BOMBAY HIGH COURT

Mulchand Kundanmal Jagtiani

Vs.

Raman Hiralal Shah

O.C.J. Suit No. 1859 of 1948 and Miscellaneous Application No. 231 of 1938

(M.C. Chagla, C.J. and Bhagwati, J.)

02.09.1948

JUDGMENT

M.C. Chagla, C.J.

1. The plaintiff filed a suit on July 2, 1948, on two promissory notes. A. plaint was also prepared in respect of a suit on a promissory note on August 27, 1948, and an application was made to take that suit on the file of this Court, and the question that arises both in the suit and in the application is whether this Court has jurisdiction to try these two suits, and the question of jurisdiction can only be determined by considering whether a recent piece of legislation passed by the Provincial Legislature is intra vires with regard to certain of its provisions.

2. Bombay Act XL of 1948, an Act to establish an additional City Civil Court for Greater Bombay, received the assent of the Governor General on May 10, 1948, and the Act came into force on August 16, 1948. The material provisions of the Act are that it sets up an additional Civil Court for the Greater Bombay for the trying of all suits of a civil nature not exceeding ₹ 10,000 in value and arising within the Greater Bombay. In Section 3 of the Act certain kinds of suits are excluded from the purview of this new Court, but we are not concerned with those excepted. suits. Section 12 bars the jurisdiction of this Court in all those suits which are made cognizable by the City Civil Court. Therefore the position is that whereas before the passing of this Act the High Court had jurisdiction to try all suits from ₹ 1,000 upwards on its Original Side, now suits up to the value of ₹ 10,000 would be solely triable by the City Civil Court. Section 18 provides for the transfer of suits pending in the High Court, and the effect of that section is that all suits, which were pending in this Court in which issues had not been settled or evidence had not been recorded on or before the date of the coming into force of the Act, were to be transferred to the new Court which was established.

3. Now, the contention, very briefly put, of the plaintiff and the petitioner before us, is that it is not within the legislative competence of the Provincial Legislature to invest this new Court with the jurisdiction to try suits on promissory notes, nor is it within the legislative competence of the Provincial Legislature to deprive the High Court of its jurisdiction to try suits on promissory

notes below the value of ₹ 10,000. In order to fully understand and appreciate this contention it is necessary to look at the scheme of the Government of India Act. The scheme of the Constitutional Act has been considered over and over again both by the Federal Court and by the Privy Council, and I do not think it will be right on my part to repeat and reiterate what have now come to be regarded as truisms in the interpretation of the Constitutional Act. The basic and fundamental idea underlying the Government of India Act is the creation of a Federation, and as is well known, Federation means distribution of powers, and the scheme adopted in the Government of India Act is that legislative power is distributed between the Center and the Provinces and the distribution is brought about in this way. Three Lists are prepared : List I which deals with subjects over which the Center alone has the egislative competence; List III which is the Concurrent List with regard to which both the Centre and the Provinces can legislate; and List II which is a purely Provincial List in regard to which only the Provincial Legislature can legislate. Section 100 deals with these Lists and the scheme of Section 100 also is fairly clear. It, as it were, lays down a hierarchy of these Lists. It gives priority to the different Lists and it provides that the dominant List shall be the Federal Legislative List; next comes the Concurrent Legislative List; and finally comes the Provincial Legislative List. It is also now a well recognized canon "of construction that as far as possible attempt should be made to reconcile different items in different Lists so as to avoid a conflict and overlapping and also that full effect must be given to each item in each of the Lists.

