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Ref. No.- MPL/DEL/2019/2525 **Date: 16th September 2019**

To,

Shri Sanjay Kumar Singh

Secretary

Central Electricity Regulatory Commission,

3rd & 4 th Floor, Chanderlok Building,

36, Janpath, New Delhi- 110001

Subject: Objections/ Comments on the Draft CERC (Procedure, Terms And Conditions For Grant of Trading Licence and Other Related Matters) Regulations, 2019

Respected Sir,

Central Electricity Regulatory Commission has issued a draft notification of Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2019. CERC also published public notice inviting comments/suggestions/objections from the stakeholders and interested persons on the provisions of above draft notification.

Formed in 2005, Manikaran Power Limited (MPL) is a Trading Member of Indian Energy Exchange (IEX) and Power Exchange India Ltd (PXIL). MPL is also a Category-I Inter State Trading Licensee. MPL has been efficaciously implementing the power trading concept in India and has successfully demonstrated its capability in optimally utilizing the existing infrastructure within the country for the benefit of all. MPL has maintained a remarkable position in the market in electricity trading since its inception in 2008. It seeks to provide comprehensive services in the power trading market to fulfil the Short

term, Medium term as well as Long term energy requirements of its customers. As a power trader, MPL supports their clients with data driven power market analysis to help them get best returns. It is not only providing power in Day Ahead Market (DAM) through Exchanges but is also imparting the services to its clients in Term Ahead Market (TAM) of the Power Exchanges. MPL is adept at providing a wide range of services to its clients vide Sale/Purchase of power through Short/medium term trades, bilateral contracts and banking of power.

Under this circumstances, we put forward our comments and suggestions on the above-mentioned subject matter.

We would be grateful if you provide us with an opportunity to be heard in person during the public hearing if any.

Thanking You,

Sincerely

For and on behalf of **Manikaran Power Limited**

Vedant Sonkhiya

Legal Officer

OBJECTIONS/ COMMENTS ON THE DRAFT CERC (PROCEDURE, TERMS AND CONDITIONS FOR GRANT OF TRADING LICENCE AND OTHER RELATED MATTERS) REGULATIONS, 2019

A. Background

1. The Electricity Act, 2003, is a comprehensive legislation, which covers generation, transmission, distribution and trading of electricity. A reading of the Preamble of the 2003 Act will confirm that the Parliament intended to provide measures for conducive development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity in all areas etc. It is in this context, one has to review the role and jurisdiction of the Appropriate Commission constituted under the Act, which are vested with various functions such as licensing, tariff determination, adjudication of disputes etc.

2. The Statement of Objects and Reasons in paragraph 4 while dealing with the main features of the bill in the context of "trading", states as follows:

> "4. The main features of the Bill are as follows:
>
> ... ...
>
> (ix) Trading as distinct activity is being recognised with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.
>
> (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.

... ..."

3. Under Section 12 of the Electricity Act, 2003, trading of electricity is a licensed activity, for which a license can be granted in terms provided under sections 14 and 15 of the Electricity Act, 2003. Section 79 and 86 deal with the various functions of the Central and State Commissions respectively. A careful perusal of section 79(1) will reveal that while the Central Commission has the power to "regulate" tariff for generating companies owned by the Central Government and those which have a composite scheme for generation and sale of electricity in more than one State. The Central Commission also exercises regulatory jurisdiction over inter-State transmission of electricity. In section 79(1)(j), the Parliament has vested the following jurisdiction on the Central Commission in relation to electricity trading:

> "79. Functions of Central Commission
>
> (1) The Central Commission shall discharge the following functions, namely:
>
> ... ...
>
> (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
>
> ... ..."

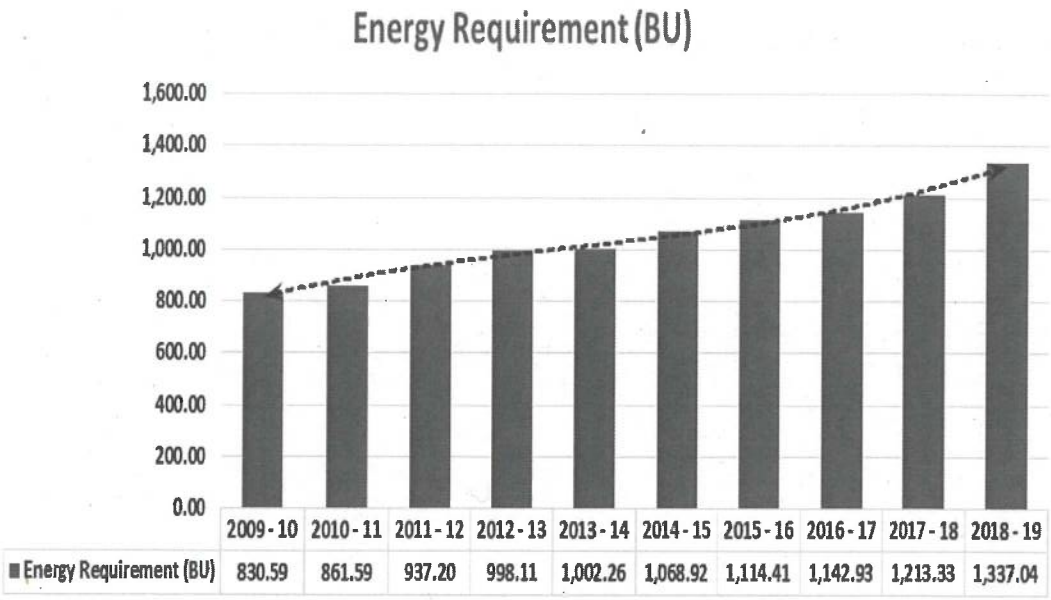
4. The aforesaid reveals that while the power to regulate is available over generation and transmission of electricity, no such power has been vested in the Central Commission in matters relating to trading of electricity. The power in this context is limited only to fix the trading margin, and that too, if considered, necessary. Similarly, under Section 86, the State Commission has powers to determine tariff for generation, supply, transmission and wheeling of electricity

and also the power to regulate the purchase and procurement process of electricity by a distribution company. However, in relation to trading of electricity, the jurisdiction is limited.

5. The aforesaid jurisdictional limitations have to be considered while framing a delegated legislation, whose purpose is to implement the provisions of the statute and not in any manner offend the letter or spirit of the statute.

6. As will be seen from the present submission, the draft regulations constitute a regulatory overreach, and stifles the growth of the power market and will reduce competition.

7. The quantum of power in the Indian power market has gone up over the last 15 years, and has subsequently resulted in the entry of many intermediaries in the sector, each of whom play a significant role in ensuring the viability of the power sector in India. Consumer open access is a reality only on account of the aggressive manner in which electricity traders have been able to deliver power to industrial consumers in an innovative manner. The table below demonstrates the growth of the power market:



Source: Central Electricity Authority LGBR 2009-2018

8. The Draft CERC (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters) Regulations, 2019 under Regulation No. ECO-14/06/2019-CERC dated 24.07.2019 (hereinafter referred to as the 'Draft Regulations') makes excessive inroad in market operation. CERC (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters) Regulations, 2009 (hereinafter referred to as the 'Current Regulations') in its current form itself had to be rationalized.

9. Before proceeding further, the following needs to be highlighted:

   (i) The Draft Regulations seek to impose certain unreasonable conditions on the Trading Licensees, which could result in adverse effects in the market, leading to survival of only a handful of traders having high net worth through parent organisation;

(ii) The Draft Regulations are highly arbitrary in nature and does not take into account the problems associated with the trading of electricity by the Trading Licensee. It must be noted that despite the growth of exchanges, there is a need for customized products offered by trading licensees. As the market gets matured, the role of trading licensees increases as they facilitate competition and drive efficiencies;

(iii) Furthermore, the number of trading companies has doubled from 14 in 2009 to 28 in 2017-18 and the volume of electricity transacted through traders has increased from ~22 BU in 2009 to ~39 BU in 2017-18 representing a CAGR of 6%. Therefore, traders act as market makers and liquidity providers by connecting suppliers with the best suited buyers;

(iv) The trading licensees offer the ability to pioneer new product development in power markets and hence take a central role in increasing competition, driving efficiency in markets and in realizing lower power prices;

(v) Instead of encouraging trading as an activity, the Draft Regulations proceeds with an element of distrust and consequently works against market principles. Further, the stringent policies which is sought to be implemented through the Draft Regulations will lead to derailment of the trading sector by wiping out the traders who are service based, having built their net-worth from trading of electricity over the years (and not relied on large capital base of their parent or associate companies). This will lead to a scenario wherein only the institutional based trading licensees will be left;

(vi) Institutional based traders have a high net worth and support from parent institution thereby giving them an advantage over

the service-based trading licensees. This is due to the fact that service-based trading licensees have their core business as trading of electricity and do not have the support of any other organisation for finance;

(vii) The Draft Regulations seek to promote only such entities/ traders who have the high net worth to the prejudice of traders with lower net worth, which will in turn lead to wiping out such traders. This will greatly reduce competition which would consequentially lead to market manipulation by certain bigger traders having a high net worth. This would go to the root of the intent of the Act, which is succinctly provided in the Preamble of the said Act.

10. In view of the above, while finalizing the draft Regulations, the ultimate test has to be whether the said Draft Regulations are promoting competition or is it inherently anti-competition.

11. Hence, the amendments proposed under the Draft Regulations have to be seen in a holistic manner, in order to understand and mitigate the serious ramifications for traders which shall be caused if the Draft Regulations, in their present form, are notified.

B. <u>Proposed Amendment</u>

I. Regulation3(3)- Financial Qualification – Capital Adequacy and Liquidity Requirements

12. The Regulation 3(3) of the Draft Regulations is set out herein below:

> "(3) Financial Qualifications-Capital Adequacy and Liquidity Requirements
>
> (a) Considering the volume of inter-State and intra-State trading proposed to be undertaken

by the Applicant on the basis of the inter-State trading licence, the minimum Net Worth of the Applicant on the date of application, as per audited special balance sheet accompanying the application, shall not be less than the amounts specified hereunder:

S.No.	Category of the trading licence	Minimum Net Worth (Rs. in crore)	Volume of electricity proposed to be traded in a financial Year
1.	Category I	75.00	Above 5,000 MUs and upto 10,000 MUs
2.	Category II	35.00	Not more than 5,000 MUs
3.	Category III	20.00	Not more than 3,000 MUs
4.	Category IV	10.00	Not more than 1,500 MUs
5.	Category V	2.00	Not more than 500 MUs

Provided that for Category I Trading Licensee, an additional net worth of Rs. 20 Crores would be required for every 3000 MUs of electricity traded over and above 10,000 MUs during a Year:

Provided further that volume of electricity traded shall include inter-State, intra-State and Cross Border Trade in long term, medium term and short-term transactions, including transactions undertaken through power exchanges.

(b) An Applicant shall be required to maintain the Net Worth as per clause (a) above and ensure a minimum Current Ratio of 1:1 and a minimum Liquidity Ratio of 1:1 at all times:

Provided that the Net Worth, Current Ratio and Liquidity Ratio specified in this regulation shall be computed on the basis of the audited special balance sheet prepared in accordance with the

financial reporting framework prescribed under the Companies Act, 2013."

13. It must be noted that the aforementioned requirements violate the fundamental rights of the Trading Licensee / Applicant granted under Article 19(1)(g) of the Constitution of India as the requirements causes restriction on the rights of the Applicant / Trading Licensee to engage in free trade. This also makes the said provision violative of Article 14 of the Constitution of India. The Draft Regulation fails to appreciate that while such stringent terms are being placed on trading licensees, distribution licensees (many of whom are serial defaulters and may have a negative net-worth) are deemed traders and can engage in trading activity without the application of stringent regulation.

14. In this regard, it is submitted that taking into consideration the basic economic norms, net worth is to be linked with profitability of any organisation. However, the Draft Regulations intends to arbitrarily and wrongly link the net worth to the volume/ turnover of the organisation. How does one create net-worth from trading activity alone, when margins are regulated and reduced from time to time? On one hand, the draft regulation seeks to drastically reduce the cap of trading margin, which means that there are no market forces at play and the profit/ earnings of a trading licensee are deliberately controlled and reduced, while on the other hand for a Category 1 licensee the draft regulations propose that an additional net worth of Rs. 20 Crores would be required for every 3000 MUs of electricity traded over and above 10,000 MUs during a Year.

15. The linking of the net worth with the volume/ turnover is arbitrary and is aimed at eliminating purely service based trading companies from the market. It is to be noted that as per Companies Act, "Net worth" means the aggregate value of the paid-up share capital and

all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation. While as per Draft Regulation, while calculating Net Worth the investments in associates has been excluded. It is submitted that while calculating a company's Networth, investments made in subsidiaries should not be excluded as these have been done out of Company's assets for capital appreciation and these are investments that can be liquidated in case of requirement. So, these are also part of net worth and should not be deducted from net worth. As per the prevalent market practises, the margin of the traders is proposed to be restricted to a mere 1%of the total turnover. It is to be noted that any business including the business of trading of electricity, involves the cost of operations and payment of taxes on net profit. After bearing such costs, the profit margin/ earnings of a trading licensee turns out to be very low which in turn results in only a minimal addition to the net worth.

16. There appears to be no relationship, or link, with the objective which is sought to be achieved by the above requirement for a Category 1 licensee.

17. The perceived reason for incorporating the above provision is to allegedly ensure that a trading licensee has deep pockets, in order to meet a situation of default. In this context, it needs to be appreciated that by its very nature, and as per the aforementioned definition, trading involves buying and selling of electricity, with the trader entitled to keep a margin (which also in the draft regulations is sought to be drastically reduced). It is stated that no trader can guarantee 100 % payments, or can take upon itself the risk of servicing the cost

of electricity, in the event the purchaser/ beneficiary of the power does not make timely payments.

It further needs to be considered that the consumer base of a trading licensee, is minuscule in comparison with the consumer base of a distribution licensee, which is also a deemed trader as per Section 14 of the Act. This Hon'ble Commission is fully aware of the problems and cash flow issues being faced by distribution licensees while making payments to the generators. Hence, this proves that there is no relationship, or link, at all, between net worth and ensuring timely payments in the event the consumer/ Discoms do not pay. This Hon'ble Commission cannot at all turn a blind eye to the above, while prescribing the above requirements of net worth.

18. If the proposed draft regulations are indeed notified, then only high net worth players or the institutional based traders will be able to carry on trading under Category 1, while limiting other service-based traders having a lower net worth from engaging effectively in trading of electricity. Hence, the proposed additional net worth requirement for a Category 1 trader ought to be reviewed and revoked, as the same is contrary to need to increase competition and opening of the market to more and more electricity traders. There is no historical data to show that on account of lower net worth there has been any default by traders, which has caused in serious damage to the power market participants.

19. The intent of the proposed draft regulations should be that serious players should be allowed to trade in electricity, and for the said purpose a reasonable net worth requirement is sufficient. Having a huge net worth cannot at all be a key to ensure that there would not be any bona fide payment issues. In any event, it needs to be appreciated that if payments of an entity are withheld, for whatsoever reasons, then there are legal remedies available for any aggrieved

party, including the recently enacted Insolvency and Bankruptcy Code, 2016.

There are many entities which are working in the free market, where there is no net worth requirement, and in the event of any commercial disputes, the parties can resort to appropriate legal remedies. As such, it only needs to be ensured that a Category 1 trader is not a fly by night operator, for which existing criterion of net worth is sufficient. Furthermore, the biggest defaulters of payment are not the electricity traders but the DISCOMs and over the years this has led to a lot of problems faced by the generators for supply of power to such DISCOMs, which are withholding the payments and thereby causing unnecessary stress on the entire market.

20. It is further stated that as per the existing regulations, the traders falling under Category I of the Regulations are required to have a net worth of Rs. 50 Crore only. However, on the contrary, the Draft Regulations seeks to enhance the said requirement of net worth to Rs. 75 Crore only for a volume of 10,000 MUs which is unjustifiable. It is submitted that there is no concrete reasoning for substantiating the provisions in relation to the criteria of having such net-worth. Therefore, increasing the requirements of net worth and capping the volume to 10,000 MUs per year will result in reduction in the growth of the power market. It is to be highlighted that a trader has to rely on its reserves for the purpose of increasing its net worth. Taking into consideration, the competition in the market, such enhancement of net worth will lead to elimination of many active traders from the market leaving only big organisations base traders to handle the market.

21. When the country itself is going through a period of recession or slow-down, there is a need to provide impetus to electricity traders, who can be engines of growth. By creating innovating products etc.

electricity traders can be those who will act as a catalyst to re-start closed industries or increase the number of shifts.

22. In addition to the above, the Draft Regulations require a net worth of Rs. 20 Crore for every 3000 MU for Category I traders. The said provision is in contravention with the intent of the Act, 2003 as it seeks to promote such entities/ traders who have the large market share in terms of volume of electricity traded including a high net worth to the prejudice of such traders which are smaller in terms of volume of electricity traded, which would consequentially lead to market manipulation by certain bigger players. The said criteria prescribed under the Draft Regulations seeks to exclude smaller traders from the business of trading, thereby restricting competition.

23. In addition to the above, it is submitted that the Draft Regulations are completely vague without any substance and reasoning as it lacks taking into consideration the basic requirement of any business/ trade i.e. appropriate return in relation to the investment made in the business. This is evident from the fact that the Draft Regulations, on one hand seek to substantially cap trading margins at abysmally low levels, while on the other hand requires the traders to maintain an additional Rs. 20 Crore net-worth for every 3000 MU of trading activity under Category I. In fact, the active traders have been reduced and many trading licenses have been surrendered in last five years due to restrictive margins.

24. It is further submitted that the capping of trading margin will, in turn, result in decreased return on equity and in turn result in reduction of net-worth of the said Trader. Thus, the Draft Regulations, on the one hand seeks to tie the hands of the Traders from receiving appropriate return on their investment and on the other hand burdens them to maintain the net-worth as prescribed in the said Regulations. If such regulations are notified and implemented, the same would result in

huge financial losses to the traders which will, in turn, wipe out the small players from the market and reduce competition hampering the public interest at large.

25. It is submitted that the idea behind gauging the net worth of a person/ body corporate before entering into any contract is necessary to ascertain whether the person/ body corporate would be able to discharge his/ her/ its liability in case the person/ body corporate goes into insolvency etc. The Net Worth of any entity is the balance of the assets and the liabilities of which the assets include cash, movable, immovable property, bonds, shares etc., while the liabilities would mean to include all the debts and payments that are due by the said entity to the various creditors.

26. The idea behind keeping the provision of Net Worth under the Electricity Act, 2003 for a trading entity is to ascertain whether such entity has the appropriate financial safeguard to invest the required equity in such business. Apart from the above, it is necessary to ascertain the net worth of an entity because it gives a clear indication of whether the entity is a going concern or not.

Section 52(1) of the Electricity Act, 2003 mandates as follows:

> "Without causing prejudice to the provisions contained in clause (c) of Section 12, the Appropriate Commission may specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader."

27. It would be pertinent to note that the intent of the aforementioned section is to allow the Appropriate Commission to regulate and supervise the criteria for selecting an entity as a trading licensee qua specification of technical and financial standards which includes net worth and creditworthiness of the said entity. While doing the same,

the Appropriate Commission is to avoid causing any kind of prejudice to a trader who is authorised under Section 12(c) of the Act by virtue of a license granted under Section 14 of the Act to trade in electricity, by imposing unreasonable capital adequacy requirement, net worth and creditworthiness.

In this regard, it must be noted that there are two types of organisation that undertake trading of electricity, one being smaller service-based organisations who only undertake trading of electricity, and the other being large asset-based organisations which apart from trading have distinct asset based businesses whereby they fund their trading activities. As such, the asset-based organisation has a trading arm which is used by such organisation (via assets) to have a higher net worth. Therefore, the draft regulations prescribing unreasonable net worth requirements ought to be revised, so that more number of traders can remain in the market thereby providing more and more competition.

28. It is submitted that the condition provided under Section 52(1) is not mandatory and the Appropriate Commission "may" specify the technical standards and capital adequacy requirements, if required, using its discretionary power for an entity undertaking trading of electricity. The Appropriate Commission, while prescribing the said technical and financial standards cannot specify such standards in an arbitrary manner violating the provisions of Article 19(1)(g) of the Constitution of India.

29. The intent of the legislation is not to cause hindrance and obstacles for the person/ company engaging in trading of electricity but is to promote free trade and the basic intent of the legislation is to have supervisory control over the qualification of an entity as an electricity trader. It is a settled principle of law that any regulatory parameters have to have a reasonable link/ relationship with the objective that is

sought to be achieved, and the said parameters cannot be such which inhibit or reduce the business activity of market participation.

30. In this context, reference is made to the following judgments:

a) In ***R.M. Seshadri vs District Magistrate, Tanjore (AIR 1954 SC 747)***, challenge was made to Section 8 of the Cinematograph Act which empowered the State to prescribe conditions of license and consequential stipulation under Clause 4 of the conditions of license. The Hon'ble Supreme Court held as hereunder:

> "...
>
> *(4) A condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction. It is significant that the condition does not profess to lay down that the approved films must be of an educational or instructional character for the purpose of social or public welfare. We think, therefore, that Condition 4(a) as it stands at present amounts to an unreasonable restriction on the right of the licensee to carry on his business and must be declared void as against the fundamental right of the appellant under Article 19(1)(g)."*

A copy of the judgment passed in ***R.M. Seshadri vs District Magistrate, Tanjore (AIR 1954 SC 747)***, is annexed herewith and marked as **ANNEXURE A.**

b) In ***M/s Dwarka Prasad Laxmi Narain vs State of U.P. (AIR 1954 SC 224)***, the Hon'ble Supreme Court held as under:

"...

(7) The power of granting or withholding licences or of fixing the prices of the goods would necessarily have to be vested in certain public officers or bodies and they would certainly have to be left with some amount of discretion in these matters. So far no exception can be taken; but the mischief arises when the power conferred on such officers is an arbitrary power unregulated by any rule or principle and it is left entirely to the discretion of particular persons to do anything they like without any check or control by any higher authority. A law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable. As has been held by this court in Chintamon v. The State of Madhya Pradesh [1950 SCR 759] the phrase "reasonable restriction" connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in

reasonableness. It is in the light of these principles that we would proceed to examine the provisions of this Control Order, the validity of which has been impugned before us on behalf of the petitioners."

A copy of the judgment passed in ***M/s Dwarka Prasad Laxmi Narain vs State of U.P. (AIR 1954 SC 224)***, is annexed herewith and marked as **ANNEXURE B.**

In view of the above, this Hon'ble Commission has to consider the test as to whether any perceived objective can be achieved.

31. It would be of utmost disregard to Article 19(6) of the Constitution of India if the Draft Regulations are allowed because the restrictions under the provisions of the Draft Regulations transgresses way beyond reasonableness and to serve the larger interest of the public.

32. The SOR to the Draft Regulations provides an explanation that the criteria for having minimum net worth for all categories of traders is to mitigate the risk of the ultimate beneficiary and the market in general. However, the Draft Regulations have transferred the burden of risks on the trader, therefore, putting the trading licensee at a huge risk, instead of mitigating the risk. In this regard, it must be noted that a trader faces various kinds of risks while undertaking trading in electricity. These risks include late payment risk forming 55% of the entire risks taken by the traders. Other risks include default risk, contract dishonour risk, operations and maintenance expenses. It is submitted that mitigation of risk is the prerogative of the trader and the ultimate beneficiary and the Appropriate Commission cannot unilaterally bind the traders to such unreasonable requirements. The Draft Regulations in this regard are completely arbitrary and against the object of the Electricity Act, 2003.

Manikaran Power Ltd.

ANNEXURE-A

(1955) 1 SCR 686 : AIR 1954 SC 747

In the Supreme Court of India

(BEFORE BIJAN KUMAR MUKHERJEA, C.J. AND SUDHI RANJAN DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.)

R.M. SESHADRI ... Appellant;

Versus

1. DISTRICT MAGISTRATE, TANJORE;
2. STATE OF MADRAS REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF MADRAS ... Respondents.
3. UNION OF INDIA ... Intervener.

With an Application by the Appellant for permission to argue in person.

Civil Appeal No. 192 of 1952[±], decided on October 1, 1954

Advocates who appeared in this case :

Appellant in person. Appeal filed by S. Subramanian, Advocate, for the Appellant;

C.K. Daphtary, Solicitor-General for India (R. Ganapathy Iyer and P.G. Gokhale, Advocates, with him), for the Respondent;

C.K. Daphtary, Solicitor-General for India (P.A. Mehta and P.G. Gokhale, Advocates, with him), for the Intervener (The Union of India).

The Judgment of the Court was delivered by

GHULAM HASAN, J.— The appellant is the owner of a permanent cinema theatre called Sri Brahannayaki in Tiruthuraipundi, Tanjore District, and held a licence from the District Magistrate, Tanjore, in respect of the same with effect from September 5, 1950 to September 4, 1951. The licence is granted for one year at a time and is renewable from year to year. He objected to certain conditions in the licence imposed by the District Magistrate, Tanjore, in pursuance of 2 notifications (GO Mis. 1054, Home, dated 28th March, 1948 and GO Mis. 3422, dated 15th September, 1948) issued by the State of Madras purporting to act in exercise of powers conferred by Section 8 of the Cinematograph Act of 1918. The impugned conditions may conveniently be set out here:

> "4. (*a*) The licensee shall exhibit at each performance one or more approved films of such length and for such length of time, as the Provincial Government or the Central Government, may, by general or special order, direct.
>
> (*b*) The licensee shall comply with such directions as the Provincial Government may by general or special order give as to the manner in which approved films shall be exhibited in the course of any performance.
>
> *Explanation*.— 'Approved Films' means a cinematograph film approved for the purpose of this condition by the Provincial Government or the Central Government.
>
> *Special Condition 3*.— The licensee should exhibit at the commencement of each performance not less than 2000 feet of one or more approved films."

2. The appellant moved the High Court of Judicature at Madras under Article 226 of the Constitution for an order or direction to the District Magistrate, Tanjore, to delete the said conditions from his licence and to the State of Madras to rescind the notifications issued by it. His contention was that the conditions imposed by the said notifications are ultra vires and beyond the powers of the licensing authority and that they are void inasmuch as they contravened his freedom of speech and expression under Article 19(1)(*a*) and his right to carry on trade or business under Article 19(1)

(*g*) of the Constitution. Both the contentions were rejected, the High Court holding that the conditions imposed were reasonable and were in the interests of the general public. The High Court granted leave to appeal to this Court.

3. The appellant who argued the appeal in person raised 2 main contentions. He argued firstly, that the notifications and conditions are beyond the competence of the Government of Madras and the District Magistrate, and secondly, that in any event the conditions do not, as being outside the scope of the Cinematograph Act, amount to reasonable restrictions imposed in the interest of the general public.

4. We are of opinion that this appeal can be disposed of on the second ground. It may be stated that the Madras Cinematograph Rules, 1933, were amended by the notification GO Mis. 1054, Home, dated March 28, 1948, in exercise of the powers conferred by Section 8 of the Cinematograph Act, 1918 (Central Act II of 1918), and in place of Condition 4 of the licence in Form A, the impugned conditions were inserted. Section 8 empowers the State Government to make rules for the purpose of carrying into effect the provisions of the Act. The object of the Act as stated in the preamble is to make provisions for regulating exhibitions under the Cinematograph Act. Without going into the question whether it is within the contemplation of the Act that educational and instructional films should be shown and whether the holder of a cinema licence may be compelled to exhibit such films as falling within the scope of the Act, the question which still arises for consideration is whether the impugned conditions amount to "reasonable restrictions" within the meaning of Article 19(6). Approved films are those films which are either produced by the Government or are purchased from the private producers. As the private producers do not possess any machinery for marketing their films the Government purchases them from such producers and charges hire from the cinema licensees for showing such films. Condition 4(*a*) compels a licensee to exhibit at each performance one or more approved films of such length and for such length of time as the Provincial Government or Central Government may direct. Neither the length of the film nor the period of time for which it may be shown is specified in the condition and the Government is vested with an unregulated discretion to compel a licensee to exhibit a film of any length at its discretion which may consume the whole or the greater part of the time for which each performance is given. The exhibition of a film generally takes 2 hours and a quarter. Now if there is nothing to guide the discretion of the Government it is open to it to require the licensee to show approved films of such great length as may exhaust the whole of the time or the major portion of it intended for each performance. The fact that the length of the time for which the approved films may be shown is also unspecified leads to the same conclusion, in other words, the Government may compel a licensee to exhibit an approved film, say for an hour and a half or even 2 hours. As the condition stands, there can be no doubt that there is no principle to guide the licensing authority and a condition such as the above may lead to the loss or total extinction of the business itself. A condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction. It savours more of the nature of an imposition than a restriction. It is significant that the condition does not profess to lay down that the approved films must be of an educational or instructional character for the purpose of social or public welfare. We think, therefore, that Condition 4(*a*) as it stands at present amounts to an unreasonable restriction on the right of the licensee to carry on his business and must be declared void as against the fundamental right of the appellant under Article 19(1)(*g*).

5. Among the special conditions, Condition 3 which requires the licensee to exhibit at the commencement of each performance not less than 2000 feet of one or more of the approved films is open to similar objection. This condition lays down the minimum length of the film to be shown as 2,000 feet and gives no indication of the maximum.

We are informed that the showing of a film of 2000 feet will take about 20 minutes. This will work out to about 1/7th of the total time of each performance if it is taken to last for 2¼ hours. Whether a maximum of 2000 feet would be reasonable is a matter we need not consider but as this is mentioned as the minimum it is obvious that the Government may compel the licensee to exhibit a film of 10,000 or 12,000 feet which in effect will amount to pushing out of the film intended to be shown by the licensee during the time allotted. Here again no maximum limit having been imposed it follows that the discretion of the authority is unrestrained and unfettered and must lead to an unjustifiable interference with the right of the licensee to carry on his business. We hold, therefore, that this condition is equally obnoxious and must be deleted. We accordingly allow the appeal and hold that Condition 4(*a*) and special Condition 3 expressed as they are at present are void and have no legal effect as against the fundamental right of the appellant under Article 19(1)(*g*) of the Constitution.

6. We express no opinion upon the first contention advanced by the appellant. The appellant will get his costs from the respondent in this Court and in the Court below.

———

* Appeal under Article 132(1) of the Constitution of India from the Judgment and Order dated 24th August 1951 of the Madras High Court in Civil Miscellaneous Petition No. 5744 of 1951.

ANNEXURE-B

1954 SCR 803 : AIR 1954 SC 224

In the Supreme Court of India

(BEFORE MEHR CHAND MAHAJAN, BIJAN KUMAR MUKHERJEA, VIVIAN BOSE, GHULAM HASAN AND B. JAGANNADHA DAS, JJ.)

DWARKA PRASAD LAXMI NARAIN ... Petitioners;

Versus

STATE OF UTTAR PRADESH AND TWO OTHERS ... Respondents.

