the root of the answer which he had elicited in the cross-examination of the witness, viz. people associated the nice decoration and the good food with the name Kokwah, as according to him the witness was certainly not competent to say anything in that behalf. In answers to the Court this witness definitely stated that people did not visit the restaurant because it was named the Kokwah Chinese Restaurant, it was not the name that attracted the customers but it was the good food that was served there. It had a good situation with the Yacht Club on the one side, and with the Green's Hotel on the opposite side. There were the naval officers' quarters in the building itself, which enjoyed the central position having regard to all the circumstances named by him, in effect suggesting that the restaurant commanded a

goodwill.

13. On behalf of the respondent one Homiyar Dhanjishaw Broacha was examined as a witness. He was the manager of the building up to May, 1942, when the upper floors of the same were requisitioned by the Government. He stated that the name Kokwah Chinese Restaurant had been adopted by the owners of the restaurant only in the beginning of 1944 the same having been run in other names prior thereto. He further stated that the business of a restaurant had been carried on in the whole of the premises only after May, 1942, the business carried on prior to that date having been that of a restaurant as well as of a curios shop conducted side by side by the then owners thereof. In the cross-examination of this witness it was elicited that he had nothing to do with the shops on the ground floor of the Dhanraj Mahal or the tenants thereof or with the preparation of the bills or the recovery of the rents thereof after May, 1942, as the management of the shops on the ground floor was being looked after by the manager in the employ of the owner after May, 1942, his services having been transferred to the Government when the upper floors of the Dhanraj Mahal were requisitioned by the Government in 1942. The one thing which was established in the evidence of this witness was that after May, 1942, the business of a restaurant was the sole business carried on in these premises, that it was largely frequented by military personnel as well as the civil population and that the custom commanded by the restaurant was fairly large.

14. As regards the second question whether the respondent was guilty of any discrimination as against the owners of Chinese restaurants, the first petitioner was not able to lead any evidence which would go to show that such discrimination was ever resorted to by the respondent. The respondent, on the other hand, put in certain correspondence which had taken place between the petitioners' attorneys and his attorney between March 29, 1945, and April 3, 1945, wherein the petitioners' attorneys demanded particulars of the requisition orders served on Chinese restaurant keepers and on keepers of restaurants in the Fort locality belonging to other nationalities, which particulars were furnished by the respondent's attorney to the petitioners' attorneys along with the letters dated March 31, 1945, and April 3, 1945. These particulars demonstrated that besides the two Chinese restaurants which had been already requisitioned a number of restaurants belonging to Iranis and owners of other nationalities were also requisitioned by the respondent. These statements were not challenged by the petitioners and were sufficient to prove that there was no discrimination exercised by the respondent as against the owners of the Chinese restaurants as alleged by the petitioners.

15. On this evidence I have come to the conclusion that the petitioners purchased the Kokwah Chinese Restaurant from the previous owners thereof together with its goodwill for a sum of L 42,000 and a substantial portion of that sum of L 42,000 was paid for the goodwill of that restaurant. As to what exact sum out of the L 42,000 represented the goodwill of the restaurant, it will be for whoever is concerned in the future with the determination of the value of the goodwill to consider. Suffice it to say that there was a goodwill attached to the Kokwah Chinese Restaurant and the premises occupied thereby, that the value of it was a part of the consideration of L 42,000 paid by the petitioners to the previous owners thereof and that the goodwill which is attached to the premises is a distinct and valuable asset and property of the. petitioners.

16. I have also come to the conclusion that the petitioners have failed to establish that the respondent was guilty of any discrimination against the owners of Chinese restaurants and that the requisition order dated February 12, 1945, cannot be challenged at all on that ground.

17. There thus remain to be disposed of by me three substantial points of law which have been the subject-matter of great contest between the parties: (1) whether the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules is ultra vires the Central Legislature; (2) whether even if Rule 75A of the Defense of India Rules is intra vires the powers of the Central Legislature, the requisition order dated February 12, 1945, is illegal, void and inoperative in law by reason of the respondent having no jurisdiction, power or authority to issue the same under the provisions of Rule 75A of the Defense of India Rules; and (3) whether the requisition order dated February 12, 1945, is illegal, void and inoperative in law as contravening the provisions of Section 15 of the Defense of India Act. If the answer to some or more of the above questions is in favor of the petitioners, the further question which would arise for my consideration would be (4) whether, even if the requisition order dated February 12, 1945, was illegal, void and inoperative in law on some or more of the grounds abovementioned, the Court has power to issue are order against the respondent under Section 45 of the Specific Relief Act.

18. The first question, therefore, which I have got to consider is whether the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules is ultra vires the Central Legislature. This question was very hotly contested between the parties before me and very elaborate and exhaustive arguments were addressed by both the parties to me extending over several hearings. The determination of this question depends on the construction of the Government of India Act, 1935. It may not be out of place therefore to refer to the relevant provisions of the Government of India Act, 1935, which have been canvassed before me.

19. Part II of the Act deals with the Federation of India including in its various chapters provisions as to the Federal Executive, the Federal Legislature, the Legislative powers of the Governor General and Provisions in case of failure of Constitutional Machinery. Part III of the Act deals with the Governor's Provinces including in its various chapters the provisions as to the Provincial Executive, the Provincial Legislature, the Legislative Powers of Governors and the Provisions in case of failure of Constitutional Machinery. Part V of the Act deals with Legislative Powers and is important for the purposes of this petition.

20. Section 99 therein enacts that subject to the provisions of the Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

21. Section 100(1) enacts that notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the 7th schedule to the Act (hereinafter called the "Federal Legislative List").

22. Section 100(2) enacts that notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the schedule (hereinafter called the "Concurrent Legislative List").

23. Section 100(5) enacts that subject to the two preceding sub-sections the Provincial

Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the schedule (hereinafter called the "Provincial Legislative List").

24. These are the three lists, the Federal, the Concurrent and the Provincial Legislative Lists enacted under Section 100 of the Act which lay down the subject-matters of the Federal and the Provincial laws.

25. Section 102 enacts that notwithstanding anything in the preceding sections of the chapter, the Federal Legislature shall, if the Governor General has in his discretion declared by Proclamation (in the Act referred to as a "Proclamation of Emergency") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List: Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor General in his discretion, and the Governor General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

26. Section 102(4) enacts that a law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

27. Section 104 deals with what are called the Residual Powers of Legislation. It enacts that the Governor General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the 7th Schedule to the Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor General otherwise directs.

28. It further enacts that in the discharge of his functions under the section the Governor General shall act in his discretion.

29. There is annexed to the Act the Seventh Schedule which consists of the Legislative Lists, list (1) being the Federal Legislative List, list (2) being the Provincial Legislative List, and list (3) being the Concurrent Legislative List. These are the relevant provisions of the Government of India Act which require to be considered in this connection.
30. It may not be out of place also to set out the relevant provisions of the Defense of India Act (XXXV of 1939) and the Defense of India Rules made there under. The preamble to the Defense of India Act says:

> Whereas an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the Defense of British India and for the trial of certain offences: And whereas the Governor General in his discretion has declared by Proclamation under Sub-section (1) of Section 102 of the Government of

India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war;

It is hereby enacted as follows:

Section 2 of the Defense of India Act provides:
(1) The Central Government may, by notification in the? official Gazette, make such rules as appear to it to be necessary or expedient for securing the Defense of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.
(2) Without prejudice to the generality of the powers conferred by Sub-section (1), the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely:
* * * *
(xxiv) the requisitioning of any property, moveable or immovable, including the taking possession thereof and the issue of any orders in respect thereof;
(4) The Central Government may by order direct that any power or duty which by rule- under Sub-section (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged
(a) by any officer or authority subordinate to the Central Government, or
(b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws, by any Provincial Government or by any officer or authority subordinate to such Government, or
(c) by any other authority.

Section 15 of the Defense of India Act enacts that any authority or person acting in pursuance of the Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the Defense of British India. Section 16(1) of the Defense of India Act enacts that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court.

31. Section 19 of the Defense of India Act enacts that where by or under any rule made under this Act any action is taken of the nature described in Sub-section (2) of Section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, therein set out. It provides in effect for compensation to be paid in accordance with certain principles for compulsory acquisition of Immovable property, etc.

32. Rule 2(11) of the Defense of India Rules defines "requisition" as meaning in relation to any property, to take possession of the property or to require the property to be placed at the disposal of the requisitioning authority. Rule 75A of the Defense of India Rules runs as follows:

(1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the Defense of British India, public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any property, moveable or immovable, and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning:

Provided that no property used for the purpose of religious worship and no such property as is referred to in Rule 68 or in Rule 72 shall be requisitioned under this rule.

(2) When the Central Government or the Provincial Government has requisitioned any property under Sub-rule (1), that Government may use or deal with the property in such manner as may appear to it to be expedient, and may acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the official Gazette, a notice stating that the Central or Provincial Government as the case may be, has decided to acquire it in pursuance of this rule.

(3) Where a notice of acquisition is served on the owner of the property or published in the official Gazette under Sub-rule (2), then at the beginning of the day on which the notice is so served or published, the property shall vest in Government free from any mortgage, pledge, lien or other similar encumbrance, and the period of the requisition thereof shall end.

(4) Whenever in pursuance of Sub-rule (1) or Sub-rule (2) the Central Government or the Provincial Government requisitions or acquires any movable property, the owner thereof shall be paid such compensation as that Government may determine:

Provided that, where immediately before the requisition, the property was by virtue of a hire-purchase agreement in the possession of a person other than the owner, the amount determined by Government as the total compensation payable in respect of the requisition or acquisition shall be apportioned between that person and the owner in such manner as they agree upon, and in default of agreement in such manner as an arbitrator appointed by the Government in this behalf may decide to be just.

(5) The Central Government or the Provincial Government may with a view to requisition any property under Sub-rule (1) or determining the compensation payable under Sub-rule (4), by order

(a) require any person to furnish to such authority as may be specified in the order such information in his possession relating to the property as may be so specified;

(b) direct that the owner, occupier or person in possession of the property shall not without the permission of Government dispose of it or where the property is a building, structurally alter it or where the property is movable remove it from the premises in which it is kept till the expiry of such period as may be specified in the order.

(5A) Without prejudice to any powers otherwise conferred by these Rules, any person authorized in this behalf by the Central Government or the Provincial Government may

enter any premises and inspect such premises or any property therein or thereon for the purpose of determining whether, and, if so, in what manner, an order under this rule should be made in relation to such premises or property, or with a view to securing compliance with any order made under this rule.

* * * *

(7) If any person contravenes any order made under this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

33. It was urged by Mr. Taraporewalla for the petitioners that the requisition of property which is the subject-matter of Section 2(2)(xxiv) of the Defense of India Act, which is defined in Rule 2(11) of the Defense of India Rules and provided for in Rule 75A of the Defense of India Rules is a category of legislation by itself, is not included in any of the items in the three lists of the seventh schedule to the Government of India Act and being, therefore, not within the competence of the Federal or the Provincial Legislatures would fall within the residual powers of legislation vested in the Governor General under Section 104 of the Government of India Act. It is common ground that the Governor General did not issue any public notification empowering the Federal Legislature (which by virtue of Section 316 of the Government of India Act is to all intents and purposes the Central Legislature exercising those powers which are given to the Federal Legislature under Section 100 of the Government of India Act) to enact a law with respect to this matter of requisition of property, and it was therefore urged that even though the Central. Legislature passed, by virtue of the proclamation of emergency made by the Governor General under Sub-section (1) of Section 102 of the Government of India Act, the Defense of India Act (XXXV of 1939), the enactment of the provisions as regards requisition of property contained in Section 2(2)(xxiv) of the Defense of India Act was ultra vires the Central Legislature.

34. The Advocate General, on the other hand, urged that in the present case he was not concerned with requisition of any moveable property but was only concerned with requisition of the leasehold interest in the premises occupied by the Kokwah Chinese Restaurant, including the landlord's fittings and fixtures, which was according to him requisition of Immovable property. He contended that the requisition of such Immovable property was requisition of "land" which had been defined in Section 299(5) of the Government of India Act, 1935, as including Immovable property of every kind and any rights in or over such property, thus including within that category the leasehold interest in the said premises which were sought to be requisitioned by the respondent. He urged that the requisition of "land" was included in item No. 9 in list II of the seventh schedule which dealt with the compulsory acquisition of land and was in any event included in item No. 21 in the said list which dealt with "land", that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove. He, therefore, urged that the Central Legislature had by virtue of the proclamation of emergency under Section 102(1) of the Government of India Act the power to enact the provision with reference to requisition of land and therefore the enactment of Section 2(2)(xxiv) of the Defense of India Act was intra vires the Central Legislature.

35. By way of preliminary observations on the method of approach which should be adopted by the Court in the determination of these rival contentions of both the sides, the Advocate General

submitted that the Government of India Act, 1935, was a Constitution Act and in the construction of that Act the Court should not approach the matter in a narrow and a pedantic sense but should give a large and liberal interpretation to the provisions of that Act. He relied upon the principles of construction which have been laid down in this behalf in various cases beginning with *British Coal Corporation v. The King*[2] in which it was observed (p. 518):

> Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Henrietta Muir Edwards v. Attorney-General for Cananda*[3] Their Lordships do not conceive it to be the duty of this Boardit is certainly not their desire-to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs'. 'The Privy Council, indeed) has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony'.

He also relied upon the observations of the Appeal Court in *James v. Commonwealth of Australia*[4]

[2][1935] A.C. 500
[3][1930] A.C. 124
[4][1936] A.C. 578 (p. 613)

> The constitution has been described as the federal compact, and the construction must hold a balance between all its partsit is appropriate to apply the words of Lord Selborne in *The Queen v. Burah*[5] 'The established Courts of Justice, when a question, arises [in regard to a constitution] whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions'.

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances

illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted': *British Coal Corporation v. The King*[6]

He further relied on the case of *In re C.P. Motor Spirit Act*[7], in which at p. 4, col. 2, Gwyer C.J. observed that:

> The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense: per Lord Wright in *fames v. Commonwealth of Australia*[8] The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge: "Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere act which declares what the law is to be:' (1908) 6 Commonwealth L.R. 469, per Higgins J. at p. 611.Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be

[5](1878) 3 A.C. 889 [7] AIR 1939 FC 1
[6][1935] A.C. 500 [8][1936] A.C.578

> construed ut res magis valeat quam pereat." (So as the thing should have validity rather than it should perish).He therefore urged that the Court should in interpreting provisions of the Government of India Act adopt a broad and liberal construction rather than a narrow and pedantic one.

36. The Advocate General pointed out that the powers of the Indian Legislature were plenary powers of legislation within the limits laid down in the Government of India Act of 1935. He relied upon the observations of Lord Selborne in *The Queen v. Burah*[9] where in expressing the views of the Board His Lordship used this very significant language (p. 904):

> The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or

> delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

He also relied on the observations of Gwyer C.J. in *United Provinces v. Atiqa Begum*[10], Within their own sphere the powers of the Indian Legislature are as large and ample as those of Parliament itself *The queen v. Burah*[11], and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it, and also upon the observations of the same learned Chief Justice in *Bhola Prasad v. Emperor*[12]

> Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. If that was true in 1878, it cannot be less true in 1942. Every intendment ought therefore to be made in favor of a legislature which is exercising the powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the by-laws of a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by the arbitrary introduction of far-fetched and impertinent limitations.

37. The Advocate General further pointed out that the scope of the powers granted by the Government of India Act, 1935, to the Indian Legislature, even though they were plenary within their own spheres, was to be found in the three Legislative Lists of the seventh schedule to the Act. As to the nature of those Lists he relied upon the observations contained in an extract from the White Paper where Sir Samuel Hoare is reported to have stated as follows:

> But the only bridge that we could find between these two diametrically opposite points of view was to have three lists, namely, the Federal List, the: Provincial List and the Concurrent List, each as exhaustive as we could make it, so exhaustive as to have little or nothing for the residuary field. I believe that we have succeeded in

[9](1878) 3 A C. 889
[10] AIR 1941 FC 16 : 1941 AWR (F.C.) 11 3 : 1941 AWR (F.C.) 11 109 : 1940 F.C.R. 110
[11](1878) 3 A.C. 889
[12] A.I.R [1942] F.C. 17

> that attempt and that all that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Hon. Friend nor I can contemplate at this moment. We find that we have really exhausted the ordinary activities of Government in the three other fields. I agree with my Hon. Friend that it means complications. I believe that it also means the possibility of increased litigation.

Besides this extract from the White Paper he also relied upon the observations of Gwyer C.J. in *United Provinces v. Atiqa Begum*[13], Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as 'Local Government,' 'Education,' 'Water,' 'Agriculture' and 'Land,' the general word is amplified and explained by a number of examples or

illustrations, some of which would probably on any construction have been held to fall under the more general world, while the inclusion of others might not be so obvious. Thus 'Courts of Wards' and 'treasure-trove' might not ordinarily have been regarded as included under 'Land,' if they have not been specifically mentioned in item 21. I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. He also relied upon the observations of Sulaiman J. in *Subramanyan v. Muttuswami*[14]*,*

> No doubt, every effort appears to have been made to make the three lists as comprehensive and exhaustive as wall as exclusive as possible; and it may well be that barring personal or customary laws, it would only be extremely rare cases which would not come in any one of these three lists so as to fall within the residual powers of legislation dealt with by Section 104 of the Act, Nevertheless, in view of the large number of items in the three lists, it is almost impossible to prevent a certain amount of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible. Rigid and inflexible watertight compartments cannot be ensured. To avoid such difficulties the Imperial Parliament has thought fit to use the expression 'with respect to' which obviously means that looking at the legislation as a whole, it must substantially be with respect to matters in one list or the other. A remote connexion is not enough.

He further relied upon the observations of Gwyer C.J. in *Bhola Prasad v. Emperor*[15]

> The wordsexplain or illustrate and do not amplify or limit the words immediately preceding them and cover the whole field of possible legislation on the subject.

To the same effect were the observations of their Lordships of the Privy Council which were relied upon by him in the case of *Governor-General in Council v. Province of Madras*[16] where Lord Simonds who delivered the judgment of the Board observed (p. 72):

[13] AIR 1941 FC 16: 1941 AWR (F.C.) 11 3: 1941 AWR (F.C.) 11 109: 1940 F.C.R. 110
[14] AIR 1941 FC 47: 1941 AWR (F.C.) 11 192: 1941-53-LW 397: 1941-53-LW 109: 1940 F.C.R. 188
[15] A.I.R [1942] .F.C. 17 (p. 19, col. 2)
[16][1945] 8 F.L.J. 69

> The Indian Constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enumeration and division of Legislative powers between the Federal and Provincial Legislatures.