4. Now, turning to these Lists, Mr. Joshi has argued that these Lists display a peculiar feature in our Constitution, that whereas the distribution of legislative and executive power is carried out, as is ordinarily carried out in most Federal Constitutions, by dividing the subjects between the Federation and the Provinces, with regard to the distribution of judicial power the scheme presents certain novel features. The administration of justice is made a Provincial subject. It falls under List II, item 1, and the constitution and organization of all Courts are also within the legislative competence of the Province. But Mr. Joshi contends that as far as the jurisdiction of the Courts set up by the Provinces is concerned, that is distributed between the Province and the Federation. Before the passing of the Act of 1985 India was governed by an unitary constitution and therefore the question of distribution of powers did not arise, and so by Section 223 of the Act the jurisdiction of existing High Courts has been saved. But according to Mr. Joshi, with regard to the future the Courts in India can only derive their power and their jurisdiction with regard to different subjects according as those subjects are Federal subjects or Provincial subjects or fall in the Concurrent List. It is pointed out to us that in List I, the Federal List, item 53 provides with regard to jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers. Therefore item 53 confers upon the Federal Legislature the sole power of conferring jurisdiction and power upon all Courts with respect to each one of the items that figure in List I. Mr. Joshi says that that power cannot be encroached upon by the Provincial Legislature. That establishes the paramountcy of the Federation, and although the Provinces may set up new Courts, the Federal Legislature alone can confer jurisdiction upon those Courts with regard to the items enumerated in List I. Then we turn to List II, which is the Provincial List, and there too we have a similar provision, being item 2, which states : "Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list," and says Mr. Joshi that under this power the Provincial Legislature can confer jurisdiction and that Legislature alone

can confer jurisdiction upon the Courts set up by the Province with regard to matters enumerated in List II. And in the Concurrent List we have item 15 which also speaks of jurisdiction and powers of all Courts with respect to any of the matters in this list, and here both the Province and the Federation can confer jurisdiction and power upon the Courts. Mr. Joshi and also Mr. Mistree therefore argue that inasmuch as promissory notes is item 28 in List I, it is only the Federal Legislature that can confer jurisdiction upon the City Civil Court to hear and dispose of suits on promissory notes, and it is also only the Federal Court that can deprive the High Court of its jurisdiction to hear suits on promissory notes.

5. Now, in order to determine whether the impugned legislation falls within List I and therefore ultra vires of the Provincial Legislature, we have to consider what the nature of the legislation is. It is entirely fallacious to argue, as was sought to be argued at one stage, that the well-known argument of pith and substance does not apply to the case before us. The pith and substance argument really amounts to this. The Court must look at the true nature and effect of the legislation which it is considering. It must consider its scope and ambit, it must consider its true aspect from the point of view of the Legislature and must come to the conclusion what is the legislation about. It must not be misled by mere technicalities or by legal phraseology which may conceal the true intent of the Legislature, but must fairly arrive at 8 conclusion as to what is the true nature and character of the legislation which it is considering. The Privy Council in a very recent case has very clearly enunciated this principle. The decision is to be found in *Prafulla Kumar Mukherjee v. Bank of Commerce Lid., Khulna*[1] The judgment was delivered by Lord Porter, and it would indeed be audacity of the highest order for me to try and improve upon what has been so lucidly and succinctly stated by Lord Porter as the true principles which should govern the consideration of whether a particular piece of legislation is ultra vires or not. Reading the Privy Council case I find certain principles that emerge which I will briefly state. The first is that although it is not always wise to construe the Indian Constitution Act by analogy with the Canadian or the Australian Constitution Acts, even so both in the interpretation of the Canadian and the Australian Acts and in the Indian Act the pith and substance argument fully applies. The second principle that emerges is that when you have different subjects mentioned in different lists, subjects are bound to overlap, and when they do overlap, what the Court must do is to find out what is the nature of the enactment in pith and substance and in which List does it fall according to its true nature and character. The Privy Council also clearly asserts that a Provincial Act may encroach upon the Federal field, but what the Court must do is to determine the extent of that invasion and the Court must do so in order to find out whether in pith and substance the legislation really falls in the Provincial field. The mere fact that there is a trespass by the Provincial Legislature upon the Federal field does not necessarily make the Provincial legislation ultra vires. The extent and nature and character of the trespass must be considered, and if the Court finds that the trespass is such as to make the legislation really a legislation which falls in one of the items in List I, then alone the Court would say that the legislation is ultra vires. Finally, the main principle laid down in this case of the Privy Council is that the Provincial Legislature may deal with a Federal subject if it is only an ancillary or incidental effect of the legislation, provided that in substance it is dealing with a Provincial subject.