Petition No. 326 of 1953*, decided on January 11, 1954

Advocates who appeared in this case :

S.C. Issacs, Senior Advocate, (S.K. Kapur, Advocate, with him), instructed by Ganpat Rai, Agent, for the Petitioners;

H.J. Umrigar, Advocate, instructed by C.P. Lal, Agent, for the Respondents.

The Judgment of the Court was delivered by

BIJAN KUMAR MUKHERJEA, J.— This is an application presented by the petitioners under Article 32 of the Constitution, complaining of infraction of their fundamental rights guaranteed under Article 14 and clauses (*f*) and (*g*) of Article 19(1) of the Constitution and praying for enforcement of the same by issue of writs in the nature of mandamus.

2. To appreciate the contentions that have been raised on behalf of the petitioners, it would be necessary to give a short narrative of the material facts. The petitioners are a firm of traders who had, prior to the cancellation of their licence, been carrying on the business of retail sellers of coal at a coal depot held by them in the town of Kanpur. It is said that the District Magistrate of Kanpur as well as the District Supply Officer, who figure respectively as Respondents 2 and 3 in the petition, had been for a considerable time past issuing directives from time to time upon the petitioners as well as other coal depot holders of the town, imposing restrictions of various kinds upon the sale of coal, soft coke, etc. It is stated that prior to the 14th of February, 1953, the prices that were fixed by the District Officers left the coal dealers a margin of 20 per cent profit upon the sale of soft coke and 15 per cent profit on the sales of hard coke and steam coal, such profits being allowed on the landed costs of the goods up to the depot. The landed costs comprised several items and besides ex-colliery price, the middleman's commission and the railway freight, there were incidental expenses of various kinds including labour duty, loading and unloading charges, cartage and stacking expenses. After making a total of these cost elements, an allowance was given for shortage of weight at the rate of 5 Mds. and odd seers per ton in the case of soft coke and 3 Mds. and odd seers in the case of hard coke and steam coal, and it was on the basis of the net weight thus arrived at that the price was calculated. On the 14th of February, 1953, the District Supply Officer issued a directive reducing the selling prices of coke, coal, etc., much below the existing rates. This reduction was effected in a three-fold manner. In the first place, the allowance for shortage of weight was made much less than before; secondly, a sum of Rs 4-12-0 only was allowed for all the incidental expenses, and thirdly, the margin of profit was cut down to 10 per cent. On the 22nd of May, 1953, a representative petition was filed by seven colliery depot holders of Kanpur including the present petitioners challenging the validity of the executive order, dated the 14th of February, 1953, mentioned above inter alia on the ground that it infringed the fundamental rights of the petitioners under Articles 14 and 19 of the Constitution. There was an application for ad interim stay in connection with this petition which came up for hearing before the learned

Vacation Judge of this court on the 1st of July, 1953. On that day an undertaking was given by the State of Uttar Pradesh to the effect that they would withdraw the order of the 14th February, 1953, and apparently the consideration that weighed with the State in giving this undertaking was that it was a purely executive order without any legislative sanction behind it. The order of the 14th February was in fact withdrawn, but on the 10th of July, 1953, the State of Uttar Pradesh promulgated by a notification an order intituled "The Uttar Pradesh Coal Control Order, 1953" purporting to act in exercise of the powers conferred upon it by Section 3(2) of the Essential Supplies Act, 1946, read with the notified order of the Government of India issued under Section 4 of the Act. As the constitutionality of this Coal Control Order is the main object of attack by the petitioners in the present proceeding, it would be convenient to set out the material provisions of that order in respect of which the controversy between parties primarily centers:

"THE UTTAR PRADESH COAL CONTROL ORDER, 1953.

* * *

2. In this Order unless there is anything repugnant in the subject or context

(*a*) 'Coal' includes coke but does not include cinder and ashes.

* * *

(*c*) "The Licensing Authority" means the District Magistrate of the District or any other officer authorised by him to perform his functions under this Order and includes the District Supply Officer of the district.

(*d*) 'Licensee' means a person holding a licence under the provisions of this Order in Form 'A' or in Form 'B'.

3.(1) No person shall stock, sell, store for sale or utilise coal for burning bricks or shall otherwise dispose of coal in this State except under a licence in Form 'A' or 'B' granted under this Order or in accordance with the provisions of this Order.

(2) Nothing contained in sub-clause (1)—

(*a*) shall insofar as it relates to taking out a licence for stocking or storing coal for their own consumption, apply to the stocks held by persons or undertakings obtaining coal on permits of the District Magistrate or the State Coal Controller for their own consumption.

(*b*) shall apply to any person or class of persons exempted from any provision of the above sub-clause by the State Coal Controller, to the extent of their exemption.

4.(1) Every application for licence under this Order shall be made in the form given in Schedule I appended to this Order.

(2) A licence granted under this Order shall be in Form 'A' or Form 'B' appended to this Order and the holder of a licence granted under this Order shall comply with any directions that may be issued to him by the Licensing Authority in regard to the purchase, sale, storage or distribution of coal.

(3) The Licensing Authority may grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke or modify any licence or any terms thereof granted by him under the Order for reasons to be recorded. Provided that every power which is under this Order exercisable by the Licensing Authority shall also be exercisable by the State Coal Controller or any person authorised by him in this behalf.

* * *

7. The State Coal Controller may by written order likewise require any person holding stock of coal to sell the whole or any part of the stock to such person or class of persons and on such terms and prices as may be determined in accordance with the provisions of clause (8).

8. (1) No licensee in Form 'B' and no person acting on his behalf shall sell, agree to sell or offer for sale, coal at a price exceeding the price to be declared by the Licensing Authority in accordance with the formula given in Schedule III.

(2) A licensee in Form 'A' or any other person holding stock of coal or any other person acting for or on behalf of such licensees or person transferring or disposing of such stocks to any person in accordance with clause 6 or clause 7 shall not charge for the coal a price exceeding the landed cost, plus incidental and handling charges, plus an amount not exceeding 10 per cent of the landed cost as may be determined by the Licensing Authority or the State Coal Controller.

Explanation.— (1) Landed cost means the ex-colliery price of the coal plus the L.D.C.C. and Bihar sales tax plus middleman's commission actually paid and railway freight.

Incidental and handling charges mean the cost of unloading from wagons, transporting to stacking site, unloading at the stacking site, plus godown rent, plus choukidari charges, if any, not exceeding Rs 8-8-0 per ton as may be determined by the Licensing Authority or the State Coal Controller according to local conditions.

* * *

11. The District Magistrate shall within a week of the commencement of this Order prepare and publish in a local paper a list of persons carrying on the business of sale of coal in his district and upon the publication of the list, the persons included therein will be deemed for purposes of this Order to be licensee until three months next following the publication of the list in Form A or B as may be specified.

12. If any person contravenes any of the provisions of this Order, or the conditions of licence granted thereunder, he shall be punishable under Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, with imprisonment for a term which may extend to three years or with fine or with both and without prejudice to any other punishment to which he may be liable ...."

3. Schedule III referred to in the Order is as follows:

SCHEDULE III

(Formula for declaration of prices of soft coke/hardcoke/steam coal).

1.	Ex-colliery price	Actuals.
2.	L.D.C.C. and Bihar Sales Tax	Actuals.
3.	Middleman's commission	Actually paid subject to the maximum laid down under clause 6 of the Government of India Colliery Control Order, 1945.
4.	Railway freight	Actuals.
5.	Incidental and handling charges including	Maximum of Rs 8/8 per ton as may be determined by the Licensing Authority
	(*i*) (*ii*) (*iii*) (*iv*) (*v*)	Unloading from wagons. Transport up to premises of stacking. Unloading and stacking at the premises or depot. Godown rent and chaukidari charges, if any. Weighing charges, if any. according to local conditions, provided that at places which are extraordinarily distant from the railway head a higher rate may be allowed

		by the Licensing Authority.
6.	Local taxes Octroi, etc.	Actuals.
7.	Shortage	Not exceeding 3½ maunds per ton in the case of soft coke and 2 ½ maunds in the case of hard coke and steam coal as may be determined by the Licensing Authority.
8.	Profit	At 10 per cent on total Items 1 to 6 above except Item 5.

4. It is said that on the 16th of July, 1953, Respondent 2 issued a declaration whereby he fixed the retail rates for the sale of soft coke, coal, etc. at precisely the same figures as they stood in the directive issued on the 14th of February, 1953. The result, according to the petitioners, was that the selling prices were reduced so much that it was not possible for the coal traders to carry on their business at all. In accordance with the provision of clause 11 of the Control Order set out above, the petitioners' name appeared in the list B of licence-holders and they did apply for a licence in the proper form as required by clause (4). The licence, it is said, was prepared, though not actually' delivered over to the petitioners. By a letter dated the 3rd of October, 1953, the Area Rationing Officer, Kanpur, accused the petitioners of committing a number of irregularities in connection with the carrying on of the coal depot. The charges mainly were that there were two other depots held and financed by the petitioners themselves in the names of different persons and that the petitioners had entered into agreements for sale of coal at more than the fixed rates. The petitioners submitted an explanation which was not considered to be satisfactory and by an order dated the 13th of October, 1953, the District Supply Officer, Kanpur, cancelled the petitioners' licence. In the present petition the petitioners have challenged the validity of the Coal Control Order of the 10th of July, 1953, the declaration of prices made on the 16th of July following and also the order cancelling the petitioners' licence on the 13th of October, 1953.

5. The constitutional validity of the Uttar Pradesh Coal Control Order has been assailed before us substantially on the ground that its provisions vest an unfettered and unguided discretion in the licensing authority or the State Coal Controller in the matter of granting or revoking licenses, in fixing prices of coal and imposing conditions upon the traders; and these arbitrary powers cannot only be exercised by the officers themselves but may be delegated at their option to any person they like. It is argued that these provisions imposing as they do unreasonable restrictions upon the right of the petitioners to carry on their trade and business conflict with their fundamental rights under Article 19(1)(*g*) of the Constitution and are hence void. With regard to the order dated the 16th of July, 1953, by which the prices of coke, coal, etc. were fixed, it is pointed out that it was not only made in exercise of the arbitrary power conferred upon the licensing authority by the Coal Control Order, but the prices as fixed, are palpably discriminatory as would appear from comparing them with the prices fixed under the very same Control Order in other places within the State of Uttar Pradesh like Allahabad, Lucknow and Aligarh. The order of the 13th October, 1953, cancelling the petitioners' licence is challenged on the ground that the charges made against the petitioners were vague and indefinite and that the order was made with the ulterior object of driving the petitioners out of the coal business altogether. It is said further that as a result of the cancellation order, the petitioners have been made incapable of disposing of the stocks already in their possession, though at the same time the holding of such stock after the cancellation of their licence has become an offence under the Coal Control Order.

6. It is not disputed before us that coal is an essential commodity under the

Essential Supplies (Temporary Powers) Act of 1946, and by virtue of the delegation of powers by the Central Government to the Provincial Government under Section 4 of the Act, the Uttar Pradesh Government was competent to make provisions, by notified order, for regulating the supply and distribution of coal in such a way as they considered proper with a view to secure the objects as specified in Section 3 of the Act. All that is necessary is that these provisions should not infringe the fundamental rights of the citizens guaranteed under Part III of the Constitution and if they impose restrictions upon the carrying on of trade or business, they must be reasonable restrictions imposed in the interests of the general public as laid down in Article 19(6) of the Constitution.

7. Nobody can dispute that for ensuring equitable distribution of commodities considered essential to the community and their availability at fair prices, it is quite a reasonable thing to regulate sale of these commodities through licensed vendors to whom quotas are allotted in specified quantities and who are not permitted to sell them beyond the prices that are fixed by the controlling authorities. The power of granting or withholding licences or of fixing the prices of the goods would necessarily have to be vested in certain public officers or bodies and they would certainly have to be left with some amount of discretion in these matters. So far no exception can be taken; but the mischief arises when the power conferred on such officers is an arbitrary power unregulated by any rule or principle and it is left entirely to the discretion of particular persons to do anything they like without any check or control by any higher authority. A law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable. As has been held by this court in *Chintamon* v. *The State of Madhya Pradesh*[1] the phrase "reasonable restriction" connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in reasonableness. It is in the light of these principles that we would proceed to examine the provisions of this Control Order, the validity of which has been impugned before us on behalf of the petitioners.

8. The provision contained in clause 3(1) of the Order that "no person shall stock, sell, store for sale or otherwise utilise or dispose of coal except under a licence granted under this Order" is quite unexceptional as a general provision; in fact, that is the primary object which the Control Order is intended to serve. There are two exceptions engrafted upon this general rule: the first is laid down in sub-clause (2)(*a*) and to that no objection has been or can be taken. The second exception, which is embodied in sub-clause (2)(*b*) has been objected to by the learned counsel appearing for the petitioners. This exception provides that nothing in clause 3(1) shall apply to any person or class of persons exempted from any provision of the above sub-clause by the State Coal Controller, to the extent of such exemption. It will be seen that the Control Order nowhere indicates what the grounds for exemption are, nor have any rules been framed on this point. An unrestricted power has been given to the State Controller to make exemptions, and even if he acts arbitrarily or from improper motives, there is no check over it and no way of obtaining redress. Clause 3(2)(*b*) of the Control Order seems to us, therefore, prima facie to be unreasonable. We agree, however, with Mr Umrigar that this portion of the Control Order, even though bad, is severable from the rest and we are not really concerned with the validity or otherwise of this provision in the present case as no action taken under it is the subject-matter of any complaint before us.

9. The more formidable objection has been taken on behalf of the petitioners against clause 4(3) of the Control. Order which relates to the granting and refusing of licences. The licensing authority has been given absolute power to grant or refuse to grant, renew or refuse to renew, suspend, revoke, cancel or modify any licence under this Order and the only thing he has to do is to record reasons for the action he takes. Not only so, the power could be exercised by any person to whom the State Coal Controller may choose to delegate the same, and the choice can be made in favour of any and every person. It seems to us that such provision cannot be held to be reasonable. No rules have been framed and no directions given on these matters to regulate or guide the discretion of the licensing officer. Practically the Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licences in any way he chooses and there is nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same. Mr Umrigar contends that a sufficient safeguard has been provided against any abuse of power by reason of the fact that the licensing authority has got to record reasons for what he does. This safeguard, in our opinion, is hardly effective; for there is no higher authority prescribed in the Order who could examine the propriety of these reasons and revise or review the decision of the subordinate officer. The reasons, therefore, which are required to be recorded are only for the personal or subjective satisfaction of the licensing authority and not for furnishing any remedy to the aggrieved person. It was pointed out and with perfect propriety by Mr Justice Matthews in the well-known American case of *Yick Wo* v. *Hopkins*[2], that the action or non-action of officers placed in such position may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives which are easy of concealment and difficult to be detected and exposed, and consequently the injustice capable of being wrought under cover of such unrestricted power becomes apparent to every man, without the necessity of detailed investigation. In our opinion, the provision of clause 4(3) of the Uttar Pradesh Coal Control Order must be held to be void as imposing an unreasonable restriction upon the freedom of trade and business guaranteed under Article 19(1)(*g*) of the Constitution and not coming within the protection afforded by clause (6) of the article.

10. As this provision forms an integral part of the entire structure of the Uttar Pradesh Coal Control Order, the order cannot operate properly unless the provision of clause 4(3) is brought in conformity with the constitutional requirements indicated above. The licence of the petitioners having been cancelled in pursuance with the above clause of the Control Order, the cancellation itself should be held to be ineffective and it is not necessary for us to enquire further whether or not the grounds upon which the licensing authority purported to act were vague or indefinite or could constitute proper grounds for cancellation.

11. The two other clauses of the Control Order to which exception has been taken on behalf of the petitioners are clauses (7) and (8). Clause (7) empowers the State Coal Controller to direct, by written order, any person holding stock of coal to sell the whole or any part of the stock to such person or class of persons and on such terms and prices as may be determined in accordance with the provision of clause (8). Clause 8(1) provides that no licensee in Form 'B' shall sell or agree to sell coal at a price exceeding the price to be declared by the licensing authority in accordance with the formula given in Schedule III. With regard to both these clauses, the contention of the petitioners' counsel, in substance, is that the formula for determining the price, as laid down in Schedule III, is per se unreasonable as it is made dependent on the exercise of an unfettered and uncontrolled discretion by the licensing authority. An unfair determination of the price by the licensing authority, it is argued, would be totally destructive of the business of the coal traders and the grievance of the

petitioners is that that is exactly what has been done by the declaration of prices made on the 16th of July, 1953.

12. We have examined the formula given in Schedule III to the Control Order with some care and on the materials that have been actually placed before us, we are not in a position to say that the formula is unreasonable. The prices, as said already, are calculated on the basis of the landed costs of coke and coal up to the depot, to which a profit of 10 per cent is added. The landed costs comprise seven items in all which are enumerated in Schedule III. With regard to Items 1, 2, 3, 4 and 6 of the Schedule the actual costs are taken into account and to that no objection can possibly be taken. The entire dispute is with regard to incidental charges specified in Item 5 and the allowance for shortage which forms Item 7. So far as incidental charges are concerned, the Schedule allows a maximum of Rs 8/8 per ton to be determined by the licensing authority according to local conditions. The rates undoubtedly vary according to local conditions and some amount of discretion must have to be left in such cases to the local authorities. The discretion given to the licensing authority in fixing these rates is, however, not an unlimited discretion, but has got to be exercised with reference to the condition prevalent in the locality with which the local officers must be presumed to be familiar. The grievance of the petitioners is that in the declaration of 16th of July, 1953, the licensing authority allowed incidental charges only at the rate of Rs 4/12/- per ton and that is grossly unfair. It is pointed out that at Lucknow, Aligarh, Allahabad and other places much higher rates were allowed, though the local conditions of these places are almost identical; and there has been consequently a discrimination in this respect which makes the declaration void altogether. The statements that have been made by the petitioners in this connection are not supported by any affidavit of any person who is familiar with the local conditions in the other places and on the materials that we have got here we are unable to say that the rates fixed by the licensing authority of Kanpur are really discriminatory. It is certainly not open to us to substitute our own determination in the matter of fixing the prices for that of the licensing authority and provided we are satisfied that the discretion that has been vested in a public officer is not an uncontrolled discretion and no unfair discrimination has resulted from the exercise of it, we cannot possibly strike down as illegal any order or declaration made by such officer.

13. The same reasons apply, in our opinion, to the seventh item of Schedule III which relates to allowances for shortage of weight. Here also the Control Order specifies a maximum and the determination of the allowance in particular cases has been left to the discretion of the licensing authority. We are not satisfied from the materials placed before us that this provision is unfair or discriminatory. The formula allows a profit of 10 per cent upon the cost items with the exception of Item 5 which relates to incidental charges. We do not know why this item has been omitted and Mr Umrigar, appearing for the respondents, could not suggest any possible reason for it. But even then, the result of this omission would only be to lower the margin of profit a little below 10 per cent and nothing more. If the other traders in the locality are willing to carry on business in coal with that amount of profit, as is stated on the affidavits of the respondents, such fixation of profit would undoubtedly be in the interests of the public and cannot be held to be unreasonable. The counsel for the petitioners is not right in his contention that the Control Order has only fixed the maximum profit at 10 per cent and has left it to the discretion of the licensing authority to reduce it in any way he likes. Schedule III fixes the profit at 10 per cent upon the landed costs with the exception of Item 5 and as this is not the maximum, it would have to be allowed in all cases and under clause 8(1), the 'B' licensees are to sell their stocks of coal according to the prices fixed under Schedule III. Clause 8(2) indeed is not very clearly worded, but we think that all that it provides is to impose a disability upon all holders of coal stocks to charge prices exceeding the landed costs

and a profit upon the same not above 10 per cent as may be determined by the licensing authority. The determination spoken of here must be in accordance with what is laid down in Schedule III and that, as has been said above, does specify a fixed rate and not a maximum and does not allow the licensing authority to make any reduction he likes. On the whole we are of the opinion that clauses (7) and (8) of the Control Order do not impose unreasonable restrictions upon the freedom of trade enjoyed by the petitioners and consequently the declaration of the 16th of July, 1953, cannot be held to be invalid. The result is that, in our opinion, clause 4(3) of the Control Order as well as the cancellation of the petitioners' licence should be held to be invalid and a writ in the nature of mandamus would issue against the respondents opposite parties preventing them from enforcing the cancellation order. The rest of the prayers of the petitioners are disallowed. We make no order as to costs.

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* (Under Article 32 of the Constitution for enforcement of Fundamental Rights).

[1] 1950 SCR 759

[2] 118 US 356 at 373

OBJECTIONS/ COMMENTS ON THE DRAFT CERC (PROCEDURE, TERMS AND CONDITIONS FOR GRANT OF TRADING LICENCE AND OTHER RELATED MATTERS) REGULATIONS, 2019

A. Background

1. The Electricity Act, 2003, is a comprehensive legislation, which covers generation, transmission, distribution and trading of electricity. A reading of the Preamble of the 2003 Act will confirm that the Parliament intended to provide measures for conducive development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity in all areas etc. It is in this context, one has to review the role and jurisdiction of the Appropriate Commission constituted under the Act, which are vested with various functions such as licensing, tariff determination, adjudication of disputes etc.

2. The Statement of Objects and Reasons in paragraph 4 while dealing with the main features of the bill in the context of "trading", states as follows:

> "4. The main features of the Bill are as follows:
>
> ... ...
>
> (ix) Trading as distinct activity is being recognised with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.
>
> (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.

... ..."

3. Under Section 12 of the Electricity Act, 2003, trading of electricity is a licensed activity, for which a license can be granted in terms provided under sections 14 and 15 of the Electricity Act, 2003. Section 79 and 86 deal with the various functions of the Central and State Commissions respectively. A careful perusal of section 79(1) will reveal that while the Central Commission has the power to "regulate" tariff for generating companies owned by the Central Government and those which have a composite scheme for generation and sale of electricity in more than one State. The Central Commission also exercises regulatory jurisdiction over inter-State transmission of electricity. In section 79(1)(j), the Parliament has vested the following jurisdiction on the Central Commission in relation to electricity trading:

> "79. Functions of Central Commission
>
> (1) The Central Commission shall discharge the following functions, namely:
>
> ... ...
>
> (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
>
> ... ..."

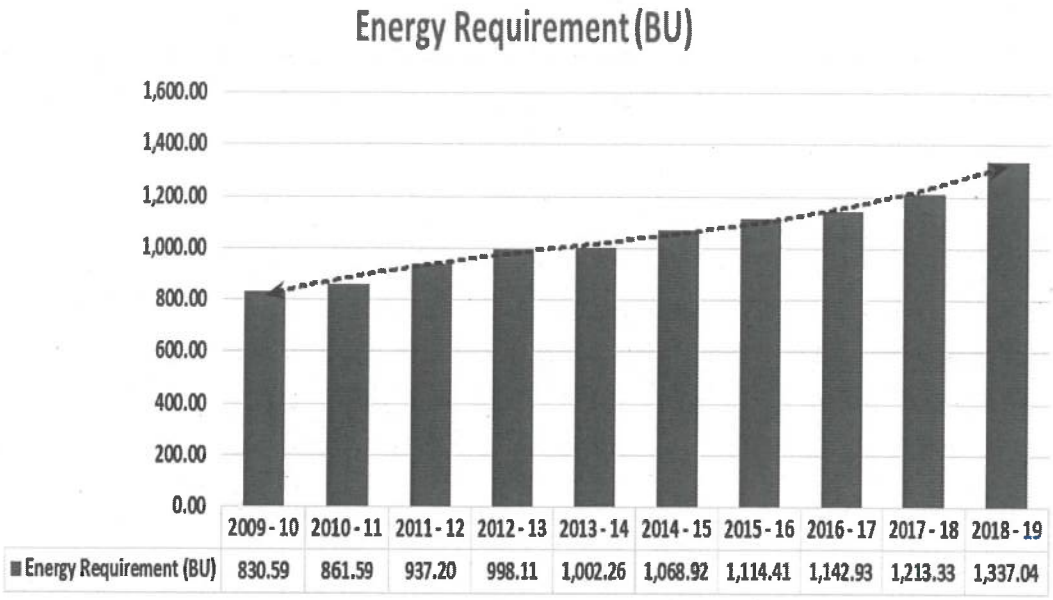
4. The aforesaid reveals that while the power to regulate is available over generation and transmission of electricity, no such power has been vested in the Central Commission in matters relating to trading of electricity. The power in this context is limited only to fix the trading margin, and that too, if considered, necessary. Similarly, under Section 86, the State Commission has powers to determine tariff for generation, supply, transmission and wheeling of electricity

and also the power to regulate the purchase and procurement process of electricity by a distribution company. However, in relation to trading of electricity, the jurisdiction is limited.

5. The aforesaid jurisdictional limitations have to be considered while framing a delegated legislation, whose purpose is to implement the provisions of the statute and not in any manner offend the letter or spirit of the statute.

6. As will be seen from the present submission, the draft regulations constitute a regulatory overreach, and stifles the growth of the power market and will reduce competition.

7. The quantum of power in the Indian power market has gone up over the last 15 years, and has subsequently resulted in the entry of many intermediaries in the sector, each of whom play a significant role in ensuring the viability of the power sector in India. Consumer open access is a reality only on account of the aggressive manner in which electricity traders have been able to deliver power to industrial consumers in an innovative manner. The table below demonstrates the growth of the power market:



	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Energy Requirement (BU)	830.59	861.59	937.20	998.11	1,002.26	1,068.92	1,114.41	1,142.93	1,213.33	1,337.04

Source: Central Electricity Authority LGBR 2009-2018

8. The Draft CERC (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters) Regulations, 2019 under Regulation No. ECO-14/06/2019-CERC dated 24.07.2019 (hereinafter referred to as the 'Draft Regulations') makes excessive inroad in market operation. CERC (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters) Regulations, 2009 (hereinafter referred to as the 'Current Regulations') in its current form itself had to be rationalized.

9. Before proceeding further, the following needs to be highlighted:

   (i) The Draft Regulations seek to impose certain unreasonable conditions on the Trading Licensees, which could result in adverse effects in the market, leading to survival of only a handful of traders having high net worth through parent organisation;

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(ii) The Draft Regulations are highly arbitrary in nature and does not take into account the problems associated with the trading of electricity by the Trading Licensee. It must be noted that despite the growth of exchanges, there is a need for customized products offered by trading licensees. As the market gets matured, the role of trading licensees increases as they facilitate competition and drive efficiencies;

(iii) Furthermore, the number of trading companies has doubled from 14 in 2009 to 28 in 2017-18 and the volume of electricity transacted through traders has increased from ~22 BU in 2009 to ~39 BU in 2017-18 representing a CAGR of 6%. Therefore, traders act as market makers and liquidity providers by connecting suppliers with the best suited buyers;

(iv) The trading licensees offer the ability to pioneer new product development in power markets and hence take a central role in increasing competition, driving efficiency in markets and in realizing lower power prices;

(v) Instead of encouraging trading as an activity, the Draft Regulations proceeds with an element of distrust and consequently works against market principles. Further, the stringent policies which is sought to be implemented through the Draft Regulations will lead to derailment of the trading sector by wiping out the traders who are service based, having built their net-worth from trading of electricity over the years (and not relied on large capital base of their parent or associate companies). This will lead to a scenario wherein only the institutional based trading licensees will be left;

(vi) Institutional based traders have a high net worth and support from parent institution thereby giving them an advantage over

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the service-based trading licensees. This is due to the fact that service-based trading licensees have their core business as trading of electricity and do not have the support of any other organisation for finance;

(vii) The Draft Regulations seek to promote only such entities/ traders who have the high net worth to the prejudice of traders with lower net worth, which will in turn lead to wiping out such traders. This will greatly reduce competition which would consequentially lead to market manipulation by certain bigger traders having a high net worth. This would go to the root of the intent of the Act, which is succinctly provided in the Preamble of the said Act.

10. In view of the above, while finalizing the draft Regulations, the ultimate test has to be whether the said Draft Regulations are promoting competition or is it inherently anti-competition.

11. Hence, the amendments proposed under the Draft Regulations have to be seen in a holistic manner, in order to understand and mitigate the serious ramifications for traders which shall be caused if the Draft Regulations, in their present form, are notified.

B. <u>Proposed Amendment</u>

I. Regulation 8- Trading Margin

12. The Regulations 8 of the Draft Regulations are set out herein below:

Regulation 8:

"(1) Trading Licensee shall comply with the trading margin as given below:

The trading margin shall be charged on the scheduled quantity of electricity;

(b) The margin shall include all charges, except the charges for scheduled energy, open access and transmission losses:

Provided that the charges for the open access include the transmission charge, operating charge and the application fee;

(c) For short term contracts and contracts through power exchanges, the Trading Licensee shall charge a minimum trading margin of zero (0.0) paise/kWh and a maximum trading margin of seven (7.0) paise/kWh:

Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause 10 of regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge any trading margin exceeding one (1.0) paise/kWh.

(d) For long term contracts and medium-term contracts, the trading margin would be decided mutually between the Trading Licensee and the seller:

Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of regulation 9 is not provided by the Trading Licensee in favour of seller, then the Trading Licensee shall not charge any trading margin exceeding one (1.0) paise/kWh.

(e) In case of Back to Back deals, the Trading Licensee shall charge a minimum trading margin of zero (0.0) paise/kWh and a maximum trading margin of one (1.0) paise/kWh

(f) For Cross Border Trade of Electricity, the trading margin would be decided mutually between the Trading Licensee and the seller."

Submissions regarding the general power of the Commissions to fix trading margins

12. It is submitted that as per Regulation 7, the capping of trading margin has been provided for short term, medium term and long-term contracts entered into by a trading licensee. This is a complete departure from the existing trading margin regulations, which provide a margin cap for only short-term transactions. The relevant provision of the existing CERC (Fixation of Trading Margin) Regulations, 2010 is set out herein below:

> "2. Applicability: These regulations shall apply to the short-term buy-short-term sell contracts for the inter-State trading in electricity undertaken by a licensee."

There is no perceived logic to include medium-term and long-term contracts within the purview of margin caps. The provisions in relation to trading margin is applicable on short term contracts, long term contracts, medium-term contracts as well as back to back deals.

13. At the outset, it is pertinent to mention herein that the methodology adopted for capping trading margin, under the Draft Regulations, is in direct contravention/ contrast with the provisions of Section 49 of the Act. Section 49 of the Act is reproduced herein below:

> **"Section 49. (Agreement with respect to supply or purchase of electricity):**
>
> Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."

In addition to the above, reference be made to Sections 61, 62, 63, 79(1)(a), 79(1) (b), 86(1)(a) and 86(1)(b) of the Act. From the said provisions it is clear that the regulatory commissions do not at all

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determine tariff/ price of electricity for a consumer availing open access.

14. The trading margin sought to be imposed by the Draft Regulations, 2019 is in contravention to Section 49 of the Act. Section 49 of the Act entitles any two entities, which includes the generator as well as the consumer/ beneficiary to mutually enter into an Agreement for Sale and Purchase of Power on such terms and conditions as may be mutually agreed between them including the tariff. Such autonomy necessarily includes the freedom to enter into any arrangement to supply power, which may also include a trader. Hence, on the basis of Section 49 of the Act, any regulatory intervention in any manner is prohibited, including the terms under which the contracting parties take the services of a trader.