On the basis of these authorities he urged that the Lists of the seventh schedule to the Government of India Act were exhaustive and should be read as comprising each and every legislative power which could possibly be exercised by the Indian Legislature. He also urged that the residual powers of legislation vested in the Governor General under Section 104 of the Government of India Act should not be resorted to unless and until all the categories in the Lists were absolutely exhausted. In that behalf he relied upon the observations of Gwyer C.J. in *In re C.P. Motor Spirit Act*[17]*,* that the attempt to avoid a final assignment of residuary powers by an exhaustive remuneration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists. He also relied upon

the observations of Sulaiman J. in *Subramanyan v. Muttuswami*[18]

> But resort to that residual power should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a nondescript.
> He, therefore, contended that the power to requisition immovable property should be read by the Court as having been included in item No. 9 or in any event item No. 21 in list II of the seventh schedule to the Government of India Act.

38. The Advocate General further urged that in the matter of the construction of the Constitution Act like the Government of India Act, 1935, regard should be had to the legislative practice prevailing in England as well as in India in order to determine what is ordinarily treated as embraced within a particular topic or category of legislation. He relies upon the observations of the Privy Council in *Croft v. Dunphy*[19] in which their Lordships have observed (p. 165):

> When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power.

He also relied upon the observations of Beaumont C. J. in *Sir Byramjee Jeejeebhoy v. Province of Bombay*[20] where the learned Chief Justice observed (p. 45):

> In constructing the Government of India Act, 1935, the Court is entitled to look to the legislative practice prevailing in England and in India at the time when it was passed.

39. Mr. Taraporewalla for the petitioners, however, urged that though the Government of India Act was a Constitution Act and a large and liberal interpretation should be given to the terms thereof, that canon of construction did not abrogate the other canon of construction which was equally well-known and which has been enunciated by Maxwell

[17] AIR 1939 FC 1 (p. 5, col. 1)
[18] A.I.R [1941] .R.F.C. 47 (p. 55, col. 1)
[19] [1933] A.C. 156
[20] (1939) 42 Bom. L.R. 10

on the Interpretation of Statutes, 8th edn., at p. 248:

> The tendency of modem decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the Legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be favorable to personal liberty, and this tendency is still evinced in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful inferences. The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or

ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence. Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects pf the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt.

He urged that the canon of construction which warrants a large and liberal construction to be put on the provisions of the Constitution Act should be modified by the canon which enjoins the Courts to adopt a strict construction in respect of enactments which provide for confiscation of property and encroach upon the rights and liberties of the subject; and that the Courts should not adopt such a construction unless and until the intention of the Legislature in that behalf was plainly manifest if not in express words, at least by clear implication and beyond reasonable doubt. He further urged that it was one of the cardinal principles of British jurisprudence that no person should foe deprived of his property save by authority of law and that the Legislature should not enact any laws authorizing the confiscation of the property of the subject unless due provision was made for compensation to be rendered to the subject for such deprivation of his property. He relied in this behalf on the provisions of Section 299(1) and (2) of the Government of India Act which he submitted were a statutory enactment of these principles of British jurisprudence. He did not dispute that the Imperial Parliament had supreme and plenary powers to legislate on any subject whatever and in any manner whatever, so as to deprive a subject of the liberty of person as well as his rights of property. He, however, submitted that there was in this respect a distinction between the powers of the Imperial Parliament and those of the Indian Legislature that whereas there were no limitations to the legislative powers of the Imperial Parliament, the powers of the Indian Legislature were circumscribed within the lists of the seventh schedule to the Government of India Act, and that even though the powers conferred on the Indian Legislatures within their own spheres were plenary, the same were also circumscribed by the salutary provisions contained inter alia in Section 299(1) and (2) of the Government of India Act hereinbefore referred to. He also contended that at no time had such a claim to confiscate the property of the subject been ever put forward before, either by the Indian Legislature or by the Government of India and it was only as an act of State that the Government could deprive or confiscate the property of the subject; if it did not amount to an act of State, it was open to the subject to challenge the whole action of the Government which deprived him of his

rights of property. He, therefore, urged that having regard to these principles of construction which were pointed out by him, the Court should read the items in the lists of the seventh schedule to the Government of India Act in such manner as would not warrant the confiscation of the property of the subject by the Government, or give the Legislature power to enact provisions with regard thereto.

40. Mr. Taraporewalla further urged that even though the lists of the seventh schedule to the Government of India Act might have been thought quite exhaustive by the framers of the Act as shown from the extract of the White Paper which was referred to by the Advocate General and even though the lists contained topics or categories of legislation which were to be read in a large and liberal and not a narrow or restricted sense, the true rule of interpretation of those lists which should be adopted was that these topics or categories of legislation should be so construed as only to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprised in the same. Though Section 100 of the Government of India Act gave to the Federal and the Provincial Legislatures the power to make laws with respect to the matters enumerated in the respective lists therein referred to, the words "with respect to" obviously meant that looking at the legislation as a whole it must substantially be with respect to matters comprised in the items in those lists. A remote connection was not enough. He pointed out that even though it was the intention of the framers of the Act and the fond hope which they entertained as shown from the extract from the White Paper above referred to that all possible categories of legislation had been exhausted in those lists, there had been several occasions after 1939 when fresh topics of legislation which were not comprised in those lists were inserted in those lists by way of amendments or additions thereto. He also pointed out that those lists however exhaustive they might be were, admittedly, within the terms of the extract from the White Paper, concerned with the ordinary activities of the Government, and requisitioning of property could not be one of the ordinary activities of the Government ever contemplated by the framers of the Government of India Act. He therefore urged that there was no justification for including the requisition of land in item No. 9 in list II of the seventh schedule to the Government of India Act or item No. 21 in the list, as requisitioning was not an ancillary or subsidiary matter which could fairly and reasonably be said to be comprised in the items but was remotely connected with the topics of legislation therein contained. Mr. Taraporewalla also urged that the residual power of legislation which was vested in the Governor General under the terms of Section 104 of the Government of India Act was not a mere nondescript as stated in the judgment of Sulaiman J. in *Subramanyan v. Muttuswami*[21], There were various topics of legislation which could not be thought of by the framers of the Act as comprised in the ordinary

[21] AIR 1941 FC 47: 1941 AWR (F.C.) 11 192 : 1941-53-LW 397 : 1941-53-LW 109 : 1940 F.C.R. 188

activities of the Government, and would have to be dealt with when emergency arose such as the present war which necessitated considerable encroachment on the liberties of the subject and his rights of property. When occasion arose for such emergency legislation it would be but natural to find that the particular powers which were sought to be acquired by the Government to meet the emergency might not be covered by the items in the lists of the seventh schedule to the Government of India Act. Special measures might have to be enacted to meet the needs of the situation, and apart from the instances cited by Mr. Taraporewalla where the lists having been found wanting, certain amendments had got to be made either to the lists or to the definitions contained in the Act, the residual power of Legislature might have to be exercised by the Governor General under Section 104 of the Government of India Act. He therefore contended

that the resort to the residual power of legislation vested in the Governor General under Section 104 of the Government of India Act was not merely a remote possibility as contended by the Advocate General but was a living reality, and the same could certainly be invoked in times of emergency like the present war in order to invest in the Government powers of requisitioning of property and other like powers which would encroach upon the liberties of the subject and his rights of property in times of such emergency.

41. Mr. Taraporewalla did not dispute that legislative practice was no doubt one of the guides in the construction of the provisions of the Government of India Act and the items in the lists of the seventh schedule to the Act as contended by the Advocate General.

42. These are the points of view which, it was urged by the Advocate General and Mr. Taraporewalla, should be adopted by the Court in considering the question whether the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules is ultra vires the Central Legislature. There is no doubt on the authorities cited before me that the Imperial Parliament is supreme and has powers to enact laws affecting the liberty of person and the rights of property enjoyed by the subject in any manner whatever. The Imperial Parliament has got the power to deprive a subject of his liberty of person and also of his rights of property in any manner whatever without assigning any reason whatsoever or without making any compensation for the same. When, however, one comes to the powers granted to the Indian Legislature under the Government of India Act, 1935, the powers which are conferred on the Indian Legislature under the terms of that Act are circumscribed within the items in the lists of the 7th schedule to the Act, though the powers of the Indian Legislature to make laws with respect to the items in those lists are plenary within their own sphere. In the exercise of those powers to make laws with respect to those items the Indian Legislature does not act as an agent of or exercise any delegated authority from the Imperial Parliament. It exercises plenary powers, as full powers as the Parliament itself could exercise with respect to the items in those lists. Even though those lists may have been meant to be as exhaustive and comprehensive as human ingenuity could make them, they were meant to comprise all that could be thought of as within the ordinary activities of the Government. Even though the emergency like the present war could well have been within the contemplation of the framers of the Constitution Act, there is no doubt that such powers as may have to be exercised in the case of such emergency could not have been contemplated to have been included in the items in those lists. Such powers as may have to be exercised by the Government according to the exigencies of the situation would have to be given to the Indian Legislature having due regard to the development of the situation from time to time and the exigencies of the situation and certainly could not have been forethought when the framers of the Government of India Act put down the enumeration of the topics or categories of legislation in the lists of the seventh schedule to the Government of India Act. Even with regard to the ordinary activities of the Government it was not humanly possible to exhaust all categories of legislation, with the result that as evidenced by the enactment of the India and Burmah (Miscellaneous Amendment) Act of 1940 (3 & 4 Geo. VI, c. 5) which effected the amendment of the definition of "taxation" in Section 311(2) of the Government of India Act and the addition of Items 48(a) and 48(b) in the items contained in the Federal Legislative list as also certain amendments in the Provincial and the Federal Legislative lists by reason of the inclusion of the! Universities in the category of "Education" and also by the enactment of the Indian Estates Duties Act of 1945 (8 & 9 Geo. VI, c. 7) and the insertion of item 56(a) in the Federal Legislative List and Item 45(a) in the Provincial Legislative List in the lists of the seventh

schedule to the Government of India Act by reason of the decision given by the Federal Court in *In re Powers of Federal Legislature to levy Estate Duty*[22] in regard to the estate duty proposed to be levied by the Government of India, these lists which were fondly hoped by the framers of the Government of India Act to be as exhaustive and comprehensive as possible were found not to be absolutely so. If that is the position, it is but consonant with reason that the emergency powers sought to be given to the Government by the enactment of the provisions of the Defense of India Act by the Central Legislature, even though that was done in pursuance of a proclamation issued by the Governor General in that behalf, could not have been at all contemplated by the framers of the Government of India Act when the lists of the seventh schedule came to be compiled by them. That is the real reason why the residual powers of legislation were vested in the Governor General under the terms of Section 104 of the Government of India Act. In spite of the fond hope entertained by the framers of the Government of India; Act that only personal laws and some rare items of legislation would have to be covered by the provisions of the residual powers of legislation invested in the Governor General under the terms of Section 104 of the Government of India Act, such powers as had to be invested' in the Government by reason of the emergency which was brought about by the present war could not all have been contemplated and included in the topics or categories comprised in the Items in the lists of the seventh schedule to the Act.

43. If as I have already observed the lists of the seventh schedule to the Government of India Act were not as exhaustive and comprehensive as were intended by the framers of the Act to be, it remains to be seen how far the power of requisition of land can be said to have been comprised in item No. 9 or in item No. 21 in list II of the seventh schedule to the Government of India Act. In this behalf I may observe that I entirely agree with Mr. Taraporewalla as regards his submission on the method of approach and the canons of construction which should be adopted in the interpretation of the Constitution Act like the Government of India Act. I am of opinion that the canon of construction which warrants a large and liberal construction to be put upon the various provisions of the Government of India Act should be modified by the canon of construction which lays down that a strict construction should be put upon those provisions which go to curtail the liberties of the subject or impose burdens and obligations upon him. If this principle of interpretation be adopted, it is abundantly clear that the items in the lists of the seventh schedule to the

[22][1944] 7 F.L.J. 215: A.I.R [1945] .F.C. 73

Government of India Act should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used therein in spite of the items contained in those lists being read as extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the same. Before one can read a power like the requisition of land in item No. 9 which relates to compulsory acquisition of land or item No. 21 which relates to land with the amplification or explanation thereof contained in the latter part of that category., one should have duel regard to the principles of British jurisprudence which, as I have already stated, have been enacted in Section 299(1) and (2) of the Government of India Act and should as far as possible avoid a construction which runs counter to those salutary provisions of the Act.

44. If regard be had to these principles of interpretation in regard to the construction of the provisions of the Government of India Act and the items in the lists of the seventh schedule thereto, it would, in my opinion, require considerable stretching of words which is not justified by the various considerations to which I will advert hereafter, to read that requisition of land is

included either in item No. 9 or item No. 21 in list II of the seventh schedule to the Government of India Act.

45. Before I proceed with those considerations, I may here dispose of one argument which was advanced by the Advocate General that Section 299 (1) and (2) of the Government of India Act did not give statutory recognition to the general principles of British jurisprudence which I have referred to above but merely enacted the limitations on the legislative powers invested by the Government of India Act in the Indian Legislature. He pointed out that that provision was to be found enacted in part XII of the Act which dealt with Miscellaneous and General items and was under the heading of "provisions as to certain legal matters" which commenced with Section 292 of the Act. This argument, however, ignores the fact that the Government of India Act had dealt with restrictions on legislative powers in Chapter II of Part V thereof commencing with Section 108 of the Act and that there was no question of laying down any further restriction on the same in Part XII thereof commencing with Section 292 of the Act. What was sought to be enacted under that heading and by the sections commencing with Section 292 of the Act were not restrictions on the powers of the Legislature but were certain fundamental principles of British jurisprudence, international law, His Majesty's prerogative to grant pardons, remissions of punishments and the like which should not be in any manner whatsoever affected or departed from in the exercise of the legislative powers invested in the Indian Legislature under the terms of the Government of India Act. Examples of this are to be found inter alia in the provisions of Section 298(1), Section 299(1) and (2) of the Government of India Act which are not merely restrictions on the legislative powers of the Indian Legislature but are in reality the statutory recognition of the fundamental principles of British jurisprudence enacted therein.

46. I now proceed to consider how far requisition is included in the conception of acquisition. If one has regard to the dictionary meaning of the word "acquisition" it has been defined in the Oxford English Dictionary as (1) Action of acquiring: see Acquire, and (2) A thing acquired or gained. The verb "Acquire" in its turn has been defined as (1) To gain, or get as one's own (by one's exertions or qualities), and (2) To receive, to come into possession of. The word "Requisition", on the other hand, has been defined as (1)(a). The action of requiring; a demand made by a person; (b) A requirement, necessary condition. (2) The (or an) action of formally requiring one to perform some action, discharge some duty, etc.; the fact of being so called upon. Also, a written demand of this nature; (3) The action of requiring a certain amount or number of anything to be furnished; a demand or order of this nature, especially one made upon a town, district, etc., to furnish or supply anything required for military purposes; (4) The state or condition of being called or pressed into service or use, the last two meanings being in consonance with the idea of requisition of property for the purposes of the State or for military purposes. This is the dictionary meaning attached to the words "Acquisition" and "Requisition". Even though the second part of the definition of the verb "Acquire" gives an impression that the receiving or coming into possession of a thing may, apart from the gaining or getting it as one's own, be included in the word "Acquisition", the central idea in the word "Acquisition" is that whatever rights a person acquires in the thing which is the subject-matter of such acquisition are proprietary rights in the same, whereas the central idea in the word requisition is that the person requiring the thing requires it for his own use or for some particular purpose, as is amply illustrated by the dictionary meaning of the word "Requisition" which defines it as (1)(a) to require (anything) to be furnished for military purposes ; to put in requisition ; (b) to make demands upon (a town, etc.)(2) to make requisition for; to demand, call for, request to have or

get; and (b) to call in for some purpose. This dictionary meaning, therefore, of the words "Acquisition" and "Requisition" does not carry the matter any further. When we go, however, to consider the decided cases on the point, so far as the word "Acquisition" is concerned, we find it used only in the sense of the compulsory acquisition of land which is enacted in the Land Acquisition Act I of 1894, or the compulsory purchase of land which is known to English law. As regards the word "Requisition," we have a consideration of the same in The Meandros [1925] P. 61, where the following observations have been made (p. 65):

> The next question is as to requisition. The effect of requisition may be of the most various kinds. It is not an operation of stereotyped form. Requisition is not a term of Article It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which English people became familiar twenty-five years ago-the term 'commandeering'. A requisition is a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various. If, for instance, a stack of hay is requisitioned, it is requisitioned to be consumed; if premises are requisitioned they are requisitioned to be occupied; and if a ship is requisitioned it may be requisitioned for the purpose of being sent to sea, or sunk at the mouth of a harbour, or for a purpose which is satisfied the next day.The possession of the vessel and the control of her passed for the time being;. The property in her did not pass. It is obvious, upon the facts being examined, that the owners of the Meandros never were disseised, in the technical sense, of property in her. All they were deprived of for the time being was the use and possession of her.

A consideration of the whole of the passage above referred leads to the conclusion that requisition was there taken to be a deprivation of the owners of the property for the time being of the use and possession thereof. It was not understood in the sense of the acquisition of ownership in the property or the rights in or over such property. This case of The Meandros was considered in *France Fenwick & Co. v. The King*[23] where Wright J. observed (pp. 464-465):

> 'Requisition' so used in para. 25 means, in my judgment, some effective and positive dominion or control constituted by a definite order given under the regulations. To amount to a requisition the direction must, I think,amount to a requirement that the vessel be placed at the disposal of the Government. The word 'requisition' appears from the Oxford Dictionary to have been adopted from the French, and as early as 1837 was used by Carlyle as meaning "to require anything to be furnished for military purposes.' It came, however, into official prominence during the Great War and, in particular, was employed in the Proclamation by the Admiralty dated August 3, 1914, in connection with the requisition and taking up of British vessels; it was employed in several of the! War Emergency Regulations, especially Article 39 B.B.B, and in the Indemnity Act, 1920, Section 2, Sub-section 1, and Schedule, Part I,Pickford L.Jwhen Master of the Rolls, again discussed: the meaning of the word in *Bombay & Persia Steam Navigation Co. v. Shipping Controller*[24]

He obviously would regard as a requisition a case where the Government having taken possession of a cargo kept it in the ship at their disposal,. These observations, again, lead to the conclusion that the word "requisition" was understood to mean a dominion or control of the property and not the acquisition of rights of ownership therein. The Advocate General in this connection drew the attention of the Court to a decision of the High Court of Australia on appeal from the Supreme Court of New South Wales reported in *The Minister of State for the Army v. Dalziel*[25] which he contended was on all fours with the present case. The authority of the decisions of Australian and Canadian Courts was considered by Gwyer C. J. in *In re C.P. Motor Spirit Act*[26], (p. 5, col. 1):

> The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the) Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a color from its context and bear different senses accordingly.