[1](1947) L.R. 74. IndAp 23

6. It is interesting to note what the facts were in the case which came before the Privy Council and in which these principles were enunciated by their Lordships, The Act that was challenged was the Bengal Money Lenders Act of 1940, and one of the sections of that Act provided that notwithstanding anything contained in any law for the time being in force, or in any agreement,

no borrower shall be liable to pay after the commencement of this Act more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest, and the respondent before their Lordships filed the suit, from which the appeal arose, to recover loans and interest alleged to be due on promissory notes executed by the borrowers who were the appellants, and the contention before the Privy Council was that the Bengal Legislature in passing the Money Lenders Act, 1940, had encroached upon the Federal field inasmuch as they had passed legislation which affected promissory notes which fell in List I of the Seventh Schedule. Their Lordships felt that three questions arose in order to determine whether the contention of the party challenging the legislation was sound, and these three questions were :

> (1) Does the Act in question deal in pith and substance with money lending ?
> (2) If it does, is it valid though it incidentally trenches on matters reserved for the Federal Legislature ?
> (3) Once it is determined whether the pith and substance is money lending, is the extent to which the Federal field is invaded a material matter"? And their Lordships' answer was that the Act dealt in pith and substance with money lending and therefore it was valid although it incidentally trenched on matters reserved for the Federal Legislature, and finally that once it was determined that the pith and substance was money lending, the extent to which the Federal field was invaded was not a material consideration. In connection with the second question their Lordships cited with approval an observation of Sir Maurice Gwyer, Chief Justice, in *Subrahmanyan Chettiar v. Muttuswami Goundan*[2]

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purposes of determining whether it is legislation with respect to matters in this list or in that Dealing with the same point their Lordships observed (p. 43) :

> Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with.

With regard to the third question their Lordships stated that it was not necessary to

[2][1940] F.C.R. 188

determine degrees of invasion, but to consider invasion from the point of view of deciding what the pith and substance of the impugned Act was, and they go on to say (p. 43):

> Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money lending but promissory notes or banking ? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.
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> And their Lordships further emphasized that the view that they had just been expressing places the precedence accorded to the three Lists in its proper perspective

7. Lord Atkin in a passage, which has come to be regarded as a locus classic us, also denned what the pith and substance argument really is, and that is in *Gallagher v. Lynn*[3] and the passage is at p. 870 :

> If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.

And the Federal Court in *Bank of Commerce Ltd. v. Amulya Krishna Basu* : *Bank of Commerce Ltd. v. Brojo Lal Milm*[4] have also considered what must be the true approach to legislation which is challenged as being beyond the competence of a. particular legislative authority, and the Chief Justice of India, Sir Patrick Spens, quotes with approval from Lefroy's Treatise on Canadian Constitutional Law. Lefroy says that :

> It seems quite possible that a particular Act, regarded from one aspect, might be intra vires of a Provincial Legislature, and yet, regarded from another aspect, might be also intra vires of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act.

And the learned author goes on to define what aspect means and says :

> The cases which illustrate this principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon.

8. Armed with these tests let us look at the legislation which is being challenged and let us try and determine what is its pith and substance, its true nature and character, its scope and ambit. As its very preamble shows, the Act is intended for the purpose of setting up

[3][1937] A.C. 863
[4][1944] F.C. 126

an additional Civil Court for Greater Bombay. The Legislature has created a Court of a lower grade than the High Court for certain suits of a certain pecuniary value. The Legislature has taken the view-rightly or wrongly is immaterial-that litigation of a certain value should not be