15. It is submitted that under an open access transaction as per Section 49 of the Act, a generator can directly enter into an agreement for the supply of power to a consumer. In such an event, a generator is allowed to charge whatever tariff it intends to, in case the consumer agrees. As such, Section 49 projects the autonomy and independence of a private transaction for purchase of electricity. Hence, it defies logic when trading margin is capped just because a trading licensee is involved in a transaction between a generator and a consumer.

Therefore, in the light of Section 49, in an open access transaction, there is no jurisdiction to cap trading margins. Trading margins should be left open to the market forces. On account of increased competition as a result of huge number of trading licensees, coupled with the ability of the generators to directly enter into contracts with consumers, such competition would ensure that high trading margins are not charged by the trading licensees.

16. It is stated that Section 49 ensures that the tariff payable by a consumer under open access, is beyond any regulatory intervention, and that the same is purely within the discretion and decision of such consumer, or contracting parties. The said tariff, for a consumer, is inclusive of the trading margin which a trader may charge, in a Section 49 transaction. Hence, by virtue of Section 49, the tariff, including margin, is free from any regulatory intervention.

17. As per Section 2(49) of the Act, the definition of "person" is very wide and includes an electricity trader. Hence, as per Section 49, there is no regulatory control or supervision when a consumer and a person (trader) enters into an agreement to supply electricity, which can be done upon mutual terms and conditions, including tariff. A trader arranges power from a generator, for supply to a consumer. Hence, a trader has to recover the cost of arranging power, from the consumer, when it supplies the said power under open access. Apart from the said cost, a trader also earns a trading margin from the consumer, which is the difference between the costs incurred in arranging power and the price/ tariff at which the power is supplied to the consumer.

    This means that the "tariff" payable by a consumer to an electricity trader, in a Section 49 transaction, is inclusive of the trading margin to be charged by the said trader. Hence, by virtue of Section 49, the terms and conditions of an open access transaction, including tariff, which would include margin, are beyond any regulatory control.

18. In this context, reference be made to Sections 79(1)(j) and 86(1)(j) of the Act which provides that margins can only be fixed, if considered necessary. This means that fixing of trading margins is not mandatory as per the provisions of the Act. In furtherance of the above intent of Section 79(1)(j) of the Act, the same leads to the question as to

under what circumstances and situations can the discretion of fixing a trading margin cap be contemplated.

In order to answer the above question, the only transaction where possibly any trading margin can be capped, is when a trading licensee supplies power distribution licensee, since in such an event, it is the distribution licensee which has to recover the cost from the consumers under retail supply. Any additional cost of purchase of power, is a pass through for a distribution licensee, to be ultimately borne by the end consumers, and such consumers have to compulsory procure electricity from the said distribution licensee, as only a handful of consumers are allowed open access. Therefore, when a trading licensee supplies electricity to a distribution licensee, only in such a transaction can capping of trading margin be considered. In fact, sale of electricity to a distribution licensee is always regulated. In this context, reference may be made to section 62(1), 86(1)(a) and 86(1)(b) of the Electricity Act, 2003.

19. As such, by virtue of Section 49, transactions which relate to retail sale of electricity, can only have an element of regulatory intervention, and not otherwise. There is no jurisdiction to provide for a trading margin, if a sale to a distribution licensee is not involved. This Hon'ble Commission has to consider the same while finalising the draft regulations.

Re: Submissions regarding specific provisions restricting margins

20. Under Regulation 7(a) of the Draft Regulations, the definition of short-term contracts has been changed to include a situation involving a transaction, where even one of the contracts of the trader with a buyer or a seller, is of less than one year, then the margin cap of zero to ₹ 0.07 per Unit [as per Regulation 8(1)(c)] would be applicable. This works against market principles. If general economic

growth has to be achieved, the traders have to be encouraged to create product that suit the market conditions prevalent at a given point of time.

21. It is submitted that in order to ease out of the above regulation, a trader has to find both, generator and buyer/ consumer which are willing to enter into long-term transactions/ contracts, i.e. for a period more than one year. In this context, it needs to be considered that electricity market is extremely dynamic, and that very rarely a generator, trader or a consumer would agree to enter into long-term contracts for purchase of power under "open access", with a fixed tariff. The generators and consumers always like to have the flexibility to change their power source in the event there is a cheaper alternative source available by availing open access. Also, as the Consumer tariff is changed every financial year, therefore, the Consumer seeks flexibility to procure power as per market conditions rather than entering into long term contracts. Such flexibility is the beauty of open access.

22. This Hon'ble Commission, being the sector regulator, is very much aware of the practical impossibilities in execution of long-term open access contracts between traders and consumers. This means that the provision for capping of margin from zero to ₹ 0.07 per Unit, is with an intent to restrict the open access market development and growth.

23. The Draft Regulations seek to prevent traders from earning a revenue of more than ₹ 0.07 per unit under open access transactions covered under Section 49 of the Act, while on the other hand, a generator is free to charge a tariff of its choice from a consumer under the said Section. This is discriminative and goes against the economics of market that requires to be rightly regulated.

24. Therefore, it is evident that the draft regulations seek to create a class within a class, under open access transactions covered under Section 49 of the Act. In other words, a trading licensee is being discriminated, vis-à-vis a generator or a consumer, qua the ability to have complete freedom while incorporating terms/ clauses in the open access contract, included consideration/ tariff.

25. It is a settled principle of law that a subclass, or class within a class, cannot be treated unless mandated under the parent Act. In this context, reference be made to the following judgments of the Hon'ble Supreme Court:

a) In ***Western U.P. Electric Power & Supply Company Limited vs State of U.P. [(1969) 1 SCC 817]***, the Apex Court held as hereunder:

> *"(7) Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discrimination treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law."*

A copy of the judgment passed in ***Western U.P. Electric Power & Supply Company Limited vs State of U.P. [(1969) 1 SCC 817]***, is annexed herewith and marked as **ANNEXURE A.**

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b) In ***State of Jammu & Kashmir vs Triloki Nath Khosa [1974 (1) SCC 19]***, the Constitution Bench of the Supreme Court held as hereunder:

> "...
> *(29) But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.*
>
> *(30) Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class.*
> ..."

A copy of the judgment passed in ***State of Jammu & Kashmir vs Triloki Nath Khosa [1974 (1) SCC 19]***, is annexed herewith and marked as **ANNEXURE B.**

c) *In* ***Kunnathat Thatehunni Moopil Nair vs State of Kerala (AIR 1961 SC 552)***, the Hon'ble Supreme Court held as hereunder:

> "...
> *(8) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions*

are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification.

After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself.

..."

(underline supplied)

A copy of the judgment passed in ***Kunnathat Thatehunni Moopil Nair vs State of Kerala (AIR 1961 SC 552)***, is annexed herewith and marked as **ANNEXURE C.**

26. It is further submitted that it is absolutely unclear as to what is the objective behind inserting Regulation 7(a) in its present form. If a consumer wishes to avail power under long term arrangement from a trader, then it may happen that the quantum of required power is

arranged from more than one generator and such arrangement may be through different short-term arrangements. In such a situation, for the consumer the tariff continues to be the same, irrespective of the fact as to whether the trading margin for the licensee is capped or not.

Hence, there is no difference in tariff for a consumer who receives supply of power from a trader under long-term, either through a generator under a long-term arrangement (by virtue of Regulation 8(1)(d) of the Draft Regulations) or through different generators under short term arrangements.

27. Therefore, when there is no apparent benefit or logic behind Regulation 7(a) of the Draft Regulations, then it makes no sense, whatsoever, to forcefully cap the ability of a trading licensee to earn revenue in an open access transaction under Section 49 of the Act, especially when a generator, which directly enters into a bilateral arrangement with a consumer, is allowed to charge a tariff of its choice. Such discrimination is nowhere provided under the provisions of the Act.

In view of the above, Regulation 7(a) of the Draft Regulations, ought to be revised.

28. Similarly, Regulation 7(b) of the Draft Regulations, which specify that long-term and medium-term contracts are those in which period of contract of the trading licensee, with both the seller and the buyer, is more than one year, also needs to be revised. In view of the submissions made hereinbefore, it is evident that there is no perceived benefit out of the above stipulation. Hence, it would be completely arbitrary to fix trading margins as contemplated under the Draft Regulations, as there is no supporting provision under the Act which enables such micro-management of the trading licensee,

including its inability to earn revenue through trading margin. This makes the Draft Regulations as completely contrary to the provisions of the Act, thereby also being against the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India.

29. It is further submitted that from a reading of the Draft Regulations, it is evident that the same is meant to be the death knell for trading licensees.

30. In this context, reference be made to Regulations 7(c) and 8(1)(e) of the Draft Regulations under which back-to-back deals executed through a trader, are being capped at the margin of zero to ₹ 0.01 per unit. No justification or logic can justify the above abysmally low margin.

31. In relation to 'back to back deals' it is necessary to look at the definition of 'back to back deals', as provided under Power Market Regulations, 2010, the same is reproduced hereunder:

> "The interstate transaction in which an Electricity Trader buys a specific quantity of power for a particular duration from one party and simultaneously sells it to another party on same terms and conditions. Such transaction does not expose the trader to any price risk. It may expose the trader to credit risk and operational risk."

32. It is submitted that in case of sale and purchase of power through long-term or medium-term open access, the Commission in the existing regulations intentionally decided not to impose capping of trading margin taking into account the factor that in such transactions, the cost involved for payment of trading margin is inclusive of the tariff and there is no distress purchase of power in medium-term and long-term open access transactions.

33. However, the Commission in the Draft Regulations has categorically included long term contract, medium term contract as well as back-to-back deals within the purview of the Draft Regulations which is violative of the provisions of the existing Regulations, Section 49 of the Act as well as Articles 14 and 19(1)(g) of the Constitution of India.

The Draft Regulations failed to take into consideration the fact that in long-term and medium-term contracts no question arises of hampering the interest of the consumer/ ultimate beneficiary due to the absence of the factor of distress purchase of power on account of non-availability of deficiency of the contracted capacity.

Further, any transaction can be termed as a back-to-back transaction which involves the entire chain of transactions for purchase of power from the generator, and subsequent sale thereof to the ultimate beneficiary/ consumer in which the trading licensee acts as an intermediary/ conduit providing a service to both the parties involved. By way of the Draft Regulations, the Commission intends to encompass any and all kind of back-to-back deals within margin restrictions, irrespective of the same being effectuated by way of obtaining medium-term or long-term open access.

This clearly goes to reflect that the Commission is trying to bring under its purview all the transactions which can be undertaken by a trading licensee, irrespective of the tenure of the open access, which is contradictory and violative of the intent of the Commission itself in terms of the earlier regulations as well as Section 49 of the Act and Article 19(1)(g) of the Constitution of India.

34. It is submitted that the logic which is being provided for the above capping of trading margin in a back-to-back transaction, is that there are no alleged risks involved in such a transaction for a trader. This is a completely arbitrary and wrongful reasoning, without any logic.

It is submitted that there is no difference between back to back transaction or any other transaction. In a back to back transaction, the trading licensee has a good title for the power purchased for subsequent sale. Section 2(71) of the Act defines 'trading' as purchase of electricity for resale thereof and the expression trade shall be construed accordingly. The Draft Regulations cannot create a sub class within a class, by discriminating between traders on account of the alleged nature of a transaction.

35. It needs to be appreciated that a trading licensee will charge margin for the following reasons:

a) the ability of traders to maintain a ready database with respect to the eligible and willing consumers, and the willing generators who have surplus generation capacity available for sale;

b) a trading licensee has to deploy dedicated team which contacts various consumers for advising them on energy saving by availing power under open access;

c) the trading licensee arranges power as per the procurer's requirement, identifies the seller, manages entire transaction such as open access, scheduling, energy accounting, facilitates energy settlement and supply of power from alternate sources in case of generator outages;

d) The role of the trading licensee from a seller's perspective is to arrange for off-take of power, market discovery for implementing banking/ swap contracts, ensuring payment security etc;

e) Traders participate in a number of tenders and out of which they manage to win only a few, however, they have to absorb the cost associated with the said bid participations;

e) In the absence of a trading licensee, it would very difficult for a generator to know or contact consumers who are desirous of availing cheaper power under open access. This will result in reducing the options for a generator, or a consumer, to enter into open access transactions which will ultimately reduce competition thereby pushing the prices.

Hence, in view of the above, the much larger evil of reduction in competition and possibly higher electricity prices under open access, has to be avoided, rather than resorting to cap trading margins thereby making it extremely difficult for trading licensees to survive which will lead to their wiping out, or in other words, going against the intent of the Act which is to promote competition.

36. It is for the above purpose/ USP of a trading licensee, that they charge margins. For a robust electricity market, where power is freely available to consumers under open access, it is necessary that the trading licensees are encouraged and motivated for the purpose of fulfilling the mandate of the Act, which is to enable open access consumers who have cheap power available readily. The said purpose can only be achieved in the event there are a number of trading licensees in the market, which can only happen if the competitive market is allowed to operate freely.

The Draft Regulations are completely against trading licensees by providing completely unjustifiable and unreasonable margin caps, which will ultimately filter out such licensees thereby leaving only institutional based players with high net worth. This will render the entire intent of the Act, qua competition, completely otiose.

37. It is, therefore, pertinent to mention herein Section 79(1)(j) of the Act, which provides that this Hon'ble Commission is mandated to fix

trading margins, only if it is considered necessary. The above provision puts an enormous onus upon the Commission to come out with a compelling reason, as a justification, for imposing fixed trading margins. For the various reasons cited above, there appears to be no compelling or justifiable reason in unreasonably and unjustifiably capping trading margins, especially for the reason that a trading licensee is not the only entity which is entitled to facilitate a transaction under open access, as the generators and consumers can individually enter into bilateral agreements without such trading licensees. As such, there is no iota of monopoly which can be exercised by a trading licensee in an open access transaction falling under Section 49 of the Act.

It needs to be further considered that the consumers and generators are also free to purchase or sell electricity through power exchanges. Therefore, trading licensees have no ability, whatsoever, to control or have a monopoly qua the open access market.

Hence, there remains no reason for the necessity to exercise the discretionary jurisdiction under Section 79 (1) (j) of the Act.

38. It is a settled principle of law that for imposing any restrictions qua undertaking business transactions, either the same has to be expressly provided under the statute/ parent Act, or there has to be a compelling reason. In this context, reference be made to the following judgments:

a) In ***Chintaman Rao and Others vs State of Madhya Pradesh (AIR 1951 SC 118)***, wherein the question was whether the statute under the guise of protecting public interest arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation, thereby being violative of article 19(1)(g) of

the Constitution. The Hon'ble Supreme Court in Para 8 held as hereunder:

> *"(6) The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality."*

A copy of the judgment passed in ***Chintaman Rao and Others vs State of Madhya Pradesh (AIR 1951 SC 118)***, is annexed herewith and marked as **ANNEXURE D.**

b) In ***State of Bombay and Another vs F.N. Balsara (AIR 1951 SC 318)***, the Hon'ble Supreme Court held as hereunder:

> *"(46) The question boils down to ascertaining whether the restrictions imposed by the provisions to which reference has been made are reasonable. In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of State policy set forth in Article 47 of the Constitution,*

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"The State is charged with the duty of bringing about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health". That the restrictions imposed by the sections on the right of a citizen to possess, or sell or buy or consume or use spirits of wine, methylated spirits, wine, beer, toddy are in view of the aforesaid directive principles of State policy quite reasonable, has not been disputed before us. The controversy has centred round the words "and all liquids consisting of or containing alcohol". It is said that those words include "all liquids, toilet or medicinal preparations containing alcohol" and the restrictions imposed upon the ordinary use of such toilet or medicinal preparations are unreasonable and therefore void. So far as these preparations are concerned, the High Court has dealt with the matter as follows:

"To put it in a simple form, the question to which we have to address ourselves is whether the legislature can prohibit the legitimate use of an article which ordinarily is not drunk, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition Act. Let us take the concrete case of eau-de-cologne or lavender water. Their legitimate use is only for the purpose of toilet. They contain spirit and it may be that an addict deprived of his drink may drink it in order to satisfy his thirst. Is it permissible to the legislature under such

circumstances to deprive the general public of the legitimate use of eau-de-cologne or lavender water as articles of toilet? The legislature may prevent the abuse of these articles, but can it prevent their legitimate use? It is difficult to understand how any restriction on the legitimate use of these articles can be in the interests of the general public so as to make these restrictions reasonable within the meaning of Article (19)(5). If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is acting against public interest. Therefore, in our opinion, while it was open to the legislature to provide against the abuse of these articles, it was not open to it to prevent its legitimate use. But the legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Government. It is contended by the Advocate-General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold and dispose of property, and, in our opinion, that restriction is not reasonable. The same argument applies to medicinal and toilet preparations containing alcohol. Therefore we hold that to the extent to which the Prohibition Act prevents the possession, use and consumption of non-beverages and medicinal

and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(1)(f) of the Constitution even if they may be within the legislative competence of the Provincial Legislature."

A copy of the judgment passed in ***State of Bombay and Another vs F.N. Balsara (AIR 1951 SC 318)***, is annexed herewith and marked as **ANNEXURE E.**

In the present case, there seems to be no compelling reason for the purpose of exercise of the discretionary power provided under Section 79(1)(j) of the Act.

Re: Margins should be left to be decided by market forces

39. This Hon'ble Commission needs to consider that by letting the margin being determined by market forces, the same is in long-term consumer interest and in the interest of competition. There is no overwhelming data which supports the fact that unregulated trading margin will lead to pushing up of prices at which consumers procure electricity access, thereby invoking jurisdiction under Section 79(1)(j) of the Act.

40. In fact, the data is to the contrary, which can be ascertained from the fact that most State Commissions do not have any margin restrictions for intra-state trading of electricity. In this context, reference be made to the proviso of Regulation 2 of the existing CERC (Fixation of Trading Margin) Regulations, 2010, which is reproduced herein below:

"2. Applicability: These regulations shall apply to the short-term buy-short-term sell contracts

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for the inter-State trading in electricity undertaken by a licensee.

Provided that these regulations shall not apply to the intra-State trading in electricity undertaken by the licensee by virtue of the provisions of Rule 9 of the Electricity Rules, 2005, on the basis of the inter-State trading licence granted by the Commission."

(underline supplied)

The above provision even exempts trading licensees which have been granted inter-state trading license, who undertake intra-state trading under Rule 9 of the Electricity Rules, 2005.

41. There is no data, whatsoever, which has been considered by this Hon'ble Commission which supports that the non-fixation of trading margins by a host of State Commissions, has led to considerable increase in electricity prices for the consumers availing power under open access. Without such detailed analysis, the Hon'ble Commission should not have issued the Draft Regulations in the present form. This lack of analysis goes to the root of the Draft Regulations, and the said aspect cannot at all be ignored.

42. It is further submitted that the Act was enacted with the main objective of introduction of competition. For the said purpose, concepts of open access and trading licensees was introduced. Further, generation of electricity was de-licensed. In addition to the said reforms, under Section 49, the Act provided that a consumer can enter into any arrangement with any "person", which means a generator or a trader, at a mutually decided tariff. This means that generators can directly enters into arrangements with consumers, and the involvement of a trader is not compulsory.

Hence, by virtue of the above provision, the Act guaranteed that a consumer is not dependent solely upon a trading licensee to arrange

power under open access. The said provision made the entire open access market as highly competitive. With such free market and competition, it makes no sense to then arbitrarily cap trading margins of the electricity traders. Had the Act mandated that in every open access transaction, an electricity trader has to be involved, then it would have made sense to regulate or cap trading margins.

43. It is submitted that this Hon'ble Commission is under a completely mistaken notion that capping of trading margins can help in reduction of costs or tariff for end consumers, or that the said capping is necessary to check any abuse of market or manipulation by electricity traders.

In this regard, it must be noted that the defaults committed by one or two traders in the market cannot be made a basis to paralyse the entire trading sector. In case any trader defaults as stipulated in the SOR to the Draft Regulation, this Commission has power to deal with such default by imposing penalty on such defaulting trader in accordance with the Regulations but resorting to arbitrary capping of the trading margin amongst other restrictive conditions vide the Draft Regulations is not just and fair. The Draft Regulations seeks to impose restrictions which will cause an impediment for the service-based traders to carry out free trade in accordance with Article 19(1)(g) of the Constitution of India.

44. The above is for the reason that in the open market envisaged under the Act, there is no monopoly which is being exercised by electricity traders. Otherwise, the open access tariffs, in Section 49 transactions qua intra-state trading, where there are no regulations for capping trading margin, should have gone abnormally high. This fact completely demolishes any justification or argument that any capping of trading margins would help in checking any increase in tariffs.

45. It needs to be considered as to what was the need to introduce the concept of trading licensees. A trading licensee can only survive in a hugely competitive electricity market by having a complete database of consumers who require electricity under open access, and the willing electricity generators having untied generation capacity. However, at the same time the Act enables a direct bilateral commercial/ merchant arrangement between a generator and a consumer falling under Section 49. This ability to engage in sale of electricity by a generating company, takes away any ability of an electricity trader(s) to manipulate the market, or to take consumers for a ride. In addition to the above, there can be multiple trading licensees as there is no restriction for granting such licenses under the provisions of the Act. As such, in such a highly competitive market, it serves no purpose or logic to cap, or fix a ceiling, qua trading margins.

46. It would be noteworthy to see a comparison of global power markets covering mature markets (Europe and USA) and emerging markets (Brazil) vis-à-vis India:

Parameter	Germany	USA	Brazil	India
Generation	Deregulated – Privately Owned	Deregulated – Privately Owned	Public power generation utilities, IPP, CGP	Public power generation utilities, IPP, CGP
Transmission	Controlled by four privately owned TSAs	Controlled by Independent System Operator which provides non-discriminatory open access	Government controlled entities with open access available to free consumers	Controlled by Central/ State Transmission Utility which provides non-discriminatory open access

Distribution	The four major Transmission System Operator (TSOs) also act as Distribution System Operators.	Independent System Operator (ISO) controls wholesale electricity while retail activities are managed by local utility companies/ electricity retailers	Majority DISCOMs are privately operated with a few public DISCOMs	Predominantly controlled by State Distribution Companies
Type of Market (Energy/ Capacity)	Energy	Mostly energy markets with less/ no capacity markets	Mostly capacity markets ~ 20-30% energy trading	Mostly capacity markets only ~ 10% is traded
Nature of Products Traded	Term ahead physically settled contracts and financially settled derivatives	Term ahead physically settled contracts and financially settled derivatives	Physically settled contracts	Physically settled contracts
Wholesale Markets	Over the Counter trade and Trading through Commodity Exchange	Physical contracts are traded through ISO, Financial Derivatives are exchange traded	Largely through traders as over the counter trades. Trading through electricity exchange	Trading through Power Exchange and OTC arrangement with trading licensees
Selling/ Buying price in Wholesale Market	Reference price for trading set based on	Price for day ahead market determined	Prices in free market are negotiated	Price discovery in short term markets is

	prices in day ahead markets	based on marginal pricing at a location by ISO which acts as reference price for other trading instruments	between traders and their counter parties	done through e-bidding portals, Price in day ahead market is determined through exchange
Determination of trading margin	Market driven	Market driven	As part of negotiation between traders and sellers	Regulations determine the margin cap
Ownership of Exchanges	EEX – the largest commodity exchange is privately held. Nord Pool is owned by regional transmission operators	ISOs were formed out of regional transmission operators – overseen by state and federal regulators. NYMEX – Privately owned commodities exchange for derivatives trading	Privately owned trading platforms and exchange	Privately owned exchange

47. Apart from the aforementioned inability to fix trading margins in Section 49 transactions, it is submitted that based upon feedback and experience gained from 2006 Regulations and considering various risks associated with the electricity trading business, CERC revised the trading margin in 2010. As per the CERC (Fixation of Trading Margin) Regulations, 2010, the trading licensees were allowed to charge trading margin up to 7 paise/kWh in case the sale price exceeds Rs. 3/kWh, and 4 paise/kWh where the sale price is less than

or equal to Rs. 3/kWh in the case of short-term open access transactions.

The trading licensees have been charging the trading margin as per the above regulations. Due to stiff competition amongst the trading licensees, the trading margin charged by the trading licensees was always less than the ceiling margin allowed in the trading margin regulations.

48. Following data is as per the Report on Short-term power market in India 2017-18 published by this Hon'ble Commission which substantiates the above fact that the trading licensee in reality does not enjoy much revenue while charging trading margin:

Period	Trading Margin (Rs/kWh)
2008-09	0.040
2009-10	0.040
2010-11	0.050
2011-12	0.050
2012-13	0.041
2013-14	0.035
2014-15	0.038
2015-16	0.032
2016-17	0.032
2017-18	0.031

Note 1: Weighted Average Trading Margin is computed based on volume and margin of all Inter-state Trading Transactions.

49. The above clearly shows that an electricity trader under the Act, does not earn a substantial amount by charging trading margins. Therefore, it would be unfair on the part of the traders to be further restricted, as per the Draft Regulations, which seeks to cap the trading margin at a lower rate than even the 2010 Regulations.

50. It is further submitted that this Hon'ble Commission used to publish generic tariff orders for wind and solar power plants under Section 62 of the Act. However, when competitive bidding under Section 63 of the Act was introduced in wind and solar sector, then it is evident that the tariffs discovered in such bidding were much lower than the generic tariffs determined by this Hon'ble Commission. This means that when there is competition, and free market, there should not be any regulatory intervention for achieving the desired results. Hence, the margin aspect has to be left to the open market, and such margins need not be artificially capped.

Re: Micro-management of trading licensees

51. It is submitted that the Draft Regulations seek to cap the trading margin to 1 paise/kwh in case an escrow arrangement or irrevocable, unconditional and revolving letter of credit is not provided by the trading licensee. The said capping will lead to denying the traders their genuine right enshrined under Section 49, by restricting the ability of such traders to decide by their free will the terms and conditions of a contract.

52. The above scenario can further be explained by way of an illustration as hereunder:

Eg: RTC Power Procurement

Power Procurement Tender issued by Utility				
Requisition as per Tender Document				
Period		**Duration (Hrs)**		**Quantum (MW)**
1-Aug-19	31-Aug-19	0.00	24.00	400
1-Sep-19	30-Sep-19	0.00	24.00	400

Bank Guarantee (as per Proposed Quantum)									
				Rate of CPG (Rs./MW/Month/Lakhs)					2.00
				Rate of EMD (Rs./MW/Month/Lakhs)					0.30
Period		Duration (Hrs)		Quantum (MW)	Days	Hours (Rs.)	Quantum (MUs)	Amount of EMD (Rs./Lakhs)	Amount of CPG (Rs./Lakhs)
1-Aug-19	31-Aug-19	0.00	24.00	100	31	24.0	74.40	31.00	206.67
1-Sep-19	30-Sep-19	0.00	24.00	100	30	24.0	72.00	30.00	200.00
Total							146.40	61.00	406.67
Margin Money & Collateral against Bank Guarantee @ 45% of BG Amount								27.45	183.00
Interest cost Payable to Bank against Margin Money (15% p. a.)								3.09	13.73
Interest cost receivable from Bank against Margin Money (FD) (6% p.a.)								1.24	5.49
Extra cost against BG								1.85	8.24
Guarantee Commission @ 2.1% p.a.								0.96	4.27
GST 18%								0.17	0.77
P & T Charges								0.01	0.01
Total BG Charges								2.99	13.28

PFC Consulting Ltd. Requisite Fees (as per Bidding Quantum)							
Applicable Tax Rate (%)				18%			
Rate of Requisite Fees (Rs.)				500			
Period		Duration (Hrs)		Quantum (MW)	Amount of Requisite Fees (Rs./Lakhs)	Amount of Applicable Tax (Rs./Lakhs)	Total Amount Payable (Rs./Lakhs)
1-Aug-19	31-Aug-19	0.00	24.00	400	2.00	0.36	2.36
1-Sep-19	30-Sep-19	0.00	24.00	400	2.00	0.36	2.36
Total					4.00	0.72	4.72

Manikaran Power Ltd.

Interest cost Payable to Bank against Margin Money (15% p. a.)	0.53
Requisite Fees against LOI received from Utility to Trader for sale of 100 MW Power	1.18
Total Requisite Fees	1.71

Total Expenses	
Particulars	Paisa/Unit
EMD	0.20434
CPG	0.90701
PFC	0.11687
Total	1.2282

Eg: Non-RTC Power Procurement

Power Procurement Tender issued by Utility				
Requisition as per Tender Document				
Period		Duration (Hrs)		Quantum (MW)
1-Aug-19	31-Aug-19	18.00	24.00	400
1-Sep-19	30-Sep-19	18.00	24.00	400

Bank Guarantee (as per Proposed Quantum)								
				Rate of CPG (Rs./MW/Month/Lakhs)				2.00
				Rate of EMD (Rs./MW/Month/Lakhs)				0.30
Period		Duration (Hrs)		Quantum (MW)	Days	Hours (Rs.)	Quantum (MUs)	Amount of EMD (Rs./Lakhs)	Amount of CPG (Rs./Lakhs)
1-Aug-19	31-Aug-19	18.00	24.00	50	31	6.0	9.30	3.88	25.83
1-Sep-19	30-Sep-19	18.00	24.00	50	30	6.0	9.00	3.75	25.00
Total							18.30	7.63	50.83

Margin Money & Collateral against Bank Guarantee @ 45% of BG Amount	3.43	22.88
Interest cost Payable to Bank against Margin Money (15% p. a.)	0.39	1.72
Interest cost receivable from Bank against Margin Money (FD) (6% p.a.)	0.15	0.69
Extra cost against BG	0.23	1.03
Guarantee Commission @ 2.1% p.a.	0.12	0.53
GST 18%	0.02	0.10
P & T Charges	0.01	0.01
Total BG Charges	0.38	1.66

PFC Consulting Ltd. Requisite Fees (as per Bidding Quantum)							
Applicable Tax Rate (%)					18%		
Rate of Requisite Fees (Rs.)				500			
Period		Duration (Hrs)		Quantum (MW)	Amount of Requisite Fees (Rs./Lakhs)	Amount of Applicable Tax (Rs./Lakhs)	Total Amount Payable (Rs./Lakhs)
1-Aug-19	31-Aug-19	18.00	24.00	400	2.00	0.36	2.36
1-Sep-19	30-Sep-19	18.00	24.00	400	2.00	0.36	2.36
Total					4.00	0.72	4.72
Interest cost Payable to Bank against Margin Money (15% p. a.)							0.53
Requisite Fees against LOI received from Utility to Trader for sale of 50 MW Power							0.59
Total Requisite Fees							1.12

Total Expenses	
Particulars	Paisa/Unit
EMD	0.20673
CPG	0.90940
PFC	0.61257

Total	1.7287

53. It is evident in the light of the aforementioned illustration that the EMD cost and the CPG cost itself comes over and above 1.0 Paisa/ kWh. In such a case, the capping of trading margin to 1.0 paisa/ kWh is financially and economically unviable as well as arbitrary and unreasonable. Therefore, imposing a condition of maintenance of escrow arrangement or opening of letter of credit is unjustifiable and will put additional burdens. The Draft Regulations fails to take into consideration the fact that the cost of opening the letter of credit or maintenance of Escrow account is to be borne by the Trader. This would make the open access transactions totally unviable leading to wiping out the small players from the market.