I will, therefore, approach a consideration of the decision cited by the Advocate General, reported in *The Minister of State for the Army v. Dalziel* with due regard to the observations set out above. In that case the question for the consideration of the High

[23][1927] 1 K.B. 458 [25]68 Com. L.R. 261
[24]7 L.L 226 [26] AIR 1939 FC 1

Court was whether the taking under reg. 54 of the National Security (General) Regulations by the Commonwealth for an indefinite period of the exclusive possession of property constituted an acquisition of property within the meaning of Section 51 (xxxi) of the Constitution, and whether reg. 60H of the National Security (General) Regulations did not provide just terms within the meaning of Section 51(xxxi) of the Constitution in respect of such a taking of possession by the Commonwealth. The facts of the case were that on May 12, 1942, certain vacant land owned by the Bank of New South Wales which had been in the occupation of one Arthur Dalziel as a weekly tenant at a rental of 8 per week from the Bank and had been used as a car-parking station for about thirteen years by him was requisitioned and taken possession of by the Quartermaster-General for the Commonwealth by virtue of reg. 54 of the National Security (General) Regulations pursuant to a notice in writing dated May 5, 1942. The notice directed the Quartermaster, United States Armed Forces in Australia, to occupy the land and authorized him to do in relation to the land anything which any person having an unencumbered interest in the fee simple in the land would be entitled to do by virtue of that interest and provided that, while the land remained in possession of the Commonwealth, no person should exercise any right of way over the land or any other right relating thereto, whether by way of an interest in land or

otherwise. There was correspondence between the solicitors of Arthur Dalziel and the Deputy Assistant Director of Hirings in regard to the compensation payable to him in respect of such requisitioning. The Central Hirings Committee determined certain compensation as payable to Dalziel which he refused to accept, forwarding his claim for compensation to a Compensation Board which in its turn found that Dalziel was entitled to compensation, but that the basis set out in the Basis of Compensation Order made under reg. 60H did not provide just terms. The Board did not make any allowance for loss of profits and fixed the amount of profits as 197 as full compensation, comprising thirteen weeks at 8 per week in lieu of reasonable notice to quit, 104; goodwill 91; and for removal of fixtures 2, refusing to allow any additional amount for future or other rental. Dalziel applied to the Supreme Court of New South Wales in accordance with Section 60G for a review of the assessment made by the Compensation Board on the ground that he was entitled to more compensation than the amount awarded by the Board. A similar application was made by the Minister of State for the Army, on the ground that Dalziel was not entitled to any compensation, in addition to that offered by the Central Hirings Committee. Upon preliminary points of law Roper J. held that the right to the possession of the land conferred upon the Commonwealth by reg. 54 of the National Security (General) Regulations was an acquisition of property within the meaning of Section 51(xxxi) of the Constitution, so that the Commonwealth could only take possession of the land under the regulation on just terms, that reg. 60H did not provide just terms and therefore it was ultra vires, and that the compensation. payable should therefore be determined without regard to the Basis of Compensation Order made by the Minister on March 23, 1942, as amended, and under the ordinary established principles of the law of compensation for the compulsory taking of property. From this decision the Minister appealed, by special leave, to the High Court. The matter came on for hearing before a bench constituted by Latham C. J., Rich, Starke, McTiernan and Williams JJ. The majority of the Court (Latham C.J. dissenting) held that the taking under reg. 54 of the National Security (General) Regulations by the Commonwealth for an indefinite period of the exclusive possession of the property constituted an acquisition of property within the meaning of Section 51(xxxi) of the Constitution, Latham C.J., however, in his dissenting judgment held that the taking of possession of land under such an authority as that conferred by reg. 54 was different in legal significance from any acquisition of an interest in the land. Latham C.J. observed:

> In the present case, the Commonwealth has not acquired any interest of any kind in the land, that it has not acquired any interest either from the owner of the fee simple or from the tenant and that the possession of the Commonwealth may, I think, properly be described as that of a licensee whose rights are defined by the Regulations.

The ratio of that decision of Latham C.J. is very important for the purpose of the decision in the present case, and I fully endorse the same. The learned Chief Justice in the course of his decision observed:

> Sub-regulations 1 and 2 again emphasize the assumption made by the Regulations as a whole, namely, that there is a distinction between acquisition of property and other acts which may be done by virtue of the Regulations, including taking possession and user of land which may cause loss or damage to persons interested in property.It has already been shown that the Regulations proceed upon the basis that the taking possession of land

> under the Regulations does not amount to the acquisition of land. The National Security Act is based upon the same assumption. Section 5 of that Act provides that 'the Governor General may make regulations for securing the public safety arid the Defense of the Commonwealth and the Territories of the Commonwealth, and in particular. (b) for authorizing(i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking; or (ii) the acquisition, on behalf of the Commonwealth, of any property other than land.

[See the same provisions in the Emergency Powers (Defense) Act, 1939 (2 & 3 Geo. VI, c. 62, Section 1(2)(b)(i) and (ii). And see also the Compensation (Defense) Act, 1939 (2 & 3 Geo. VI, c. 75, Section 1). The distinction between (i) and (ii) is the distinction between taking of possession of property and the acquisition of property.] In the present case the question arises as to the acquisition of land. The Commonwealth cannot be said to have acquired land unless it has become the owner of land or of some interest in land. If the Commonwealth becomes only a possessor but does not become an owner of land, then, though the Commonwealth may have rights in respect to land, which land may be called property, the Commonwealth has not in such a case acquired property. Accordingly, in my opinion, the facts that the right to possession is the most valuable attribute of ownership, that possession is prima jack evidence of ownership, and that possession may develop into ownership, do not justify any identification of possession with ownership, but, on the contrary, emphasize the distinction between the two ideas. The fact that the Commonwealth is in possession of land as a result of action under the Regulations does not show that the Commonwealth has become the owner of the land or of any estate in the land. The rights of the Commonwealth are to take and remain in possession of the land and to use it for purposes of Defense. In such use, but only for the purposes of such use, the Commonwealth has the rights of an owner in fee simple. The Commonwealth can, at will, give up possession at any time. The rights of the Commonwealth, by reason of the terms of the National Security Act, Section 19, cannot last for longer than the war and six months afterwards. In my opinion the Commonwealth is unable to alienate these rights so as to entitle any other person to enjoy them. The right is limited to a right to the Commonwealth to use the land for Defense purposes, and such a right cannot be transferred to any other person. The mode of such use may be as determined by the Commonwealth, but any use must be by or on behalf of the Commonwealth. The right may be said to be personal to the Commonwealth. The only question is, as I have already said, whether these rights are proprietary rights. That which can be owned in respect of land is, as already stated, an estate. The Minister has not an estate in fee simple or any lesser freehold estate, nor, in my opinion, has he a chattel interest. The Bank of New South Wales is still the owner of the land and Dalziel is still the tenant under a weekly tenancy. No other tenancy has been created and there has been no assignment of Dalziel's tenancy. The Commonwealth is, in my opinion, in the position of a licensee with rights as stated in the regulations. In the present case the rights of the Commonwealth to use land for purposes of Defense are created, not by contract, but by action taken by the Commonwealth under the Regulations. But the rights so created are, in my opinion, of the same character as those which were created in the cases citedthey are inalienable personal rights and the Commonwealth is not a grantee of property but a licensee. Such personal rights are not proprietary rights. After having come to that conclusion on grounds of general reasoning, the learned Chief Justice came to the conclusion that the taking of possession of land under the regulations did not amount to the acquisition of an interest in land so as to bring about an acquisition of property within the meaning of Section 51(xxxi) of the

Constitution, The learned Chief Justice further supported his reasoning that there was a real difference between, on the one hand, taking possession of land for a temporary purpose under those particular regulations, and, on the other hand, the acquisition of land, by reference to similar statutes and decisions of the Courts thereon. He referred to the cases of *Attorney-General v. De Keyser's Royal Hotel*[27] A Petition of Right, In re [1915] 3 K.B. 649, *Whitehall Court, Limited v. Ettlinger*[28] *Matthey v. Curling*[29] *Robinson & Co. v. The King*[30] *Swift v. Macbean*[31] and also the provisions of the Defense Act, 1842, (5 & 6 Vic. c. 94, Section 16), the Defense of the Realm Consolidation Act, 1914 (5 Geo. V, c. 8) and the Emergency Powers (Defense) Act, 1939, made there under, and reached the conclusion that the authorities to which he had referred showed in his opinion that the taking of possession of land under such an authority as that conferred by reg. 54 was different in legal significance from any acquisition of an interest in land. The learned Chief Justice reiterated his conclusion:

> In the present case the Commonwealth has not acquired any interest of any kind in the land. It has not acquired any interest either from the owner of the fee simple or from the tenant. The possession of the Commonwealth may, I think, properly be described as that of a licensee whose rights are denned by the Regulations.

47. I have quoted these passages from the judgment of Latham C.J. in extenso for the simple reason that, in my opinion, they throw a flood of light on the question which I have to decide in the present case as to whether the requisition of land is included in the item of compulsory acquisition of land in item No. 9 in list II of the seventh schedule to the Government of India Act. As I have already stated, I perfectly endorse the ratio of that decision which was reached by Latham C.J. The. other learned Judges who delivered the majority judgment of the High Court in that case were mainly guided by the consideration

[27][1920] A.C. 508 [29][1922] 2 A.C. 180 [31][1942] 1 K.B. 375
[28][1920] 1 K.B. 680 [30][1921] 3 K.B. 183

that if they came to the conclusion that the requisition of land in that case was not an acquisition of land within the meaning of Section 51(xxxi) of the Constitution, Dalziel would not on their construction of reg. 60H of the National Security (General) Regulations and the Basis of Compensation Order made thereunder be able to get proper compensation in respect of the requisition of his land by the Commonwealth. The learned Judges, therefore, appear to have stretched the point in favor of Dalziel and held that the exclusive possession of the property which was taken by the Commonwealth was, together with the rights created in the Commonwealth under the terms of the notice dated May 5, 1942, closely analogous to, though not identical with, compulsory acquisition of land, and was therefore an acquisition of property within the meaning of Section 51(xxxi) of the Constitution. I respectfully dissent from the neasoning adopted by the majority of the learned Judges of the High Court of Australia in that case and prefer to adopt the ratio of Latham C.J. in arriving at the conclusion that the requisition of land by the Commonwealth in that case was not an acquisition of property within the meaning of Section 51(xxxi) of the Constitution.

48. I am, therefore, of opinion that the authorities cited by the Advocate General do>not lend support to his contention that requisition is included in acquisition but that it is separate and distinct from acquisition.

49. Turning now to the legislative practice in England as well as in India which, according to the authorities cited before me by the Advocate General, can be resorted to while construing the provisions of a Constitution Act like the Government of India Act, one finds that so far as legislative practice in England is concerned, the Defense Act, 1842 (5 & 6 Vic. c. 94), which was an Act to consolidate and amend the Laws -relating to the Services of the Ordnance Department, and the vesting and Purchase of Lands and Hereditaments for those Services, and for the Defense and Security of the Realm, laid down a clear distinction between the compulsory purchase of lands and all provisions analogous to compulsory acquisition of land on the one hand and the taking of lands for a temporary purpose in which case the erections on such lands were to be removed before the lands were restored to the owner and compensation was to be made for the injury done to the land so restored to the possession of the owner.

50. The next enactment of the Imperial Parliament after the Defense Act, 1842, in this behalf was the Emergency Powers Defense Act, 1939 (2 & 3 Geo. VI, c. 62), which was an Act to confer on His Majesty certain powers which it was expedient that His Majesty should be enabled to exercise and to make further provision for purposes connected with the Defense of the realm. Under Section 1(1) it was enacted that: Subject to the provisions of that section His Majesty by order in Council might make such regulations as appeared to him to be necessary or expedient for securing the public safety, the Defense of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty might be engaged and for maintaining supplies and services essential to the life of the community. Section 1(2) enacted that without prejudice to the generality of the powers conferred by the preceding sub-section, the Defense Regulations might, so far as appeared to His Majesty in Council to be necessary or expedient for any of the purposes mentioned in that sub-section,authorise (i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking; (ii) the acquisition, on behalf of His Majesty, of any property other than land. This makes a clear distinction between requisition on the one hand and acquisition of property on the other. It is noteworthy that these were the provisions of the Emergency Powers (Defense) Act, 1939, and the Compensation Defense Act, 1939, which were referred to by Latham C.J. in the judgment in the *The Minister of State for the Army v. Dalziel*[32] as laying down a distinction between taking of possession of property on the one hand and the acquisition of property on the other. The Advocate General drew my attention to a passage in Halsbury's Laws of England, Hailsham Edition, Vol. VI, p. 532, para. 660, which stated that:

> Certain compulsory powers of purchasing any lands, buildings, or other hereditaments or easements, either absolutely or for a limited period, or of stopping up or diverting public or private footpaths, or bridle roads, may also be exercised at any time by the Secretary of State for War for the service of the department or the Defense of the realm.
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> Mr. Taraporewalla, however, drew my attention to the relevant provisions contained in Section 16 of the Defense Act of 1842 which were supposed to be the foundation of the statements contained in para. 660 in Halsbury's Laws of England above referred to, and it was found that instead of lending support to that statement there was a clear distinction drawn between compulsory purchase of land absolutely and temporary use and possession of land for a limited period. I am, therefore, of opinion that so far as legislative practice in England is concerned, there is no warrant for holding that requisition is

included in the acquisition.

51. As regards the legislative practice in India, Mr. Taraporewalla traced the position right from the year 1861 when the Indian Councils Act, 1861 (24 & 25 Vic. c. 67) was enacted. That was an Act passed by the Imperial Parliament to make better provision for the Constitution of the Council of the Governor General of India, and for the Local Government of the several Presidencies and Provinces of India. By Section 22 of that Act which laid down the extent of the powers of the Governor General in Council to make laws and regulations at the meetings of the Council it was enacted that:

> The Governor General in Council shall have power at Meetings for the Purpose of making Laws and Regulations as aforesaid, and subject to the Provisions herein contained, to make Laws and Regulations for repealing, amending, or altering any Laws or Regulations whatever, now in force or hereafter to be in force in the Indian Territories now under the Dominion of Her Majesty, and to make Laws and Regulations for all Persons, whether British or Native, Foreigners or others, and for all Courts of Justice whatever, and for all Places and Things whatever within the said Territories, and for all Servants of the Government of India within the Dominions of Princes and States in alliance with Her Majesty; and the Laws and Regulations so to be made by the Governor General in Council shall control and supersede any Laws and Regulations in anywise repugnant thereto. Provided always, that the said Governor General in Council shall not have the Power of making any Laws or Regulations which shall repeal or in any way affect any of the Provisions of this Act or.
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> Certain provisos were there enacted which laid down the limitations on the absolute authority to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all

[32]68 Com. L.R. 261

> places and things whatever within the said territories and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty. By this section the Governor General in Council was given absolute powers to make such laws and regulations, subject only to the limitations contained in those provisos which were all of a general nature. When, however, the Government of India Act, 1915, consolidated up to 1919 (5 & 6 Geo. V, c. 61, 6 & 7 Geo. v, c. 37 and 9 & 10 Geo. v, c. 101) was enacted legislative powers were granted to the Indian Legislature with a classification of Central and Provincial subjects between1 the Central and Provincial Legislatures. Under Section 63 of that Act, an Indian Legislature was constituted consisting of the Governor General and two Chambers, viz. the Council of State and the Legislative Assembly. Section 65(1) of that Act conferred on the Indian Legislature powers to make laws which were almost parallel to the powers granted to the Governor General in Council by Section 22 of the Indian Councils Act of 1861. There were, however, limitations of such powers enacted by Section 65(2) of that Act which limited the powers of the Indian Legislature to enact laws, which limitations were again parallel

to those which were laid down in the provisos to Section 22 of the earlier Act. Provisions were, however, made for the making of rules under that Act (a) for the classification of subjects in relation to the functions of the Government as Central and Provincial subjects, for the purposes of distinguishing the functions of local Governments and local Legislatures from the functions of the Governor General in Council and the Indian Legislature, (b) for devolution of authority in respect of Provincial subjects to local Governments and for the allocation of revenue or other monies to those Governments. These devolution rules were to be made by the Governor General in Council with the sanction of the Secretary of State in Council and were to be approved of by both the Houses of Parliament. In accordance with the provisions of the Act in that behalf Devolution Rules No. 308(s), dated February 16, 1920, were made which provided inter alia for the classification of subjects into Central and Provincial subjects. Under those rules we had for the first time a classification of those subjects which were enumerated in schedule I, part I, as the Central subjects, and in schedule I, part II, as the Provincial subjects, the enumeration of those subjects being parallel to the enumeration contained in the lists of schedule VII to the Government of India Act, 1936. Item No. 15 of schedule 1, part II, setting out the Provincial subjects, related to "Land acquisition, subject to legislation by the Indian Legislature." This meant that even though land acquisition was there treated as a Provincial subject, the enactment in respect of the same was to be subject to legislation in respect of the same by the Indian Legislature itself.