dealt with by the High Court on its Original Side, but should be dealt with by a special Civil Court which is established by the Legislature. It is important to note that this Court is not a special Court in any sense of the term. It is a Civil Court like any of the several Courts existing in the Province of Bombay. No special jurisdiction is conferred upon it, and with regard to subject-matter it is competent to try all civil suits excepting certain matters where the jurisdiction of the High Court is continued, like the Admiralty, Matrimonial, Testamentary and Insolvency jurisdiction. It is difficult to understand how it can be said of this piece of legislation that it confers jurisdiction and power upon the City Civil Court to deal with cases falling under item 28 of the List I. If, therefore, the Act deals with administration of justice and constitutes a Court for that purpose and confers ordinary civil jurisdiction upon it, in my opinion the legislation clearly falls within the legislative competence of the Provincial Legislature and is covered by item 1 of List II of the seventh schedule. That item expressly confers upon the Provincials Legislature the power to legislate with regard to the administration of justice and the constitution and organization of all Courts except the Federal Court. It is difficult to imagine how a Court can be constituted without any jurisdiction, and if Parliament has made the administration of justice exclusively a Provincial subject and has conferred exclusively upon the Provincial Legislature the power to constitute and organize all Courts, it must follow that the power is given to the Provincial Legislature to confer the ordinary civil jurisdiction upon the Courts to carry on with their work. Item 2 of List II deals with jurisdiction and power of all Courts except the Federal Court with respect to any of the matters in this List, and Mr. Mistree's argument is that item 1 is limited and conditioned by item 2 and what he contends is that the only power that the Provincial Legislature has is undoubtedly to create Courts, but to confer upon them only such jurisdiction as relates to items comprised in List II. I am unable to accept that contention or that interpretation of List II in the Seventh Schedule. Each item in List II is an independent item, supplementary of each other, and not limited by each other in any way. Item 1 having given the general power to the Provincial Legislature with regard to all matters of administration of justice and with regard to the constitution and organization of all Courts, further gives the power to the Legislature to confer special jurisdiction, if needs be, and special power, if needs be, to these Courts with regard to any of the items mentioned in List II. It is impossible to read item 2 as curtailing and restricting the very wide power with regard to administration of justice given to the Provincial Legislature under item 1. Similarly in List I the Federal Legislature has been given the power under item 53 to confer jurisdiction and power upon any Court with regard to matters falling under any of the items in that List, and therefore it would be competent to the Federal Legislature to confer any special jurisdiction or power which it thought proper upon any Court with regard to suits on promissory notes or matters arising under the Negotiable Instruments Act. The conferment of such special jurisdiction and powers with regard to negotiable instruments would be solely and entirely within the competence of the Federal Legislature. To say that because the City Civil Court will be trying suits on promissory notes, therefore there is an invasion of the Federal field and jurisdiction has been conferred by the Provincial Legislature upon the Court to try suits on promissory notes, is to my mind, taking an erroneous view of the impugned legislation. It was not the point of view of the Legislature at all that any jurisdiction should be conferred upon the City Civil Court with regard to promissory notes. Assuming that there has been an invasion of the Federal field to the extent that a new Court which has been set up has been clothed with the power of trying suits on promissory notes, in my opinion, that invasion is purely incidental or ancillary. If the Provincial Legislature has ventured at sill to trespass upon the Federal field, that trespass is of the most minor and immaterial character, and when one considers the nature of that trespass, if anything, the fact is emphasized that what the Legislature

was doing in substance was legislating in a matter which is exclusively within its own sphere and not within the sphere of the Federal Legislature, In this case it cannot for a moment be suggested that by any guise or contrivance the Provincial Legislature has attempted to do what it had no power to do and what only the Federal Legislature had the power. Nothing could have been further from the minds and thoughts of the distinguished Legislators who were responsible for this legislation, than the thought of negotiable instruments and promissory notes.

9. Mr. Mistree has also argued that if this interpretation was placed upon item 1 of List II of the 7th Schedule, item 53 of List I would be rendered completely nugatory. Mr. Mistree says that the Provincial Legislature would be able to confer jurisdiction on the new Court set up with regard to all matters which may fall within the Federal field. I do not think that the argument is really sound because, as I have already pointed out, item 53 deals with the special jurisdiction and powers with regard to certain specified matters which the Federal Legislature has the power of conferring upon all Courts in the Dominion. That power is by no means taken away by the Provincial Legislature acting patently within its own sphere under item 1 of List II and creating a Court for the administration of justice and conferring upon that Court, not any special powers, not any special jurisdiction, but jurisdiction which every civil Court in the Province has under the Civil Procedure Code. This apprehension of the Provincial Legislature stealthily taking away the powers of the Federal Legislature, I am afraid, is based on a misunderstanding and misappreciation of the real effect and content of item 58 of List I of the Seventh Schedule. It is not disputed either by Mr. Joshi or by Mr. Mistree that if the legislation falls within item 1 of List II, then not only would the Provincial Legislature have the power of conferring jurisdiction in all matters up to ₹ 10,000 on the City Civil Court, but it would equally have the power to deprive the High Court of that same jurisdiction.