54. With respect to the above micro-management of trading licensees, at the cost of repetition, it is submitted that Section 49 of the Act was inserted for promoting competition in Open Access. As per the said provision, there is no regulatory intervention for the purpose of defining the terms and conditions, including tariff, between a consumer and any other person in the event of an open access transaction.

In other words, there is complete mutuality between the consumer and the person who wishes to supply power to such consumer under open access. When an Agreement is entered into by and between a generator and a consumer, the same cannot be regulated under the provisions of the Act. Therefore, mere involvement of a Trading Licensee will not empower the Commission to regulate the trading margin. It is for this reason that various State Commissions have not specified trading margin caps for intra-state trading.

55. It is further submitted that Regulation 8(1)(d) of the Draft Regulations has created a peculiar condition of maintaining an escrow account or opening of letter of credit in order to be entitled for mutual determination of trading margin by a trading licensee in a long-term or medium-term transaction. In this regard, it is to be noted that any contract entered into by and between the parties, including the trading licensee is based on the goodwill of a particular trading licensee.

The imposition of a condition of maintaining an escrow account or opening of letter of credit is arbitrary and without any logical or legal reasoning. The Draft Regulations seeks to impose high qualification in terms of net worth for enabling a trading licensee to initiate or to undertake any trading of power. The Draft Regulations fail to encompass the fact that the net worth of any entity/ trader is dependent upon the assets possessed by it. However, maintenance of an escrow account, as well as opening of letter of credit, leads to freezing of a particular amount till the existence/ term of such escrow account or letter of credit. Due to such freezing of finances, the trading licensee is barred from utilising the said sum for any other purpose, which in turn would lead to reduction of net worth of a trading licensee.

56. Apart from the said fact, it is also necessary to be highlighted that the purpose of maintaining an escrow account or opening of letter of credit is to protect the party to the contract from any future contingencies or risks. The said factor is solely dependent upon the free will of the parties, and the Commission cannot undertake to micromanage the terms of a pure commercial contract, especially in the light of Section 49 of the Act.

In the later part of the present objections, it has been highlighted that there is no jurisdiction vested with a court of law for writing the terms of a contract, especially in an unregulated transaction as provided under the Act, and as such the aforementioned requirement of opening an escrow account or a letter of credit, is completely illegal.

57. It is submitted that, if the Draft Regulations intends to protect the party who enters into a contract with the trading licensee from any future risk, then there should be an equivalent arrangement to protect the trading licensee from any future risks associated with the default of the party, timely payment, funding from banks, including the generator/ consumer/ ultimate beneficiary.

The Draft Regulations fail to provide a level playing field to the trading licensee and is intending to impose harsh and completely unreasonable conditions only on the trading licensee, by shifting all the risk associated in a transaction on such licensee.

58. In view of the above, it is concluded that the Draft Regulations are bad in law and are required to be thoroughly revised, to the extent they seek to impose unreasonable conditions or restrictions upon a person/ trader engaged in a Section 49 transaction undertaken as per the Electricity Act, 2003.

59. As per Draft Regulation 8 (1) (a):

"The trading margin shall be charged on the scheduled quantity of electricity"

It is submitted to the Commission that Traders takes risk on the contracted quantum including but not limited to submission of payment security, open access charges, credit risk etc. If entire liability and risk to which traders are exposed to is on the contracted quantum, in that case they shall be allowed to charge trading margin

upon the contracted quantum as well. Therefore, it is necessary that, as the regulations provide for the payment security, open access charges etc., on the contracted quantum, similarly, the trader should also be allowed to charge trading margin on the contracted capacity Thus, the same is to be considered applying the principle of harmonious construction.

ANNEXURE-A

(1969) 1 Supreme Court Cases 817

(BEFORE J.C. SHAH AND V. RAMASWAMI, JJ.)

(*From Allahabad*)

WESTERN U.P. ELECTRIC POWER AND SUPPLY COMPANY LTD. . . Appellant;

Versus

STATE OF U.P. AND ANOTHER . . Respondents.

Civil Appeal No. 2482 of 1968, decided on 7th March, 1969

1. Constitution of India — Articles 14 and 31(2) — Order of the Government to supply electricity directly to a company in the supply area of the appellant licensee.

2. Indian Electricity Act 9 of 1910, Sections 3(1) and (2) as amended by the U.P. Act 30 of 1961 — Whether Government decision that supply is "necessary in public interest" can be reviewed by the courts.

The Appellant company held licence under Section 3(1) of the Indian Electricity

Act, 1910, to supply electricity in certain areas in Uttar Pradesh. Hind Lamp Company was receiving energy from the appellant company and represented several times to the State Government that the supply of energy was inadequate and fluctuating. There was no improvement in supply position in spite of meetings held between the appellant Company, State Official and Hind Lamps Company. On the application of Hind Lamp Co., the State Government exercised powers under Section 3(2)(e)(iii) of the Act as amended by U.P. Sanshodhan Adhiniyam, 1961, directing the State Electricity Board to supply electrical energy to Hind Lamps Co., on terms and conditions similar to those applicable to other customers. On representation from appellant Company, the State Government replied that the decision was necessitated in the public interest and that there was no justification for revising the order.

Appellants' petition for writ of certiorari was rejected by the High Court on the ground that the order could not be challenged for being discriminatory as it was not established by evidence; that the order was made in public interest; that the granting of direct supply of electrical energy to Hind Lamps did not amount to compulsory acquisition of property of the Company without payment of compensation, and that no rules of natural justice were violated.

Held :

(i) Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminating treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.

The impugned Section 3(2)(e) of the Act did not violate Article 14 because (a) there was no discrimination between Hind Lamps and other consumers within the area of supply in respect of which appellant company held the licence as they did not belong to the same class — in one case energy was being supplied by the Company and in the other by the State Electricity Board and there was no grievance made by any consumer that he was by the grant of preferential rates to Hind Lamps prejudicially treated;(b) there was no evidence that different rates were charged by the State Electricity Board for the supply to Hind Lamps and Company and the Company being a distributor and Hind Lamps being a consumer they did not belong to the same class.

Western U.P. Electric Power and Supply Co. Ltd. v. *State of U.P.*, AIR 1968 SC 1099, *distinguished*

(ii) The satisfaction of the Government under Section 3(2) of the Act that the supply was necessary in the public interest is in appropriate cases not excluded from judicial review. The exercise of power is conditioned by the Government deeming it necessary in public interest to make such supply and if challenged the Government must show that exercise of the power was necessary in public interest. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are fulfilled. The order to the State Electricity Board to supply energy to Hind Lamps in the circumstances of the case was unquestionably in public interest.

(Paras 11, 12, 13 and 14)

(iii) By the grant of a licence under the Indian Electricity Act, 1910, no monopoly was created in favour of the Company as the statute expressly reserved the right of the State to authorise supply of electrical energy through another

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licensee in the same area or to a consumer directly through the State Electricity Board. By the order granting direct supply of electrical energy ownership of property or right to possession of property was not transferred to the State or to a corporation owned or controlled by the State. Therefore, Article 31(2) of the Constitution, was not violated. The Company might suffer loss but Article 31(2) does not guarantee protection against that loss.

(Para 15)

(iv) The Company was afforded sufficient opportunity to make its representation before and after the impugned order was passed.

(Para 16)

Appeal dismissed.

Mohan Behari Lal, Advocate for Appellant;

O.P. Rama, Advocate for Respondents 1 and 2.

C.K. Daphtary and B.R.L. Iyenger. Senior Advocates (Bishambher Lal and H.K. Puri, Advocate with him) for Respondent 3.

The Judgment of the Court was delivered by

J.C. SHAH, J.— The Western U.P. Electric Power and Supply Company Ltd. hereinafter called "the Company" — holds a licence under Section 3(1) of the Indian Electricity Act 9 of 1910 to supply electricity in certain areas in the State of U.P. Hind Lamps Private Ltd., set up a factory for manufacturing electrical equipment within the area of supply of the Company. Hind Lamps was receiving energy from the Company. Hind Lamps made several representations to the State Government that the supply of energy by the Company was inadequate to meet its requirements and was "interrupted and fluctuating". Meetings were held between the Company, the State officials and Hind Lamps for devising means to ensure uninterrupted and adequate supply of energy required by Hind Lamps, but there was no improvement in the supply position.

2. Hind Lamps then applied to the Government of U.P. to grant direct supply of electrical energy from the State Electricity Board. The State Government by order, dated December 26, 1961, issued in exercise of the powers conferred by Section 3(2)(*e*)(*ii*) of the Indian Electricity Act, 1910, as amended by the Indian Electricity (Uttar Pradesh Sanshodhan) Adhiniyam, 1961, directed the State Electricity Board "to supply electrical energy directly to Hind Lamps upon terms and conditions similar to those on which it supplied electrical energy to other consumers". In reply to a representation to reconsider the decision, the Government informed the Company that the "decision was

necessitated in the public interest and there was no justification for revising it." Another representation made by the Company was also turned down and direct supply of electrical energy was commenced by the State Electricity Board to Hind Lamps.

3. A petition moved by the Company in the High Court of Allahabad for a writ of certiorari quashing the order, dated December 26, 1961, was rejected by R.S. Pathak, J. In appeal under the Letters Patent against the order passed by the learned Judge, counsel for the Company applied for leave to plead that the order, dated December 26, 1961, resulted in discrimination between Hind Lamps and other consumers within the area of supply of the Company, and also between Hind Lamps and the Company and the order was on that account invalid. The High Court permitted the Company to raise the contention, but declined to give opportunity to "enlarge the evidence on record at that stage". Sole reliance was therefore placed by counsel for the

company on para 2 of the Government Gazette Notification issued by the U.P. Government on April 24/28, 1962, containing the revised tariff for the supply of electrical energy to licensees obtaining bulk supply from the U.P. State Electricity Board and to other consumers. It stated:

> "The revised tariff shall, except in the case of the licensees, be applicable to consumers in respect of consumption in the month of May, 1962. In the case of licensees, obtaining bulk supply of energy from the Board, the revised tariff shall apply to supplies made from 1st July, 1962 and onwards."

The Schedules in the Gazette Notification set out the rates at which electrical energy was to be supplied by the Board to licensees as well as to diverse classes of consumers who received supply of energy from the Board. The High Court held that there was no evidence on the record to prove the rates at which energy was being supplied to the Company on December 25, 1961, and the rates at which the energy was being supplied to Hind Lamps. The High Court observed that before the order, dated December 26, 1961, could be challenged on the ground of discrimination between Hind Lamps and other consumers as also between Hind Lamps and the Company, it was necessary for the Company to establish by evidence the rates of supply of energy to the Company, to Hind Lamps and to the other consumers obtaining at the time of the impugned order i.e. December 26, 1961, and in the absence of that evidence the plea of discrimination must fail.

4. The High Court also rejected the contentions raised by the Company that the impugned order was not made in public interest, that granting direct supply of electrical energy to Hind Lamps amounted to compulsory acquisition of property of the Company without payment of compensation, and that in refusing to give an opportunity to the Company to object the rules of natural justice were violated.

5. The Indian Electricity Act 9 of 1910, makes provision by Section 3 for the grant of a licence to supply energy in any specified area and also to lay down or place electric supply-lines for transmission of energy. Clause(*e*) of sub-section (2) as amended by U.P. Act 30 of 1961, and sub-section (3) provide:

> "(2)(*e*) grant of a licence under this part for any purpose shall not in any way hinder or restrict—
>
> *(i) the grant of licence to another person within the same area of supply for a like purpose; or*
>
> *(ii) the supply of energy by the State Government or the State Electricity Board within the same area, where the State Government deems such supply necessary*

in public interest.

(3) Where the supply of energy in any area by the State Electricity Board is deemed necessary under sub-clause (*ii*) of clause (*e*) of sub-section (2), the Board may, subject to any terms and conditions that may be laid down by the State Government, supply energy in that area notwithstanding anything to the contrary contained in this Act or the Electricity Supply Act, 1948."

The State Government may grant a licence to supply electrical energy to consumers within a specified area on terms and conditions prescribed in the licence and subject to statutory conditions, but on that account the

State Government is not debarred from granting a licence to another person or to supply energy directly to a consumer within the same area if the State Government deemed it necessary so to do in the public interest.

6. Section 3(2)(*e*) is challenged on the ground of denial of the guarantee of the equal protection clause of the Constitution. Strong reliance was placed by counsel for the appellant upon a recent judgment of this Court: *Western U.P. Electric Power and Supply Co. Ltd.* v. *State of U.P.*[1]. In that case the Government of U.P. had by Notification, dated September 21, 1966, authorised the State Electricity Board to supply energy directly to consumers in the area of supply for which a licence was already granted. This Court held that a licensee supplying electrical energy in an area has no monopoly under its licence; but the Notification issued by the U.P. Government directing the State Electricity Board to supply energy directly to a consumer at a rate lower than the rate at which it was supplied to the licensee Company amounted to discrimination between that consumer and the other consumers and also between the consumer and the licensee and the Notification on that account was invalid. Counsel for the Company says that the question which falls to be determined in the present appeal is concluded by the judgment in *Western U.P. Electric Power and Supply Company case*[1] for the court in that case held that the Notification of the Government of U.P. directing the State Electricity Board to supply energy directly to certain concerns at a rate lower than the rate at which energy was supplied to the licensee Company amounts to discrimination between those concerns on the one hand and the other consumers on the other, and also between the concerns and the Company.

7. Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminatory treatment. It does not, however, operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law. In the present case, there is no evidence about the rate charged for energy supplied by the State Electricity Board to the Company on December 26, 1961, nor is there any evidence on the record about the rates charged for electrical energy supplied to the consumers by the Company.

8. The plea of discrimination has to be considered from two different points of view; (*1*) the discrimination between Hind Lamps and the other consumers within the area of supply in respect of which the Company held the licence; and (*2*) discrimination in the rates of supply charged by the State Electricity Board to the Company and to Hind Lamps. There is no evidence on the record about the operative rates on the date of the impugned order. Again Hind Lamps was a consumer of electrical energy and so were

the other consumers within the area of supply in respect of which the Company held the licence. But on that account it does not follow that they belong to the same class. In one case energy is being supplied by the Company and in the other by the State Electricity Board. Again, there is no grievance made by any consumer of energy that he is by the grant of preferential rates to Hind Lamps prejudicially treated. Other consumers of energy and Hind Lamps, therefore, do not belong to the same class, and there is no grievance by any consumer of any prejudicial treatment accorded to him.

9. There is also no evidence that the rates charged by the State Electricity Board to Hind Lamps were lower than the rates charged to the Company. The Company and Hind Lamps again do not belong to the same class. The Company is a distributor of electrial energy, whereas Hind Lamps is a consumer. If the State Government charged different rates from persons belonging to the same class, in the absence of any rational basis for that treatment, the plea of discrimination founded on differential rates may probably have some force. But the Company and Hind Lamps did not belong to the same class, and there is no evidence that for energy supplied different rates were charged. In *Western U.P. Electric Power and Supply Co. Ltd.* v. *State of U.P.* the position was different. That case was decided on the footing that the consumer and the Western U.P. Electric Power and Supply Co. Ltd. belonged to the same class, and the Board charged higher rates from the distributing Company than the rate charged from the third respondent in that case. The Court observed in that cases :

> " ... the notification and the Government's direction to the Board therein results in clear discrimination. If the Board were to supply energy directly to the 3rd respondent, it has to do so at rates lower than the rates at which electricity is supplied by it to the petitioner company. The petitioner company being thus charged at higher rates from its other consumers with the result that the 3rd respondent would get energy at substantially lower rates than other consumers including other industrial establishments in the area. The notification thus results in discrimination between the 3rd respondent on the one hand and the other consumers on the other as also between the 3rd respondent and the petitioner company."

The first contention was, therefore, rightly negatived by the High Court.

10. By the amendment made by U.P. Act 30 of 1961, electrical energy may be supplied by the State Government or the State Electricity Board within the same area in respect of which a licence is granted only if the State Government deems such supply "necessary in public interest". The High Court observed that "the State Government was the sole Judge of the question whether direct supply of energy to Hind Lamps was or was not in the public interest. The test is of a subjective nature, no objective test being contemplated. Thus, it is not open to this Court to examine whether it was necessary in the public interest. The subjective opinion of the Government is final in the matter, and the same is not justiciable or subject to judicial scrutiny as to the sufficiency of the grounds on which the State Government has formed its opinion. In other words, the Legislature has left it to the sole discretion of the State Government to decide whether a direct supply of energy was in the public interest."

11. We are unable to agree with that view. By Section 3(2)(e) as amended by the U.P. Act 30 of 1961, the Government is authorised to supply energy to consumers

within the area of the licensee in certain conditions: exercise of the power is conditioned by the Government deeming it necessary in public interest to make such supply. If challenged, the Government must show that exercise of the power was necessary in public interest. The Court is thereby not intended to sit in appeal over the satisfaction of the Government. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are

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fulfilled. Normally a licensee of electrical energy, though he has no monopoly, is the person through whom electrical energy would be distributed within the area of supply, since the licensee has to lay down electric supply-lines for transmission of energy and to maintain its establishment. An inroad may be made in that right in the conditions which are statutorily prescribed. In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review.

12. But the decision of the High Court must still be maintained. The order issued by the Government recited:

> "The Governor is satisfied that it is necessary in the public interest for the State Electricity Board to make the supply of electricity direct to the industry (Hind Lamps Private Ltd.) and is, therefore, pleased to order in exercise of the powers vested in him under Section 3(*2*)(*e*)(*ii*) of the Indian Electricity Act, 1910 (Act 9 of 1910) as amended by the Indian Electricity (Uttar Pradesh *Sanshodhan*) *Adhiniyam*, 1961 (U.P. Act 30 of 1961) that the U.P. State Electricity Board make the supply of electricity direct to the Hind Lamps Ltd., Shikohabad."

13. There is ample evidence on the record to prove that uninterrupted supply of electrical energy to Hind Lamps was necessary in public interest, and the Company was unable to ensure it. The only averment made in the petition filed by the Company before the High Court was that "the giving of the supply to Hind Lamps (Private) Ltd. could not be said to be in public interest as required by Section 3(2)(*e*)(*ii*) of the Indian Electricity Act, 1910, as amended by Indian Electricity (U.P. Amendment) Act, 30 of 1961". No particulars were furnished in the petition. In the affidavit filed on behalf of the State Electricity Board it was affirmed that Hind Lamps was engaged in the manufacture of electric bulbs, fluorescent tubes, etc. and the process required uninterrupted supply; that it was one of the major industries of the State and was the only industry of its kind in the State; that as a result of the defective supply by the Company, Hind Lamps felt dissatisfied and informed the Government that if the supply position was not improved it would be forced to shift its factory from the State to some other State; that the industry gave employment to a number of people in the State and saved a large amount of foreign exchange and on that account the State Government was keen to give it fair and due protection that it deserved; that the total supply of electricity to the Company was 1700 K.W. and even if the entire supply under the agreement was made available by the Company to Hind Lamps it would fall short of its requirements. It was, therefore, in public interest that direct supply of energy should be made available to Hind Lamps. An affidavit containing similar averments was also filed on behalf of the State of Uttar Pradesh.

14. There is no evidence on behalf of the Company to the contrary. For maintaining effective working of a large industry which gave scope for employment to the local population and earned foreign exchange, if it was necessary to give direct supply of electrical energy to Hind Lamps, the order to the Electricity Board to make direct

supply of electrical energy to Hind Lamps was unquestionably in public interest within the meaning of Section 3(2)(*e*)(*ii*) of the Act.

15. There is no substance in the contention that by the issue of the order, dated December 26, 1961, there was compulsory acquisition of the property of the Company without providing for compensation. By the grant of a

licence under Act 9 of 1910, no monopoly was created in favour of the Company. The statute expressly reserves the right of the State to authorise supply of electrical energy through another licensee in the same area or to a consumer directly through the State Electricity Board. Assuming that the right to supply electrical energy is property (on that question we express no opinion), we are of the view that there is no infringement of the guarantee under Article 31(2) of the Constitution. Clause (2) of Article 31 as amended by the Constitution (Fourth Amendment) Act, 1955, insofar as it is material, provides:

> "No property shall be compulsorily acquired ... save for a public purpose and save by authority of a law which provides for compensation for the property so acquired ... and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; ...."

Clause (2-A) in substance defines compulsory acquisition or requisitioning of property within the meaning of clause (2). It provides:

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

By clause (2-A) there is no compulsory acquisition or requisitioning of property, unless ownership or right to possession of the property stands transferred to the State or a corporation owned or controlled by the State. By the order granting direct supply or electrical energy ownership of property or right to possession of property was not transferred to the State or to a corporation owned or controlled by the State, and on that limited ground it must be held that Article 31(2) has no application. The Company may, it may be assumed, as a result of direct supply of electrical energy to Hind Lamps, suffer loss; but Article 31(2) does not guarantee protection against that loss.

16. The Company was afforded sufficient opportunity to make its representation before and after the impugned order was passed. Hind Lamps had submitted several representations to the Government of U.P. regarding inadequate and irregular supply of electrical energy. The Company was informed about the complaints made by Hind Lamps. Meetings were held in which certain steps to be taken by the Company to make the supply regular were agreed upon, but they were not carried out, presumably because the Company had not the requisite equipment for that purpose. The Company was asked to supply electrical energy as released in favour of Hind Lamps; it failed to do so. Representations made by the Company, after the order was passed, requesting that the order, dated December 26, 1961, be withdrawn, were also considered by the Government and rejected. Adequate opportunity of making a representation was afforded to the Company to satisfy the State Government that it was not in the public interest to supply electrical energy directly to Hind Lamps.

17. The appeal fails and is dismissed with costs.

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[1] AIR 1968 SC 1099

ANNEXURE-B

(1974) 1 Supreme Court Cases 19 : 1974 Supreme Court Cases (L&S) 49

(From Jammu & Kashmir High Court)

(BEFORE A.N. RAY, C.J. AND D.G. PALEKAR, Y.V. CHANDRACHUD, P.N BHAGWATI AND V.R. KRISHNA IYER, JJ.)

STATE OF JAMMU AND KASHMIR . . Appellant;

Versus

SHRI TRILOKI NATH KHOSA AND OTHERS . . Respondents.

Civil Appeal No. 2134 of 1972, decided on September 26, 1973

Government Servants — Conditions of service — Change in — Retrospective operation — Whether operation of a service rule be deemed retrospective for reason that it applies to existing employees.

Government Servants — Conditions of service — Change in — Whether Government can alter terms and conditions of some of its employees unilaterally — Whether consent is a pre-condition for validity of rules of service.

Constitution of India — Articles 16 & 14 — Onus — Change in long standing conditions of service — Whether onus on State to justify departure from existing order and need to create classification — General rule of presumption of constitutionality of an enactment.

Constitution of India — Articles 16 & 14 — Classification in matters of promotion — Academic or technical qualification as basis — Challenge to classification, held, cannot be based on matters of policy — A matter for legislative determination.

Constitution of India — Articles 14, 32 & 226 — Pleadings — Petitioner must specifically show classification unreasonable and having no rational relation to the object — Remand if may be granted.

Constitution of India — Articles 16 & 14 — Equality in matters of employment — Classification test — Nature of — Scope & extent of judicial examination — Classification should not be arbitrary or absurd and object a pretence for imposing inequility.

Constitution of India — Articles 16 & 14 — Promotion — Educational qualifications as a basis of classification for promotion.

Constitution of India — Article 14 — Classification — Validity of — To be judged on the facts and circumstances of each case — Historical perspective and present state of affairs relevant.

Constitution of India — Articles 16 & 14 — Promotion — Direct recruits and promotees — Whether any classification based on educational qualification can be made for promotion after integration into one class — Whether such classification hit by ruling in Roshan Lal Tandon case.

Constitution of India — Article 14 — Temporary inequality produced in implementing reforms does not render the scheme unconstitutional.

Constitution of India — Articles 16 and 14 — Promotion — Educational qualification as a basis of classification for promotion within an integrated service of direct recruits and promotees — Classification between degree and diploma-holders in Engineering for purposes of promotion — Whether violative of Article 16 — J & K Engineering (Gazetted) Service Recruitment Rules, 1970 — Validity — Government servants.

Constitution of India — Article 14 — Classification — Reasonableness of — Held, relevant material always admissible to show the reasons and justification

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for the classification — Not necessary that such reasons appear on the face of the impugned rule or law — R.K. Dalmia case followed.

(Para 25)

The respondents are serving in different branches of State of Jammu & Kashmir (appellants) as Assistant Engineers by promotion from the Subordinate Engineering Services. The scale of pay admissible to the Assistant Engineers during 1960 to 1966 was Rs 300-20-500. Their conditions of services were then governed by the relevant rules of 1939, under which graduates in Civil Engineering were alone eligible for direct appointment as Assistant Engineers. Only departmental promotions could be made from amongst diploma-holders and that too if they had put in 5 years' service in the cadre of Supervisors. In 1962 and 1968 the State Government undertook two general revisions of pay scales by framing the J & K Civil Services (Revision of Pay) Rules.

Then came the J & K Engineering (Gazetted) Service Recruitment Rules, 1970 superceding the old rules on the subject. As regards promotion to the posts of Executive Engineers, and to those only, it was provided therein that only those Assistant Engineers would be eligible for promotion who possessed a bachelor's degree in the engineering or held the qualification of a.m.I.E. section A & B and who had put in at least 7 years service in the J & K Engineering (Gazetted) Service. This is the Rule impugned by the respondents who are diploma-holders. The impugned rules, according to the respondents, brought about a reduction in rank, deprived their of equal opportunity in the matter of promotion and were violative of Articles 14 and 16 of the Constitution of India. Finally, the respondents contended by their petition that it was not competent to the Government to change the service conditions unilaterally to the disadvantage of its employees so as to deprive them of their vested right of promotion by giving retrospective effect to the Rules

Held :

Per Ray, C.J.. Palekar, Chandrachud, Bhagwati and Krishna Iyer, JJ.

(i) It is wrong to characterise the operation of a service rule as restrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes undoubtedly operates on those who entered service before the framing of the Rule, but it operates in future, in the sense that it governs the future right of promotion of those who are already in service. The Rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity by extending its arms over the past.

(Para 16)

(ii) It is well settled that though employment under the Government like that under any other master may have a contractual origin, the Government servant acquires a "status" on appointment to his office. As a result, his rights and obligations are liable to be determined under statutory or constitutional authority which, for its exercise, requires no reciprocal consent. The Government can alter the terms and conditions of some of its employees unilaterally and though in modern times consensus in matters relating to public services is often attempted to be achieved, consent is not a precondition of the validity of rules of service, the contractual origin of the service notwithstanding.

(iii) Where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the Rules offend Article 14 the burden is on him to plead and prove the infirmity. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A rule cannot be struck down as discriminatory on any a priori reasoning.

(Para 18)

The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts for there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification, between degree

holders and diploma-holders. Unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16.

(Para 18)

Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality. Formal education may not always produce excellence but a classification founded on

variant educational qualifications is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the fact of it and the onus therefore cannot shift from where it originally lay.

(Para 19)

Ram Krishna Dalmia v. *Justice S.R. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279, 297 : 1959 SCJ 147, *relied on*

State of U.P. v. *Kartar Singh*, AIR 1964 SC 1135 : (1964) 6 SCR 679, 687 : (1964) 2 SCJ 666, *relied on*

G.D. Kelkar v. *Chief Controller of Imports and Exports* AIR 1967 SC 839 : (1967) 2 SCR 29, 34 : (1967) 2 SCJ 182, *relied on*

(iv) Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the stand point of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld.

(Para 20)

(v) Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. It was therefore incumbent on the respondents to plead and show that the classification of Assistant Engineers into those who hold diplomas and those who hold degrees is unreasonable and bears no rational nexus with its purported object. Omission to furnish the necessary particulars has been construed by the Supreme Court as indicating that the plea of unlawful discrimination had no basis.

(Para 21)

Katra Educational Society v. *State of U.P.*, AIR 1966 SC 1307 : (1967) 1 SCJ 5 : (1966) 3 SCR 328, 336 and 337, *relied on*

Probhudas Morarjee Rajkotia v. *Union of India*, AIR 1966 SC 1044, 1047, (1967) 1 SCJ 52. *relied on*

State of M.P. v. *Bhopal Sugar Industries*, (1964) 6 SCR 846 : AIR 1964 SC 1179 : (1964) 1 SCJ 555, *relied on*

(vi) Article 16 of the Constitution which ensures to all citizens equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in Article 14. The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals.

(Para 29)

Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class. A classification of employees can therefore be made, for first identifying and then distinguishing members of one class from those of another.

(Para 30)

Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints. classification must be truly founded on substantial differences which distinguish person grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

(Para 31)

Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation

of the basis of classification, for were such an inquiry permissible it would be open to the Court to substitute their own judgment for that of the legislature of the Rule-making authority on the need to classify or the desirability of achieving a particular object

(Para 32)

(vii) Educational qualification is a safe criterion for determining validity of a classification. If the object of the classification is to achieve administrative efficiency in Engineering Services, the classification is clearly co-related to it for higher educational qualifications are at least presumptive evidence of a higher mental equipment. Efficiency which comes in the trial of a higher mental equipment can reasonably be attempted to be achieved by restricting promotional opportunities to those possessing higher educational qualifications. This is not to suggest that administrative efficiency can be achieved only through the medium of those possesing comparatively higher educational qualifications but that is beside the point. One has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.

(Para 34)

It is relevant that the object to be achieved is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterised as arbitrary or absurd. That is the farthest that judicial scrutiny can extend. The Court is concerned with the reasonableness of the classification, not with the precise accuracy of the decision to classify nor with the question whether the classification is scientific.

(Paras 33 and 34)

Joseph Radice v. *People of State of New York*, 68 L Ed 690, 696, *referred.*

American Sugar Ref. Co. v. *Louisiana*, 45 L Ed 102, 103, *referred.*

Arkansas Natural Gas Co. v. *Railroad Commission*, 67 L Ed 705, 710, *referred.*

State of Mysore v. *Narasing Rao*, (1968) 1 SCR 407 : AIR 1968 SC 349 : (1968) 2 Lab LJ 120, *relied on*

Ganga Ram v. *Union of India*, (1970) 3 SCR 481, 488 : (1970) 1 SCC 377, *relied on*

Union of India v. *Dr (Mrs.) S.B. Kohli*, (1973) 3 SCC 592 : 1973 SCC (L&S) 136, *relied on*

(viii) One has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.