52. This subject of land acquisition was at that time the subject-matter of an enactment by the Indian Legislature, viz. Land Acquisition Act I of 1894. It was an Act to amend the law for the acquisition of land needed for public purposes, and for companies and for determining the amount of compensation to be made on account of such acquisition, and the preamble to that Act ran as under:

Whereas it is expedient to amend the law for the acquisition of land needed for public purposes and for Companies and for determining the amount of compensation to be made on account of such acquisition; It is hereby enacted as follows:

There was no definition of acquisition given in Section 3 which was the section of definitions in the Act, but part II of the Act dealt under the heading of acquisition with the procedure with reference to the same. After laying down the provisions for preliminary investigation, objections to acquisition, declaration of intended acquisition, and the like provisions, the Act laid down that the Collector was to make an award under his hand of (i) the true area of the land, (ii) the compensation which in his opinion should be allowed for the land, and (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he had information, whether or not they had respectively appeared before him. After the Collector had made his award he was empowered to take possession of the land which was thereupon to vest absolutely in the Crown free from all encumbrances. Special powers were given in cases of urgency where even though no award had been made by

the Collector, the Collector was, whenever the Provincial Government so directed, empowered on the expiration of fifteen days from the publication of the notice of the intended acquisition, to take possession of any waste or arable land needed for public purposes or for a company, and in such cases such land was to thereupon vest absolutely in the Government, free from all encumbrances. Provision was made for reference to Court in the event of the award of the Collector not being acceptable to the persons interested and Sections 23 and 24 of the Act provided what matters were to be considered in determining compensation and what matters were to be neglected in determining the same. These were the matters to be considered by the Collector and by the Court alike, and there were provisions for the apportionment of compensation as well as for payment of the amount finally determined. Under these provisions the word "acquisition" was used as meaning taking over of the land which was to vest absolutely in the Crown free from all encumbrances and that was the only sense in which the word "acquisition" was used. Part VI of the Act, however, dealt with temporary occupation of land, and under Section 35 of the Act it was enacted that whenever it appeared to the Provincial Government that the temporary occupation and use of any waste or arable land were needed for any public purpose or for a company, the Provincial Government might direct the Collector to procure the occupation and use of the same for such term as it should think fit, not exceeding three years from the commencement of such occupation. Provision was made for the payment of compensation to persons interested in such land, and Section 36 of the Act enacted that on the expiration of the term, the Collector was to make or tender to the persons interested compensation for the damage (if any) done to the land and not provided for by agreement reached between the Collector and the persons interested therein and was to restore the land to the persons interested therein, subject however to this proviso that if the land had become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the persons interested should so require, the Provincial Government should proceed under the Act to acquire the land as if it was needed permanently for a public purpose or for a company. It was argued by the Advocate General that the enactment of the provision for temporary occupation of land in the Land Acquisition Act showed that the temporary occupation of land therein contemplated was included in the acquisition of land and that the requisition of land which was the subject of the present inquiry which was analogous to the temporary occupation of land provided for in part VI of the Act was thus included in the compulsory acquisition of land, being item No. 9 in List II of the seventh schedule to the Government of India Act. It is to be noted, however, that this temporary occupation of land which was provided for in Part VI of the Land Acquisition Act appears to have been enacted in the Act not because such temporary occupation of land was included in the acquisition of land which was the object of the enactment of that Act, but because as stated in the proviso to Section 36(2) of the Act the persons interested in the land, the subject-matter of such temporary occupation thereof, were entitled to, if the land had become permanently unfit to be used for the purpose for which it was used immediately

before the commencement of such term of temporary occupation to require the Provincial Government to proceed under that Act to acquire the land as if it was needed permanently for a public purpose or for a company. I am of opinion that but for this proviso to Section 36(2) of the Act the temporary occupation of land which is the subject-matter of enactment in Part VI of the Land Acquisition Act would never have been included in that Act at all. I am supported in this conclusion of mine by the provisions of Section 48 of the Act which lay down that except in the cases provided for in Section 36, the Government should be at liberty to withdraw from the acquisition of any land of which possession had not been taken It shows that once the possession was taken the acquisition of land was final and the Government could not withdraw from the same, because under the earlier provisions of the Act once possession of the land was taken by the Collector the land was to vest absolutely in the Crown free from all encumbrances. Once the acquisition was complete, all persona interested in the land ceased to have any interest therein and the Crown became the absolute owner of the land free from all encumbrances. Before such possession was taken, the Government was to be at liberty to withdraw from the acquisition of the land. No such power was, however, given to the Government to withdraw from the acquisition of land in those cases which were provided for in Section 36 of the Act, because in those cases the persons interested in the land were entitled, if the land had become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term of temporary occupation of land, to require the Provincial Government to proceed under the Act to acquire the land as if it was needed permanently for a public purpose or for a company. In my opinion, therefore, these provisions of the Land Acquisition Act, far from establishing that the temporary occupation of land provided for in Part VI of the Act was included in the acquisition of land, go to establish that clear demarcation was made by the Legislature between the acquisition of land which resulted in the land being vested absolutely in the Crown free from all encumbrances on the one hand and the temporary occupation and use of waste or arable land which even though needed for any public purpose or for a company did not create any rights in the Government beyond the rights of such temporary occupation thereof.

53. In the course of his arguments on this aspect of the question Mr. Taraporewalla drew my attention to various other enactments of the Indian Legislature in which similar provisions were included by the Legislature in those enactments, though they were not included in the main provisions enacted therein, He drew my attention in this behalf to the Indian Trusts Act II of 1882. It was an Act to define and amend the law relating to private trusts and trustees, and the preamble to that Act ran as under:

Whereas it is expedient to define and amend the law relating to private trusts and trustees ; It is hereby enacted as follows:The trusts which were the subject-matter of that enactment were defined in Section 3 of the Act and right up to chap. VIII which ended with Section 79 of the Act all provisions with reference to the trusts and trustees, were enacted therein.

Chapter IX, however, of that Act laid down provisions as regards "Certain obligations in the Nature of Trusts" and the various relationships which were analogous to that between a trustee and a cestui que trust were provided for in the sections which were 'enacted under chap. IX of that Act beginning with Section 80 and ending with Section 96 thereof. By no stretch of imagination could those relationships be brought within the definition of trusts, and the very heading of chap. IX and the terms of Section 80 definitely showed that those relationships which were provided for in that chapter were not trusts but were obligations in the nature of trusts. Could it be urged, therefore, by reason of the fact that those obligations in the nature of trusts were enacted within the provisions of the Indian Trusts Act that those relationships were included in the definition or conception of trusts, which only were the subject-matter of the enactment of that Act?

54. Mr. Taraporewalla similarly drew my attention to the Indian Contract Act IX of 1872. The preamble to that Act ran as under:

Whereas it is expedient to define and amend certain parts of the law relating to contracts ; It is hereby enacted as follows:
The definition of contract was given in Section 2 of the Act and in chapters I to IV of the Act were found all the provisions as regards the contracts which were the subject-matter of that enactment. Chapter V, however, enacted provisions as regards certain relations resembling those created by contract, and in Section 68 to Section 72 of that Act provisions were enacted with regard to those relations resembling those created by contract, viz. claim for necessaries supplied to person incapable of contracting of on his account, reimbursement of person paying money due by another in payment of which he is interested, obligation of person enjoying benefit of non-gratuitous act, responsibility of finder of goods, and liability of person to whom money is paid, or thing delivered, by mistake or under coercion. These obligations were certainly not contractual obligations, nor could they be brought by any stretch of imagination within the definition of contract enacted in Section 2 of the Act. They were, however, included in the Act by the enactment of chap. V thereof because even though they were not contracts, the obligations created thereunder resembled those created by contract. Could it, therefore, be contended that those relations though resembling those created by contracts were included in contracts which only were the subject-matter of the enactment, viz. the Indian Contract Act IX of 1872?

55. Mr. Taraporewalla finally drew my attention to the Indian Easements Act V of 1882. The Act was called the Indian Easements Act, 1882. It was, however, an Act to define and amend the law relating to easements and licenses, and the preamble of the Act ran as under:

Whereas it is expedient to define and amend the law relating to easements and licenses; it is hereby enacted as follows:
The definitions of easements and of licenses were to be found respectively in Section 4

> and Section 52 of the Act. The distinction between easements and licenses has been well-known to law. The very definition of a license under Section 52 of the Act in terms lays down that a license is the grant of a right to do something or to continue to do something in or upon the Immovable property of the grantor which would in the absence of such right be unlawful and such right does not amount to an easement or an interest in the property. It is unnecessary here to dilate upon the distinction between easements on the one hand and licenses on the other. Suffice it to say that these two conceptions are quite distinct the one from the other and it could not be urged by reason of the enactment of the provisions as to licenses in the Indian Easements Act that licenses were included in easements.

56. Mr. Taraporewalla, therefore, urged that by reason of the enactment of the provisions as to temporary occupation of land in the Land Acquisition Act I of 1894 it could not be validly contended that temporary occupation of land was included within the acquisition of land. I accept this argument of Mr. Taraporewalla and have come to the conclusion that the enactment of these provisions as to temporary occupation of land in the Land Acquisition Act does not establish what is contended for by the Advocate General, viz. that temporary occupation of land for public purposes or for a company was included in the compulsory acquisition of land.

57. No change was or has been made in this conception of the acquisition of land since the enactment of the Land Acquisition Act I of 1894 by the Indian Legislature. That this was the meaning attached to acquisition of land was well-known to the framers of the Devolution Rules when they compiled the classification of subjects and included land acquisition subject to legislation by the Indian Legislature as item 15 in the list of Provincial subjects contained in Schedule I, Part II, thereof. Even after the year 1920 when these Devolution Rules were published no change has been made in the conception of the acquisition of land, either by any legislative enactment or by any decided cases on the point. The same conception of acquisition of land which has obtained since the Land Acquisition Act I of 1894 was enacted has continued ever since, and that conception was also known to the framers of the Government of India Act, 1925, when they compiled the Lists of the seventh schedule to the Government of India Act. If any regard be had to the legislative practice in India, the result of that as hereinbefore stated is that the term "acquisition of land" or "compulsory acquisition of land" has been all along known as the taking over of land by the Government so that the land vests absolutely in the Crown free from all encumbrances.

58. The Advocate General drew my attention in this connection to the provisions of the Defense of India Act XXXV of 1939 and the Defense of India Rules framed there under. He relied in particular upon the provisions of Section 19 of the Defense of India Act which enacts that:

> Where by or under any rule made under this Act any action is taken of the nature described in Sub-section (2) of Section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out.

He pointed out that under Sub-section (1), Clause (e), of that section, it was provided that:

The arbitrator in making his award shall have regard to-

(i) the provisions of Sub-section (2) of Section 23 of the Land Acquisition Act, 1894, so far as the same can be made applicable; and

(ii) whether the acquisition is of a permanent or temporary character.

He urged that in this provision the Legislature had enacted that the acquisition which was the subject-matter of the rules as to compensation enacted in that section could be of a permanent or a temporary character and that therefore the word "acquisition" was used by the Legislature there not in the sense of the acquisition of land as known to the Land Acquisition Act I of 1894, viz. an acquisition of land which vested absolutely in the Crown free from all encumbrances. This argument of the Advocate General, however, cannot carry him any further, because it is this very Act, viz. the Defense of India Act, XXXV of 1989, and the provisions as to requisition of land enacted therein under Section 2(2)(xxiv) of that Act which are impugned as ultra vires the Central Legislature and it would be of no avail to refer to the provisions of the impugned Act itself as a guide to the legislative practice in India. Even though this provision is no doubt to be found in Section 19 of the Act, we have in Rule 2, Sub-rule (11), of the Defense of India Rules enacted thereunder, a definition of "requisition" which says that:

> 'requisition' means in relation to any property to take possession of the property or to require the property to be placed ,at the disposal of the requisitioning authority.

When we go further to Rule 75A which deals with the requisitioning of property, no doubt within the definition of this very word "requisition", a clear demarcation is to he found between requisition and acquisition. In Sub-rule (1) provision is made as regards the requisition of property, In Sub-rule (2) power is given to the Central Government or the Provincial Government which has requisitioned any property under Sub-rule (1) to use or deal with the property in such manner as may appear to it to be expedient and to acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule. Sub-rule (3) provides that:

> Where a notice of acquisition is served on the owner of the property or published in the official gazette under Sub-rule (2), then at the beginning of the day on which the notice is so served or published, the property shall vest in Government free from any mortgage, pledge, lien or other similar encumbrance, and the period of the requisition thereof shall end.
>
> This, if at all, emphasizes the distinction between the requisition of property which only gives to the Government the right to use or deal with the property in such manner as may appear to it to be expedient and the acquisition of property which vests the property in the Government free from any mortgage, pledge, lien or other similar encumbrance, and further provides that once there is acquisition of the property in that sense the requisition thereof which is provided in the earlier part of Rule 75A shall end. The provisions of the Defense of India Act and the Defense of India Rules framed there under, therefore, in my opinion, instead of helping the Advocate General go very far to support the contention of

Mr. Taraporewalla that requisition is not included in acquisition.

59. Having regard, therefore, to the various considerations, the decisions of the English and the Australian Courts and the legislative practice prevailing in England as well as India hereinbefore referred to, I have come to the conclusion that the requisition of land, the subject-matter of these proceedings, is not included in, nor is it an ancillary or subsidiary matter which can fairly and reasonably be said to be comprehended in the item of compulsory acquisition of land which is item No. 9 in list II of the seventh schedule to the Government of India Act.

60. I will now proceed to consider whether the requisition of land is included in item No. 21 in list II of the seventh schedule to the Government of India Act. As I have already stated item No. 21 relates to land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land ; land improvement and agricultural loans ; colonization ; Courts of Wards ; encumbered and attached estates ; treasure trove.

61. The topic or the category of legislation "land" is no doubt very wide in its scope and would include within itself a very wide range of topics. The framers of the Government of India Act have, however, thought it fit to elaborate that topic by adding what may be described as an amplification or explanation of that topic or category of legislation. This amplification or explanation is, however, prefaced by the expression "that is to say." This expression "that is to say" has been the subject-matter of judicial interpretation. In Stroude's Judicial Dictionary, 2nd edition,' we find under the heading "That is to say" the following (p. 2040):

> That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties:- (1) it must not be contrary to the principal Clause ; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it.

If this judicial interpretation of the expression "that is to say" be adopted in this context, it would show that the topic or the category of legislation, "land" which is general in terms, should be taken as restricted by what follows in this item No. 21. If that is so, the only things which would be included in the topic or category of land would be the items which are specifically enumerated in what follows the expression that is to say in item No. 21, and it would not be possible to read in the topic or category of "land" anything beyond what has been described in those particular items. If one has regard to the diversity of the subjects which have been mentioned in the latter part of item No. 21 following the expression "that is to say", one might naturally come to the conclusion that they were really restrictive of the general manner in which the topic or category of legislation, "land" has been described therein. The Advocate General urged that what has been described in the latter part of this item No. 21, following the expression "this is to say" was purely illustrative and was not limitative of the general topic or category of legislation "land" and therefore contended that the requisition of land--which was the subject-matter of these proceedings was included in this general topic or category of legislation "land" as having relation to land and as being ancillary or subsidiary matter which could fairly and reasonably be said to be comprehended in the same. I do not agree with this interpretation which is sought to be put upon this item No. 21 by the Advocate General. Even though the items comprised in these lists

have got to be read not in a narrow and restricted sense but in a large and liberal manner, there are no doubt limitations to that principle of interpretation as I have already observed. The subject-matter of legislation which comes for consideration before the Court must be "with respect to" a topic or category of legislation enumerated in the lists. This means that it must substantially be with respect to matters in one list or the other. A remote connection would not be enough. It must be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of legislation. Could it be said that merely because the requisition of land which is the subject-matter of these proceedings has reference to "land", such requisition is ancillary or subsidiary to that topic or category of legislation "land", and can be said to be fairly and reasonably comprised within it, or could it be urged as it has been urged by Mr. Taraporewalla that such requisition of land is only remotely connected with the topic or category of legislation "land" described in item No. 21? In my opinion even though a large and liberal interpretation requires to be given to this topic or category of legislation "land" described in item No. 21, it is of necessity limited by the user of the expression "that is to say" which I have already stated has been judicially interpreted to mean laying down restrictions on the generality of the topic or category of legislation which it goes to explain. I am therefore of opinion that the general topic or category of legislation "land" described in item No. 21 is limited in its scope by the user of the expression "that is to say" followed by the amplification and explanation of that item by describing the various modes in which that legislative power invested in the Legislature has got to be exercised. I am supported in this construction of mine by the remarks of their Lordships of the Federal Court in *In re Powers of Federal Legislature to levy Estate Duty*[33], where their Lordships held (headnote):

> It cannot be said that the word 'succession' used in entry 56 of list I which speaks of duties in respect of succession to property is capable of comprehending every kind of passing of property intended to be comprised in the question under reference. The expression in respect of in the entry indicates that succession is the subject-matter of the taxation and not merely the occasion. There is more reason and justification for placing a limited construction on entry 56 in list I than the wider one.
>
> In spite of the large and liberal interpretation which had been ordained by their Lordships of the Federal Court in the earlier decisions of that Court which I have already referred to above, their Lordships in this case came to the conclusion that there was more reason and justification for placing a limited construction on that entry than the wider one, meaning thereby that where the context or the circumstances warranted a limited construction being put on a topic or category of legislation it was open to the Court to do so. In the present case also, having regard

[33] AIR 1944 FC 73 : 1944 F.C.R. 317

> to the expression "that is to say", and the amplification and explanation contained in the latter part of item No. 21, I feel I am justified in coming to the conclusion that that amplification and explanation was really restrictive or limitative of the general topic or category of legislation "land" described in item No. 21.