10. In my opinion, therefore, the Provincial Legislature had power to confer upon the City Civil Court the jurisdiction to entertain and try suits in respect of negotiable instruments of the value of and below ₹ 10,000 and that the impugned Act is intra vires of the Provincial Legislature. Therefore this Court would have no jurisdiction to try the Suit No. 1859 of 1948 and that suit must stand transferred to the City Civil Court under Section 18(7) of the Act.

11. With regard to the Petition No. 231 of 1948, as we cannot accede to that petition, the suit cannot be taken on the file of this Court, because after the coming into force of the Act on August 16, 1948, that suit can only be tried by the City Civil Court as its value is under ₹ 10,000.

Bhagwati, J.

12. The question that arises for our determination is whether this Court has jurisdiction to receive, try and dispose of the suits in respect of promissory notes not exceeding ₹ 10,000 in value. Suit No. 1859 of 1948 was filed on July 12, 1948. The Bombay Act XL of 1948 was passed by the Bombay Legislature and received the assent of the Governor General on May 10, 1948. It came into force by a notification in the official Gazette by the Provincial Government from August 16, 1948, and on the Act coming into force a notice was put up by the Prothonotary to the effect that the suit would be transferred to the City Civil Court. A precipe was thereupon filed by the plaintiff's attorneys contesting this position and contending that this Court had jurisdiction to try and dispose of the suit. On August 27, 1948, another plaint was sought to be

presented in respect of a suit on a promissory note of a value not exceeding ₹ 10,000 and that was rejected by the Prothonotary. A petition was thereupon filed, which is Petition No. 281 of 1948, asking that the plaint be taken on file on the ground that this Court has jurisdiction to receive, try and dispose of that suit. It is on these precipe and the petition that the issue as to jurisdiction of this Court has come to be tried before us.

13. The provisions of the Bombay Act XL of 1948, hereinafter referred to as the impugned Act, which are relevant for the purpose of the determination of this issue, may be referred to in short. The Act has been enacted by the Provincial Legislature to establish an additional Civil Court for Greater Bombay. Section 3 of the Act enables the Provincial Government to establish for the Greater Bombay a Court, to be called the Bombay City Civil Court, and it enacts that "notwithstanding anything contained in any law, such Court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding ten thousand rupees in value, and arising within the Greater Bombay," except for certain exceptions which are not relevant in these proceedings. Section 4 empowers the Provincial Government by notification in the official Gazette, to invest the City Civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within the Greater Bombay and of such value not exceeding twenty-five thousand rupees as may be specified therein. Section 12 of the Act says that "notwithstanding anything contained in any law. the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court: Provided that the High Court may, for any special reason, and at any stage remove for trial by itself any suit or proceeding from the City Court." And Section 18(1) of the Act provides for a transfer of all suits and proceedings cognizable by the City Court and pending in the High Court, in which issues have not been settled or evidence has not been recorded on or before the date of the coming into force of this Act, to the City Court. These are the relevant provisions of the impugned Act on which the questions to be determined by us arise. These questions may be stated as under : First, whether the Bombay City Civil Court Act of 1948, to the extent that it confers jurisdiction on the Bombay City Civil Court to receive, try and dispose of suits in respect of cheques, bills of exchange, promissory notes and other like instruments not exceeding ₹ 10,000 in value is ultra vires the Provincial Legislature. The second issue, which is a cognate issue based on Section 12 of the impugned Act, is whether the Bombay City Civil Court Act of 1948, to the extent that it takes away the jurisdiction of the High Court to receive, try and dispose of suits in respect of cheques, bills of exchange, promissory notes and other like instruments not exceeding ₹ 10,000 in value is ultra vires' the Provincial Legislature. A determination of these two issues will result in the determination of the issue as to jurisdiction which has been referred to us.