(Para 34)

(ix) All that Roshan Lal case lays down is that direct recruits and promotees lose their birth-marks on fusion into a common stream of service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Roshan Lal case is thus no authority for the proposition that if direct recruits and promotees are integrated into one class, they cannot be classified for purposes of promotion on a basis other than the one that they were drawn from different sources. In the instant case, classification rests fairly and squarely on the consideration of educational qualifications: Graduates alone shall go into the higher post, no matter whether they were appointed as Assistant Engineers directly or by promotion. The discrimination therefore is not in relation to the source of recruitment as in Roshan Lal case. The ratio of Roshan Lal case can at best be an impediment in favouring persons drawn from one source as against those drawn from another for the reason merely that they are drawn from different sources.

(Paras 45, 46 and 47)

Roshan Lal Tandon v. *Union of India*, AIR 1967 SC 1889 : (1968) 1 SCR 185 : (1968) 1 SCJ 746, *distinguished.*

Mervyn Continho v. *Collector of Customs Bombay*, AIR 1967 SC 52 : (1966) 3 SCR 600 : (1967) 1 Lab LJ 749, *distinguished.*

S.M. Pandit v. *State of Gujarat*, AIR 1972 SC 252 : (1972) Lab LJ 127 : 1972 Lab IC 155, *distinguished.*

(x) It is often imposible or at any rate inexpedient to reach and remedy all

forms of evil, wherever present. Reform must begin somewhere if it has to begin at all and therefore the administrator who has nice and complex problems to solve must be allowed the freedom to proceed tentatively, step by step.

(Para 37)

Bain Peanut Co. v. *Pinson*, 7 L Ed 482, 489 (1931), *referred.*

Miller v. *Wilson*, 59 L Ed 632, *referred.*

Kookee Consol Coke Co. v. *Taylor*, 58 L Ed 1288, 1289, *referred.*

(xi) Thus though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers be classified on the basis of educational qualifications. The Rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Articles 14 and 16 of the Constitution and must be upheld. The differences between the two classes — graduates and diploma-holders — furnish a reasonable basis for separate treatment and bear a just relation to the purpose of the impugned provision.

(Paras 50 and 34)

However, this judgment will not be construed as a charter for making minute and microcosmic classification. Excellence is, or ought to be, the goal of all good government and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants,

(Para 51)

Per Krishna Iyer & P.N. Bhagwati, JJ. (supplementing)

In this unequal world the proposition that all men are equal has working limitations, since absolute equality leads to Procrustean cruelty or sanctions indolent inefficiency. Necessarily, therefore, an imaginative and constructive modus vivendi between commonness and excellence must be forged to make the equality clauses viable.

While striking a balance between the long hunger for equal chance of the lowlier and the disturbing concern of the community for higher standards of performance, the State should not jettison the germinal principle of equality altogether. The dilema of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees.

Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straight-forward classifications plainly promoting elevant goals can have constitutional validity. To overdo classification is to undo equality .

(Paras 54, 56 and 57)

Appeal allowed. M/1734/CL

The Judgments of the Court were delivered by

Y.V. CHANDRACHUD, J. (*for himself, Ray, C.J., Palekar, Chandrachud, Bhagwati and Krishna Iyer, JJ.*)— If persons drawn from different sources are integrated into one class, can they be classified for purposes of promotion on the basis of their educational qualifications? That is the issue for consideration before us.

2. Respondents, who are Diploma Holders in Engineering, filed in the High Court of Jammu and Kashmir a petition under Article 226 of the Constitution to challenge the validity of certain Service Rules framed by the Government of Jammu and Kashmir. A learned Single Judge

dismissed the petition but in appeal a Division Bench of the High Court took the view that the impugned rules were violative of Articles 14 and 16 of the Constitution. The correctness of that view is challenged by the State of Jammu and Kashmir in this appeal by special leave.

3. Respondents, who are serving in different branches of the Engineering Service of the appellants, were appointed as Assistant Engineers between 1960 and 1966 by

promotion from the Subordinate Engineering Service. Their conditions of service were then governed by the Rules published under Order No. 1328-C of 1939. Those rules, to the extent material, read thus:

"The following rules prescribing the procedure relating to recruitment to the gazetted services are sanctioned.

(3) Special qualifications — Under Rule 18 of the Kashmir Civil Services Rules (General), the following special qualifications are prescribed in the case of candidates for direct recruitment or recruitment by transfer, as the case may be, to the services mentioned below: -

* * *

KASHMIR ENGINEERING SERVICE

Category 2 of Class II	(Assistant Engineer)	Direct	Degree in Civil Engineering of any recognised University
		By transfer	(*i*) Degree or diploma in Civil Engineering of any recognised University or Upper Subordinates Diploma of any recognised College of Engineering and (*ii*) Service as a Supervisor for a period of not less than 5 years on duty
Class III	(Ground Engineer)	Direct	Certificate of Ground Engineering prescribed by the Government of India.

KASHMIR ELECTRICAL SERVICE

Category 2 of Class II	(Assistant Electrical Engineer)	Direct	(*i*) Degree in Electrical Engineering of any recognised University, and (*ii*) Practical training in an Electrical Power Station.

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		By transfer	(*i*) Degree or Diploma in Electrical Engineering of any recognised University and (*ii*) Practical experience in an Electric Power Station."

4. The Rules further provided that appointments by transfer (that is, by promotion) to the cadre of Divisional Engineers (now known as Executive Engineers) could be made only from the cadre of Assistant Engineers. Promotions to the cadre of Assistant Engineers could, in turn, be made only from the cadre of Supervisors in the Subordinate Service. Recruitment by transfer was to be made "on the basis of merit, ability and the previous record of the candidates, seniority being considered only in case of equality of merit, ability and excellence of record". The scale of pay admissible to the Assistant Engineers was 300 — 20 — 500.

5. In 1962, the appellants undertook a general revision of pay scales and framed "Jammu and Kashmir Civil Services (Revised Pay) Rules", which were gazetted on August 6, 1962. Rule 12 divided the Assistant Engineers into two categories, datewise. Those appointed prior to August 1, 1960 were placed in Grade I while those appointed subsequently were placed in Grade II, regardless of whether appointments to the posts of Assistant Engineers were made directly or by promotion and whether the incumbents held a degree or a diploma. Those in Grade I were put in the pay scale of 300 — 700 while those in Grade II were put in the scale of 250 — 600. Officers in Grade II were entitled to go into Grade I after completing two years' service, subject to the availability of vacancies.

6. A further revision of pay scales was effected under the "Jammu and Kashmir Civil Services (Revised Pay) Rules, 1968" which were gazetted on February 27, 1968. Under Rule 10 (IIB)(*i*), Assistant Engineers were granted a new pay scale of Rs 300 — 30 — 540 — EB — 35 — 610 — QB/ 35 — 750, but it was provided that the "QB at Rs 610 will not be crossed by Assistant Engineers with Diploma Course". This rule was challenged by the respondents insofar as it denied to them an opportunity to cross the qualification bar.

7. Then came the "Jammu and Kashmir Engineering (Gazetted) Service Recruitment Rules, 1970", gazetted on October 12, 1970. These rules provide for appointments to the gazetted posts in various branches of the Engineering Service of the appellants and supersede the old rules on the subject. By Rule 3(*f*) "promotion" is defined to mean promotion from one class, category or grade to another class, category or grade on the basis of merit and efficiency, seniority being considered

only when merit was equal. Under the Schedule annexed to these Rules, recruitment to the cadre of Executive Engineers and above was to made only by promotion. But as regards promotion to the posts of Executive Engineers, and to those only, it was provided that only those Assistant Engineers would be eligible for promotion who possessed a bachelor's degree in engineering or held the qualification of a.m.I.E. (Section A & B) and who had put in at least 7 years service in the J & K Engineering (Gazetted) Service. This is the second of the two Rules impugned in this appeal.

8. The case of the respondents as disclosed in their petition was that under the Rules of 1939, Assistant Engineers were entitled to be promoted to the higer cadre on the basis of their merit and record and no distinction was made between degree-holders and diploma-holders for the purposes of such promotion. The discrimination made by the impugned rules between degree-holders and diploma-holders was arbitrary and capricious because academic or technical qualifications could be germane only at the time of recruitment. For purposes of promotion, efficiency and experience alone must count. Respondents further contended that once the Government appointed candidates with different academic or technical qualifications to the same cadre, having the same pay scale and similar duties, such candidates would form one

class and they cannot be further classified for purposes of promotion on the basis of their educational qualifications. The impugned Rules, according to the respondents, brought about a reduction in rank, deprived them of equal opportunity in the matter of promotion and were violative of Articles 14 and 16 of the Constitution of India. Finally, the respondents contended by their petition that it was not competent to the Government to change the service conditions unilaterally to the disadvantage of its employees so as to deprive them of their vested right of promotion by giving retrospective effect to the Rules.

9. The appellants, by their counter affidavit, traversed these averments thus: It was within the competence of the Government to grant a higher pay scale to persons with higher educational qualifications. Under the Rules of 1968 a higher slab of pay was sanctioned for Assistant Engineers with higher educational qualifications and the qualification bar was imposed so as to exclude diploma-holders, with a view to ensuring administrative efficiency in the Engineering service. Under the Rules of 1970, the Governor had laid down the method of recruitment and had prescribed qualifications for appointment to various categories of posts in the engineering department keeping in view the nature of duties and responsibilities attached to those posts. Classification, for purposes of promotion, on the basis of educational qualifications has an intelligible differentia and was therefore not violative of the constitutional provisions of equality. Lastly, the appellants disputed that the application of the Rules to existing employees made the Rules "retrospective" in any sense.

10. The learned Single Judge who heard the petition rejected the respondents' contentions but that judgment was reversed in appeal by a Division Bench of the High Court. Briefly, the Division Bench held

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that though it was open to the Government to make a reasonable classification of its employees, where the employees were grouped together and integrated into one unit without reference to their qualifications, they formed a single class in spite of initial disparity in behalf of their educational qualifications and no discrimination could thereafter be made between them on the basis of such qualifications; that the discrimination made under the Rules of 1968 between diploma-holders and degree-holders was unconstitutional and that having prescribed a diploma or degree in engineering with practical experience as a minimum qualification for entry into service, it was not open to the Government to prescribe higher educational qualifications for promotion from the cadre of Assistant Engineers to that of Executive Engineers. The main judgment was delivered by Mufti Bahauddin J. who confined his view to the vice attaching to the Rules by reason of their retrospectivity. The learned Chief Justice, by a concurring judgment, struck down the Rules for all time. They were, according to him, bad insofar as they applied to existing employees and would be bad if applied to those who may join the cadre in future.

11. The learned Attorney-General, who appears on behalf of the appellants, contends that it is always open to the Government to classify its employees so long as the classification is reasonable and has nexus with the object thereof: that a classification cannot be held to infringe the equality clause unless it is actually and palpably arbitrary; that if there are different sources of recruitment, the employees recruited from different sources can either be allowed different conditions of service and so continue to belong to different classes or the Government may integrate them into one class: that once the employees are integrated into one class, they cannot, for

purposes of promotion, be classified again into two different classes on the basis of differences existing at the time of recruitment but, after integration into one class, the employees can, in the matter of promotion, be classified into different classes on the basis of any intelligible differentia as, for example, educational qualifications, which has a nexus with the object of classification, namely efficiency in the post of promotion.

12. Mr Setalvad who led for the respondents contended that neither at the time of appointment to the post of Assistant Engineers nor for the purposes of promotion to the post of Divisional Engineers (now called "Executive Engineers"), was any distinction made by the Rules of 1939 between diploma-holders and degree-holders; that rules governing condition of service could not be changed retrospectively to classify employees on the basis of educational qualifications so as to deny promotion to the diploma-holders; that there was in the instant case no nexus between the classification and the object sought to be achieved thereby and in fact the classification defeated that object; that having regard to the fact that from 1939 to 1970 holders of diplomas and degrees were treated alike, the onus lay heavily on the appellants to prove the necessity for differentiating between the two, which onus was not discharged of the record of the case; and that, if the object of the classification was the attainment of efficiency, the Government could

have achieved that object, and perhaps in a better measure, by making talent, experience and efficiency as criteria for determining promotional opportunities.

13. Mr Gupte, appearing for Respondents 18 to 29, took the stand that once there is a class of equals no discrimination can be made among them on any ground whatsoever. Therefore, if chances of promotion are denied to a few within a class of equals, there is an inherent vice attaching to the classification and no question of the reasonableness of the new yardstick can possibly arise. In the alternative, Mr Gupte contended, possession of a degree qualification was not a reasonable basis for segregating degree-holders and diploma-holders into water tight compartments. The impugned Rule of 1970 was made in the awareness that only some Assistant Engineers were graduates and the facts of the case disclosed no reasonable basis for differentiation between them and the diploma-holders in regard to promotion as Executive Engineers. Finally, the learned counsel contended that the unreasonableness of the classification was patent from the fact that a degree qualification was prescribed as a pre-condition for promotion to the post of Executive Engineers but not to higher posts. There was neither rhyme nor reason in a rule which permitted a diploma-holder to occupy the post of a Superintending Engineer or the highest post of a Chief Engineer but barred him from being considered for a lower post in the cadre of Executive Engineer.

14. Mr Garg, who appears for one of the respondents, laid particular stress on the question of onus. He contended that the heavy onus which lay on the appellants to justify the classification remained wholly undischarged in the context, especially, of the background that between 1939 and 1970 holders of degrees and diplomas were treated alike in the matter of promotion from the post of an Assistant Engineer to that of an Executive Engineer. A system which had stood the test of time, could not, reasonably, be proclaimed unworkable or inefficacious unless the entire context and requirements of the system had undergone some significant change. Of that, says the counsel, there is just no evidence.

15. Most of the arguments advanced for the respondents have been considered and rejected by this Court in some case or the other but before coming to that, a few points may be kept out of way.

16. An argument which found favour with Mufti Bahauddin J., one of the learned fudges of the Letters Patent Bench of the High Court, and which was repeated before us is that the "retrospective" application of the impugned Rules is violative of Articles 14 and 16 of the Constitution. It is difficult to appreciate this argument and impossible to accept it. It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, undoubtedly operates on those who entered service before the framing of the Rule but it operates *in future*, in the sense that it governs the future right of promotion of those who are already in service. The impugned Rules do not recall a promotion already made or reduce a pay scale already

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granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment. Whether a classification founded on such a consideration suffers from a discriminatory vice is another matter which we will presently consider but surely, the Rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity be extending its arms over the past. If rules governing conditions of service cannot ever operate to the prejudice of those who are already in service, the age of superanuation should have remained immutable and schemes of compulsory retirement in public interest ought to have foundered on the rock of retroactivity. But such is not the implication of Service Rules nor is it their true description to say that because they affect existing employees they are retrospective. It is well settled that though employment under the Government like that under any other master may have a contractual origin, the Government servant acquires a "status" on appointment to his office. As a result, his rights and obligations are liable to be determined under statutory or constitutional authority which, for its exercise, requires no reciprocal consent. The Government can alter the terms and conditions of its employees unilaterally and though in modern times consensus in matters relating to public services is often attempted to be achieved, consent is not a pre-condition of the validity of rules of service, the contractual origin of the service notwithstanding.

17. The argument on the question of onus is largely founded on the context of facts obtaining in the case. It is urged that for purposes of promotion to higher posts diploma-holders were treated on par with degree-holders from 1939 to 1970 and therefore, the onus must be on the appellants to prove facts and circumstances which necessitated a radical departure from the old and established order. If diploma-holders could competently fill higher posts for over three decades, reasons leading to the Rule which renders them wholly ineligible even from being considered for promotion to the post of Executive Engineer ought to be established by the appellants and, it is urged, no evidence is disclosed in support of such reasons.

18. This submission is erroneous in its formulation of a legal proposition governing onus of proof and it is unjustified in the charge that the record discloses no evidence to show the necessity of the new Rule. There is always a presumption in favour of the constitutionality of an enactment and the burden upon him who attacks it to show that there has been a clear transgression of the constitutional principles.[1] A rule cannot be struck down as discriminatory on any *a priori* reasoning. "That where a party seeks to

impeach the validity of a rule made by a competent authority on the ground that the Rules offend Act. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration." The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce

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"cogent and convincing evidence" to prove those facts for "there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification".[2] In *G.D. Kelkar* v. *Chief Controller of Imports and Exports*[3] Subba Rao, C.J., speaking for the Court has cited three other decisions of the Court in support of the proposition that "unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution".

19. Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality. Formal education may not always produce excellence but a classification founded on variant educational qualifications is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the face of it and the onus therefore cannot shift from where it originally lay.

20. Respondents have assailed the classification in the clearest terms but their challenge is purely doctrinaire. "Academic or technical qualification can be germane only at the time of initial recruitment; for purposes of promotion, efficiency and experience alone must count" — this is the content of their challenge. The challenge, at best, reflects the respondent's opinion on promotional opportunities in public services and one may assume that if the roles were reversed, respondents would be interested in implementing their point of view. But we cannot sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents is not to be preferred. Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld.

21. Our reason for saying this is to emphasize that the respondents ought to have furnished particulars as to why, according to them, the classification between diploma-holders and degree-holders is not based on a rational consideration having nexus with the object sought to be achieved. In order to establish that the protection of the equal opportunity clause has been denied to them, it is not enough for the respondents to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with others similarly circumstanced. Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. It was therefore incumbent on the respondents to plead and show that the classification of Assistant Engineers into those who hold diplomas and those who

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hold degrees is unreasonable and bears no rational nexus with its purported object. Rather than do this, the respondents contented themselves by propounding an

abstract theory that educational qualifications are germane at the stage of initial recruitment only. Omission to furnish the necessary particulars was construed by this Court in two cases as indicating that the plea of unlawful discrimination had no basis.[4] Such an infirmity in pleadings led this Court in *State of Madhya Pradesh* v. *Bhopal Sugar Industries Ltd.*[5] to remand the matter to the High Court in order to enable the petitioner therein to amend its petition.

22. Mr Garg asked for a remand so that the respondents could have an opportunity to plead the necessary facts but we declined to do so as we did not propose to allow the appeal on the narrow ground that the respondents' plea of discrimination was inadequate. Nor indeed did the learned Attorney-General press for a decision on any such ground. We have heard the learned counsel fully on the merits of the matter, especially as the question of onus was not presented before the High Court in the form in which it was presented before us. We will now advert to the merits of the other contentions.

23. The proviso to Rule 10 (IIB)(*i*) of the 1968 Rules under which diploma-holders were debarred from crossing the qualification bar placed at Rs 610 need not detain us because the learned Attorney-General states that the bar has since been removed with retrospective effect. The 1968 scale of pay will therefore apply equally to the degree-holders and diploma-holders in the cadre of Assistant Engineers, with effect from the date on which the 1968 Rules came into force. Respondents, accordingly, will be eligible to reach the ceiling of the scale regardless of the fact that they held a diploma and not a degree in Engineering.

24. The main question for decision arises out of the challenge to the Rules of 1970 under which diploma-holders in the cadre of Assistant Engineers are not entitled even to be considered for promotion to the next higher cadre of Executive Engineers. Under the Schedule to those Rules, recruitment to the cadre of executive engineers can be made only by promotion from amongst Assistant Engineers. To that is added the impugned rider that only those Assistant Engineers will be eligible for promotion who possess a bachelor's degree in Engineering or who hold the qualification of A.M.I.E. (Section A and B) and who have put in at least seven years' service. Diploma-holders in Engineering, like the respondents, are thus rendered ineligible for promotion as Executive Engineers.

25. We have observed earlier while dealing with the question of onus that there was no justification for the respondents' plea that the record does not disclose the necessity for the impugned Rule of 1970.

We will draw attention to the relevant material, which is always admissible to show the reason and the justification for the classification. Such reasons need not appear on the face of the Rule or law which effects the classification.[6]

26. The seniority list of Assistant Engineers as of January 1, 1971 discloses a significant phenomenon. The list comprises 78 Assistant Engineers and omitting the very first amongst them who was only a matriculate, the remaining 77 were appointed as Assistant Engineers between October 19, 1960 and December 24, 1970. Prior to August 6, 1962 when the Rules of 1962 came into force, only 7 Assistant Engineers held an Engineering Degree as against 13 who held a diploma. The position on February 27, 1968 when the Rules of 1968 came into force was that the number of degree-holders had increased to 38 while that of diploma-holders went up from 13 to 21 only. On October 12, 1970 when the impugned Rules now under consideration

came into force, there were 48 degree-holders and 26 diploma-holders in the cadre of Assistant Engineers, excluding the last one at Item 78 who was promoted after the promulgation of the Rules but who is also a degree-holder. We have advisedly taken no note of two instances in one of which the incumbent was not appointed as a regular Assistant Engineer and the other where, though appointed, the person concerned did not join the Department.

27. It is transparent from this analysis that till about 1968 there was a dearth of Engineering graduates. In 1962, the ratio between graduates and diploma-holders was 1: 2. In 1968 it became almost 2: 1 and in 1970 the position remained more or less unchanged. The appellants were entitled to take into account this spurt in the availability of person with higher educational qualifications for manning the next higher post of promotion. In fact, it may not be overlooked, that even under the Recruitment Rules of 1939 graduates in Civil Engineering were alone eligible for direct appointment as Assistant Engineers in the Kashmir Engineering Service. Only departmental promotions could be made from amongst diploma-holders and that too if they had put in 5 years' service in the cadre of Supervisors. There is therefore no substance in the contention that the record sheds no light on why a change was thought necessary in a system that had stood the test of time. In 1968 itself when there was a proliferation in the ranks of graduates, an attempt was made which was later rectified, to offer a higher incentive to graduates by the placement of a qualification bar. We are not called upon to adjudge its validity for reasons already mentioned but it is obvious that the impact of the changing pattern had to receive its due recognition.

28. But then Mr Setalvad contends that if the nature of duties and responsibilities of the post of Executive Engineer has undergone no significant change, there would be no justification for restricting the field of choice to graduates. Talent and efficiency could be found in the

ranks of diploma-holders in an equal measure and it is urged that rather than display a mere fancy for graduates and restrict its choice, the State should have, in the interest of an efficient service, laid the promotional chances open to both the ranks on the basis of talent, experience and efficiency.

29. This argument, as presented, is attractive but it assumes in the Court a right of scrutiny somewhat wider than is generally recognized. Article 16 of the Constitution which ensures to all citizens equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in Article 14. The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

30. Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class. A classification of employees can therefore be made for first identifying and then distinguishing members of one class from those of another.

31. Classification, however, is fraught with the danger that it may produce artificial

inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

32. Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permisible it would be open to the Courts to substitute their own judgment for that of the legislature or the Rule-making authority on the need to classify or the desirability of achieving a particular object.

33. Judged from this point of view, it seems to us impossible to accept the respondents' submission that the classification of Assistant Engineers into degree-holders and diploma-holders rests on any unreal or unreasonable basis. The classification, according to the appellants, was made with a view to achieving administrative efficiency in the Engineering services. If this be the object, the classification is clearly co-related to it, for higher educational qualifications are at least presump-

tive evidence of a higher mental equipment. This is not to suggest that administrative efficiency can be achieved only through the medium of those possessing comparatively higher educational qualifications but that is beside the point. What is relevant is that the object to be achieved here is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterized as arbitrary or absurd. That is the farthest that judicial scrutiny can extend.

34. On the fact of the case, classification on the basis of educational qualifications made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstance and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. The provision in the 1939 Rules restricting direct recruitment of Assistant Engineers to Engineering graduates, the dearth of graduates in times past and their copious flow in times present are all matters which can legitimately enter the judgment of the Rule-making authority. In the light of these facts, that judgment cannot be assailed as capricious or fanciful. Efficiency which comes in the trail of higher mental equipment can reasonably be attempted to be achieved by restricting promotional opportunities to those possessing higher educational qualifications. And we are concerned with the reasonableness of the classification, not with the precise accuracy of the decision to classify nor with the question whether the classification is scientific. Such tests have long since been discarded. In fact American decisions have gone as far as saying that classification would offend against the 14th Amendment of the American Constitution only if it is "purely arbitrary, oppressive or capricious"[7] and the inequality produced in order to encounter the challenge of the Constitution must be "actually and palpably unreasonably and arbitrary".[8] We need not go that far as the differences between the two classes — graduates and diploma-holders — furnish a reasonable basis for separate treatment and bear a just relation to the purpose of the impugned provision.

35. . Educational qualifications have been recognized by this Court as a safe criterion for determining the validity of classification. In *State of Mysore* v. *P. Narasing*

Rao[9] where the cadre of Tracers was reorganized into two, one consisting of matriculate Tracers with a higher scale of pay and the other of non-matriculates in a lower scale, it was held that Articles 14 and 16 do not exclude the laying down of selective tests nor do they preclude the Government from laying down qualifications for the post in question. Therefore, it was open to the Government to give preference to candidates having higher educational qualifications. In *Ganga Ram* v. *Union of India*[10] it was observed that "The State which encounters diverse problems arising from a variety of circumstances is entitled to lay down conditions of efficiency

and other qualifications for securing the best service for being eligible for promotion in its different departments." In *Union of India* v. *Dr (Mrs.) S.B. Kohli*[11] a Central Health Service Rule requiring that a professor in Orthopaedics must have a post-graduate degree in the particular speciality was upheld on the ground that the classification made on the basis of, such a requirement was not "without reference to the objectives sought to be achieved and there can be no question of discrimination". The argument that a degree qualification was not the only criterion of suitability was answered laconically as "strange".

36. Under the Schedule to the 1970 Rules a degree qualification is prescribed as a condition for promotion to the post of an Executive Engineer from the cadre of Assistant Engineers. But there is no rule requiring a similar qualification for promotion to the post of Superintending Engineer which is next higher to the post of Executive Engineer or for promotion to the apex post of the Chief Engineer. The Schedule provides that recruitment to these two categories of posts shall be made by promotion from amongst persons in cadres next below, who possess experience for a stated number of years. This circumstance is pressed into service by the respondents in support of their plea that the whole basis of classification is unreal and that the true object could not be the attainment of higher administrative efficiency. If it was thought necessary to prescribe a degree qualification in order to achieve efficiency in the post of Executive Engineers, *ex hopethesi* it should have been equally imperative, if not more to provide for a similar condition in regard to promotion to higher posts — thus runs the argument.

37. This argument means that any service reform must embrace every hierarchy or none at all. It is often impossible or at any rate inexpedient to reach and remedy all forms of evil, wherever present. Reform must begin somewhere if it has to begin at all and therefore, the administrator who has nice and complex problems to solve must be allowed the freedom to proceed tentatively, step by step. Justice Holmes gave in a similar context a significant warning that: "We must remember that the machinery of Government would not work if it were not allowed a little play in its joints."[12]

38. The seniority list of January 1, 1971 shows how very unreal the argument is that the qualification rule not having been extended to the higher echelons of service, it can bear no nexus with the attainment of administrative efficiency in a comparatively lower hierarchy of Assistant. Engineers. On January 1, 1971 which was soon after the publication of the 1970 Rules, there were 6 persons in the cadre of Superintending Engineers all of whom, except one, are graduates. The one at the top is an L.E.E. but he entered service in 1939 and must not be quite on the verge of retirement. There is therefore but slender chance that a non-graduate could climb into the top position of a Chief Engineer, which post can, under the Rules of 1970, be filled only by promotion from amongst Superintending Engineers. Pro

motion to the cadre of Superintending Engineers can he made only from amongst Executive Engineers and the seniority list shows that out of 22 Executive Engineers, 19 are graduates and only 3 are diploma-holders. Out of the 19, the first 15 according to seniority are all graduates so that the chances of a diploma-holder being promoted as a Superintending Engineer are fairly remote. With the new Rules coming into force, all Executive Engineers will, after October 12, 1970, be appointed from amongst graduates in the rank of Assistant Engineers and therefore the cadre of Executive Engineers will soon consist of graduates exclusively. The Governor was entitled to give weight to these practical considerations and of restrict the operation of the impugned Rule to cases where their application was imperative. Dealing with practical exigencies, a rule-making authority may be guided by the realities of life, just as the legislature, while making a classification "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest.[13] If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied[14].

39. Only one point remains to be considered and it requires a close attention as it claims to have the authority of leading decisions rendered by this Court. We have relegated this point to a rear position because it was necessary, for a proper understanding thereof, to clear the ground of various other doubts dealt with above. A neat point can now be framed and discussed.

40. If persons recruited from different sources are integrated into one class, they cannot thereafter be classified so as to permit in favour of some of them a preferential treatment in relation to others. That is the argument before us which, applied to be facts of the case, means in plain terms this: Direct recruits and promotees having been appointed as Assistant Engineers on equal terms, they constitute an integrated class and for purposes of promotion they cannot be classified on the basis of educational qualifications.

41. We have drawn attention to three decisions of this Court (*Narasing Rao case, Ganga Ram case* and Dr (*Mrs*) *Kohli case*) in which classification on the basis of educational qualifications was upheld. In *Narasing Rao case*, Tracers doing equal work were classified into two grades having unequal pay, the basis of the classification being higher educational qualifications. In Dr (*Mrs*) *Kohli case*, as refined a classification as between an F.R.C.S. in general surgery and an F.R.C.S. in Orthopaedics was upheld in relation to appointment to the post of a Professor of Orthopaedics. But these cases are sought to be distinguished on the authority of the decision of this Court in *Roshan Lal Tandon* v. *Union of 1ndia*[15]. That case is

crowded with facts and requires a careful consideration for its proper understanding.

42. Vacancies in Grade 'D' of Train Examiners were filled in *Roshan Lal case* by (*a*) direct recruits i.e. apprentice train examiners and (*b*) promotees from the class of skilled artisans, in the ratio of 50 : 50. Promotion from Grade 'D' to Grade 'C' was to be made on the basis of seniority-cum-suitability. In October 1965 the Railway Board issued a notification providing that 80% of the vacancies in Grade 'C' would be filled up from the class of apprentice train examiners recruited on and after April 1, 1966

and the remaining 20% from amongst the train examiners in Grade 'D'. The notification further provided that apprentice train examiners who were absorbed in Grade 'D' before April 1966 would be accommodated en bloc in Grade 'C' in the 80% of the vacancies, without undergoing any selection. With regard to 20% of the remaining vacancies it was provided that the promotion would be on the basis of selection and not on the basis of seniority-cum-suitability. The petitioner, Roshan Lal Tandon, who had entered Railway service in 1954 as a skilled artisan and was later selected and confirmed in Grade 'D' as a train examiner, filed a writ petition in this Court challenging under Articles 14 and 16 of the Constitution, that part of the notification which gave favourable treatment to apprentice train examiners who had already been absorbed in Grade 'D'. His case was that he, along with direct recruits, formed one class in Grade 'D' and according to the conditions of service applicable to them, seniority was to be reckoned from the date of appointment as train examiners in Grade 'D' and promotion to Grade 'C' was to be on the basis of seniority-cum-suitability, irrespective of the source of recruitment. His contention was that since he was appointed to Grade 'D' after undergoing the necessary selection and training and since he was integrated with the others who were appointed to Grade 'D' by direct recruitment, no differentiation could be made as between him and the direct recruits in the matter of promotion to Grade 'C'.