62. If that is the true construction of the contents of item No. 21, it remains to consider whether the rights in or over land which have been mentioned therein as the subject-matter comprised in

this topic or category of legislation "land" do include the requisition of land which is the subject-matter of these proceedings. If the Legislature has got the power to enact laws with regard to rights in or over land, it was contended that it could also have the power to legislate with regard to the creation of those rights, transfer of those rights and amplification and explanation of those rights, and it was therefore contended that it was open to the Legislature under this item No. 21 to legislate for the requisition of land of the type enacted in Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules. This argument is no doubt very plausibly. It was, however, pointed out to me that the expression rights in or over land has been used in Section 299 of; the very same Government of India Act, 1935. Section 299(5) enacts that in that section "land" includes Immovable property of every kind and any rights in or over such property. This expression is no doubt again capable of a very wide interpretation. It was in fact contended by the Advocate General that any rights in or over Immovable property included the right to requisition property as was sought to be done in this very matter by the Collector qua the proprietors of the Kokwah Chinese Restaurant. If one has regard, however, to the subject-matter of Section 299 of the Government of India Act, 1935, which has been described in the marginal note thereof as "Compulsory acquisition of land, etc." one finds that the rights in or over Immovable property which are the subject-matter of that section are proprietary rights in the sense of right, title, or interest therein and not the rights of temporary use and possession of the same which are the rights claimed under the requisition of property the subject-matter of these proceedings. Section 299(1) gives a statutory recognition to the general principle of British jurisprudence that no person shall be deprived of his property save by authority of law. That could only have reference to the proprietary rights enjoyed by an individual in respect of property of every kind or sort. Sub-section (2) of Section 299 makes this clearer still. It provides that if any law is enacted authorising the compulsory acquisition for public purposes of any land, etc., that law should provide for payment of compensation for the property acquired. Sub-section (3) of Section 299 again provides that no bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, should be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion. This again provides for a transference of land to public ownership or for extinguishment or modification of rights therein, meaning thereby the creation of rights in property in any person other than the owner thereof. In my opinion, the rights in or over Immovable property which are the subject-matter of enactment in this Section 299 are rights of ownership in or over such property which can be aptly described as right, title and interest in the property, but are certainly not what may be called personal rights to temporary use and possession of land which are the rights vested in the Government by the requisition of property. If this be the true construction of the expression "rights in or over Immovable property" which has been used in Section 299 of the Government of India Act, can it be said that the same expression which has been used in item No. 21 in list II of the seventh schedule to the Government of India Act is used in any different sense whatever? Maxwell on the Interpretation of Statutes, 8th edition, p. 276, lays down:

> It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. *Courtauld v. Legh*[34] *The Queen v. Poor Law Commissioners*; In the matter of the *Hoborn Union*[35] *In re Cirhstall Brewery, Company, Limited and Reduced*[36] the judgment of Cockbum C.J. in *Smith v. Brown*[37] and Baggally

L. J. in *The Franconia*[38] When precision is required, no safer rule can be followed than always to call the same thing by the same name. Having regard to this principle of interpretation, I am of opinion that the expression "rights in or over land" used in the latter part of item No. 21 is used in the same sense as the expression rights in or over Immovable property which is used in Section 299(5) of the Government of India Act and that the rights in or over land mean not personal rights, not rights of temporary use and possession of land, but rights whereby some interest is created in the land itself. If that is the true construction of the expression "rights in or over land" the rights which are created in the Government by the requisition of land of the nature described above do not create in the Government any interest in the land. They only create in the Government the rights to temporary use and possession of land which are, to use the words of Latham C.J. in *The Minister of State for the Army v. Dalzie*[39] the rights of a licensee and no more. These rights of temporary use and possession which are created in the Government are not, in my opinion, ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the expression "rights in or over land" and which are by reason of the amplification and explanation of the general topic or category of legislation "land" mentioned in item No. 21 deemed to be comprised within that topic or category of legislation "land" as already indicated above. I have, therefore, come to the conclusion that the requisition of Immovable property which is the subject-matter of these proceedings is not included in item No. 21 in list II of the seventh schedule to the Government of India Act.

63. I might refer in passing to a half-hearted attempt which was made by the Advocate General to include the requisition of land within item No. 8 in list III of the seventh schedule to the Government of India Act. Item No. 8 in list III relates to "Transfer of property other than agricultural land ; registration of deeds and documents." Here again the Advocate General was confronted with the legislative practice in India which was to be found in the enactment of the Transfer of Property Act, IV of 1882, which was an Act to define and amend certain parts of the law relating to the transfer of property by act of parties. The expression "transfer of property" was well-known to the framers of the Government of India Act, 1935, and on the reasoning which I have adopted above, it was impossible to contend that the requisition of property of the nature we have in these proceedings could by any stretch of imagination be construed as a transfer of property from the owner of the property to the Government. In so far as this particular point was not seriously pressed by the Advocate General, I do not think it is necessary for me to

[34](1869) L.R.130 [36](1877) 5 Ch. D. 535 [38](1877) 2 P.D. 163
[35](1838) 6 Ad. E. 57 [37](1871) L.R. 6 Q.B. 729 [39]68 Bom. L.R. 261

deal with it in any further detail....

64. Having regard to all the circumstances detailed above, I have come to the conclusion that the requisition of land is not included either in item No. 9 or item No. 21 in list II of the seventh schedule to the Government of India Act, and that even though there was a proclamation of emergency by the Governor General under Section 102(1) of the Government of India Act the Central Legislature did not derive any power to make a law with respect to a topic or category of legislation which was not comprised in any of the three lists of the seventh schedule to the

Government of India Act. I, therefore, hold that the Central Legislature had no power or authority to enact a provision with regard to the requisition of land as was comprised in Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules framed thereunder in the absence of any public notification by the Governor General under Section 104(1) of the Government of India Act issued by him in exercise of his residual powers of legislation and empowering the Central Legislature to enact a law with reference thereto. I, therefore, hold that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules framed thereunder with reference to the requisition of Immovable property without a public notification by the Governor General under Section 104 of the Government of India Act is ultra vires the Central Legislature.

65. The next question which arises for my consideration is whether even if Rule 75A of the Defense of India Rules is not ultra vires the powers of the Central Legislature, the requisition order dated February 16, 1945, is illegal, void and inoperative in law, by reason of the respondent having no jurisdiction, power or authority to issue the same under the provisions of Rule 75A of the Defense of India Rules. Mr. Taraporewalla contended that though ostensibly the respondent was requisitioning the premises occupied by the Kokwah Chinese Restaurant including landlord's fittings and fixtures, which if literally read would mean that as he was requisitioning Immovable property or land, what the respondent was really doing was under the guise of that requisition to requisition also the commercial undertaking of the petitioners. He urged that the goodwill attached to those premises was a valuable asset and property of the petitioners and could not be divorced from the premises which were being requisitioned, that the requisition of the premises necessarily entailed a requisition of the goodwill which went along with those premises, that the goodwill which was attached to the premises and the business of Kokwah Chinese Restaurant which was carried on in those premises was moveable property which the respondent was in no event entitled to requisition under the terms of the notification of the Government of India, Defense Co-ordination Department, No. 1336/OR/1/42, dated April 25, 1942, that in any event what was being requisitioned was a commercial undertaking under the guise of the requisition of the premises described in the order dated February 16, 1945, that the only way in which that commercial undertaking could be dealt with was under Rule 81 of the Defense of India Rules and that therefore the requisition order which had been served on the petitioners was without any jurisdiction, power or authority in the respondent to issue the same under the provisions of Rule 75A of the Defense of India Rules and was therefore illegal, void and inoperative in law. The Advocate General, on the other hand, contended that the only thing that was nought to be done under the terms of the requisition order dated February 16, 1945, was the requisition of the premises occupied by the Kokwah Chinese Restaurant including the landlord's fittings and fixtures, that the Government did not either in terms or by necessary implication requisition the goodwill attached to the premises or to the business of the Kokwah Chinese Restaurant, that the destruction if any of the goodwill which might result from the premises being handed over by the petitioners to the respondent in accordance with the terms of the requisition order was not the direct result of the requisition of the premises by the respondent, that such destruction of the goodwill was a matter to be taken into account by the authorities in awarding compensation to the petitioners which compensation was always being made and was going to be made even to the petitioners without stint or reserve, that by no stretch of imagination could the requisition order dated February 16, 1945, be construed as requisition of the goodwill of the premises and the business of the Kokwah Chinese Restaurant, that the respondent was not dealing in any manner whatever with the commercial undertaking which was carried on by the petitioners in the

premises, that what was sought to be done by the respondent was within the four corners of the provisions of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules, that in any event Section 2(2)(xx) of the Defense of India Act and Rule 81A of the Defense of India Rules had no application to the facts of the present case and that the requisition order dated February 16, 1945, was passed by the respondent with full jurisdiction, power or authority to issue the same under Rule 75A of the Defense of India Rules and was therefore not illegal, void and inoperative in law as contended by the petitioners.

66. In this connection it is necessary to bear in mind that the respondent did not in. terms requisition the goodwill attached to the premises or the business of Kokwah Chinese Restaurant conducted therein. Gould it be therefore urged by reason of the fact that such goodwill was necessarily attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein, that by merely requisitioning the premises of the Kokwah Chinese Restaurant together with the landlord's fittings and fixtures the respondent was also requisitioning the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein? The respondent at no time had any express or implied intention of using the said premises except as a Detailed Issue Depot for the Royal Indian Navy. At no time was there any intention express or implied that the respondent or the military authorities to whom the possession of the premises was ordered by him to be handed over were going to use the premises for the purpose of carrying on the business of a restaurant therein. No doubt the delivery over of possession of the premises by the petitioners to the respondent or to the Military authorities as directed in the requisition order would result in the suspension or the partial destruction of the goodwill attached to the premises or the business of the Kokwah Chinese Restaurant conducted therein, if the petitioners were not in a position to obtain suitable premises in the locality and' to carry on their business of the Kokwah Chinese Restaurant in such premises. It might as well be that all the advantage which they had obtained by reason of their ownership of the goodwill might be lost to them, their custom might be destroyed and whenever the petitioners happened to get back possession of the premises after the emergency was over, they might not be able to enjoy that advantage of the goodwill attached to the premises!; and the business as they were enjoying at the present moment. Could it be, however, said that by reason of these circumstances the respondent was requisitioning the goodwill along with the premises? In my opinion the loss of the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein would no doubt be the necessary result of the requisition of the premises by the respondent. The same would not, however, convert the requisition of the premises into a requisition of the goodwill attached to those premises and the business. It would no doubt be a count in the claim for compensation which the petitioners would' be entitled to sustain against the respondent by reason of the requisition of the premises. In fact it was so mentioned by the petitioners in the correspondence which took place between the petitioners and the respondent in October-November 1944 when the respondent carried on correspondence with the petitioners with a view to the requisition of the Kokwah Chinese Restaurant under the Defense of India Act. That the petitioners would be entitled to claim compensation from the respondent or the military authorities in connection with such suspension or the destruction of the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein would, however, not convert the requisition order which is merely directed to the requisition of the premises into an order for the requisition also of the goodwill attached to the premises and the business. The goodwill attached to the premises and to the business of the Kokwah Chinese Restaurant, though it is a part and parcel of the premises sought to be requisitioned, would not therefore convert the

order of requisition of the premises into an order for the requisition of the goodwill also.

67. Mr. Taraporewalla contended that the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein was moveable property and that therefore the respondent had no jurisdiction, power or authority to requisition the same under the powers vested in him by the notification of the Government of India, Defense Co-ordination Department, No. 1336/OR/1/42 dated April 25, 1942. If I had come to the conclusion that the requisition order dated February 16, 1945, was in fact also an order for the requisition of the goodwill of the premises and the business of the Kokwah Chinese Restaurant conducted therein, I would have considered whether under the terms of the notification the respondent had any power, authority or jurisdiction to requisition the same. As I have already stated there is no warrant for the contention of Mr. Taraporewalla that the respondent in fact under the terms of the requisition order dated February 16, 1945, also requisitioned the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein. This contention of Mr. Taraporewalla therefore need not be dealt with by me.

68. Mr. Taraporewalla further contended that the commercial undertaking which was being conducted by the petitioners in the premises was neither moveable nor immovable property within the meaning of Section 2(2)(xxiv) of the Defense of India Act. He relied upon the observations of Young C.J. in *The Lahore Electric Supply Company, Limited, Lahore v. The Province of Punjab*[40] where the learned Chief Justice observed (p. 639):

> ...an undertaking such as the Lahore Electric Supply Company, which was what has been called a ' going concern', was nothing but a collection of items of movable and Immovable property. A careful examination of the provisions of Rule 75-A shows conclusively that this rule is not applicable at all to the requisition or acquisition of an 'undertaking' [as a; going concern such as the Electric Supply Co.]

The learned Chief Justice thus came to the conclusion that the undertaking not being: either moveable or Immovable property within the meaning of Section 2(2)(xxiv) of the

[40] I.L.R (1943) Lah. 617

Defense of India Act could not be made the subject-matter of either a requisition or acquisition within the meaning of Rule 75A of the Defense of India Rules. This judgment of the Lahore High Court was approved of and relied upon by Das J. in In the matter of the Continental Hotel in Calcutta [1945] Calcutta case (Unreported), where Mackertich John, the proprietor of the Continental Hotel, was the petitioner and H.C. Gupta, the Additional Land Acquisition Collector of Calcutta, was the respondent. In that judgment Das J. dealt with the argument that Rule 75A did not authorise the requisition of any business or commercial undertaking, and that general control of industry, etc. was secured by Rule 81 of the Defense of India Rules. He dealt with the case of *The Lahore Electric Supply Company, Limited v. The Province of Punjab* as under:

> In that case Young C.J. after reviewing some of the English decisions held at p. 638 that the Court could interfere if it was satisfied either that the order under Rule 75-A was ultra vires or that the order was not made bom fide but for some collateral purpose. Then at p. 639 the learned Chief Justice held that Rule 75-A was not applicable at all to the requisition or acquisition of an undertaking. I did not understand the learned Advocate

General" to controvert the principles laid down in the Lahore case.

It therefore appears that the point as to whether the judgment of Young C.J. in *The Lahore Electric Supply Company, Limited, Lahore v. The Province of Punjab* was correct or not was not at all canvassed in that case before Das J. and the point was in fact conceded by the Advocate General. It was pointed out by the Advocate General here that this judgment of Das J. was under appeal. After the close of the arguments in this case the solicitor of the respondent with the consent of the petitioners furnished to me a certified copy of the judgment of the Appeal Court in Calcutta in this appeal which was filed by H.C. Gupta as the appellant against Mackertich John as the respondent. The appeal came before a bench constituted by Derbyshire C.J. and Gnetle J. In his judgment Derbyshire C.J. observed with regard to the judgment of Young C.J. in *The Lahore Electric Supply Company, Limited, Lahore v. The Province of Punjab* as follows:

> Mr. Chatterjee then referred to the Lahore Electric Supply Company's case mentioned above where the Punjab Government who had powers to take over the Lahore Electric Supply Company under certain Acts, but found difficulties in its way of doing so,, purported to act under Rule 75-A of the Defense of India Rules and requisitioned the whole of the undertaking. The learned Chief Justice after dealing with the circumstances came to the conclusion that the Punjab Government was not acting bona fide under Rule 75-A, but using it in order to acquire the undertaking which it found difficult in doing owing to its. laches under the Acts which entitled the Government to acquire it, I can see no reason for doubting that part of the decision of the Lahore High Court. That was sufficient for the purpose of the Lahore case. The learned Chief Justice then went on to fortify the judgment by holding that Rule 75-A was not applicable at all to the requisition of an undertaking such as the Lahore Electric Supply Company. I regret I do not see my way to follow the reasoning in that matter. Rule 75-A provides that for purposes of the Defense of British India, public safety, the maintenance of public order, or the efficient prosecution of the War or for maintaining supplies essential to the life of the community, the Government may, by order in writing, requisition any property moveable or Immovable and may make such further orders as to the Government may have been necessary or expedient for requisitioning. The words 'any property, moveable or immovable' must necessarily include all kinds of property, land, buildings, machinery and chattels of any kind, and anything that can be described as property. This prima facie covers a business, and its goodwill.
>
> With great respect to the learned Chief Justice of the Lahore High Court, I share the regret of Derbyshire C.J. in not seeing my way to follow his reasoning in this matter. There is no definition of property, moveable or immovable, to be found in the Defense of India Act or the Defense of India Rules framed thereunder. The meaning of those words, therefore, has to be got from the General Clauses Act X of 1897. In Section 3, Clause (25), of the General Clauses Act, "immovable property" is defined as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth ; and in Section 3, Clause (34) "move-able property" has been defined as meaning property of every description, except Immovable property. In the result when the

Legislature enacted in Section 2(2)(xxiv) of the Defense of India Act the power to make rules for requisitioning of any property, moveable or immovable, it included within its scope all property whatever, moveable or immovable, within the definitions thereof to be found in the General Clauses Act. I therefore endorse the view taken by Derbyshire C.J. that the words "any property, moveable or immovable" used in Section 2(2)(xxiv) of the Defense of India Act must necessarily include all kinds of property, land, building, machinery and chattels of any kind, and anything that can be described as property, and that this would prima facie cover a business and its goodwill which are the essential ingredients of a commercial undertaking. I am fortified in this view of mine by the provisions of Section 2(2)(xx) of the Defense of India Act and Rule 81 of the Defense of India Rules framed thereunder. Section 2(2)(xx) of the Defense of India Act refers to the control of agriculture, trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to, articles or things of any description whatsoever which can be used in connection with the conduct of war or for maintaining supplies and services essential to the life of the community. It does not refer to the requisition of any property employed in agriculture, trade or industry. It merely refers to the control thereof for the purposes specified therein. Under the terms of Section 2(2)(xx) of the Defense of India Act and Rule 81 of the Defense of India Rules the Government controls and directs in what manner the particular property employed in agriculture, trade or industry should be dealt with by the owners thereof These powers of control are certainly narrower in their scope than powers of requisition of such property vested in the Government under the provisions of Section 2(2)(xxiv) of the Defense of India Act and have been specially vested in the Government under Section 2(2)(xx) of the Defense of India Act for the purposes therein specified. I am, therefore, of opinion that even though Section 2(2)(xx) of the Defense of India Act and Rule 81 of the Defense of India Rules deal with commercial or industrial undertakings, the mode which is therein prescribed is not the only mode in which the Government can deal with property employed in agriculture, trade or industry. The wider) powers which are vested in the Government under Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules are not in any manner whatever curtailed by the provisions of Section 2(2)(xx) of the Defense of India Act and Rule 81 of the Defense of India Rules. The powers which are vested in the Government under Section 2(2)(xx) of the Defense of India Act and Rule 81 of the Defense of India Rules can be exercised by the Government for the purposes therein mentioned and when the Government thinks it necessary or expedient to do so for the fulfilment of the purposes mentioned in Rule 75A of the Defense of India Rules, it can exercise the powers of requisitioning of property which have been vested in it under Section 2(2)(xxiv) of the Defense of India Act. The powers which are vested in the Government under Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules are quite distinct from the powers vested in the Government under Section 2(2)(xx) of the Defense of India Act and, Rule 81 of the Defense of India Rules. It cannot, therefore, be validly contended that the only manner in

which the Government can deal with a commercial or business undertaking is under Section 2(2)(xx) of the Defense of India Act and Rule 81 of the Defense of India Rules. If contrary to the conclusion which I have arrived at in the earlier portion of my judgment the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules was not ultra vires the Central Government, the Government would have by virtue of the powers vested in it under Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules the power to requisition a commercial or business) undertaking and to requisition a business like that of the Kokwah Chinese Restaurant as a running concern. The respondent in this view of mine would have the power to requisition even a commercial undertaking like the Kokwah Chinese Restaurant if he desired to do so, and the order in that behalf, if any, passed by him would be an order not without jurisdiction, power or authority under Rule 75A of the Defense of India Rules, hut with full jurisdiction, power or authority to do so and therefore valid and operative in law. I therefore negative this contention of Mr. Taraporewalla.