14. In order to appreciate the rival contentions which have been urged before us, it is necessary to set out a few provisions of the Government of India Act, 1935, with the various amendments, adaptations and modifications from time to time ending with the Indian Provisional Constitution (Amendment) Order, 1947, hereinafter referred to as the Constitution Act. Part V of the Constitution Act deals with the legislative powers, and Chapter I thereof deals with distribution of powers between the Dominion and the Provincial Legislatures. Section 100 sets out the three Lists which are annexed to the Seventh Schedule to the Act, which are respectively called the Federal Legislative List, the Concurrent Legislative List, and the Provincial Legislative List. It is enacted that so far as the Federal Legislative List is concerned, which is List I to the Seventh

Schedule to the Act, the Dominion Legislature has, and the Provincial Legislature has not, power to make laws with respect to any of the matters enumerated therein. In respect of the Concurrent Legislative List, the Dominion Legislature, and, subject to the preceding sub-section, the Provincial Legislature also, have power to make laws with respect to any of the matters enumerated therein. And, lastly, with regard to the Provincial Legislative List, the Provincial Legislature has, and the Dominion Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated therein. These are the Lists which contain the distribution of powers between the Dominion and the Provincial Legislatures. Going to the respective Lists, there is one particular thing which has got to be observed, and it is this that in all the three Lists we have got laid down as specific items jurisdiction and powers of the Courts circumscribed as they arc by the terms of those particular items. Item 53 of List I refers to the jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers. It may be incidentally noted that the matters in this List, viz. List I, include item 28, viz. cheques, bills of exchange, promissory notes and other like instruments. Item 2 of List II, which is the Provincial Legislative List, again refers to jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List. Again, it may be noted that item 1 of this List refers to the administration of justice, constitution and organization of all Courts, except the Federal Court, arid fees taken therein. Item 15 of List III, which is the Concurrent Legislative List, is an item with reference to jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this List. And again it may be noted that item 4 in this List is Civil Procedure, including the law of limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act. These are the specific items which have been mentioned as items in relation to the jurisdiction and powers of all Courts in these three respective Lists which have been incorporated in the Seventh Schedule to the Act. One more provision of the Constitution Act which may be noted is contained in Section 223 thereof which refers to jurisdiction of existing High Courts, and it says that :

> Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made tinker this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the establishment of the Dominion.
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> These are the relevant provisions of the Constitution Act which will have to be considered in the later part of this judgment.

15. It has been contended on behalf of the plaintiff that by enacting Section 3 and Section 12 of the impugned Act, the Provincial Legislature encroached upon the powers of the Dominion Legislature in regard to the enactment of the provisions as regards the jurisdiction and powers of all Courts in regard to item 28 of List I. It is urged that so far as the jurisdiction and powers of all Courts with regard to this item 28 of List I was concerned, any enactment in relation thereto or