43. The Constitutional objection taken by Roshan Lal was upheld by this Court with these observations:

> "At the time when the petitioner and the direct recruits were appointed to Grade 'D', there was one class in Grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'. In the present case, it is not disputed on behalf of the first respondent that before the impugned notification was issued there was only one rule of promotion for both the departmental promotees and the direct recruits and that rule was seniority-cum-suitability, and there was

no rule of promotion separately made for application to the direct recruits. As a consequence of the impugned notification a discriminatory treatment is made in favour of the existing Apprentice Train Examiners who have already been absorbed in Grade 'D' by March 31, 1966, because the notification provides that this group of Apprentice Train Examiners should first be accommodated en bloc in Grade 'C' up to 80% of vacancies reserved for them without undergoing any selection. As regards the 20 per cent of the vacancies made available for the category of Train Examiners to which the petitioner belongs the basis of recruitment was selection on merit and the previous test of seniority-cum-suitability was abandoned. In our opinion, the present case falls within the principle of the recent decision of this Court in *Mervyn* v. *Collector* (1966) 3 SCR 600."

44. The key words of the judgment are: "The recruits from both the *sources* to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one *source* as against the recruits from the other *source* in the matter of promotion to Grade 'C', (emphasis supplied). By this was

meant that in the matter of promotional opportunities to Grade 'C', no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice train examiners who were recruited directly to Grade 'D' as train examiners formed one common class with skilled artisans who were promoted to Grade 'D' as train examiners, no favoured treatment could be given to the former merely because they were directly recruited as train examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning of the observation extracted above and no more than this can be read into the sentence next following: "To put it differently, once the direct recruits and promotees are absorved into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'." In terms, this was just a different way of putting what had preceded.

45. Thus, all that *Roshan Lal case* lays down is that direct recruits and promotees lose their birth-marks on fusion into a common stream of service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again.

46. *Roshan Lal case* is thus no authority for the proposition that if direct recruits and promotees are integrated into one class, they cannot be classified for purposes of promotion on a basis other than the one that they were drawn from different sources. In the instant case, classification rests fairly and squarely on the consideration of educational qualifications: Graduates alone shall go into the higher post, no matter whether they were appointed as Assistant Engineers directly or by pro-

motion. The discrimination therefore is not in relation to the source of recruitment as in *Roshan Lal case.*

47. It is relevant, though inconclusive, that the very Bench which decided *Roshan Lal case* held about a fortnight later in *Narsing Rao case* that higher educational qualifications are a relevant consideration for fixing a higher pay scale and therefore matriculate Tracers could be given a higher scale than non-matriculate Tracers, though their duties were identical. Logically, if persons' recruited to a common cadre can be classified for purposes of pay on the basis of their educational qualifications, there could be no impediment in classifying them on the same basis for purposes of promotion. The ratio of *Roshan Lal case* can at best be an impediment in favouring persons drawn from one source as against those drawn from another for the reason merely that they are drawn from different sources.

48. There is an aspect of *Roshan Lal case* which may not be ignored. The Union of India had contended by its counter-affidavit therein that the reorganization of the service was made with a view to obtaining a better and more technically trained class of train examiners which had become necessary on account of the acquisition of modern types of Rolling Stock, complicated designs of carriages and wagons and greater speed of trains under the dieselisation and electrification programmes. This contention, though mentioned in the affidavit, was not placed before the Court as is transparent from the judgment. What its impact would have been on the ultimate conclusion need not be speculated, for it is enough for understanding the true ratio of the judgment to say that the case was decided on the sole basis that persons recruited from different sources were classified according as whether they were appointed

directly or by promotion. That is why the key passage cited by us from the judgment winds up by saying that the "case falls within the principle of ... the decision ... in *Mervyn* v. *Collector*".

49. *In Mervyn Coutinho* v. *Collector of Customs, Bombay*[16], no question arose in regard to the validity of a classification based on educational qualifications. The question there was whether a rotational system for fixing seniority was discriminatory if the recruitment was partly by promotion and partly directly. It was held that there is no inherent vice in such a system if the service is composed in fixed proportion of direct recruits and promotees. The rotational system could therefore be adopted in fixing seniority in the cadre of Appraisers, to which recruitment was in actual practice made directly and by promotion in the ratio of 50: 50. But different considerations were held to arise when the same system was applied for fixing seniority in the cadre of Principal Appraisers because there was only one source from which the Principal Appraisers were drawn, namely Appraisers. The ratio of the judgment is: "The rotational system cannot ... apply when there is only one source of recruitment". This is the principle within which *Roshan Lal case* was expressed to fall. Neither the one nor the other of the two cases was concerned with the question which

arises for consideration before us. The classification of which we have to determine the validity is not made in relation to the source of recruitment. Therefore cases like *Roshan Lal, Mervyn Coutindo* and *Pandits*[17] fail in a class apart. The case last mentioned is a typical instance of that class, where directly appointed Mamlatdars were accorded a favoured treatment qua the promotee Mamlatdars in the matter of promotion to the post of Deputy Collector. Mamlatdars, whether appointed directly or by promotion, constituted one class and therefore it was held no reservation could be made in favour of the directly appointed Mamlatdars for promotion to the cadre of Deputy Collectors.

50. We are therefore of the opinion that though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The Rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Articles 14 and 16 of the Constitution and must be upheld.

51. But we hope that this judgment will not be construed as a charter for making minute and microcosmic classifications. Excellence is, or ought to be, the goal of all good governments and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants. But let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: What after all is the operational residue of equality and equal opportunity?

52. For reasons indicated, we allow the appeal but there will be no order as to costs.

V.R. KRISHNA IYER, J.(*for himself and Bhagwati, J.*)(*supplementing*)— We fully endorse what has been said by our learned Brother Chandrachud, J., but the profound depths of equal justice in public employment touched in his final para (with which we ardently agree) impel a few concurring observations of our own.

54. In this unequal world the proposition that all men are equal has working limitations, since absolute equality leads to Procrustean cruelty or sanctions indolent inefficiency. Necessarily, therefore, an imaginative and constructive *modus vivendi* between commonness and excellence must be forged to make the equality clauses viable. This pragmatism produced the judicial gloss of "classification" and "differentia", with the by-products of equality among equals and dissimilar things having to be treated differently. The social meaning of Articles 14 to

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16 is neither dull uniformity nor specious "talentism". It is a process of producing quality out of larger areas of equality extending better facilities to the latent capabilities of the lowly. It is not a methodology of substitution of pervasive and slovenly medicority for activist and intelligent — but not snobbish and uncommitted — cadres. However, if the State uses classification casuistically for salvaging status and elitism, the point of no return is reached for Articles 14 to 16 and the Court's jurisdiction awakens to deaden such manoeuvres. The soul of Article 16 is the promotion of the common man's capabilities, over-powering environmental adversities and opening up full opportunities to develop in official life without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule, wriggling out of the democratic imperative of Articles 14 and 16 by the theory of classified equality which at its worst degenerates into class domination.

55. The relevance of these abstract remarks to the present case is obvious. Engineers with diplomas are likely to be drawn from poorer families and not necessarily because they are incapable of making the "degree" grade. An opportunity for them to level up, through experience and self-study, with their more fortunate degree-holding meritocracy, is of the essence of equal opportunity for people with dragging backgrounds. If economically, and therefore educationally, handicapped men distinguish themselves, they are heroes and should be honoured and not kept humble through life on account of the original sin of inferior qualifications. Indeed, diploma holders in that Himalayan State were good enough, in the past decades, to go to the top of the ladder, as the facts of this case admittedly disclose. However, in these young days few engineering graduates in the State and few engineering colleges in the country compelled Government to recruit diploma holders and promote them to higher offices. But circumstances have changed, needs have increased, availabilities have expanded and inequalities at the educational level have been partly eliminated. And so personal (*sic* personnel) policy, with an eye on efficiency, has changed. While we agree with counsel that "chill penury" should not "repress their noble rage", still during our transitional developmental stage the sacrifice of technical proficiency at the alter of wooden equality is an unreasonable injury the State cannot afford to self-inflict. The technology of equal opportunity is to assume diffusion of talent and to afford in-service facilities, through relaxation of rules and otherwise, to the. weaker members to acquire better skills.

56. The wise and tonic words of our learned Brother, if we may say so with great deference, are however portentous. While striking a balance between the long hunger for equal chance of the lowlier and the disturbing concern of the community for higher standards of performance, the State should not jettison the germinal principle of equality altogether. The dilemma of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the

constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees. These are perhaps meta-judicial matters left to the other branches of Government, but the Court must hold the Executive within the leading strings of egalitarian constitutionalism and correct, by judicial review, episodes of subtle and shady classification grossly violative of equal justice. That is the heart of the matter. That is the note that rings through the first three fundamental rights the people have given to themselves.

57. Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality. If in this case Government had prescribed that only those degree holders who had secured over 70 per cent marks could become Chief Engineers and those with 60 per cent alone be eligible to be Superintending Engineers or that foreign degrees would be preferred we would have unhesitatingly voided it.

58. The role of classification may well recede in the long run, and the finer emphasis on broader equalities implicit in the concluding thought of the leading judgment will abide. The decision in this case should not — and does not — imply that by an undue accent on qualifications the Administration can cut back on the larger tryst of equalitarianism or may hijack the founding and fighting faith of social justice into the enemy camp of intellectual domination by an elite. The Court, in extreme cases, has to be the sentinel on the *qui-vive.*

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[1] *Ram Krishan Dalmia* v. *Justice S. R. Tendolkar* AIR 1958 SC 538 : 1959 SCR 279, 297(b) : 1959 SCJ 147

[2] *State of U. P.* v. *Kartar Singh* AIR 1964 SC 1135 : (1964) 6 SCR 679, 687 : (1964) 2 SCJ 666.

[3] AIR 1967 SC 839 : (1967) 2 SCR 29, 34 : (1967) 2 SCJ 182

[4] (a) *Katra Educational Society* v. *State of U. P.* AIR 1966 SC 1307 : (1966) 3 SCR 328, 336-37 : (1967) 1 SCJ 5.

(b) *Probhudas Morarjee Rajkotia* v. *Union of India* AIR 1966 SC 1044, 1047 : (1967) 1 SCJ 52.

[5] AIR 1964 SC 1179 : (1964) 6 SCR 846 : (1964) 1 SCJ 555

[6] *Ram Krishan Dalmia* v. *Justice S. R. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279, 307-08 : 1959 SCJ 147

[7] *Joseph Radice* v. *People of the State of New York*, 68 L. Ed. 690, 695 *American Sugar Ref. Co.* v. *Louisiana*, 45 L. Ed. 102, 103.

[8] 68 L. Ed. 690, 695; *Arkansas Natural Gas Co.* v. *Railroad Commission* 67 L. Ed. 705, 710.

[9] AIR 1968 SC 349 : (1968) 1 SCR 407 : (1968) 2 Lab LJ 120.

[10] (1970) 1 SCC 377, 382 : (1970) 3 SCR 481, 488

[11] (1973) 3 SCC 592 : 1973 SCC (L&S) 136.

[12] *Bain Peanut Co.* v. *Pinson*, 7 L.Ed. 482, 489 (1931)

[13] *Miller* v. *Wilson*, 59 L. Ed. 632.

[14] *Keokee Consol. Coke Co.* v. *Taylor* 58 L. Ed. 1288, 1289.

[15] AIR 1967 SC 1889 : (1968) 1 SCR 185 : (1968) 1 SCJ 746

[16] AIR 1967 SC 52 : (1966) 3 SCR 600 : (1967) 1 SCJ 574 : (1967) 1 LLJ 749

[17] *S. M. Pandit* v. *State of Gujarat* AIR 1972 SC 252 : (1972) 1 LLJ 127 : 1972 Lab 1 C 155

ANNEXURE-C

(1961) 3 SCR 77 : AIR 1961 SC 552

In the Supreme Court of India

(BEFORE BHUVANESHWAR PRASAD SINHA, C.J. AND S.J. IMAM, A.K. SARKAR, K. SUBBA RAO AND J.C. SHAH, JJ.)

KUNNATHAT THATEHUNNI MOOPIL NAIR, ETC. ... Petitioners;

Versus

STATE OF KERALA AND ANOTHER ... Respondents.

Petition Nos. 13 to 24, 42 and 46 to 54 of 1958, decided on December 9, 1960

Advocates who appeared in this case :

In Petitions Nos. 13-18, and 46-54 of 1958

M.C. Setalvad, Attorney-General for India; Dr Syed Mahmud, Advocate, and J.B. Dadachanji, S.N. Andley, Rameshwar Nath & P.L. Vohra, Advocates of R.N. & Co., with him, for the Petitioners;

In Petitions Nos. 19-24 of 58

C.K. Daphtary, Solicitor-General of India; Dr Syed Mahmud, Advocate, and J.B. Dadachanji, S.N. Andley, Rameshwar Nath & P.L. Vohra, Advocates of R.N. & Co., with him.

In Petition No. 42 of 58

S.N. Andley, Rameshwar Nath, J.B. Dadachanji & P.L. Vohra, Advocates of R.N. & Co.

K.V. Suryanarayana Iyer, Advocate-General of Kerala; Sardar Bahadur, Advocate with him, for the Respondents.

The Judgment of the Court was delivered by

BHUVANESHWAR PRASAD SINHA, C.J.— In this batch of 22 petitions under Article 32 of the Constitution, the petitioners impugn the constitutionality of the Travancore Cochin Land Tax Act, 15 of 1955, as amended by the Travancore-Cochin Land Tax (Amendment) Act, 10 of 1957, which hereinafter will be referred to as the Act. The Act came into force on June 21, 1955, and the Amending Act on August 6, 1957. The petitioners are owners of forest areas in certain parts of the State of Kerala, which, before the reorganisation of States, formed part of the State of Madras. The respondents to the petitions are: (*1*) the State of Kerala, and (*2*) the District Collector, Palghat.

2. These petitions are based on allegations, which are, more or less, similar, and the following allegations made in Writ Petition No. 42 of 1958 may be taken as typical and an extreme case, which was placed before us in detail to bring into bold relief the full significance and effect of the legislation impugned in these cases. The petitioner in Petition 42 of 1958 is a citizen of India, who owns forests in certain parts of Palghat Taluk in Palghat District, which was part of the State of Madras before the reorganisation of States. These forests are now in the State of Kerala. Up to the time that these forests were in the State of Madras, as it then was, the Madras Preservation of Private Forests Act, Madras Act 27 of 1949, governed these forests. Even after these areas were transferred to the State of Kerala, the said Madras Act, 27 of 1949, continued to apply to these forests. Under the said Madras Act the owners of forests, like the petitioner, could not sell, mortgage, lease or otherwise alienate any portion of their forests without the previous sanction of the District Collector; nor could they, without similar permission, cut trees or do any act likely to denude the forest or diminish its utility, as such. The District Collector, in exercise of the powers under the

Act, does not ordinarily permit the cutting of more than a small number of trees in the forest. Thus the petitioner has not the right fully to exploit the forest wealth in his forest area and has to depend upon the previous permission of the Collector. In exercise of the powers given to the Collector under the Madras Act aforesaid, the petitioner's lessee was given permission to cut certain trees in his forest, which brings to the petitioner by way of income from the forest, a sum of Rs 3100 per year. Under the Act, a tax called land tax at a flat rate of Rs 2 per acre has been imposed on the petitioner. In pursuance of the provisions of the Act, as amended as aforesaid, the District Collector of Palghat, purporting to act under the provisions of Section 5-A of the Act, issued a notice to the petitioner provisionally assessing the petitioner's forest under the said Act to a sum of fifty thousand rupees per annum and informing the petitioner that, if no representation was made within thirty days, the said provisional assessment would be confirmed and a demand notice would be issued. As there has been no survey of the area of forest land in the petitioner's possession, the District Collector has conjectured the said area to be twenty-five thousand acres. The Petitioner had made an application to the District Collector under the Madras Preservation of Private Forests Act for felling trees in an area of one thousand acres, but the Collector was pleased to grant permission to cut trees from 450 acres only in the course of five years at the rate of 90 acres a year. The petitioner has leased out that right to another person, who made the highest bid of Rs 3100 per year, as the landlord's fee for the right to cut and remove the trees, and other minor produce. Besides the demand aforesaid, the Revenue Authorities have levied about four thousand rupees as tax on the surveyed portions of the forest. The petitioner's forest has large areas of arid rocks, rivulets and gorges. The petitioner, in those circumstances, questions the constitutional validity of the Act, the provisions of which will be examined hereinafter.

3. These petitions have been opposed on behalf of the first respondent and the allegations and submissions made in the petitions are sought to be controverted by a counter affidavit sworn to by an Assistant Secretary of the Kerala Government in the Revenue Department. It is in similar terms, as a matter of fact printed in most of these cases. It is contended therein on behalf of the respondent that the petitions are not maintainable inasmuch as no fundamental rights of the petitioners have been infringed; that the allegations about the income, from the forest lands are not admitted; and by way of submission, it is added, they are irrelevant for the purposes of these petitions. It is stated that the Act was passed with a view to unifying the system of land tax in the whole of the State of Kerala. It is submitted that the validity of the Act has to be determined in the light of Article 265 of the Constitution and that Articles 19 and 31 were wholly out of the way. It is denied that the tax imposed was harsh or arbitrary, or has the effect of violating the petitioner's right of holding property; and it was asserted that the allegations in respect of income from the forests are entirely irrelevant, as the tax was not a tax on income, but was an "impost on land". It is equally irrelevant whether the land is productive or not. It is also contended that, in view of the provisions of Article 31(5)(*b*)(*i*) of the Constitution, Article 31(2) could not be relied upon by the petitioners. The allegation of the petitioners that the Act is a device to confiscate private forests is denied. It is admitted that, except in certain cases, the entire area is unsurveyed and that steps are being taken for surveying those areas. It is also stated that the areas shown in the notices served on the petitioners are based on information available to the Collector of the District; and lastly, it is stated that only notice has been issued calling upon the petitioners to make their representations, if any, to the proposed provisional assessments. The assessments have not yet been made, and, therefore, there is no question of demand of tax being enforced by coercive processes. Finally, it is suggested that the Act has been enacted for the legitimate revenue purposes of the

State.

4. Before entering upon a discussion of the points in controversy, it is convenient at this stage to indicate briefly the relevant provisions of the Act which is impugned by the petitioners as ultra vires the State Legislature. The preamble of the Act is in these terms:

> "Whereas it is deemed necessary to provide for the levy of a low and uniform rate of basic tax on all lands in the State of Travancore-Cochin."

Basic tax has been defined as "the tax imposed under the provisions of this Act". Section 3 lays down that the arrangement made under the Act for the levy of the basic tax shall be deemed inter alia to be a general revenue settlement of the State, notwithstanding anything in any statute, grant, deed or other transaction subject to certain provisos not material for our present purposes. The charging section is Section 4, which is in these terms:

> "Subject to the provisions of this Act, there shall be charged and levied in respect of all lands in the State, of whatever description and held under whatever tenure, a uniform rate of tax to be called the basic tax."

Section 5 lays down the rate of the tax which, by the amendment, has been raised to Rs 2 per acre (two pies per cent of land per annum) and the basic tax charged and levied at that rate shall be the tax payable to the Government in lieu of any existing tax in respect of land. Section 6 lays down that any stipulation in any contract or agreement or lease or other transaction to pay land revenue assessment of any land shall be construed as stipulation for the payment of the amount of basic tax, as charged and levied under the Act. Section 7 is in these terms:

> "This Act is not applicable to lands held or leased by the Government or any land or class of lands which the Government may, by notification in the Gazette, either wholly or partially exempt from the provisions of this Act."

Sections 8 and 9 provide for the continuance of the liability to pay certain dues in respect of existing tenures in addition to the basic tax in respect of lands covered by those tenures. Section 10 abolishes the irrigation assessment charged on certain tank beds and other water reservoirs named and described therein. Section 11 preserves the right of the Government to levy certain irrigation and water cesses and lays down that the Act shall not affect the power of the Government to levy any rate or alter any existing rate of irrigation or water cess on any land, as they deem fit. Cesses, other than those mentioned in Section 11, are also abolished by Section 12. Section 13 authorises the Government to appoint such officers as they deem necessary for the purpose of the Act. Section 14 lays down the bar of suits against the Government in respect of anything done or any order passed under the Act. Section 15 saves the right of the Government which accrued to it before the Act came into force as also the conditions of any agreement grant or deed relating to any land, except to the extent indicated in the Act. Section 16 vests the Government with the power to make rules for carrying into effect the provisions of the Act, with particular reference to the power to make rules for the apportionment of the basic tax charged on certain kinds of holdings, for defining the powers and duties of the officers appointed under the Act and for determining the kist instalments and the due date for the payment thereof. These in short are the provisions of the Act. The Act, as indicated above, was amended by Act 10 of 1957 which substituted the words "State of Kerala" for the words "State of Travancore-Cochin" and made certain other consequential changes. The amending Act introduced Section 5-A, which has been very much assailed in the course of the argument before us and it is, therefore, necessary to set it out in full. It is in these terms:

> "5-A. *Provisional assessment of basic tax in the case of unsurveyed lands.*—(1) It shall be competent for the Government to make a provisional assessment of the

basic tax payable by a person in respect of the lands held by him and which have not been surveyed by the Government, and upon such assessment such person shall be liable to pay the amount covered in the provisional assessment.

(2) The Government after conducting a survey of the lands referred to in sub-section (1) shall make a regular assessment of the basic tax payable in respect of such lands. After a regular assessment has been made, any amount paid towards the provisional assessment made under sub-section (1) shall be deemed to have been paid towards the regular assessment and when the amount paid towards the provisional assessment exceeds the amount payable under the regular assessment, the excess shall be refunded to the person assessed."

By Section 9, Section 3 of the Madras Revenue Recovery Act, 1864, has been substituted in these terms:

"3. *Landholder when and to whom to pay kist.*—Every landholder shall pay to the Collector or other officer empowered by him in this behalf the land tax due from him on or before the day fixed for payment under the rules framed under Section 16 of the Land Tax Act, 1955."

From a review of the provisions of the Act, as amended as aforesaid, it will be clear that the provisions of the Act lay down in barest outline the policy to impose a uniform and, what is asserted to be, a low rate of land tax on all lands in the State of Kerala. Unlike other taxing statutes, it does not make any provision for issue of notice to the assessee, nor is there any provision for submission of a return by the assessee. By Section 5-A, it authorises the Government to make a "provisional assessment" in respect of land, which has not been surveyed, and such provisional assessment is made payable by the person made liable under the Act. It does not make any provision for any appeals in cases where the assessee may feel dissatisfied with the assessment. The Act does contemplate the making of "a regular assessment of the basic tax". But it does not indicate as to when the regular assessment would be made, except indicating that it can be made only after a survey has been made in respect of the land assessed. The Act could not have been cast in more general terms and the proceedings under the Act could not have been more summary. It has thus the merit of brevity as also of simplicity, derived from the fact that a tax is levied at a flat rate, irrespective of the quality of the land and consequently of its productive capacity. Under the Act, the charge has to be levied, whether or not any income has been derived from the land. The legislature was so much in earnest about levying and realising the tax that it could not even wait for a regular survey of the lands to be assessed with a view to determining the extent and character of the land.

5. Such are the provisions and the effect of the Act, which has been assailed on a number of grounds on behalf of the petitioners. It is contended, in the first instance, that inequality is writ large in the provisions of the Act, which is clearly discriminatory in character and effect and thus infringes Article 14 of the Constitution. As the Act does not have any regard to the quality of the land or its productive capacity, and a tax at a flat rate of Rs 2 per acre is proposed to be levied under the Act, it is further contended, it imposes very unreasonable restrictions on the right to hold property and is thus an invasion on the rights guaranteed to the petitioners under Article 19(1)(*f*) of the Constitution. The Act does not lay down any provision calling for a return from the assessee, for any enquiry or investigation of facts before the provisional assessment is made or for any right of appeal to any higher authority from the order of provisional assessment; in fact, there is no provision for hearing the assessee at any stage. The Act is of an arbitrary character and is thus wholly repugnant to the guaranteed rights of the petitioners. Section 7 quoted above gives uncanalised, unlimited and arbitrary power to the Government to pick and choose in the matter of grant of total or partial exemption from the provisions of the Act. It also suffers from the vice of

discrimination. It has also been vehemently argued that the Act, though it purports to be a tax on land, is really a law relating to forests in possession of the petitioners and would not come within the purview of Entry 18 read by itself or in conjunction with Entry 45 of List II, but is law relating to forests under Entry 19. If we tear the veil in which the real purpose and effect of the Act has been shrouded, it will appear that the true character and effect of the Act is not to levy a tax on land, but to expropriate the private owners of the forests without payment of any compensation whatsoever. Lastly, it has been urged that the whole Act has been conceived with a view to confiscating private property, there being no question of any compensation being paid to those who may be expropriated as a result of the working of the Act. This last argument is based on the assertion that the tax proposed to be levied on private property in the State of Kerala has absolutely no relation to the paying capacity of the persons sought to be taxed, with reference to the income they could derive, or actually did derive from the property.

6. On behalf of the State of Kerala, the learned Advocate-General has argued that, though in most of the cases, that is to say, except in seven petitions (Petitions 21, 22, 47, 49, 50, 51 and 54) the lands have not been surveyed, the areas mentioned in the notices proposing provisional assessment have been ascertained through the local agencies of the Government. It was further contended that the State had only declared the liability to the payment of the tax at a flat rate of Rs 2 per acre in respect of land, irrespective of the income to be derived therefrom. Hence there was no necessity for making provision for a detailed enquiry or investigation. The rate of the tax being known, and the area of the land to be taxed having been locally ascertained, even though without any regular survey, what remained was merely quantifying the tax, which was of a purely administrative character. The local agencies estimated the land in possession of particular persons. Those persons were called upon to pay provisionally at the rate fixed by the statute. The State has, by executive action, appointed authorities who are expected to act in accordance with the principle of natural justice. There was, therefore, no need for laying down any elaborate procedure as in other instances of taxing statutes. There is a presumption that the authority appointed by the Government would act bona fide and in a proper manner. If there was any case of unfair dealings, the matter could be brought to the Court. It was greatly emphasised that as a flat rate of taxation had been envisaged by the Act and as ultimately the tax at that rate would be realised from land found to be in possession of particular persons after a regular survey, the regular survey to be ultimately made would automatically determine the amount of tax to be paid and the adjustment of the taxes already paid could be made on that basis. On the legal aspect of the controversy raised on behalf of the petitioners, it was argued that the Act has its justification in Article 265 of the Constitution, which was not subject to the provisions of Part III of the Constitution and that, therefore, Articles 14, 19, 31 could not be pressed in aid of the petitioners. It was also contended that even if the Act is, in effect, confiscatory, it cannot be questioned, being a taxing statute. Finally, it was urged that the question of the amount of income derived by the petitioners from the property sought to be taxed is wholly irrelevant, because the Act was not a tax on income but it was a tax on the property itself.

7. The most important question that arises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Article 265 of the Constitution is a complete answer to the attack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article. Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax

proposed to be levied must be within the legislative competence of the legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution. One of such conditions envisaged by Article 13(2) is that the legislature shall not make any law which takes away or abridges the equality clause in Article 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Article 14 of the Constitution, it must be struck down as unconstitutional. For the purpose of these cases, we shall assume that the State Legislature had the necessary competence to enact the law, though the petitioners have seriously challenged such a competence. The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does mean that if property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. It must, therefore, be held that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the Court might think more just and equitable. The Act has, therefore, to be examined with reference to the attack based on Article 14 of the Constitution.

8. It is common ground that the tax, assuming that the Act is really a taxing statute and not a confiscatory measure, as contended on behalf of the petitioners, has no reference to income, either actual or potential, from the property sought to be taxed. Hence, it may be rightly remarked that the Act obliges every person who holds land to pay the tax at the flat rate prescribed, whether or not he makes any income out of the property, or whether or not the property is capable of yielding any income. The Act, in terms, claims to be "a general revenue settlement of the State" (Section 3). Ordinarily, a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made, with due diligence, and, therefore, is levied with due regard to the incidence of the taxation. Under the Act in question we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is arid desert. The second one does not make any income, but could raise some crop after a disproportionately large investment of labour and capital. A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the

Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay from their own pockets, if they could afford the tax. If they cannot afford the tax, the property is liable to be sold, in due process of law, for realisation of the public demand. It is clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification. It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution. Furthermore, Section 7 of the Act, quoted above, particularly the latter part, which vests the Government with the power wholly or partially to exempt any land from the provisions of the Act, is clearly discriminatory in its effect and, therefore, infringes Article 14 of the Constitution. The Act does not lay down any principle or policy for the guidance of the exercise of discretion by the Government in respect of the selection contemplated by Section 7. This Court has examined the cases decided by it with reference to the provisions of Article 14 of the Constitution, in the case of *Shri Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar*[1]. S.R. Das, C.J., speaking for the Court has deduced a number of propositions from those decisions. The present case is within the mischief of the third proposition laid down at pp. 299 and 300 of the Report, the relevant portion of which is in these terms:

> "A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself". (p. 299 of the Report).

The observations quoted above from the unanimous judgment of this Court apply with full force to the provisions of the Act. It has, therefore, to be struck down as unconstitutional. There is no question of severability arising in this case, because both the charging sections, Section 4 and Section 7, authorising the Government to grant exemptions from the provisions of the Act, are the main provisions of the Statute, which has to be declared unconstitutional.

9. The provisions of the Act are unconstitutional viewed from the angle of the provisions of Article 19(1)(*f*) of the Constitution, also. Apart from the provisions of Sections 4 and 7 discussed above, with reference to the test under Article 14 of the Constitution, we find that Section 5-A is also equally objectionable because it imposes unreasonable restrictions on the rights to hold property, safeguarded by Article 19(1)(*f*) of the Constitution. Section 5-A declares that the Government is competent to make a provisional assessment of the basic tax payable by the holder of unsurveyed land. Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing

any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher civil court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the landholders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character. Again, the Act does not impose an obligation on the Government to undertake survey proceedings within any prescribed or ascertainable period, with the result that a landholder may be subjected to repeated annual provisional assessments on more or less conjectural basis and liable to pay the tax thus assessed. Though the Act was passed about five years ago, we were informed at the Bar that survey proceedings had not even commenced. The Act thus proposes to impose a liability on landholders to pay a tax which is not to be levied on a judicial basis, because (*1*) the procedure to be adopted does not require a notice to be given to the proposed assessee; (*2*) there is no procedure for rectification of mistakes committed by the Assessing Authority; (*3*) there is no procedure prescribed for obtaining the opinion of a superior civil court on questions of law, as is generally found in all taxing statutes, and (*4*) no duty is cast upon the Assessing Authority to act judicially in the matter of assessment proceedings. Nor is there any right of appeal provided to such assessees as may feel aggrieved by the order of assessment.