69. The last contention of Mr. Taraporewalla was that in any event the requisition order dated February 12, 1945, was illegal, void and inoperative in law as contravening the provisions of Section 15 of the Defense of India Act. He drew my attention in this behalf to the provisions of Section 15 of the Defense of India Act which laid down in terms that:

> Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the Defense of British India.
>
> He urged that in the matter of this order Sated February 16, 1945, the respondent very well knew that the business which was being carried on by the petitioners there was the business of the Kokwah Chinese Restaurant which, as I have already observed is fitted up with costly fixtures, fittings and furniture, which employs about twenty-four servants, which commands a great reputation and caters for a large clientele, which enjoys considerable goodwill and is one of the leading Chinese Restaurants in Bombay. He pointed out that as early as November 13, 1944, the petitioners had informed the respondent as to what the exact position was with respect to the Kokwah Chinese Restaurant in this connection. He contended that in view of all the above circumstances the order dated February 16, 1945, which directed that the possession of the premises occupied by the Kokwah Chinese Restaurant including landlord's fittings and fixtures should be delivered to the Commander 167-L of C sub-area forthwith was passed by the respondent in flagrant disregard of the provisions of Section 15 of the Defense of India Act which laid down upon him the duty of interfering with the ordinary avocations of life and enjoyment of property by the petitioners as little as might be consonant with the purpose of ensuring the public safety and. interest and the Defense of British India. With reference to the latter provisions of Section 15 of the Defense of India Act that the interference should be as little as may be consonant with the purposes therein mentioned, he pointed out that the premises had been requisitioned by the respondent as appears from

his affidavit dated March 1, 1945, for the purpose of opening a Detailed Issue Depot for the Royal Indian Navy therein, as far back as May 31, 1944, that since then nothing had been done by the respondent in the matter of the requisition of the premises until he for the first time thereafter addressed hi9 letter dated October 21, 1944, to the proprietor of the Kokwah Chinese Restaurant regarding the proposed requisition of the premises under the Defense of India Act asking for information on the various points therein mentioned, that in spite of the requisite information furnished by the petitioners to the respondent: on November 13, 1944, the respondent had issued the requisition order only on February 16, 1945, that the very statement which the respondent had made in para. 7 of his affidavit that although the order required the petitioners to hand over possession "forthwith" of the premises in their occupation, he would, as in other cases, have given a reasonable time to the petitioners to vacate and give possession of the premises to the Commander 167-L of C sub-area if the petitioners had requested him to that effect instead of rushing to this Court, showed that the premises which had been requisitioned by the respondent were certainly not required forthwith by the respondent for the purpose mentioned in the said requisition order, that under the circumstances therefore the requisition order which had been issued by the respondent directing the petitioners to forthwith deliver possession of the said premises was such as interfered with the ordinary avocations of life and the enjoyment of the property by the petitioners in a manner contrary to the provisions and in any event the spirit and intendment of Section 15 of the Defense of India Act. He urged that the statement made by the respondent in para. 7 of his affidavit did not cure the defect in the order, that the order was such as to cause the greatest inconvenience and hardship to the petitioners even though due regard be had to the purpose of ensuring public safety and interest and the Defense of British India, and that therefore the order being in flagrant disregard of the provisions of Section 15 of the Defense of India Act was illegal, void and inoperative in law.

70. The Advocate General, on the other hand, contended that the provisions of Section 15 of the Defense of India Act were directory or recommendatory and should not be read as mandatory, that they merely laid down recommendations or instructions as regards the mode in which the powers vested in the Government were to be exercised and any breach of the provisions, provided it did not amount to the exercise of the powers vested in the Government for collateral purposes or mala fide, could not be the subject-matter of adjudication by the Court, that Section 16(1) of the Defense of India Act which laid down that no order in the exercise of any power conferred by or under this Act should be called in question in any Court was a bar to the Court investigating whether the order which had been passed by the respondent was in flagrant breach of the provisions of Section 15 of the Defense of India Act as contended by the petitioners, that Sections 15 and 16 of the Defense of India Act should be read together. and the operation of Section 15 of the Defense of India Act should be restricted only to those cases where the Government was guilty of having passed an order in exercise of the powers vested in them under the Act for collateral purposes or mala fide, that therefore the bona fides of the respondent in this case not having been successfully impeached at all by the petitioners it was not open to them to contend that the order dated February 16, 1045, was in contravention of the provisions of Section

15 of the Defense of India Act and therefore illegal, void and inoperative in law. In this connection the Advocate General relied upon the decision of the Lahore High Court in *The Lahore Electric Supply Company, Limited, Lahore v. The Province of Punjab*[41] where it was held that Section 16 of the Defense of India Act was no bar to the jurisdiction of the civil Court if the order under Rule 75A of the Defense of India Rules (as in that case) was ultra vires and was not made bona fide but for a collateral purpose and that Section 15 of the Defense of India Act was not a statutory limitation of the powers conferred by the Act hut that section could be used as a guide in considering whether the powers invoked by the Government were exercised bona fide or not. He also relied upon the decision of the Madras High Court in *Kewalram v. Collector of Madras*[42] where it was held that Section 15 of the Defense of India Act is directory and must be read in conjunction with Section 16 of the Defense of India Act which says that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court. Of course that does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has been abused.

71. I am not prepared to hold that the provisions of Section 15 of the Defense of India Act are not mandatory but are merely directory or recommendatory. The language of Section 15 of the Defense of India Act is very clear on the point. It provides that the authority or person acting in pursuance of the Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes therein mentioned. Though the question whether the interference with the ordinary avocations of life and the enjoyment of property is in a particular case as little as may be consonant with the purposes therein mentioned may have to be determined by the authority or person who is passing the order in the exercise of the powers vested in him under the Defense of India Act and the Defense of India Rules framed thereunder, the provisions of Section 15 of the Defense of India Act are none the less mandatory. They have got to be complied with. I cannot accept the argument which was advanced by the Advocate General that Section 15 of the Defense of India Act merely contained recommendations or instructions for the guidance of the authority or the person acting in pursuance of the Act and that any breach of the provisions therein contained, howsoever flagrant the same might be, would not go to the root of the order but would have to be dealt with only by the attention of the Government being drawn to such breach by the subject suffering the hardship by reason of the issue of such an order. If that was the intention of the Legislature, I can only say that it has been very badly expressed. I cannot for a moment accept the suggestion that this provision was enacted in Section 15 of the Defense of

[41] I.L.R (1943) Lah. 617
[42] A.I.R [1944] Mad. 285

India Act for no other purpose than laying down such recommendations or instructions which might or might not be followed by the authority or the person concerned and the non-observance of which would involve no other consequences than some petition or supplication to the Government in the matter. I also cannot accept for a moment the suggestion that Section 15 of the Defense of India Act was enacted merely as a sop to the public who were naturally clamoring against the drastic powers which were being vested in the executive under the terms of the Act. That suggestion if accepted would attribute to the Legislature motives which would be far from honest and straightforward. I am not prepared to hold that such were the motives which actuated the Legislature when enacting this provision contained in Section 15 of the Defense of India Act. I am prepared to take the provisions of Section 15 of the Defense of India Act at their

face value, as meaning that it is the bounden duty of any authority or person acting in pursuance of the Act to interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes therein mentioned and that the provisions' in that behalf enacted in the section are mandatory.

72. It remains to be seen how far the provisions of Section 16(1) of the Defense of India Act affect the position. That section enacts in terms that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court. In order that an order should not be called in question in any Court, that order must be made in exercise of the power conferred by or under the Act. If the order is in fact not made in the exercise of the power conferred by or under the Act, or has been made in colourable exercise of the power conferred by or under the Act, or is made for a collateral purpose and not bona fide, it would certainly not be an order made in the exercise of the power conferred by or under the Act and will not be protected under the section. In this connection I may refer to the observations of Young C.J. at pp. 635 and 636 of the case of The *Lahore Electric Supply Company, Limited, Lahore v. The Province of Punjab*[43] where he has discussed various authorities in this connection. He referred to the observations of Lord Thankerton in *Secretary of State for India v. Mask & Co.*[44]

> It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

He also referred to the observations of Lord Reading C.J. in *Rex v. Brixton Prison (Governor): Sarmo, Ex parte*[45]

> If we were of opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers, this Court would have jurisdiction to deal with the matter.

[43] I.L.R. (1943) Lah. 617
[44] [1940] Mad. 599: 42 Bom. L.R. 767 . (p. 614)
[45] [1916] 2 K.B. 742 (p. 749)

The observations of Low J. in that case also deserve to be quoted in this connection (p. 752):

> ...I do not agree that if the Executive were to come into this Court and simply say 'A person is in our custody, and therefore the writ of habeas corpus does not apply because the custody is at the moment technically legal,' the Court would have no power to consider the matter and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown in reply to an application for the writ would not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of the law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the

exercise of its power to protect the liberty of the subject as that proposition involves.

He also referred to the observations of Farwell J. in *Roberts v. Charing Cross, Euston, and Hampstead Railway Co*[46].

> Lord Macnaghten there refers to a remark of the Master of the Rolls in *Southwork & Vauxhall Water Co. v. Wands Board of Works*[47] and goes on: In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess. If the Legislature has given powers and those powers are being used for the purpose of carrying out the works authorised and it is admitted that the mode in which they are being used is unreasonable that is an abuse of power so given and is therefore ultra vires.
>
> He lastly referred to the observations in *Galloway v. Mayor and Commonalty of London*[48] where it was stated that where persons had special powers conferred on them by Parliament for effecting a particular purpose, they could not be allowed to exercise those powers for any purpose of a collateral kind.

73. These observations and the conclusion which he came to on the basis thereof, namely, that Section 16 of the Defense of India Act was no bar to the jurisdiction of a civil Court if the order under Rule 75A of the Defense of India Rules was ultra vires -and was not made bona fide but for a collateral purpose really go to show that Section 16(1) of the Defense of India Act would not protect orders even though they might have been made in purported exercise of the powers conferred by or under the Act if the provisions of the Act were not complied with, if the powers were being misused, if what was really done was the exercise of an abuse of power, if the powers had been exceeded (abuse being only one form of excess) and if the exercise of the powers was not made bona fide but for a collateral purpose. The observations in *Kewalram v. Collector of Madras*[49], are also to the same effect in so far as they lay down that Section 16 of the Defense of India Act does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has teen abused. To the same effect again are the observations of Base J. in *Prabhakar v. Crown*[50]

> It is to be observed that Section 16 requires that the order be passed in the exercise of the power conferred by the Act and not merely in colorable exercise of such

[46](1903) 87 L.T. 732 (p. 734)
[47][1892] 2 Ch. 613
[48](1886) L.R. 1
[49] AIR 1944 Madras 285 : (1944) ILR Mad 826 : 1944-57-LW 206
[50][1943] Nag. 154 (p. 172)

> power. It is not enough therefore that these orders should be passed under color of the power conferred. They must be done in actual exercise of it and, as I read the law, no power is conferred to make such orders in bad faith, or in abuse of the Act, or for the purpose of effecting a fraud on the Act, and consequently these issues must be investigated if they are raised.

A further illustration of this principle is to be found in *Emperor v. Keshav Gokhale*[51] in which a full bench of our High Court held that where, on a perusal of an order passed under Rule 26 of the Defense of India Rules, it becomes clear that the authority or officer making the order has not applied its or his mind as required by the rule, the order is invalid, and that the obligation to

consider reasons or grounds for making an order and to be satisfied upon materials laid before the officer or authority making it or within his cognizance is a condition precedent to the making of an order, which in absence of the condition is a nullity. The Appeal Court there at p. 54 referred to Talpade's case and the observations of Sir Maurice Gwyer therein, viz.:

> We are clearly of opinion that where the order is made under or by virtue of a rule which is invalid and therefore of no force! or effect, the order is a nullity and Section 16(1), has no application.

74. On a consideration of the above authorities I am of opinion that Section 16(1) of the Defense of India Act would not protect an order made in the purported exercise of any power conferred by or under the Act from being called in question in any Court unless the order in question was made within the four corners of the provisions of that Act and was made in bona fide exercise of the power conferred by or under the Act, and that the Court will have jurisdiction to go into the question of the legality or validity of an order even though made in purported exercise of the power conferred by or under the Act if the provisions of the Act were not complied with or the powers conferred by the Act were being misused or the powers conferred by the Act had been exceeded or the powers conferred by the Act were being used mala fide and for a collateral purpose.

75. If this is the true position as regards the scope and effect of Section 16(1) of the Defense of India Act, what would be the position if the Court in fact found that an order passed by the authority or person acting in pursuance of the Act was passed in flagrant disregard of or in contravention of the provisions of Section 15 of the Defense of India Act? Would it be possible to contend that even though the provisions of Section 15 of, the Defense of India Act were mandatory as I have already held the same to be, the Court on the construction of Section 16(1) of the Defense of India Act which 1 have referred to above would not be able to call that order in question unless the breach of the provisions of Section 15 of the Defense of India Act was such as would go to the root of the bona fides of that order? It was contended by the Advocate General that unless the breach of the provisions of Section 15 of the Defense of India Act complained of went to the root of bona fides of the order, the order could not be at all questioned in any Court. I am unable to accept that contention. In my opinion, it is not only in cases where the bona fides of the particular order are questioned that the order can be called in question in any Court. In addition to the impeaching of the bona fides it is also open to a party to contend that the order complained of is such that the provisions of the Act have not been complied with,

[51](1944) 47 Bom. L.R. 42

that the powers vested in the authority or the person acting in pursuance of the Act are being misused, that the powers vested in such authority or person have been exceeded or that the power conferred on such authority or person has been abused. In the cases I have just mentioned it would be open to a party to challenge the order and the order would not be protected from being called in question in any Court by virtue of the provisions of Section 16(1) of the Defense of India Act.

76. Looking at the requisition order dated February 16, 1945, from this point of view, I have come to the conclusion that the order passed by the respondent to deliver possession of the premises of the Kokwah Chinese Restaurant together with the landlord's fittings and fixtures

therein forthwith to the Commander 167-L of C sub-area was, under the circumstances which I have already referred to, in flagrant breach of the provisions of Section 15 of the Defense of India Act, was an abuse of the power conferred on the respondent by virtue of the notification of the Government of India, Defense Co-ordination Department No. 1336/OR/1/42, dated April 25, 1942, was passed by the respondent in excess of and in abuse of the powers conferred upon him by or under the Act, was therefore not protected by the provisions of Section 16(1) of the Defense of India Act, and was illegal, void and inoperative in law.

77. Holding as I do that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules with respect to requisition of Immovable property without a public notification by the Governor General under Section 104 of the Government of India Act was ultra vires the Central Legislature and that therefore the requisition order dated February 16, 1945, was illegal, void and inoperative in law and that in any event the order was illegal, void and inoperative in law as contravening the provisions of Section 15 of the Defense of India Act, I now proceed to consider whether the Court has power to issue an order against the respondent under Section 45 of the Specific Relief Act, 1877, under the circumstances.

78. The Advocate General contended that even though the respondent herein was a public officer, the conditions of proviso (b) to Section 45 of the Specific Relief Act were not satisfied because the forbearing from executing the requisition order dated February 16, 1945, and/or enforcing delivery of possession of the premises of the Kokwah Chinese Restaurant as directed by the requisition order and/or from taking any other steps or proceedings under or in respect of the order which was prayed for in praver (a) of the petition was not under any law for the time being in force clearly incumbent on the respondent in his public character. He urged that there was no statutory provision which enacted that such forbearing was clearly incumbent on him in his public character and unless there was any statutory obligation cast upon the respondent to forbear from doing so or unless it was shown that a duty towards the petitioners had been imposed upon the respondent by statute so that he could be charged thereon, the Court had no jurisdiction to issue an order and injunction directing the respondent to forbear from doing the acts mentioned in prayer (a) of the petition.

79. In this connection he relied upon a passage in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 744, para. 1269:

> The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice ; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right; and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual.

He also relied upon the observations of Sir Lawrence Jenkins in *Provas Chandra Roy*[52], where the learned Chief Justice observed (p. 597):

..in dealing with an application under Chapter VIII of the Specific Relief Act, the principles applicable to a writ of mandamus should, generally speaking, be followed, and it was laid down by the Privy Council in *Bank of Bombay v. Suleman Somji*[53] that 'one of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he had claimed to exercise that right and none other, and that his claim has been refused.' This is in substantial accord with Section 46 of the Act.

He also relied upon the observations of Sir Norman Macleod in *Mahomedalli v. Jafferbhoy*[54] where the learned Chief Justice observed (p. 268):

The conditions under headings (a) to (e) of the proviso are cumulative so that no order can be made under the section unless they are all satisfied.

Proceedings under this section are in substitution for proceedings by writ of mandamus and writ of prohibition according to English practice.

In England the writ of mandamus is a high prerogative writ of a most exclusive remedial nature and is in form a warrant issuing from the High Court of Justice, directed to any person, corporation or inferior Court, requiring him or them to do some particular thing therein specified which appertains to his or their office, is in the nature of a public duty, and is consonant to right and justice. Its purpose is to supply defects of justice.The principles by which the Courts will be guided in such matters are laid down by Lord Cottenham C. in ***Frewin v. Lewis*** in the following words: 'The limits within which this Court interferes with the acts of a body of public functionaries...are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.

[52] In re I.L.R. (1913) Cal. 588

[53] I.L.R. (1908) Bom. 466: 10 Bom. L.R. 1065

[54](1925) 28 Bom. L.R. 264

He also relied upon the observations of their Lordships of the Privy Council in *Commissioner of Income Tax, Bombay v. Bombay Trust Corporation, Limited*[55]

The doctrine is well illustrated by that decision and by the cases therein mentioned, but is even more fully expounded in *The Queen v. Lords Commissioners of the Treasury*[56] The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before mandamus can issue to a public servant it must therefore

be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown his principal.

He lastly relied upon the observations of B.J. Wadia J. in *Shankarlal v. Municipal Commissioner of Bombay*[57], The jurisdiction of this Court is limited to cases where there is a clear breach of duty to do or forbear from doing, as the case may be. What is or is not dearly incumbent must be determined by reference to the provisions of the statute or regulation under which the act complained of should have been done or forborne. The words of Section 45, Sub-clause (b), are 'under any law for the time being in force', and the law for the time being in force is the law laid down in the Municipal Act.