any amendment of existing powers which were vested in the High Court in relation thereto could only be made by the Dominion Legislature which only had legislative competence in regard to the items contained in List I, and in so far as the Provincial Legislature sought to enact provisions as regards the jurisdiction and powers of all Courts in relation to this item 28 of List I, it trenched upon the powers of the Dominion Legislature and was not competent to do so. No doubt, so far as legislative competence is concerned, it is to be found within the four corners of Section 100 of the Constitution Act and the Lists which have been annexed to the Seventh Schedule. If the Provincial Legislature had purported to enact in terms any provision which would affect the jurisdiction and powers of all Courts in relation to item 28 of List I, it certainly was not within its competence to do so, and in so far as it purported1 to do so, it was certainly an encroachment upon the province of the Dominion Legislature. Legislative competence has got to be determined with reference to these provisions of the Constitution Act; and separate items for making enactments with regard to the jurisdiction and powers of all Courts in relation to the various items of the several Lists have been specifically conferred by virtue of those Lists on the Dominion Legislature and the Provincial Legislatures in regard to items where each of those Legislatures has got exclusive powers. It would follow, therefore, apart from the other considerations which I will advert to later, that the Provincial Legislature had no legislative competence to enact provisions with> regard to the jurisdiction and powers of all Courts in relation to item 28 in List I, By Section 3 of the impugned Act the Provincial Legislature enacted that the new City Civil Court which was established by it shall have jurisdiction to receive, try and dispose of suits and other proceedings of a civil nature not exceeding ₹ 10,000 in value and arising within the Greater Bombay, which suits would also include suits based on cheques, bills of exchange, promissory notes and the like instruments which are comprised in item 28 of List I. It can be legitimately contended, as it has been done, that in enacting this provision in Section 3 of the impugned Act the Provincial Legislature trenched upon matters reserved for the Dominion Legislature. The same is the position when the Provincial Legislature enacted Section 12 of the impugned Act which took away from the High Court the jurisdiction to try suits and proceedings cognizable by the City Civil Court. That provision was also not competent to the Provincial Legislature to enact because it was a provision with regard to the jurisdiction and powers of the civil Courts in relation to matters comprised in item 28 of List I. Speaking for myself, I am of opinion that iii enacting these provisions in Sections 3 and 12 of the impugned Act the Provincial Legislature did certainly trench upon matters reserved for the Dominion Legislature. No doubt, the administration of justice and the constitution and organization of all Courts except the Federal Court and fees taken therein were within the exclusive province of the Provincial Legislature. It was also competent to the Provincial Legislature when establishing the City Civil Court to define its jurisdiction and powers, because it would not be possible to constitute a Court merely as a Court without enacting what the jurisdiction and powers of that Court should be. But while bringing into existence that Court and investing that Court with jurisdiction and powers it was, according to the strict letter of the law, not competent to the Provincial Legislature to trench on matters reserved for the Dominion Legislature within List I. In my opinion, therefore, in enacting these provisions in Sections 8 and 12 of the impugned Act the Provincial Legislature did trench on matters reserved for the Dominion Legislature.

16. The next point, however, to consider is, whether, even though in enacting these provisions the Provincial Legislature did trench on matters reserved for the Dominion Legislature, the provisions which have been enacted in this behalf by the Provincial Legislature are ultra vires the

Provincial Legislature. It may be noted that the Provincial Legislature has not in terms purported to enact any provisions as regards the jurisdiction and powers of the City Civil Court in relation to item 28 of List I, viz. cheques, bills of exchange, promissory notes and the instruments of like nature. It has, no doubt, enacted provisions as regards the jurisdiction and powers to be exercised by the new City Civil Court which it has established, and one has got to consider what are the consequences of enacting provisions of the nature which have been challenged as ultra vires the Provincial Legislature in the terms which have been incorporated in Sections 3 and 12 of the impugned Act. It is in this connection that the argument of pith and substance of the impugned legislation assumes particular importance. In considering1 whether the impugned legislation is ultra vires, one has got to see what is the object, purpose and scope of the legislation, and one has also got to see what is the true nature and extent of the encroachment upon matters which may be reserved for the Dominion Legislature. In regard to this argument as regards the pith and substance, I can do no better than quote a passage from the judgment of the House of Lords in *Gallagher v. Lynn*[5] These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the 'true nature and character of the legislation' : *Russell v. The Queen*[6] 'the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. The same observations are to be found in the recent judgment pronounced by their Lordships of the Privy Council in *Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd., Khulna*[7] The legislation which came for consideration before their Lordships of the Privy Council there was the Bengal Money Lenders Act, 1940, and it was impugned on the ground that certain provisions therein contained trenched upon matter's reserved for the Federal Legislature in items 28 and 38 of List I. Their Lordships in connection with this matter framed three particular questions which the Court should address itself to before arriving