10. That the provisions aforesaid of the impugned Act are in their effect confiscatory is clear on their face. Taking the extreme case, the facts of which we have stated in the early part of this judgment, it can be illustrated that the provisions of the Act, without proposing to acquire the privately owned forests in the State of Kerala after satisfying the conditions laid down in Article 31 of the Constitution, have the effect of eliminating the private owners through the machinery of the Act. The petitioner in petition No. 42 of 1958 has been assumed to own 25 thousand acres of forest land. The liability under the Act would thus amount to Rs 50,000 a year, as already demanded from the petitioner on the basis of the provisional assessment under the provisions of Section 5-A. The petitioner is making an income of Rs 3100 per year out of the forests. Besides, the liability of Rs 50,000 as aforesaid, the petitioner has to pay a levy of Rs 4000 on the surveyed portions of the said forest. Hence, his liability for taxation in respect of his forest land amounts to Rs 54,000 whereas his annual income for the time being is only Rs 3100 without making any deductions for expenses of management. Unless the petitioner is very enamoured of the property and of the right to hold it, it may be assumed that he will not be in a position to pay the deficit of about Rs 51,000 every year in respect of the forests in his possession. The legal consequences of his making a default in the payment of the aforesaid sum of money will be that the money will be realised by the coercive processes of law. One can, easily imagine that the property may be sold at auction and may not fetch even the amount for the realisation of which it may be proposed to be sold at public auction. In the absence of a bidder forthcoming to bid for the offset amount, the State ordinarily becomes the auction purchaser for the realisation of the outstanding taxes. It is clear, therefore, that apart from being discriminatory and imposing unreasonable restrictions on holding property, the Act is clearly confiscatory in character and effect. It is not even necessary to tear the veil, as was suggested in the course of the argument, to arrive at the conclusion that the Act has that unconstitutional effect. For these reasons, as also for the reasons for which the provisions of Sections 4 and 7 have been declared to be unconstitutional, in view of

the provisions of Article 14 of the Constitution, all these operative sections of the Act, namely 4, 5-A and 7, must be held to offend Article 19(1)(*f*) of the Constitution also.

11. The petitions are accordingly allowed with costs against the contesting respondent, the State of Kerala.

A.K. SARKAR, J.— These petitions were filed under Article 32 of the Constitution, challenging the validity of the Travancore-Cochin Land Tax Act, 1955, as amended by Act 10 of 1957. The principal Act was passed by the legislature of the State of Travancore-Cochin and the Amending Act, by the legislature of the State of Kerala, in which the State of Travancore Cochin had been merged. The petitioners are owners of lands in the State of Kerala. The Act as amended and hereafter referred to as "the Act", levied a certain basic tax on all lands in the State of Kerala. The petitioners say that the levy is illegal and violates their fundamental rights.

13. It appears from the preamble that the Act was passed as it was deemed necessary to provide for the levy of a low and uniform rate of basic tax on all lands in the State. The Act provides that the arrangement made by it for the levy of the basic tax is to be deemed to be a general revenue settlement of the State. Section 4 of the Act is the charging section and it lays down that there shall be charged and levied in respect of all lands in the State, of whatever description and held under whatever tenure, a uniform rate of tax to be called the basic tax. Section 5 fixes the rate of the tax at 2 n.p. per cent which works out at Rs 2 per acre per annum. This section also provides that the basic tax shall be the tax payable to the Government in lieu of any other existing tax in respect of land. Section 12 abolishes all cesses on land except irrigation cess.

14. The first ground on which the validity of the Act is challenged is that it offends the provision as to the equal protection of the laws contained in Article 14 of the Constitution. The Act applies to all lands in the State and it imposes an uniform rate of tax, namely, Rs 2 per acre. It is said that all lands in the State have not the same productive quality; that some are waste lands and others, lands of varying degrees of fertility. The contention is that the tax weighs more heavily on owners of waste lands than on owners of fertile lands. It is said that it is bound to happen that some owners make no income out of their lands or make a small income and they would have to pay the tax out of their pocket while the owners of better classes of lands yielding larger income would be able to pay the tax out of the income from the lands. It is contended that the Act therefore discriminates between several classes of owners of lands in the State and is void as infringing the equality clause in the Constitution. It may be conceded that all lands in the State are not of the same degree of fertility. I am however unable to see that because of that, the Act can be said to discriminate between the owners of them.

15. What is really said appears to be that the Act makes a classification of the owners of lands according to areas. Assume that the Act does so. The question then is, is such a classification illegal? The equal protection clause in the Constitution does not mean that there shall be no classification for the purpose of any law. It has been said by this Court in *Budhan Choudhury* v. *State of Bihar*[2]: "It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the statute in question."

16. On the argument of the petitioners, the Act makes a classification between owners of lands using as the differentia, the area of the land held by them. The

question then, is, is that differentia intelligible and has that differentia a rational relation to the object of the Act? Now it seems to me that both the tests are satisfied in the present case. The taxpayers are classified according to the area of lands held by them. That is quite an intelligible basis on which to make a classification; holders of varying areas of land can quite understandably be placed in different classes. Next, has such a basis of classification, a rational relation to the object of the Act? The Act is a taxing statute. It is intended to collect revenue for the governmental business of the State. It says that one of its objects is to provide a low and uniform rate of basic tax. Another object mentioned is to replace all other dues payable to the Government in respect of the ownership of the land by a uniform basic tax. Why is it to be said that the use of the area of land held as the basis of classification has no rational relation to these objects. I find no reason. The object is to tax land held in the State for raising revenues. It is the holding of the land in the State that makes the owner liable to pay tax. It would follow that the quantum of the tax can be reasonably linked with the quantum of the holding.

17. Why is it said that the classification on the basis of area is bad? It is only because it imposes unequal burden of the tax on the owners of land; because owners of less productive land would have a larger burden put on them. Now if this argument is right, then tax on land can be imposed only according to its productivity. I have not been shown any authority which goes to this length. I am further unable to see how productivity as the basis of classification could be said to have a more rational relation to the object of a statute collecting revenue by taxing land held in the State. The tax is not levied because the land is productive but because the land is held in the State. Again if the tax which could be imposed on land had to be correlated to its productivity, then the State would have no power to tax unproductive land and the provision in the Constitution that it would have power to tax land would, to that extent, be futile. It seems to me that a contention leading to such a result cannot be accepted.

18. Reliance was placed for the petitioners on *Cumberland Coal Company* v. *Board of Revision on Tax Assessments*[3] in support of the contention that a tax on land not based on its productivity, violates Article 14. I am unable to hold that this case supports the contention. What had happened there was that a certain statute had imposed a tax ad valorem on all coal situated in a certain area and in assessing the tax, the coal of the Cumberland Coal Company had been assessed by the authorities concerned at its full value while the coal of the rest of the class liable to the tax had been assessed at a lower value. Thereupon it was held that "the intentional systematic undervaluation by State Officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed on the full value of his property". On this view of the matter the Supreme Court of America directed readjustment of the assessments. The statute with which this case was concerned had levied the tax ad valorem which, it may be, is the same thing as a tax correlated to productivity. The case had therefore nothing to do with the question that a tax on coal otherwise than ad valorem would be unconstitutional. In fact this case did not declare any statute invalid.

19. Then it seems to me that if the contention of the petitioners is right, and land could be taxed only on its productivity, for the same reason, taxes on all other things would have to be correlated to the income to be derived from them. The result would be far reaching. I am not prepared to accept a contention producing such a result and no authority has been cited to lead me to accept it.

20. It may be that as lands are not of equal productivity, some tax payers may be able to pay the tax out of the income of the land taxed while others may have to find the money from another source. To this extent the Act may be more hard on some than on others. But I am unable to see that for that reason it is unconstitutional. All

class legislation puts some in a more disadvantageous position than others. If the classification made by the law is good, as I think is the case with the present Act, the resultant hardship alone cannot make it bad. It was said in *Magoun* v. *Illinois Trust and Savings Bank*[4], "It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity."

21. It is then said that sub-section (1) of Section 5-A, which was introduced into the Act by the amending Act, offends Article 14. The impugned provision is in these terms:

> "5-A. (*i*) It shall be competent for the Government to make a provisional assessment of the basic tax payable by a person in respect of the lands held by him and which have not been surveyed by the Government, and upon such assessment such person shall be liable to pay the amount covered in the provisional assessment.
>
> * * *"

This section was enacted as at the date of the Act, all lands had not been surveyed and so the areas of all holdings were not known. In the absence of such knowledge the tax which was payable on the basis of the areas of the holdings could not be assessed on unsurveyed lands, so the section provides that pending the survey, the Government will have power to make a provisional assessment on unsurveyed lands. This provision was necessary as the survey was bound to take time.

22. The contention is that Section 5-A(1) gives arbitrary power to the Government to make a provisional assessment on any person it chooses, leaving out others from the provisional assessment. I am unable to read the sub-section in that way. It may be that it leaves it to the Government to make a provisional assessment if it chooses. This does not result in any illegal classification. The surveyed lands and unsurveyed lands are distinct classes of properties and may be differently treated. Again, all unsurveyed lands would on survey have to pay tax from the beginning. It would follow that the holders of both classes of lands are eventually subjected to the same burden. As to the contention that under this section the Government has the right to levy the provisional assessment at its choice on some and not on all holders of unsurveyed lands, I am unable to agree that this is a proper reading of the section. In my view, the expression "a person" in the section does not lead to that conclusion. That expression should be read as "all persons" and it is easily capable of being so read. The section says, "It shall be competent for the Government to make a provisional assessment of the basic tax payable by a person". Now the basic tax is payable by all persons holding land. So the provisional assessment, if made, has to be on all persons holding lands whose lands have not been surveyed. The Government cannot, therefore, pick and choose. A statute is intended to be legal and it has therefore to be read in a manner which makes it legal rather than in a manner which makes it illegal. If the Government did not make the provisional assessment in the case of all liable to such assessment, then the Government's action could be legitimately questioned. It has however not in fact been said in these petitions that in deciding to make the provisional assessment the Government has made any discrimination between the persons liable to such assessment.

23. Section 5-A(1) is also attacked on the ground that it is against rules of natural justice in that it does not say that in making the provisional assessment, any hearing would be given to the person sought to be assessed or requiring a return from him or giving him a right of appeal in respect of the provisional assessment made. It is true that the section does not expressly provide for a hearing being given. It seems to me however that if according to the rules of natural justice the assessee was entitled to a hearing, an assessment made without giving him such a hearing would be bad. The Act must be read so as to imply a provision requiring compliance with the rules of

natural justice. Such a reading is not impossible in the present case as there is nothing in the Act indicating that the rules of natural justice need not be observed.

24. It was said in *Spackman* v. *Plumstead Board of Works*[5] where a statute requiring an architect to give a certain certificate which did not provide the procedure as to how the architect was to conduct himself, came up for consideration that, "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated". Again in *Maxwell on Statutes* (10th Edn.) p. 370 it has been said, "In giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance, as that which requires that before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself". Insofar as this Act confers a power on the Government to discharge the judicial duty of making a provisional assessment, which the petitioners say, it does, it must imply that the judicial process has to be observed.

25. As regards the return, that seems to me not to be of much consequence. If the assessee is entitled to be heard, the fact that he is not asked to make a return, would not constitute a departure from the rules of natural justice. Likewise, the absence of a right of appeal is not something on which the petitioners can rely. Rules of natural justice do not require that there must always be a right of appeal. Under the Act it is the Government which makes the assessment and it would not be unreasonable to hold that in view of the high authority of the person assessing, the absence of a right of appeal is not likely to cause any miscarriage of justice. I am therefore unable to hold that in the absence of express provisions laying down the procedure according to which the provisional assessment is to be made, the Act has to be held invalid.

26. It may here be stated that in those instances where, in the present cases, provisional assessments had been made, the, assessees had either themselves supplied the area of the lands held by them or the area had been determined after giving them a hearing. After the area has been determined, the amount of the tax payable is decided by a simple calculation at the rate of Rs 2 per acre of land held and with regard to this, no hearing is required.

27. Then again sub-section (2) of Section 5-A provides that the Government after conducting a survey of the lands mentioned in sub-section (1) under which provisional assessment is to be made, shall make a regular assessment and adjustments would have to be made in regard to tax already paid on the basis of the regular assessment. A point is made that there is no time limit fixed within which the regular assessment is to be made and so the Act leaves it to the arbitrary decision of the Government when to make the regular assessment. I do not think that this contention is correct. Properly read, the section in the absence of any indication as to time, means that regular assessment would have to be made as soon after the survey, as is reasonably possible.

28. It is also said that Section 7 of the Act offends Article 14. This section gives power to the Government to exempt from the operation of the Act such lands or class of lands as the Government may by notification decide. This section does not indicate on what grounds the exemption is to be granted. It therefore seems to me that it gives arbitrary power to the Government and offends Article 14. But the section is clearly severable from the rest of the Act. If the section is taken out of the Act, the operation of the rest of the Act will not in the least be affected. The only effect will then be that the Government will have no power to exempt any land from the tax. That will not in any way affect the other provisions of the Act. The invalidity of this section is therefore no reason for declaring the entire Act illegal. It may be pointed out

that it is not alleged in the petitions that the Government has exempted any lands or class of lands from the operation of the Act.

29. It is contended that Section 8 of the amending Act also shows the arbitrary nature of the Act. That section provides that if any difficulty arises in giving effect to the provisions of this Act, the Government may by order do anything not inconsistent with such provisions which appears to it to be necessary or expedient for removing the difficulty. This is a common form of provision now found in many Acts. The power given under it cannot be said to be uncontrolled for it must be exercised consistently with the Act and to remove difficulties arising in giving effect to the Act. In any event, this provision is contained in the amending Act only. Even if the section be held to be invalid that would not affect the rest of the amending Act or any question that arises on these petitions.

30. The validity of the Act is also challenged on the ground that it infringes Article 19, clause (1), sub-clauses (*f*) and (*g*). This challenge seems to me to be wholly untenable. Apart from the question whether a taxing statute can become invalid as offending Article 19, as to which the position on the authorities does not seem to be very clear, it is plain that Article 19 permits reasonable restrictions to be put on the rights mentioned in sub-clauses (*f*) and (*g*). Now there is no dispute that the rate of tax fixed by the Act is a very low rate. It has not been said that the rate fixed is unreasonable. It clearly is not so. The restrictions on these rights under Article 19(1), (*f*) and (*g*) put by the Act, if any, are clearly reasonable. These rights cannot therefore be said to have been infringed by the Act.

31. The lands of the petitioners are lands on which stand forests. It is said that under the Madras Preservation of Private Forests Act, (Act 27 of 1949), which applies to the lands with which we are concerned as they are situated in an area which previously formed part of the State of Madras, the owners of the forests can work them only with the permission of the officer mentioned in that Act. It is said that the control imposed by the officer has been such that the income received from the forest is much less than the tax payable under the Act in respect of the land on which the forest stands. Taking by way of illustration Petition No. 13, it is pointed out that the income from the forest with which that petition is concerned was Rs 8477 for the year 1956-57 while the tax payable under the Act for more or less the same period was Rs 1,51,000. I am unable to hold that because of this the Act offends Article 19(1), (*f*) and (*g*). It is not stated that the land is not capable of producing any income other than the income from the forest standing on it. There is nothing to show that in all times to come the income from the land including the income from the forest, will be less than the tax imposed on it by the Act. The area of the land concerned in Petition No. 13 is enormous being about 75,500 acres. I am further unable to hold the impugned Act to be invalid because of action that may be taken under another Act, namely, the Madras Act 27 of 1949.

32. The validity of the Act is challenged also on the ground that it offends Article 31 of the Constitution. I am unable to see any force in this contention. If the statute is otherwise valid, as I have found the present Act to be, it cannot, even if it deprives any person of property, be said to offend Article 31(1). It has been held by this Court in *Ramjilal* v. *Income Tax Officer, Mohindargarh*[6] that "clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Article 265 becomes wholly redundant". No question of clause (2) of Article 31 being violated arises here for the Act does not deal with any acquisition of property.

33. It is also said that the Act is a colourable piece of legislation, namely, that though in form a taxing statute it, in effect, is intended to expropriate lands, held by the citizens in the State by imposing a tax too heavy for the land to bear. As was said

in *Raja Bhairebendra Narayan Bhup* v. *State of Assam*[2] "The doctrine of colourable legislation is relevant only in connection with the question of legislative competency". In the present case, there being in my view, no want of legislative competency in the legislature which passed the Act in question, the Act cannot be assailed as a piece of colourable legislation. I may add that I do not accept the argument that the Act is in its nature expropriatary or that the tax imposed by it is really excessive.

34. I come now to the last argument advanced by the petitioners. It is said that the Act was beyond the legislatative competence of the State Legislature. It is conceded that the State Legislature has power to impose a tax on land under Entry 49 of List 2 in the Seventh Schedule to the Constitution, but it is said that land as mentioned in that entry does not include lands on which forests stand. It is contended that the State Legislature has power to legislate about forests under Entry 19 of that List and also as to lands under Entry 18. There is however no power to impose a tase on forests while there is power under Entry 49 of that list to tax land. Therefore, it is said, that there is no power to impose tax on lands on which forests stand and the Act insofar as it imposes tax on lands covered by forests, which the lands of the petitioners are, is hence incompetent.

35. It is not in dispute that a State Legislature has no power to impose a tax on a matter with regard to which it has the power to legislate but has been given no express power to impose a tax. Therefore, I agree, that a State Legislature cannot impose tax on forests. I am however not convinced that "land" in Entry 49 is not intended to include land on which a forest stands. No doubt, a forest must stand on some land. In *Shorter Oxford Dictionary*, one of the meanings of "forest" is given as an extensive tract of land covered by trees and undergrowth, sometimes intermingled with pastures. The concepts of forest and land however are entirely different. The principal idea conveyed by the word "forest" is the trees and other growth on the land. Under Entry 19 there may no doubt be legislation with regard to land insofar it is necessary for the purpose of the forest growing on it. It is well known that entries in the legislative lists have to be read as widely as possible. It is not necessary to cut down the plain meaning of the word "land" in Entry 49 to give full effect to the word "forest" in Entry 19. In my view, the two entries namely, Entry 49 and Entry 18 deal with entirely different matters. Therefore, under Entry 49 taxation on land on which a forest stands is permissible and legal.

36. For these reasons I would dismiss these petitions.

ORDER

37. In accordance with the opinion of the majority of the Court, these Petitions are allowed with costs against the contesting Respondent, the State of Kerala.

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* (Under Article 32 of the Constitution of India for enforcement of Fundamental Rights).

[1] (1959) SCR p. 279

[2] (1955) I SCR 1045, 1049

[3] 76 LEd 146

[4] 42 LEd 1037, 1043

[5] 10 AC 229, 240

[6] (1951) SCR 127, 136

[7] (1956) SCR 303

ANNEXURE-D

1950 SCR 759 : AIR 1951 SC 118

In the Supreme Court of India

(BEFORE HIRALAL KANIA, C.J. AND MEHER CHAND MAHAJAN, B.K. MUKHERJEA, S.R. DAS AND CHANDRASEKHARA AIYAR, JJ.)

CHINTAMAN RAO ... Appellant;

Versus

STATE OF MADHYA PRADESH ... Respondent.

With

RAM KRISHNA ... Appellant;

Versus

STATE OF MADHYA PRADESH ... Respondent.

Petition Nos. 78 and 79 of 1950*, decided on November 8, 1950

Advocates who appeared in this case :

G.N. Joshi, for the Petitioners;

S.M. Sikri, for the Respondent.

The Judgment of the Court was delivered by

MEHER CHAND MAHAJAN, J.:— These two applications for enforcement of the fundamental right guaranteed under Article 19(1)(*g*) of the Constitution of India have been made by a proprietor and an employee respectively of a bidi manufacturing concern of District Sagar (State of Madhya Pradesh). It is contended that the law in force in the State authorizing it to prohibit the manufacture of bidis in certain villages including the one wherein the applicants reside is inconsistent with the provisions of Part III of the Constitution and is consequently void.

2. The Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 44 of 1948, was passed on 19th October, 1948 and was the law in force in the State at the commencement of the Constitution. Sections 3 and 4 of the Act are in these terms:

> "3. The Deputy Commissioner may by notification fix a period to be an agricultural season with respect to such villages as may be specified therein.
>
> 4.(1) The Deputy Commissioner may, by general order which shall extend to such villages as he may specify, prohibit the manufacture of bidis during the agricultural season.
>
> (2) No person residing in a village specified in such order shall during the agricultural season engage himself in the manufacture of bidis, and no manufacturer shall during the said season employ any person for the manufacture of bidis."

3. On 13th June, 1950 an order was issued by the Deputy Commissioner of Sagar under the provisions of the Act forbidding all persons residing in certain villages from engaging in the manufacture of bidis. On 19th June, 1950 these two petitions were presented to this Court under Article 32 of the Constitution challenging the validity of the order as it prejudicially affected the petitioners' right of freedom of occupation and business. During the pendency of the petitions the season mentioned in the order of 13th June ran out. A fresh order for the ensuing agricultural season — 8th October to 18th November, 1950 — was issued on 29th September, 1950 in the same terms. This order was also challenged in a supplementary petition.

4. Article 19(1)(*g*) runs as follows:

"All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business."

The article guarantees freedom of occupation and business. The freedom guaranteed herein is, however, subject to the limitations imposed by clause (6) of Article 19. That clause is in these terms:

"Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

4. The point for consideration in these applications is whether the Central Provinces and Berar Act 44 of 1948 comes within the ambit of this saving clause or is in excess of its provisions. The learned counsel for the petitioners contends that the impugned Act does not impose reasonable restrictions on the exercise of the fundamental right in the interests of the general public but totally negatives it. In order to judge the validity of this contention it is necessary to examine the impugned Act and some of its provisions. In the preamble to the Act, it is stated that it has been enacted to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas. Sections 3 and 4 cited above empower the Deputy Commissioner to prohibit the manufacture of bidis during the agricultural season. The contravention of any of these provisions is made punishable by Section 7 of the Act, the penalty being imprisonment for a term which may extend to six months or with fine or with both. It was enacted to help in the grow more food campaign and for the purpose of bringing under the plough considerable areas of fallow land.

5. The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in Article 19(1)(*g*) of the Constitution. Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it.

6. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.

7. Clause (6) in the concluding paragraph particularizes certain instances of the nature of the restrictions that were in the mind of the constitution-makers and which have the quality of reasonableness. They afford a guide to the interpretation of the clause and illustrate the extent and nature of the restrictions which according to the statute could be imposed on the freedom guaranteed in clause (*g*). The statute in substance and effect suspends altogether the right mentioned in Article 19(1)(*g*) during the agricultural seasons and such suspension may lead to such dislocation of the industry as to prove its ultimate ruin. The object of the statute is to provide

measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season. Even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of bidis and regulate the hours of the working of the industry, would not have amounted to a complete stoppage of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act, however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right. Further the statute seeks to prohibit all persons residing in the notified villages during the agricultural season from engaging themselves in the manufacture of bidis. It cannot be denied that there would be a number of infirm and disabled persons, a number of children, old women and petty shopkeepers residing in these villages who are incapable of being used for agricultural labour. All such persons are prohibited by law from engaging themselves in the manufacture of bidis; and are thus being deprived of earning their livelihood. It is a matter of common knowledge that there are certain classes of persons residing in every village who do not engage in agricultural operations. They and their womenfolk and children in their leisure hours supplement their income by engaging themselves in bidi business. There seems no reason for prohibiting them from carrying on this occupation. The statute as it stands, not only compels those who can be engaged in agricultural work from not taking to other avocations, but it also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of bidi making and thus earning their livelihood. These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

8. Mr Sikri for the Government of Madhya Pradesh contends that the legislature of Madhya Pradesh was the proper judge of the reasonableness of the restrictions imposed by the statute, that that legislature alone knew the conditions prevailing in the State and it alone could say what kind of legislation could effectively achieve the end in view and would help in the grow more food campaign and would help for bringing in fallow land under the plough and that this Court sitting at this great distance could not judge by its own yardstick of reason whether the restrictions imposed in the circumstances of the case were reasonable or not. This argument runs counter to the clear provisions of the Constitution. The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court. In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in

exercising its functions it has the power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Constitution. We are therefore of opinion that the impugned statute does not stand the test of reasonableness and is therefore void.

9. The result therefore is that the orders issued by the Deputy Commissioner on 13th June, 1950 and 26th September, 1950 are void, inoperative and ineffective. We therefore direct the respondents not to enforce the provisions contained in Section 4 of the Act against the petitioners in any manner whatsoever. The petitioners will have their costs of these proceedings in the two petitions.

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* Application under Article 32 of the Constitution of India for a writ of mandamus

ANNEXURE-E

1951 SCR 682 : AIR 1951 SC 318 : (1951) 52 Cri LJ 1361

In the Supreme Court of India

(BEFORE SAIYID FAZL ALI, M. PATANJALI SASTRI, B.K. MUKHERJEA, S.R. DAS AND VIVAN BOSE, JJ.)

STATE OF BOMBAY AND ANOTHER ... Appellant;

Versus

F.N. BALSARA ... Respondents.

F.N. BALSARA ... Appellant;

Versus

STATE OF BOMBAY AND ANOTHER ... Respondents.

Civil Appeal Nos. 182 to 183 of 1951*, decided on May 25, 1951

Advocates who appeared in this case :

M.C. Setalvad and C.K. Daphtary (M.M. Desai and H.M. Seervai with them), for the Appellants in Case No. 182 and respondents in Case No. 183;

N.P. Engineer (G.N. Joshi, R.J. Kolah and N.A. Palkiwala, with him), for the Respondent in Case No. 182 and Appellant in Case No. 183.

The Judgment of the Court was delivered by

SAIYID FAZL ALI, J.:— These appeals arise from the judgment and order of the High Court of Judicature at Bombay upon the application of one F.N. Balsara (hereinafter referred to as the petitioner), assailing the validity of certain specific provisions of the Bombay Prohibition Act, 1949 (Bombay Act 25 of 1949), as well as of the Act as whole. The petitioner, claiming to be an Indian citizen, prayed to the High Court inter alia for a writ of mandamus against the State of Bombay and the Prohibition Commissioner ordering them to forbear from enforcing against him the provisions of the Prohibition Act and for the issue of a writ of mandamus ordering them (*1*) to allow him to exercise his right to possess, consume and use certain articles, namely, whisky, brandy, wine, beer, medicated wine, eau-de-cologne etc. and to import and export across the customs frontier and to purchase, possess, consume and use any stock of foreign liquor, eau-de-cologne, lavender water, medicated wines and medicinal preparations containing alcohol, and (*2*) to forbear from interfering with his right to possess these articles and to take no steps or proceedings against him, penal or otherwise, under the Act. The petitioner also prayed for a similar order under Section 45 of the Specific Relief Act against the respondents. The High Court, agreeing with some of the petitioner's contentions and disagreeing with others, declared some of the provisions of the Act to be invalid and the rest to be valid. Both the State of Bombay and the petitioner, being dissatisfied with the judgment of the High Court, have appealed to this Court after obtaining a certificate from the High Court under Article 132(1) of the Constitution.

2. The Act in question was passed by the legislature of the Province of Bombay as it was constituted in 1949, and was published in the Bombay Government Gazette on 20th May, 1949, and came into force on 16th June, 1949. The Act consists of 148 sections with 2 Schedules and is divided into 11 chapters. It is both an amending and consolidating Act and incorporates the provisions of the Bombay Abkari Act which it repeals and also those of the Bombay Opium and Molasses Acts and contains new provisions for putting into force the policy of prohibition which is one of the objects mentioned in the preamble of the Act. The most important provision in Chapter I is the definition of "liquor" which has been vigorously assailed as being too wide and

therefore beyond the powers of the Provincial Legislature. Chapter II relates to establishment and is not relevant to the present appeal. Chapter III, which contains a number of prohibitions in regard to liquor as defined in the Act, is said to enact sweeping provisions which are liable to be assailed. Sections 12 and 13 and the relevant provisions of Sections 23 and 24 in this chapter may be quoted:

12. No person shall—

(*a*) manufacture liquor;

(*b*) construct or work any distillery or brewery;

(*c*) import, export, transport or possess liquor; or

(*d*) sell or buy liquor.

13. No person shall—

(*a*) bottle any liquor for sale;

(*b*) consume or use liquor; or

(*c*) use, keep or have in his possession any materials, still, utensils, implements or apparatus whatsoever for the manufacture of any liquor.

23. No person shall—

(*a*) commend, solicit the use of, offer any intoxicant or hemp, or

(*b*) incite or encourage any member of the public or any class of individuals of the public generally to commit any act, which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder, or ....

24. (1) No person shall print or publish in any newspaper, news-sheet, book leaflet, booklet or any other single or periodical publication or otherwise display or distribute any advertisement or other matter—

(*a*) which commends, solicits the use of, or offers any intoxicant or hemp.

(*b*) which is calculated to encourage or incite any individuals or the public generally to commit an offence under this Act, or to commit a breach of or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence, permit, pass or authorisation granted thereunder."

3. Chapter IV relates to "control, regulation and exemptions", and contains inter alia Sections 30 to 38 and Section 44 which provide for cases in which licenses for the manufacture, export, import, transport, sale or possession of liquor may be granted; Section 39, which authorises the Government to permit the use or consumption of foreign liquor on cargo boats, warships, troopships and in military and naval messes and canteens; Section 40, which provides for the grant of permits for the use or consumption of foreign liquor to persons whose health would be seriously and permanently affected if they were not permitted to use or consume such liquor and to foreigners who do not intend to stay permanently in India; Section 41, which enables special permits to be granted to diplomats and foreign sovereigns; Section 45, which authorises use of liquor for sacramental purposes; Section 52, which empowers an authorized officer to grant licenses, permits etc. in cases not specifically provided for; Section 53, which deals with the form in which and the conditions under which licenses etc. may be granted; and Section 54 which provides for the cancellation or suspension of licenses and permits. The other material chapters of the Act are Chapter VII, which provides for offences and penalties, and Chapter IX which deals with "powers and duties of officers and procedure". Sections 118 and 119 of the Act declare the offences under the Act to be cognisable and some of them to be non-bailable. Under Section 121, any authorised prohibition officer or any police officer may open any package and examine any goods and may stop any vessel, vehicle or other means of conveyance and search for any intoxicant. Section 136(1) provides that if any of the officers mentioned therein is satisfied that any person is acting or is likely to act in a manner which amounts to preparation, attempt, abetment or commission of any of the

offences punishable under Section 65 or 68 of the Act, he may arrest such person without a warrant and direct that such person shall be committed to such custody as such officer may deem fit for a period not exceeding 15 days. By Section 136(2), the State Government is given the extraordinary power of imposing restriction on the right of free movement of any person if it is satisfied that such person is acting or is likely to act in the manner aforesaid. Chapter XI contains certain miscellaneous provisions and the only sections of this Chapter which need be referred to are Section 139(*c*), which states that the State Government may by general or special order exempt any person or class of persons or institution or class of institutions from the observance of all or any of the provisions of the Act or any rule, regulation or order made thereunder, and Section 147, which declares that nothing in the Act shall be deemed to apply to any intoxicant or other article in respect of its import or export across the customs frontier as defined by the Central Government.