80. This was a case against the Municipal Commissioner, Bombay, where an order was sought to be obtained under Section 45 of the Specific Relief Act restraining the Municipal Commissioner from doing certain things which he was enjoined to do under the relevant provisions of the Municipal Act. The Municipal Commissioner could only forbear to do those acts if the election was declared invalid. An applicant under Section 45 of the Specific Relief Act, however, cannot ask for such a declaration nor can the Court make it, as a relief by way of declaration is neither contemplated by nor directed under the section ; see Provas Chandra Roy, In re.2 In my opinion, therefore, the Municipal Commissioner cannot be restrained from doing that, which, until the election is set aside, is clearly incumbent upon him to do under the Act. On the basis of those observations of B.J. Wadia J. the Advocate General also contended that though the petitioners ostensibly sought to obtain an order under Section 45 of the Specific Relief Act directing the respondent to forbear from doing the various acts mentioned in prayer {a) of the petition, the real motive of the petitioners was to obtain a declaration that the requisition order dated February 16, 1945, was illegal, void and inoperative in law, a declaration which they could not obtain in proceedings taken by them under Section 45 of the Specific Relief Act,

81. Mr. Taraporewalla, on the other hand, contended that the expression "under any law for the time being in force," should not be restricted in its operation to a statute or an Act of the Legislature which laid down the duties to be performed by the public officer in his public character but should be interpreted by the Court to mean any duty which is laid down on such person in his public character under any law for the time being in force, via common law, statute law, or even the personal law of the party complaining against the act of such public officer, that even though Section 45 of the Specific Relief Act could

[55](1936) 39 Bom. L.R. 18 [57] AIR 1939 Bom 431 : (1939) 41 Bom LR 911

[56](1872) L.R. 7 Q.B. 387

not be invoked by an applicant unless the respondent was a public officer and purported to do the act complained of in his public character, the question whether it was clearly incumbent on him to forbear from doing the act complained of in his public character should be determined not merely By investigating what were the duties laid down upon such person under any statute which created the public office or which laid down the duties to be performed by him as such, but regard should also be had in that connection to what may be called the general provisions of the law of the land including the provisions of common law in that behalf, that therefore the Court should not restrict itself to inquiring whether a duty towards the petitioners had been imposed upon the respondent in his public character by statute so that he could be charged thereon or that the question whether it was clearly incumbent upon him to forbear from doing the

acts mentioned in prayer (a) of the petition should not be determined merely by reference to the provisions of any statute or an act of the Legislature under which the act complained of should have been fore borne. He conceded that the principles applicable to a writ of mandamus should generally speaking be followed in dealing with an application under chapter VIII of the Specific Relief Act and that the Court should only interfere if the public officer was departing from the power which the law had vested in him and was assuming to himself power over property which the law did not give him as observed by Lord Cottenham C. in the passage quoted by Sir Norman Macleod in *Mahomedalli v. Jafferbhoy*[58] He, however, contended that the observations to be found in *Commissioner of Income Tax, Bombay v. Bombay Trust Corporation, Limited*[59] and *Shankarlal v. The Municipal Commissioner of Bombay*[60], should be read with reference to the facts of those particular cases and should not be extended beyond what was warranted thereby. He relied upon a passage in Halsbury's Laws of England, Hailsham Edition, Vol. IX, pp. 761-762, para. 1293:

> In like manner all other persons acting as servants of the Crown are exempt from the prerogative jurisdiction of the Court, and no writ of mandamus can accordingly issue against them to do any act within the scope of the duties discharged by them on behalf of the Crown.
>
> Where, however, Government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects, a writ of mandamus will lie for the enforcement of such duties.

He urged that proviso (a) to Section 45 of the Specific Relief Act was taken from the law in England as stated in this passage from Halsbury's Laws of England and that the expression "under any law for the time being in force" should be understood as meaning "Royal Charter, statute or common law" as understood in England. He therefore urged that there was no warrant for reading the expression "any law for the time being in force" in the restricted manner in which the Advocate General contended it should be read. He also pointed out that the petitioners here were not asking for any declaration. He further urged that even though the expression "under any law for the time being in force" be read by the Court as contended for by the Advocate General, there was in Section 299(1) of the Government of India Act a duty laid down upon every person including persons filling the rote of public officers not to deprive any person of property except by authority of law, and that if he succeeded in establishing before the Court that the requisition order

[58](1925) 28Bom. L.R. 264 [60] AIR 1939 Bom 431 : (1939) 41 Bom LR 911

[59](1936) 39 Bom. L.R. 18

dated February 16, 1945, was illegal, void and inoperative in law by reason of the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules being ultra vires the Central Legislature, he was entitled to ask for an order against the respondent under Section 45 of the Specific Relief Act directing him to forbear from doing the various acts mentioned in prayer (a) of the petition. He therefore urged that the ratio of the decisions cited by the Advocate General, viz. *Commissioner of Income Tax, Bombay v. Bombay Trust Corporation, Limited*, and *Shankarlal v. Municipal Commissioner of Bombay*, did not apply to the present case. In this connection he relied upon the observations of Tyabji J. in *In re Tarabai*[61] where the learned Judge observed (p. 163):

> Now, there is no specific provision in any Act that the Commissioner of Police shall cancel any notice that may have been given by him. But it does seem to me, that although there is no specific direction yet if these women are shown to be respectable women to whom Section 28 of the Police Act does not apply, it would be clearly incumbent on the Commissioner of Police to cancel or withdraw the notice which he had given under a misapprehension.

He also relied upon a decision of our Appeal Court in *Balvant Ramchandra v. Secretary of State*[62] where the Appeal Court consisting of Russell and Batty JJ. held that the order which was entirely ultra vires the Executive Government was a mere nullity and no suit was necessary to set it aside. He further relied upon a decision of a full bench of our Court in *Narasagounda v. Chawagounda*[63] and the observations of Batchelor Ag. CJ. at pp. 656 to 658, where the learned Acting Chief Justice after discussing various decisions of the Privy Council held that (p. 658):

> On the same principle the Indian High Courts, especially here and in Calcutta, have held that it is not necessary in the case of a void deed to sue to have it set aside or cancelled.
> On the strength of the last two decisions relied upon by him, he contended that in the case of the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules which he contended were ultra vires the Central Legislature it was not necessary for the petitioners to sue for a declaration that the said enactment was ultra vires the Central Legislature and that it should be treated as a nullity. He further contended that in the case of the requisition order dated February 16, 1945, also it was similarly not necessary for the petitioners to sue for a declaration that the said order was illegal, void and inoperative in law before the petitioners could obtain the relief which they claimed in prayer (a) of the petition under Section 45 of the Specific Relief Act.

82. There is no doubt that chap. VIII of the Specific Relief Act deals with the enforcement of public duties. Section 45 of the Specific Relief Act enacts that any of the High Courts of Judicature at Calcutta, Madras and Bombay might make an order requiring any specific act to be done or foreborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature: provided the

[61](1905) 7 Bom. L.R. 161
[62] I.L.R. (1905) Bom. 480: 7 Bom. L.R. 497
[63] I.L.R. (1918) Bom. 638: 20 Bom. L.R. 802

conditions laid down in provisos (a) to (e) are fulfilled. Section 50 of the Specific Relief Act provides that neither the High Court nor any Judge thereof shall thereafter issue any writ of mandamus. The effect of those provisions is to take away the jurisdiction of the High Courts of Judicature of Calcutta, Madras and Bombay to issue the high prerogative writ of mandamus and to enact the relevant provisions in chap. VIII of the Specific Relief Act commencing with Section 45 of the Act. It is not necessary for me at this stage to go into the question whether any provisions of the high prerogative writ of prohibition were also enacted in Section 45 of the Specific Relief Act by the Indian Legislature, and if so, how far the jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay to issue the high prerogative writ of prohibition was taken away by the enactment of such provisions in Section 45 of the Specific

Relief Act. Suffice it to say that the provisions enacted in chap. VIII of the Specific Relief Act do take away the jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay to issue the high prerogative writ of mandamus which they enjoyed prior to the enactment of chap. VIII of the Specific Relief Act, and that the power to issue orders of the nature which used hithertofore to be passed by the High Courts of Judicature at Calcutta, Madras and Bombay exercising their jurisdiction to issue high prerogative writs of mandamus and prohibition (the latter to the extent they are incorporated in Section 45 of the Specific Relief Act) are now to be found within the four corners of Section 45 of the Specific Relief Act. The question which has got to be considered therefore is whether "any law for the time being in force" under which the doing or forbearing of the act complained of by an applicant is clearly incumbent on a public officer in his public character under the terms of proviso (b) to Section 45 of the Specific Relief Act is the statute law or an enactment of the Legislature as contended by the Advocate General or "Royal Charter, Statute Law, or Common Law" as contended by Mr. Taraporewalla. Even though the two cases cited by the Advocate General in this behalf, viz. *Commissioner of Income Tax, Bombay v. Bombay Trust Corporation, Limited* and *Shankarlal v. The Municipal Commissioner of Bombay*, appear on a literal reading of the observations relied upon by him to support his contention that before an order could be made against the public officer under Section 45 of the Specific Relief Act, it must be shown that the duty towards an applicant has been imposed upon him by the statute so that he could be charged thereon and that what is or is not clearly incumbent must be determined by reference to the provisions of the statute or regulations under which the act complained of should have been done or foreborne, I accept the argument of Mr. Taraporewalla that the observations in those two cases should be read with regard to the facts of those particular cases. In the case before their Lordships of the Privy Council in *Commissioner of Income Tax, Bombay v. Bombay Trust Corporation, Limited*, the question whether it was clearly incumbent upon the public officer, viz. the Commissioner of Income Tax, Bombay, to do a particular act, had come up for decision with reference to the provisions of the Indian Income Tax Act, XI of 1922. In the case before B.J. Wadia J. in *Shankarlal v. Municipal Commissioner of Bombay* also the question whether it was incumbent upon the public officer, viz. the Municipal Commissioner of Bombay, to forbear from doing the acts complained of, had come up for decision with reference to the provisions of the City of Bombay Municipal Act. I am, therefore, of opinion that the observations contained in those two cases which have been called upon by the Advocate General, should be read with reference to the facts of those particular cases and should not be extended beyond what was warranted thereby. I do not think that in making those observations their Lordships of the Privy Council or B.J. Wadia J. intended to lay down that the expression "any law for the time being in force" was to be limited in its construction to the statute or the enactment of the Indian Legislature as the only laws laying down the duties to be performed by such public officers in their public character. It may also be remembered in this connection that, as in this case, the public officer against whom an order is sought may not be the creature of any particular statute, with the result that one cannot find in the body of any statute or enactment any duty laid down upon him as such. If that were so, even though the public officer acting in his public character might be guilty of any act which would not be justified or authorized by any law for the time being in force, the Courts would have no jurisdiction to make an order against such public officer under Section 45 of the Specific Relief Act. That could certainly not be intended by the Legislature in the enactment of the provisions of proviso (b) to Section 45 of the Specific Relief Act. I am, therefore, of opinion that the expression "any law for the time being in force" used in proviso (b) to Section 45 of the Specific Relief Act should be read as "Royal Charter, Statute or Common Law" as known in England, i.e. not only the statute

or the enactments of Indian Legislature but also the common law of the land which is being administered by the Courts in British India.

83. If the expression "any law for the time being in force" used in proviso (6) to Section 45 of the Specific Relief Act is to be read in the manner aforesaid, let us consider what are the provisions of common law that have got to be followed in this connection. It is one of the cardinal principled of British jurisprudence that no person shall be deprived of his property except by authority of law, a principle which I have already stated before, finds its statutory recognition in Section 299(2) of the Government of India Act, 1935. That is the principle which would be enforced by Courts in British India as a part of the common law to be administered by them in the course of the administration of justice, and would be equally applicable to private individuals as to public officers acting in their public character. If a public officer acting in his public character acted contrary to that principle of law, it would be certainly open to the Courts to direct him to forbear from doing any act contrary thereto, it being under that law for the time being in force clearly incumbent on the public officer acting in his public character to forbear from doing an act contrary to that well recognized principle of common law. Apart, however, from this argument of Mr. Taraporewalla, we have the statutory recognition of this principle in Section 299(1) of the Government of India Act; and even if a restricted interpretation of the expression "any law for the time being in force" used in proviso (b) to Section 45 of the Specific Relief Act be adopted as contended by the Advocate General, we have in Section 299(1) of the Government of India Act laid down a statutory duty on private citizens as well as public officers acting in their public character to forbear from doing acts which would be contrary to the provisions of that section. It would be clearly incumbent under the terms of that section upon a private citizen as well as a public officer acting in his public character to forbear from doing an act which would deprive a subject of his rights of property except under the authority of law ; and if a public officer acting in his public character issued an order which would not constitute any authority in law for depriving a subject of his rights to property or was illegal, void and inoperative in law, the Court would have jurisdiction to issue an order directing such public officer to forbear from acting upon such order. I am therefore of opinion that on either construction of the expression "any law for the time being in force" used in proviso (b) to Section 45 of the Specific Relief Act, it is clearly incumbent on the respondent herein to forbear from doing the acts prayed for in prayer (a) of the petition, viz. from enforcing and/or executing the said requisition order dated February 16, 1945, and/or from enforcing delivery of possession of the said premises as directed by the said requisition order and/or from taking any other steps or proceedings under or in respect of the order, the order being illegal, void and inoperative in law by reason of the circumstances hereinbefore referred to.

84. The further objection urged by the Advocate General is equally untenable. The petitioners are not in this petition asking for any declaration that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules is ultra vires the Central Legislature, or that the requisition order dated February 16, 1945, is illegal, void and inoperative in law. They are only seeking to obtain an order against the respondent herein who is a public officer acting in his public character and on whom it is clearly incumbent under the law for the time being in force to forbear from doing an act contrary either to the principles of British jurisprudence or contrary to the statutory provisions of Section 299(1) of the Government of India Act, directing him to forbear from doing the various acts mentioned in prayer (a) of the petition. No doubt the relief mentioned in prayer (a) of the petition is based on the contentions

that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules is ultra vires the Central Legislature and the requisition order dated February 16, 1945, is illegal, void and inoperative in law. These are, however, the grounds for the relief which is prayed for by the petitioners against the respondent in prayer (a) of their petition. The substantive relief which the petitioners are asking for against the respondent under the terms of prayer (a) of the petition would be competent to them to obtain only if they substantiate those grounds. But it is not necessary for them to ask for a declaration to that effect in order to obtain such relief. As has been laid down by our Appeal Court in *Balvant Ramchandra v. Secretary of State*[64] and by the full bench of our Court in *Narasagounda v. Chawagounda*[65]., it would be open to the petitioners to treat the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules which I have already held to be ultra vires the Central Legislature as void and a mere nullity and to treat the requisition order dated February 16, 1945, which also I have already held to be illegal, void and inoperative in law, as void and a mere nullity; and no suit or proceedings to have the same declared void or to set them aside would be necessary to be taken by the petitioners before they would be entitled to the relief prayed for by them in prayer (a) of their petition.

85. The Advocate General also argued in this connection that proviso (b) to Section 45 of the Specific Relief Act was based on the assumption that the statute under which it was clearly incumbent on the public officer acting in his public character to do or forbear from doing any specific act was a valid statute and no argument could be urged, as was done in this case, that such statute was invalid. He therefore urged that the argument which had been addressed by Mr. Taraporewalla that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules with respect to requisition of Immovable property was ultra vires the Central Legislature was not available to him in these proceedings under Section 45 of the Specific Relief Act. I am unable to accept this contention of the Advocate General. The acceptance of that contention would mean that the Court might have jurisdiction to issue an order under

[64] I.L.R. (1905) Bom. 480:7 Bom. L.R. 497

[65] I.L.R.(1918) Bom. 638: 20 Bom. L.R. 802

Section 45 of the Specific Relief Act against the public officer if he is contravening any provisions of that particular statute, but would have no jurisdiction to issue any such order in the event of the public officer doing an act under a statute which might itself be invalid and would therefore confer upon the public officer no authority whatever in law to do the specific act or forbear from doing the same, a result which could never be within the contemplation of the Legislature. If the Court came to the conclusion that what the public officer was doing was certainly not warranted by any valid provisions of law, the Court would certainly have jurisdiction to issue an order against the public officer asking him to do or forbear from doing any specific act which it would be clearly incumbent on that public officer in his public character, under the law for the time being in force, viz. the general law of the land, or the provisions of the common law in that behalf. Apart from the above considerations, there is also a further consideration which obtains in this particular case. As I have already held the requisition order dated February 16, 1945, is illegal, void and inoperative in law as contravening the provisions of Section 15 of the Defense of India Act. If that were so, it would be clearly incumbent on the respondent who is a public officer acting in his public character in the matter of the requisition order not to exercise the power which is vested in him by the notification of the Government of India, Defense Co-ordination Department, No. 1336/OR/1/42, dated April 25, 1942, issued under

Section 2(4) of the Defense of India Act in the manner he has purported to do. This will surely bring the action of the respondent within the four corners of proviso (a) to Section 45 of the Specific Relief Act even if contrary to what I have held above the contention of the Advocate General in the matter of the construction of the expression "any law for the time being in force" were correct. I am therefore of opinion that the objection of the Advocate General as to the maintainability of this petition against the respondent herein based on his contentions on the construction of proviso (a) to Section 45 of the Specific Relief Act fails.

86. The Advocate General further contended that the petitioners herein could not maintain this petition against the respondent because the provisions of proviso (d) to Section 45 of the Specific Relief Act were not fulfilled. He contended that the petitioners had other specific and adequate legal remedy in that they could file a suit against the Government of India for a declaration that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules was ultra vires the Central Legislature and obtain the relief which they are asking for in prayer (a) of their petition and that therefore it could not be said that there are no other specific and adequate legal remedies. I have only got to observe in this behalf that even though that legal remedy, viz. the institution of a suit for such declaration against the Government of India might be available to the petitioners, the same, however, could not be an adequate legal remedy available to them, for the simple reason that before any such suit could be instituted by the petitioners against the Government of India the requisite notice in writing would have to be given by the petitioners to the Secretary to the Government of India under the provisions of Section 80 of the Civil Procedure Code, 1908, and before any such suit could be instituted after the expiration of two months next after such notice in writing had been given to the Secretary to the Government of India the mischief which was sought to be prevented, viz. the execution of the requisition order which was illegal, void and inoperative in law, might be done by or at the instance of the respondent herein. It could not under the circumstances be contended that the petitioners had other specific and adequate legal remedy and that they were not entitled to maintain this petition by reason of the provisions of proviso (d) to Section 45 of the Specific Relief Act. I am fortified in this conclusion of mine also by the observations in the passage in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 744, para. 1269, which I have quoted above, where it is stated, "and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual." There are also observations of Bowen L.J. to the same effect in *In re Nathan*[66]

> A writ of mandamus, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. The proceeding, however, by mandamus, is most cumbrous and most expensive; and from time immemorial accordingly the Courts have never granted a writ of mandamus when there was another more convenient, or feasible remedy within the reach of the subject.