[5][1937] A.C. 863
[6](1882) 7 A. C. 839
[7](1947) L.R. 74 IndAp 23

at a conclusion whether the provisions of the impugned Act are ultra vires, and adopting the very same phraseology I also would ask myself the same three questions in connection with the impugned Act before us, viz. (1) Does the Act in question deal in pith and substance with the jurisdiction and powers of the City Civil Court ? (2) If it does, is it valid though it incidentally trenches on matters reserved for the Dominion Legislature in item 28 of List I ? (3) Once it is determined whether the pith and substance is the enactment of jurisdiction and powers of the City Civil Court, is the extent to which the Dominion field is invaded a material matter? As regards the first question there is no doubt, on a consideration of items 1 and 2 of List II, that the impugned Act deals in pith and substance with the jurisdiction and powers of the City Civil Court. The main purpose of the enactment of Bombay Act XL of 1948 is the establishment of an additional civil Court for Greater Bombay. You cannot have the establishment of a Court in mere form or name, but you must have a Court which is newly established, as the one before us, clothed with jurisdiction and powers to receive, try and dispose of suits and proceedings. In enacting the jurisdiction and powers within the meaning of item 2 of List II the Bombay Legislature had full and exclusive authority to do so and it had not got to rely upon any other power except the one which is given to it in item 2 of List II. The other provisions of the

impugned Act make it clear that the only object, purpose and scope of this piece of legislation which was enacted by the Bombay Legislature was the establishment of the City Civil Court and the investing it with the jurisdiction and powers to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding ₹ 10,000 in value and arising within the Greater Bombay. In my opinion, therefore, the pith and substance of this impugned Act was the jurisdiction and powers of the City Civil Court which was established by the Bombay Legislature acting within the scope of the powers which were vested in it by item 1 of List II. As regards the second question, I need not say anything more than what I have stated before that in the enactment of Sections 3 and 12 of the impugned Act the Bombay Legislature incidentally trenched on matters reserved for the Dominion Lgislature, in so far as the suits and other proceedings of a civil nature not exceeding ₹ 10,000 in value and arising within Greater Bombay would also comprise within that category suits within that pecuniary limit in respect of or based on cheques, bills of exchange, promissory notes and other instruments of like nature.

17. This leads me to a consideration of the third question which I have raised above, and that is, even though this sort of trenching on matters reserved for the Dominion Legislature is indulged in, is the extent to which the Dominion field is invaded a material matter so as to convert this piece of legislation into pith and substance, a legislation in respect of jurisdiction and powers of all Courts in relation to item 28 of List I. In that behalf it would be relevant to note the observations of their Lordships of the Privy Council. While discussing this aspect of the case their Lordships observed (p. 43):

> ...the extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act.

The pith and substance of the impugned Act is not-again to state the proposition in terms of the question before us-the jurisdiction and powers of the Courts in relation to item 28 of List I but the jurisdiction and powers of the City Civil Court; "once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content." The further observations of their Lordships of the Privy Council comprise the point of view which has got to be adopted in considering this aspect of the case : They observed (p. 44):

> Does the priority of the Federal legislature prevent the provincial legislature from dealing with any matter which may incidentally affect any item in its list, or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character t In their Lordships' opinion the latter is the true view.

This, with respect, is the true criterion for judging whether the provisions of the impugned Act fall within item 2 of List II or within item S3 coupled with item 28 of List I. In my opinion, the provisions which have been enacted by the Provincial Legislature in Sections 3 and 12 of the

impugned Act have to be considered from this point of view and the substance of the impugned Act is to be considered with reference to the second proposition which has been enunciated by their Lordships-of the Privy Council. The pith and substance of the enactment was the enactment of the jurisdiction and powers of the new City Civil Court which the Bombay Legislature had established, and in enacting that jurisdiction and powers it incidentally trenched upon item 28 coupled with item 53 of List I, and the extent of such encroachment upon the province of the Dominion Legislature being immaterial it does not convert the impugned Act or the provisions thereof which have been mentioned above into being in pith and substance an enactment in connection with items 28 and 53 of List I.

18. Under the circumstances aforesaid, I answer the questions which have been mooted by me above in the negative

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19. The result will be that this Court has no jurisdiction to receive, try and dispose of suits and other proceedings of a civil nature not exceeding ₹ 10,000 in value and arising out of the Greater Bombay, even in respect of cheques, bills of exchange, promissory notes and instruments of a like nature. I therefore agree with the order proposed by my Lord the Chief Justice.

20. Per Curiam. Certificate to appeal to the Federal Court under Section 205.

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