There is also a decision of the Madras High Court in In the matter of G.A. Natesan and K.B. Ramanathan I.L.R. (1916) Mad. 125, in which Kumarswami Sastriyar J. observed (p. 165):

As regards the contention that Mr. Natesan has got other adequate legal remedy, I find it difficult to see what other adequate legal remedy he has. It is well settled by a series of decisions that where a corporation or public body has a statutory duty of a public nature towards another person a mandamus will lie to compel its performance at the suit of any person aggrieved by the refusal to perform the duty unless there is another remedy 'equally convenient, speedy, beneficial and effectual' as the mandamus and that by remedy is meant not a remedy by act of the party but remedium juris or some specific legal remedy for a legal right.' I need only refer to *In re Barlow, Rector of Ewhurst*[67] *The King v. The Archbishop of Canterbury and the Bishop of London*[68] *Reg. v. Leicester Union*[69] *The Queen v. Price*[70] *The Queen v. Thomas*[71] and In re Nathan.

Greaves J. in *In re Manick Chand Mahata v. The Corporation of Calcutta and the Calcutta Improvement Trust*[72] also observed (p. 924):

With regard to the second point I think 'specific and adequate remedy' in Sub-section (d) of Section 45 of the Specific Relief Act refers not to a general right of suit which must, unless expressly barred, always exist, but to some specific remedy expressly given by a particular Act.Though one may not go to the length of accepting these observations of Greaves J. in their entirety, there is no doubt that he considered a general right of suit as not within the meaning of the specific and adequate remedy mentioned in proviso (d) to Section 45 of the Specific Relief Act. The observations in the various cases which I have referred to go to show that the specific and adequate remedy referred to in proviso (d) to Section 45 of the Specific Relief Act, should be equally convenient, speedy, beneficial and

[66](1884) 12 Q.B.D. 461 (p. 468) [68](1812) 15 East 117: S.C. 104 E.R. 789 [70](1871) L.R. 6 Q.B. 411
[67](1861) 30 L.J.Q.B. 271 [69][1899] 2 Q.B. 632 [71][1892] 1 Q.B.D. 461
[72] I.L.R. (1921) Cal. 916

effectual, and if no such specific and adequate legal remedy did exist, it will be open to an applicant to file a petition for obtaining an order under Section 45 of the Specific Relief Act. I am therefore of opinion that this contention of the Advocate General based on the construction of proviso (d) to Section 45 of the Specific Relief Act also fails.

87. The Advocate General further contended that the granting of prayer (a) of this petition would mean that the High Court would make an order binding on the Central Government in the matter of the requisition order dated February 16, 1945. He urged that the respondent herein was exercising the powers which had been vested by the Central Government in him under the terms of the Notification of the Government of India, Defense Co-ordination Department, No. 1336/GR/1/42 dated April 25, 1942, that in the matter of the making of the said requisition order he was acting as the agent or servant of the Central Government, that if the Court passed an order as prayed for by the petitioners against the respondent, it would be making an order which would be binding on the Central Government and that therefore the petition was barred under the provisions of proviso (f) to Section 45 of the Specific Relief Act.

88. Mr. Taraporewalla, on the other hand, contended that the Central Government were not parties to this petition, that in exercising the powers which had been vested in him under the notification of the Government of India, Co-ordination Department, No. 1336/OR/1/42 dated April 25, 1942, the respondent was not acting as an agent of the Government but was exercising the authority which had been delegated by the Government to him under Section 2(4) of the Defense of India Act, that even assuming that the respondent was the agent of the Government in the matter of the making of that requisition order, merely because the respondent was acting in the matter of the making of that requisition order dated February 16, 1945, as the agent of the Central Government, the Court was not deprived of its jurisdiction to pass an order under Section 45 of the Specific Relief Act against him because even as the agent of the Central Government, apart from the duty which he owed to the Central Government, he also owed duties to the petitioners to forbear from doing any act contrary to the principles of common law or contrary to the provisions of Section 299(1) of the Government of India Act, and that even though the Court could not pass any order against the Crown, the Court had jurisdiction to pass an order against the public officer who was acting as the agent of the Central Government in the issue of the requisition order dated February 16, 1945, which was complained of in the petition.

89. The Government of India is not made a party to this petition, and whatever order be passed by the Court against the respondent herein would not be as such binding on the Central Government. As a matter of fact the Court here would not be passing any order against the Central Government, as the Central Government is not a party to this petition. The respondent in this case is not acting as the agent of the Government. He has delegated to him under Section 2(4) of the Defense of India Act and by the notification of the Government of India, Defense Co-ordination Department, No. 1336/OR/1/42 dated April 25, 1942, certain powers specified in the notification which are purported to be exercised by him not as an agent of the Government but as a public officer empowered in that behalf by the Government. Assuming, however, that he was not exercising such delegated authority but was in the exercise of the powers which he purported to do merely as an agent of the Government, is his position such that he is exempt from the jurisdiction of the Court to issue an order against him under Section 45 of the Specific Relief Act?

90. As has been observed by their Lordships of the Privy Council in *Commissioner of Income Tax, Bombay v. Bombay Trust Corporation, Limited*[73]

> The doctrine is well established by that decision and by the case therein mentioned but is even more fully expounded in *The Queen v. Lards Commissioners of the Treasury*[74] The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant, merely as such. Before mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown his principal.

If as I have already held the respondent herein independently of any duty which he owed to the Central Government as his principal, also owed a duty to the petitioners by reason of the principles of common law or by reason of the provisions of Section 299(1) of the Government of

India Act, any breach of such duty would give the petitioners a cause of action against the respondent herein and the petitioners would be entitled to sustain a petition for an order against the respondent under Section 45 of the Specific Relief Act. It may be that by reason of the respondent herein acting as the agent of the Central Government and by reason of the conclusion of the Court that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules is ultra vires the Central Legislature being the foundation for making the requisite order against the respondent herein, the Central Government might respect the division of the Court within the meaning of the observations of Lord Reading in Rex v. Speyer: *Rex v. Cassel*[75]

> The second ground proceeds upon the assumption that if the Court were to pronounce a judgment of ouster in this case we should be making an order upon the Sovereign. If that were the true view of such a judgment I should, of course, agree, as this Court could not make an order upon the Sovereign. To use the words of Cockburn C.J. in *The Queen v. Lords Commissioners of the Treasury*[76] 'we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown ; the thing is out of the question. Over the Sovereign we can have no power.' But a judgment against the respondents would have effect against them only; it would be an order upon the subject, not upon the Crown. It is then argued that this Court would be powerless to enforce a judgment of ouster in this case, that we could not order the Clerk to the Privy Council, who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favor of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those

[73](1936) 39 L.R. 18. (p. 31)
[74](1872) L.R. 7 Q.B. 387
[75][1916] 1 K.B. 595 (p. 610)
[76](1872) L.R. 7 Q.B. 387

> against whom it was made. Although it may be interesting and useful for the purpose of testing the propositions under consideration to assume the difficulties suggested by the Attorney-General, none of them would in truth occur. This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown.

These observations of Lord Reading were quoted with approval by Greaves J. in In re *Manick Chand Mahata v. The Corporation of Calcutta and the Calcutta Improvement Trust*[77] I may also in this connection refer to a decision of the Madras High Court in *Ekambara v. Madras Corporation*[78], and the observations therein at p. 33, col. 1:

> Mr. Rangaswami Aiyangar argued that even though the order in this case may only be directed to the Commissioner restraining him from holding the election on a particular date, since the Government has fixed the date, any such order restraining him must be

> regarded as an order binding on the Government and therefore not capable of being passed by the Court. The expression 'binding on the Government' is a somewhat curious expression. It is not quite clear that by that expression the Legislature intended anything more than merely orders passed against the Government, following in that respect the English Law. When we speak of an order being passed binding on a person, it can only be because he was a party to the order or else is so otherwise circumstanced as to have obligation cast on him by reason of the order to carry it out. When an order does not purport to be against a party and cannot of its own force oblige any party to do any act or to refrain from doing any act, it cannot be said that the order is binding on such party. So understood, it seems to me, that any order that the Court may pass restraining the respondent from holding an election on a particular date cannot be said to be binding on the Government ; because the Government are under no obligation by reason of the order to do anything or to omit to do anything. If, however, any other construction of the expression should be adopted, it will result in the Court being unable in most matters to make any order against any public servant of Government who may also be under statutory obligations towards the public as in this case to conduct himself in a particular manner. The order, if and when made, will only be against the Commissioner requiring him to do an act or refrain from doing an act and it is impossible to see that such an order can be regarded as an order binding on the Government, except in the sense that the Government may have no power to direct the Commissioner to the contrary.

I adopt the reasoning of the learned Judges of the Madras High Court in this decision. As I have already held the respondent in this case owed a duty to the petitioners laid down upon him by the principles of common law or by the provisions of Section 299(1) of the Government of India Act to forbear from doing the acts mentioned in prayer (a) of the petition apart from whatever duty he owed to his principal the Government of India. To the same, effect is the passage from Halsbury's Laws of England, Vol. IX, p. 762, in para. 1293:

[77] I.L.R. (1921) Cal. 916

[78] AIR 1927 Mad 22

> Where, however, Government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects, a writ of mandamus will lie for the enforcement of such duties.The Advocate General also in this connection drew my attention to the fact that according to the terms of Section 45 of the Specific Relief Act the procedure by way of making an order under that section was available only against persons holding a public office, whether of a permanent or a temporary nature, or any corporation or inferior Court of Judicature. He urged if that was so, the Secretary of State, the Central Government, the Crown Representative, or any Provincial Government, which have been mentioned in Clause (f) of Section 45 of the Specific Relief Act, would certainly; not be parties to such proceedings and no order passed by the Court under Section 45 of the Specific Relief Act would, if the contention of Mr. Taraporewalla was correct, be ever binding on them because they were certainly not to be parties to the proceedings. The enactment of proviso (f) to Section 45 of the Specific Relief Act would

thus, the Advocate General submitted, be absolutely nugatory. I do not, however, accept this contention of the Advocate General. Proviso (f) to Section 45 of the Specific Relief Act is enacted to meet those cases where the party against whom an order under Section 45 of the Specific Relief Act is sought was merely acting as the agent of the Secretary of State, the Central Government, the Crown Representative, or any Provincial Government, and besides owing his duty to the principal, owed no duty whatever to the subject. In those cases where, apart from such agent owing a duty to his principal, he also owed a duty to the subject within the meaning of the observations of their Lordships of the Privy Council in *Commissioner of Income Tax, Bombay v. The Bombay Trust Corporation, Limited*[79] the Court would certainly have jurisdiction to issue an order against him under Section 45 of the Specific Relief Act, having regard to the observations which I have quoted above from the decisions in Rex v. Speyer: *Rex v. Cassel*[80] In re *Manick Chand Mahata v. The Corporation of Calcutta and the Calcutta Improvement Trust*[81] and *Ekambara v. Madras Corporation*[82]

91. I am therefore of opinion that it is competent to the petitioners, under the authorities which I have hereinbefore cited, to maintain a petition against the respondent and it. is impossible to hold under the circumstances of the present case that in passing an order against the respondent herein the Court would be making an order binding on the Central Government, which would come within the mischief of proviso (f) to 9. 45 of the Specific Relief Act. It may be noted in this connection that neither the Central Government made any application before me to be made parties to this petition nor did I order this petition and the rule nisi which I granted against the respondent herein to be served on the Central Government in exercise of my discretion under Rule 584 of the High Court Rules. I am, therefore, of opinion that this contention of the Advocate General based on the construction of proviso (f) to Section 45 of the Specific Relief Act also fails.

92. The Advocate General lastly contended that the granting of an order as prayed for by the petitioners in prayer (a) of the petition would also contravene the provisions of

[79](1936) 39 Bom. L.R. 18
[80][1918] 1 K.B. 595
[81] I.L.R. (1921) Cal. 916
[82] A.I.R [1927] Mad. 22

proviso (g) to Section 45 of the Specific Relief Act, which says that the High Court shall not be deemed to be authorised to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown. I am, however, unable to appreciate this contention of the Advocate General. There is no claim made by the petitioners herein against the Crown, nor are any proceedings taken by them for enforcing the satisfaction of a claim upon the Crown. The proceedings which they are taking by this petition are therefore not to enforce the satisfaction of a claim upon the Crown in the sense in which those words are used in proviso (g) to Section 45 of the Specific Relief Act, This position has been considered in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 761, para. 1293 ;

> As no Court can compel the Sovereign to perform any duty, no writ of mandamus will lie to the Crown. Where it is sought to establish a right against the Crown the appropriate procedure is by way of petition of right.

As was observed by Blackburn J. in *The Queen v. Lords Commissioners of the Treasury*[83]

> The general principle, not merely applicable to mandamus but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. To take a familiar instance, if a mandamus were applied for against the secretary of a railway company to do something, it would not be granted, merely because the railway company his masters had an obligation to perform the duty, and it makes no difference that the master, or the principal, or the sovereign is only suable by petition of right, or perhaps not at all-There is the familiar case of the surveyor of highways who is the servant of the inhabitants of the parish ; the inhabitants of the parish cannot be sued, because they are not a body corporate, but the surveyor of the highways is not to be responsible for the non-performance of their duties, or the negligence of their servants, though he is the person who acts for them. The same principle applies to mandamus, if the duty is by statute, though perhaps 'duty' is hardly the word to employ with regard to Her Majesty ; where the intention of the legislature shows that Her Majesty should be advised to do a thing, and where the obligation, if I may use the word, is cast upon the servants of Her Majesty so to advise, we cannot enforce that obligation against the servants by mandamus merely because the sovereign happens to be the principal.

The observations of their Lordships of the Privy Council in *Commissioner of Income Tax, Bombay v. 'The Bombay Trust Corporation, Limited*[84] are also to the same effect (p. 31):

> But in any case Clause (g) in Section 45 of the Specific Relief Act does not mean that orders can be made to enforce the satisfaction of a claim upon the Crown provided that the Court acts with some additional motive or has some further intention. The worlds of the clause have been taken verbatim from a well-known judgment cm. mandamus, the judgment of Coleridge J. in *In re Baron de Bode*[85] 'But, against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a

[83](1872) L.R. 7 Q.B. 387 (p. 398)
[84](1936) 39 Bom. L.R. 18
[85](1838) 6 Dowl. 776

> mandamus will not lie. I call this an established rule, and I believe it has never been broken in upon.' The doctrine is well illustrated by that decision and by the cases therein mentioned, but is even more fully expounded in *The Queen v. Lords Commissioners of the Treasury*[86] The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown his principal.

93. If one has regard also to the cases which have been noted in footnote (d) appended to the passage from Halsbury's Laws of England, which I have above referred to, one finds that they were all cases where though the public servants were ostensibly proceeded against, the object of the pursuers was to reach the funds or property which had gone into the hands of the Crown and that the motive of the pursuers was, through the public servants who were proceeded against ostensibly, to reach such funds or property in the hands of the Crown. There is also another passage in Halsbury's Laws of England,
Hailsham Edition, Vol. IX, p. 752, para. 1281, which may be noted in this connection:

> A mandamus will issue to Government officials in their capacity as public officers exercising executive duties which affect the rights of private persons.

94. That is really the genesis of the principle which has been enunciated in proviso (g) to Section 45 of the Specific Relief Act. If the object of these proceedings started by the petitioners in this petition was to obtain an order on the respondent as a public officer and servant of the Crown, merely to enforce satisfaction of a claim upon the Crown, within the meaning of the expression I have adopted above, then certainly it would not be open to the petitioners to maintain this petition. I may repeat here what I have stated erstwhile that the respondent in the present case is not acting merely as a servant of the Crown. Though he happens to be a public officer in the employ of the Government, he is not acting as the agent of the Government in the matter of the exercise of the powers which have been delegated to him by the Government under the provisions of Section 2(4) of the Defense of India Act and the notification of the Government of India, Defense Co-ordination Department, No. 1338/OR/1/42 dated April 25, 1942. I am, therefore, of opinion that this contention of the Advocate General based on the construction of the provisions of proviso (f) to Section 45 of the Specific Relief Act also fails. I, therefore, hold that in view of my findings that the enactment of Section 2(2)(xxiv) of the Defense of India Act and Rule 75A of the Defense of India Rules with respect to be requisition of Immovable property without a public notification by the Governor General under Section 104 of the Government of India Act is ultra vires the Central Legislature and that in any event the requisition order dated February 16, 1945, is illegal, void and inoperative in law as contravening the provisions of Section 15 of the Defense of India Act, the petitioners are entitled to maintain this petition to obtain the order prayed for by them in prayer (a) of their petition under Section 45 of the Specific Relief Act.

95. In the result, I do order and direct the respondent to forbear from enforcing and/or

[86](1872) L.R. 7 Q.B 387

executing the said requisition order dated February 16, 1945, and/or enforcing delivery of possession of the said premises, viz. the premises of the Kokwah Chinese Restaurant including the landlord's fittings and fixtures therein, as directed by the requisition order and/or from taking any other steps or proceedings under or in respect of the order as prayed for in prayer (a) of the petition.

96. As regards the costs of the petition, the respondent has failed in all the contentions which have been urged on his behalf, except the one whether the requisition order was illegal, void and inoperative in law by reason of the respondent having no jurisdiction, power or authority to issue the same under the provisions of Rule 75A of the Defense of India Rules, The arguments on that

point, however, have not taken any considerable time before me and I see no reason to deprive the petitioners of their costs of this petition merely because they have failed only in that contention of theirs. I, therefore, order that the respondent do pay the petitioners' costs of this petition taxed on a long cause scale. Two counsel allowed.

97. There will, therefore, be an order in terms of prayer (a) of the petition. The respondent will pay the petitioners' costs of this petition taxed on a long cause scale. Two counsel allowed.

98. Per curiam. The Advocate General asks for a certificate under Section 205(1) of the Government of India Act that the case involves a substantial question of law as to the interpretation of the Government of India Act. I accordingly grant that certificate.
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