4. The High Court accepted the contention of the petitioner that the definition of "liquor" in the Act was too wide and went beyond the power vested in the legislature to legislate with regard to intoxicating liquors under Item 31 of List II. It also held the following sections to be invalid:

> Sections 23(*a*) and 24(1)(*a*) so far as they refer to 'commending' Section 23(*b*); 24(1)(*b*) so far as it refers to 'evasion' Section 39; Section 52; Section 53 in part; Section 136(1); Section 136(2)(*b*), (*c*), (*e*), (*f*); and Section 139(*c*). The High Court also held Rule 67 of the Bombay Foreign Liquor Rules and Notifications Nos. 10484/45(*c*) and 2843/49(*a*), dated 30th March, 1950, invalid. It further held that the word 'addict' in the medical certificate was not warranted by the provisions of the Act.

5. The two important questions which this Court is called upon to decide in these appeals are:

> (*1*) whether there are sufficient grounds for declaring the whole Act to be invalid; and
>
> (*2*) to what extent the judgment of the High Court can be upheld with regard to the specific provisions of the Act which have been declared by it to be void.

6. It seems to me that it will be convenient to deal in the first instance with the argument assailing the validity of the Act as a whole, which is based on three grounds, these being:

> (*1*) that the law is an encroachment on the field which has been assigned exclusively to the Central legislature under Entry 19 of List I;
>
> (*2*) that some of the material provisions of the Act interfere with or are calculated to interfere with inter-State trade and commerce and as such transgress the provisions of Section 297 of the Government of India Act, 1935; and
>
> (*3*) that the High Court having held a number of material provisions to be void, should have declared the Act as a whole to be invalid, especially as the provisions found by the High Court to be void are not severable from the rest of the Act and it cannot be said that the legislature would have passed the Act in the truncated form in which it is left after the decision of the High Court.

7. It is obvious that the proper occasion to deal with the third ground will be after examining the specific provisions which have been declared by the High Court to be void, but the first two grounds may be dealt with at once.

8. The first question is whether the impugned law can be said to have made any encroachment upon the field of legislation assigned to the Centre. In order to decide this point, it will be necessary to refer to Entry 31 in List II, under which the law purports to have been made, and Entry 19 of List I, which is said to have been transgressed. These entries run as follows:

Entry 31, List II. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

Entry 19, List I. Import and export across customs frontiers as defined by the Dominion Government.

9. Prima facie, it would seem that there is no real conflict between these two entries, because Entry 31 of List II has no reference to import or export but merely deals with production, manufacture, possession, transport, purchase and sale. Dealing with this entry, Gwyer, C.J. observed as follows in the case of *Bhola Prasad* v. *King-Emperor*[1]:

"A power to legislate 'with respect to intoxicating liquors' could not well be expressed in wider terms, and would, in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, undoubtedly include the power to prohibit intoxicating liquors throughout the Province or in any specified part of the Province."

10. Thus, under Entry 31, the Provincial Legislature can pass any law regarding production, manufacture, transport, purchase, possession and sale of intoxicating liquor. But the point that is pressed for our consideration is that "import" does not end with mere landing of the goods on the shore or their arrival in the customs house, but it implies that the imported goods must reach the hands of the importer and he should be able to possess them. On this basis, it is contended that there is no difference in effect between a power to prohibit the possession and sale of an article and a power to prohibit its import or introduction into the country, since the one would be a necessary consequence of the other. This contention is based upon some American cases to which I shall refer later, but it may be stated at once that the point which is raised in this case is precisely the point which was raised and negatived in *Kishori Shetty* v. *King*[2]. In that case, the appellant had been convicted under Section 14-B of the Bombay Abkari Act, 1878, as amended by the Bombay Abkari (Amendment) Act, 1947, for having in her possession a certain quantity of foreign liquor in excess of the limit prescribed by a notification issued under the following provision of the Act:

"14-B. (2) ... the Provincial Government may by notification in the Official Gazette prohibit the possession by any individual or a class or a body of individuals or the public generally, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe."

11. The main argument advanced in that case was reproduced in the judgment in these words:

"But counsel for the appellant drew attention to Item 19 of List I which covers 'Import and export across customs frontiers as defined by the Dominion Government', and argued that if 'intoxicating liquors' in Item 31 of List II were held to include also liquors imported from abroad, then the Provincial Legislature, by prohibiting possession of such liquors by all persons, whether private consumers, common carriers or warehousemen, could defeat the power of the Federal Legislature to regulate imports of foreign liquors across the sea or land frontiers of British India which are customs frontiers as defined by the Central Government and thus seriously jeopardise an important source of central customs revenue. As under Section 100 of the Constitution Act the Provincial legislative powers under List II were subject to the exclusive powers of the Federal Legislature in List I, the Bombay Act to the extent to which it trenched upon the subject of Item 19 of the latter list must, it was submitted, be regarded as a nullity."

12. It will be seen that the rationale of the argument there is the same as that of the argument advanced in the present case, but it was rejected for reasons which are clearly set out in the following passage:

> "These is, in our view, no irreconcilable conflict here such as would necessitate recourse to the principle of federal supremacy laid down in Section 100 of the Constitution Act. Section 14-B does not purport to restrict or prohibit dealings in liquor in respect of its importation or exportation across the sea or land frontiers of British India. It purports to deal with the *possession* of intoxicating liquors which, in the absence of limiting words, must include foreign liquors. It is far-fetched, in our opinion, to suggest that, insofar as the provision covers foreign liquors, it is legislation with respect to import of liquors into British India by sea or land."

13. Since the enactment of the Government of India Act, 1935, there have been several cases in which the principles which govern the interpretation of the Legislative Lists have been laid down. One of these principles is that none of the items in each list is to be read in a narrow or restricted sense[3]. The second principle is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. This principle has been stressed in a number of cases by the Federal Court as well as by the Privy Council. In *In re The Central Provinces and Berar Act 14 of 1938*[4] the question arose as to whether a tax on the sale of motor spirits was a tax on the sale of goods within Entry 48 of the Provincial List or a duty of excise within Entry 45 of the Federal List. Dealing with the difficulty which arose in that case, Gwyer, C.J. observed as follows:

> "Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship."

14. To the same effect are the following observations made by the Judicial Committee of the Privy Council in *Governor-General-in-Council* v. *Province of Madras*[5] after referring to Section 100 of the Government of India Act, 1935:

> "Their Lordships do not doubt that the effect of these words is that, if the legislative powers of the Federal and Provincial Legislatures, which are enumerated in List I and List II of the Seventh Schedule, cannot fairly be reconciled, the latter must give way to the former. But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear".

In the present case, as already pointed out the words "possession and sale" occurring in Entry 31 of List II are to be read without any qualification whatsoever, and it will not be doing any violence to the construction of that entry to hold that the Provincial Legislature has the power to prohibit the possession, use and sale of intoxicating liquor absolutely. If we forget for the time being the principles which have been laid down in some of the American cases, it would be difficult to hold that the word "import" standing by itself will include either sale or possession of the article imported into the country by a person residing in the territory in which it is imported. There is thus no

real conflict between Entry 31 of List II and Entry 19 of List I, and I find it difficult to hold that the Bombay Prohibition Act insofar as it purports to restrict possession, use and sale of foreign liquor, is an encroachment on the field assigned to the Federal Legislature under Entry 19 of List I.

15. There is also another way of dealing with the contention raised before us. It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, and therefore, it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another legislature. This was emphasised very clearly in *Gallagher* v. *Lynn*[6] in these words:

> "It is well established that you are to look at the true nature and character of the legislation: *Russell* v. *Queen*[7] '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 authorised field."

16. In *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna*[8] the question arose before the Privy Council whether the Bengal Moneylenders Act, 1940, which provided that no borrower shall be liable to pay after the commencement of the Act more than a limited sum in respect of principal and interest, was intra vires the Provincial Legislature as dealing in pith and substance with moneylending and moneylenders, a subject-matter within the competence of the Provincial Legislature under Entry 27 of List II, or whether it trenched on "promissory notes" and "banking", which were subjects reserved for the Federal Legislature under Entries 28 and 38 respectively of List I. The Privy Council, notwithstanding the fact that loans on promissory notes would also have been subject to the provisions of the impugned Act, held that the Act was valid, and, while rejecting the argument that it was beyond the legislative competence of the Provincial Legislature which had enacted it, Their Lordships observed as follows:

> "As Sir Maurice Gwyer, C.J. said in the *Subrahmanyam Chettiar case*: 'It must invevitably 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 inter-twined that blind observance 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 purpose of determining whether it is legislation with respect to matters in this list or in that. Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion legislation.[9]"

17. The same principle was reiterated by the Federal Court in *Ralla Ram* v. *Province of East Punjab*[10] and was also referred to in *Miss Kishori Shetty* v. *King*[11] in the following passage:

> "It may be that a general adoption of the policy of prohibition by the Provinces will lead to a fall in the import of foreign liquors and to a consequential diminution of the Central customs revenue, but where the Constitution Act has given to the Provinces legislative power with respect to a certain matter in clear and unambiguous terms, the court should not deny it to them or impose limitations on its exercise, on such extraneous considerations. It is now well settled that if an

enactment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a Federal subject."

18. The short question therefore to be asked is whether the impugned Act is in pith and substance a law relating to possession and sale etc. of intoxicating liquors or whether it relates to import and export of intoxicating liquors. If the true nature and character of the legislation or its pith and substance is not import and export of intoxicating liquor but its sale and possession etc. then it is very difficult to declare the Act to be invalid. It is said that the prohibition of purchase, use, possession, transport and sale of liquor will affect its import. Even assuming that such a result may follow, the encroachment, if any, is only incidental and cannot affect the competence of the Provincial Legislature to enact the law in question.

19. On these considerations, there is really nothing else to be said on the question before us, but in view of the very great stress laid upon the American doctrine of "original package", it seems necessary to deal with what that doctrine means and under what conditions it was evolved. The wide meaning of "import" on which reliance was placed on behalf of the petitioner was adopted for the first time by Marshall, C.J. in *Brown* v. *Maryland*[12] in which the facts were these: The State of Maryland had passed an Act prohibiting importers of foreign goods from selling their goods without taking a license for which a certain amount had to be paid. The question which was raised in that case was that the Act was repugnant to the provisions of the Constitution which provided that "no State shall without the consent of Congress allow any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws". In the course of his judgment, Marshall, C.J. observed inter alia as follows:

> "There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer."[13]

20. The learned Chief Justice further observed:

> "Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorise importation, but to authorise the importer to sell."[14]

21. Upon principles so stated, what is known as the "original package" doctrine was evolved in America, which was applied not only to commodities imported from foreign countries but also to commodities which were the subject of inter-state commerce. This doctrine laid down that importation was not over so long as the goods were in the original package and hence a State had no power to tax imports until the original package was broken or there was one sale while the goods were still in the original package. The principle upon which this doctrine was founded is explained by Marshall, C.J. in the case referred to in these words:

> "There must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country .... It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the

taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form of package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."[15]

22. The doctrine was reiterated in a number of cases, and in *Leisy* v. *Hardin*[16] it was laid down that "the importers had the right to sell in the original packages unopened and unbroken, articles brought into the State from another State or territory notwithstanding a statute of the State prohibiting the sale of such articles except for purposes mentioned therein and under a license from the State". The American writers have however pointed out the difficulty which arose from time to time in applying the "original package" doctrine, since sometimes very intricate questions arose before the courts, such as whether the doctrine applied to the larger cases only or to the smaller packages contained therein, or whether it applied to smaller paper packages of cigarettes taken from loose piles of packages at the factory and transported in baskets. The difficulty in applying the doctrine was particularly experienced in working prohibition schemes, and to combat its mischief and uncertainty, new legislative measures had to be passed by the Congress like the Wilson Act, Webb-Kenyon Act etc. I do not wish to pursue the matter, but wish only to point out that the doctrine has no place in this country, having regard to the scheme of legislation that has been outlined in the Government of India Act, 1935, and in the present Constitution, in which the various entries in the Legislative Lists have been expressed in clear and precise language. In *Province of Madras* v. *Boddu Paidanna and Sons*[17] Gwyer, C.J., while expressing his profound respect for the views expressed by Marshall, C.J. in *Brown* v. *Maryland*[12] mildly hinted that it was easier to follow the line of reasoning of Thompson, J. in his dissenting judgment in that case and concluded with the following remarks:

> "Next, it is to be observed that the American Constitution also provides that Congress alone has power 'to regulate commerce with foreign nations, among the several States, and with the Indian tribes', and it was held that the Maryland tax was no less repugnant to this provision also. Marshall, C.J. asked: 'To what purposes should the power to allow importation be given, unaccompanied with the power to authorise the sale of the thing imported? Congress has a right, not only to authorise importation, but to authorize the importer to sell....What does the importer purchase, if he does not purchase the privilege to sell? On this view of the Commerce Clause, it would indeed be difficult to recognize the right of the State to impose a tax upon the first sale of the commodity, at any rate so long as it remained in the importer's hands. In the Indian Constitution Act no such question arises; and the right of the Provincial Legislature to levy a tax on sales can be considered without any reference to so formidable a power vested in the Central Government. Lastly, the prohibition in the American Constitution is against the laying of 'any imposts or duties on imports or exports' the prohibition is not merely against the laying of duties of customs, but is expressed in what we conceive to be far wider terms; and it does not appear to us that it would necessarily follow from the principle of the Maryland decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of license or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax. That was the view which commended itself to the Court in the *Maryland case*[18] and it was a view adopted and argued before us. The analogy with the American case is an attractive one, but for the reasons which we have given we are wholly unable to accept it."[18]

23. I find considerable force in the opinion thus expressed by Gwyer, C.J. and agree that the "original package" doctrine has no application to this country. In the United States, the widest meaning could be given to the Commerce clause, for there was no question of reconciling that clause with another clause containing the legislative power

of the State. Under the provisions of the Government of India Act, a limited meaning must be given to the word "import" in Entry 19 of List I in order to give effect to the very general words used in Entry 31 of List II.

24. The second attack on the Act is founded upon the provision contained in Section 297(1)(*a*) of the Government of India Act, 1935, and it is contended that the prohibitions contained in the impugned Act in regard to the use, consumption, purchase, transport, possession and sale of intoxicating liquor will necessarily amount to prohibiting and restricting inter-provincial commerce, and inasmuch as they tend to stop and restrict entry into or export from the Province of Bombay of goods of a particular class or description, the Act contravenes Section 297(1)(*a*). This section runs as follows:

> "No Provincial Legislature or Government shall—
>
> (*a*) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that List relating to the production, supply and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from the Province of goods of any class or description...."

25. It should be noticed that this provision refers to "trade and commerce within the Province", which is the subject of Entry 27 of List II and to "production, supply and distribution of commodities", which is the subject of Entry 29 of List II. The provision virtually means that import into or export from a Province of goods of any class or description cannot be prohibited or restricted on the ground that it will affect, trade and commerce within the Province or the production, supply and distribution of commodities. If therefore by any law framed by a Provincial Legislature relating to or based on the subjects of Entry 27 or Entry 29 of List II, the entry into or export from the Province of any goods is prohibited or restricted, such a law will be invalid. But, here, we are concerned not with a law which purports to be made and was made by virtue of Entry 27 or Entry 29 of List II, but a law which is claimed to have been made and was made by virtue of Entry 31 of that List and certain other entries therein. Section 297(1)(*a*) therefore has no application to the present case. This was clearly pointed out in the case of *Bhola Prasad* v. *King-Emperor*[19]. In that case, the Bihar Excise (Amendment) Act, 1940, which amended the Bihar and Orissa Excise Act, 1915, was challenged as contravening Section 297(1)(*a*), but it was held to be a valid Act on grounds already stated, as will appear from the following observations of Gwyer, C.J.:

> "The second point raised on behalf of the appellant was that Section 19(4) of the Act of 1915, as amended by the Act of 1940, is invalid because repugnant to Section 297(1)(*a*) of the Constitution Act. We confess that we have difficulty in appreciating this argument. Section 297(1)(*a*) enacts that.... It is plain beyond words that this provision only refers to legislation with respect to Entry 27 and Entry 29 in the provincial Legislative List; it has no application to legislation with respect to anything in Entry 31. A Provincial Legislature, if it desires to pass a law prohibiting export from, or import into, the Province, must therefore seek for legislative authority to do so in entries other than Entry 27 or Entry 29. If it can point to legislative powers for the purpose derived from any other entry in the Provincial Legislative List, then its legislation cannot be challenged under Section 297(1)(*a*). There is no substance at all in the appellant's arguments on this point."

26. Having dealt with and negatived the first two contentions upon which the validity of the entire Act was assailed, I now proceed to deal with certain sections of the Act, the validity of which also was brought into question. The provision which was most vigorously assailed and in regard to which the attack was successful in the High Court, is the definition of the word "liquor" in Section 2(24) of the Act. The definition

runs thus:

'Liquor' includes

(*a*) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and

(*b*) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act.

27. The High Court has held that the word "liquor" ordinarily means "a strong drink as opposed to soft drink" but it must in any event be a beverage which is ordinarily drunk. Proceeding upon this view, the High Court has held that although the legislature may while legislating under Entry 31 prevent the consumption of non-intoxicating beverages and also prevent the use as drinks of alcoholic liquids which are not normally consumed as drinks, it cannot prevent the legitimate use of alcoholic preparations which are not beverages nor the use of medicinal and toilet preparations containing alcohol. This view of the High Court was very strongly supported on the one hand and equally strongly challenged on the other before us, and I therefore proceed to deal with the question at some length.

28. In the *Oxford English Dictionary*, edited by James Murray, several meanings are given to the word "liquor", of which the following may be quoted:

"Liquor ... *1.* A liquid; matter in a liquid state; in wider sense a fluid.

2. A liquid or a prepared solution used as a wash or bath, and in many processes in the industrial arts.

3. Liquid for drinking; beverage, drink. Now almost exclusively a drink produced by fermentation or distillation. Malt liquor, liquor brewed from malt; ale, beer, porter etc.

4. The water in which meat has been boiled; broth, sauce; the fat in which bacon, fish or the like has been fried; the liquid contained in oysters.

5. The liquid produced by infusion (in testing the quality of a tea). In liquor, in the state of an infusion."

29. Thus, according to the dictionary, the word "liquor" may have a general meaning in the sense of a liquid, or it may have a special meaning, which is the third meaning assigned to it in the extract quoted above viz. a drink or beverage produced by fermentation or distillation. The latter is undoubtedly the popular and most widely accepted meaning, and the basic idea of beverage seems rather prominently to run through the main provisions of the various Acts of this country as well as of America and England relating to intoxicating liquor, to which our attention was drawn. But at the same time, on a reference to these very Acts, it is difficult to hold that they deal exclusively ... with beverages and are not applicable to certain articles which are strictly speaking not beverages. A few instances will make the point clear. In the National Prohibition Act, 1919, of America (also known as the Volstead Act), the words, liquor and intoxicating liquor, are used as having the same meaning and the definition states that these words shall be construed to "include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by Volume which are fit for use for beverage purposes". Having defined "liquor" and "intoxicating liquor" rather widely, the Volstead Act excepted denatured alcohol, medicinal preparations, toilet and antiseptic preparations, flavoring extracts and syrups, vinegar and preserved sweet cider (Section 4) which suggest that they were included in the definition. In some of these items, we have the qualifying words unfit for use for beverage purposes', but the heading of Section 4 of the Volstead Act, under which these exceptions are enumerated is exempted liquors.

30. The Licensing (Consolidating) Act, 1910, of England was an Act relating to licenses for the sale of intoxicating liquor etc. The definition of "intoxicating liquor" in this Act was as follows:

> "'Intoxicating liquor' means (unless inconsistent with the context) spirits, wine, beer, porter, cider, perry and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without an excise licence."

31. The word "spirits" has been defined in the Spirits Act, 1880, as meaning spirits of any description, and includes all liquors mixed with spirits, and all mixtures, compounds, or preparations made with spirits. It was contended before us that the definition of the word "spirits" in the Spirits Act should not be imported in the Act of 1910, but in our view for the purpose of understanding the definition of "intoxicating liquor", the two Acts should be read together. I do not suggest that the definition of "liquor" in the present Act was borrowed from those Acts, but I am only trying to show that the word "liquor" is capable of being used in a wide sense.

32. Coming now to the various definitions given in the Indian Acts, I may refer in the first instance to the Bombay Abkari Act of 1878 as amended by subsequent Acts, where the definition is substantially the same as in the Act with which we are concerned. In the Bengal Excise Act, 1909, "liquor" is said to mean "liquid consisting of or containing alcohol" and includes "spirits of wine, spirit, wine, tari pachwai, beer, and any substance which the Provincial Government may ... declare to be liquor for the purposes of the Act". In several other Provincial Acts e.g. the Punjab Excise Act, 1914, the U.P. Excise Act, 1910, "liquor" is used as meaning intoxicating liquor and as including all liquids consisting of or containing alcohol. The definition of "liquor" in the Madras Abkari Act, 1886, is the same as in the Bombay Act of 1878. Even if we exclude the American and English Acts from our consideration, we find that all the Provincial Acts of this country have consistently included liquids containing alcohol in the definition of "liquor" and "intoxicating liquor". The framers of the Government India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word "liquor" has been used in the various Excise Acts of this country and, accordingly I consider the appropriate conclusion to be that the word "liquor" covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word "liquor" in common parlance especially when that word is prefixed by the qualifying word "intoxicating", but in my opinion having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term "intoxicating liquor" as used in Entry 31 of List II.

33. There is in my opinion another method of approaching the question which also deserves consideration. Remembering that the object of the Prohibition Act was not merely to levy excise duties but also to prohibit use, consumption, possession and sale of intoxicating liquor, the legislature had the power to legislate upon the subjects included in the Act not only under Entry 31 of List II, but also under Entry 14, which refers inter alia to public health. Article 47 of the Constitution, which contains one of the directive principles of State policy, provides that "the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health". This article has no direct bearing on the Act which was passed in 1949, but a reference to it supports to some extent the conclusion that the idea of prohibition is connected with public health, and to enforce prohibition effectively the wider definition of the word "liquor"

would have to be adopted so as to include all alcoholic liquids which may be used as substitutes for intoxicating drinks, to the detriment of health. On the whole, I am unable to agree with the High Court's finding, and hold that the definition of "liquor" in the Bombay Prohibition Act is not ultra vires.

34. The learned Attorney-General also relied upon Entry 1 of List II which relates among other items to "public order", and though at first sight it may appear to be far-fetched to bring the subject of intoxicating liquor under "public order", yet it should be noted that there has been a tendency in Europe and America to regard alcoholism as a menace to public order. In *Russel* v. *Queen*[7] Sir Montague Smith held that the Canada Temperance Act, 1878, the object and scope of which was to promote temperance by means of a uniform law throughout the Dominion, was a law relating to the "peace, order, and good government" of Canada, and, in so deciding said as follows:

> '*Laws of this nature designed for the promotion of public order*, safety, or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which falls within the general authority of Parliament to make laws for the order and good government of Canada ...."[20]

35. Again, referring to liquor laws and liquor control, a learned British author[21] says as follows:

> "The dominant motive everywhere, however, has been a social one, to combat a menace to public order and the increasing evils of alcoholism in the interests of health and social welfare. The evils vary greatly from one country to another according to differences in climate, diet, economic conditions and even within the same country according to differences in habits, social customs and standards of public morality. A new factor of growing importance since the middle of the 19th century has been the rapid urbanisation, industrialization and mechanization of our modern every day life in the leading nations of the world, and the consequent wider recognition of the advantages of sobriety in safeguarding public order and physical efficiency."

36. These passages may lend some support to the contention of the learned Attorney-General that the Act comes also within the subject of "public order", but I prefer to leave out of account this entry, which has a remote bearing, if any, on the object and scope of the present Act.

37. I now come to Section 39 of the Act which has been impugned on the ground that it offends against Article 14 of the Constitution which states that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". The meaning and scope of this article has been fully discussed in the case of *Chiranjit Lal Chowdhury* v. *Union of India*[22], and the principles laid down in that case may be summarized as follows:

> (*1*) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.
>
> (*2*) The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.
>
> (*3*) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
>
> (*4*) The principle does not take away from the State the power of classifying

persons for legitimate purposes.

(*5*) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

(*6*) If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

(*7*) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.

38. Similarly, Professor Willis, dealing with the Fourteenth Amendment of the Constitution of the United States, which guarantees equal protection of the laws, sums up the law as prevailing in that country in these words:

"The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'. 'The inhibition of the amendment ... was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation'. It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."[23]

39. With these principles in view, I have to decide whether Article 14 of the Constitution has been violated by the provisions contained in Section 39 of the Act before us. That section runs as follows:

"The Provincial Government may, on such conditions as may be specified in the notification published in the Official Gazette, permit the use or consumption of foreign liquor on cargo boats, warships and troopships and in military and naval messes and canteens."

40. What is contended is that the concession shown to the warships, troopships, and military and naval messes and canteens is a violation of the principle of equality and the legislature has acted arbitrarily and capriciously in selecting certain bodies or groups of people for favoured treatment, while subjecting the petitioner and other citizens to the general provisions of the Act. It is said that the law should have been enforced alike against the civil population and military personnel, between whom no distinction can be made at all on any rational ground in the enforcement of the policy of prohibition.

41. The scheme of Chapter IV of the Prohibition Act, in which the impugned provision finds a place, seems inter alia to relax the law in favour of certain persons or groups of persons or institutions by introducing the system of passes, licences, permits and authorizations. A few examples will show that the legislature did not proceed without making any classification. For instance, Section 35 deals with licences to hotels, Section 37 with licences to dining cars and coastal steamers, Section 38 with licences to shipping companies, Section 40 with permits to foreigners and

persons who need liquor on grounds of health, Section 41 with permits to foreign sovereigns and diplomats, Section 44 with licences to clubs, Section 45 with authorisations for sacramental purposes, Section 46 with visitors' permits, and so on. These sections were not challenged before us, and it may be assumed that the classification made by the legislature has been accepted so far as they are concerned. The question is whether in relaxing the rule in favour of warships, troopships, and military and naval messes and canteens, the legislature has acted arbitrarily and capriciously or it has proceeded here also on the basis of reasonable classification. The learned Attorney-General referred us to several statutes, army regulations and certain provisions of the Constitution, in order to show that the military force has been regarded in this country as a class by itself, and there are many special provisions with regard to it. But it is contended that this is not enough and that no classification can be held to be valid unless it is shown to bear a just and reasonable relation to the objects of the particular legislation before us. The argument, in other words, is this: Assuming that the armed forces may be treated as a class for certain purposes, can it be treated as a class for the purpose of enforcing prohibition? This argument found favour with the High Court, and Section 39 was declared to be void. In my opinion, the judgment of the High Court cannot be supported because I think that there is an understandable basis for the exemptions granted to the military canteens, etc. by the Act. The armed forces have their own traditions and mode of life, conditioned and regulated by rules and regulations which are the product of long experience and which aim at maintaining at a high level their morale and those qualities which enable them to face dangers and perform unusual tasks of endurance and hardship when called upon to do so — qualities such as dash and courage, unbreakable tenacity and energy ready for any sacrifice which should be unfaltering for long days together. By these rules and regulations, drinking among the forces is not prohibited, but it is properly and carefully regulated. It is easy to understand that the legislature chose not to interfere with the mode of life to which the forces have been accustomed, lest such interference should affect their morale and and lead to subterfuges which may prove unwholesome for their discipline and good behaviour. Besides, when drinking is regulated among a class of persons by specific rules and regulations and drunkenness is made an offence, the relaxation of the law of prohibition in their case is not likely to produce the same evil results as it may produce under other circumstances. I find therefore nothing wrong prima facie in the legislature according special treatment to persons who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions. In my opinion, therefore, Section 39, insofar as it affects the military and naval messes and canteens, warships and troop-ships, cannot be held to be invalid. So far as the cargoboats are concerned, it was contended on behalf of the petitioner that no rational differentiation could be made between them and the passenger boats, and there was no conceivable ground for granting exemption or concession of any kind to the former. Here again, we cannot assume that the legislature has proceeded arbitrarily. The cargoboats being slower boats have to be on the sea for long periods, the number of persons affected by the exemption is comparatively small, and they are mostly sojourners who stay at the port for a short time and then go away. These considerations may well have induced the legislature to show some concession to them, and we cannot say that these are irrelevant considerations. The provision relating to exemption of cargoboats should therefore be held to be valid.

42. I have already referred to Section 46 which deals with visitors' permits. That section provides that the Provincial Government may authorize an officer to grant visitors' permits to consume, use and buy foreign liquor to persons who visit the Province for a period of not more than a week. The High Court held this provision to be valid, but it considered Rule 67 of the Bombay Foreign Liquor Rules, framed under

Section 143 of the Act, to be invalid. That Rule provides that any foreigner on a tour of India who enters the State of Bombay and desires to possess, use and consume foreign liquor shall apply to certain officers for obtaining a permit, which may be granted for a period not exceeding one month subject to subsequent renewal. The High Court declared this Rule to be invalid on the ground that it discriminated between foreign visitors and Indian visitors who visit Bombay from neighbouring Provinces. It seems to me that this is hardly a matter which should have been gone into on the petitioner's application, since he claims to be neither a foreigner nor an Indian visitor from another Province. But, in any event, the Rule cannot be assailed on the ground of discrimination, firstly because though it provides for the case of a foreign visitor there is no prohibition against any other outsider being granted a permit, and secondly, because the policy underlying the Rule is quite consistent with the policy underlying Section 40 of the Act which enables permits to be granted to foreigners under certain conditions.

43. The High Court has also declared Sections 52, 53 and 139(*c*) of the Act invalid on the ground that they constitute "delegation of legislative power". The reasons given by the High Court for arriving at this conclusion are stated in its judgment as follows:

> "Under Section 52 power is given to the Government to grant licences in cases other than those specifically provided under any of the provisions of the Act. Under Section 53 Government is inter alia empowered to vary or substitute any of the conditions of the licence laid down in the Act, and under Section 139(*c*) power is given to Government to exempt any person or institution or any class of persons or institutions from the observance of all or any of the provisions of the Act or any rule or regulation or order made thereunder. The policy of legislation has been clearly laid down by the legislature in the Act itself. As pointed out by us before, the legislature intended to grant permits ordinarily only on grounds of health and certain exceptions were made in the case of certain classes. It is always open to the legislature to leave it to the Government to work out the policy in details. It would be impossible for the legislature to provide for all circumstances and all eventualities that may arise in the actual working of the Act. But it is not open to the legislature to permit Government to alter the policy itself. In our opinion, in leaving it to Government to issue permits in cases other than those provided for by the Act, in permitting Government to vary or substitute conditions of the licence, and in permitting Government to exempt persons or classes from the provisions of the Act, the legislature was clearly delegating to Government its own power of legislation. This it can clearly not do."

44. This Court had to consider quite recently the question as to how far "delegated legislation" is permissible, and a reference to its final conclusion will show that delegation of the character which these sections involve cannot on any view be held to be invalid. (See *Special Reference 1* of 1951: *In re Delhi Laws Act, 1912 etc.*[24]) A legislature while legislating cannot foresee and provide for all future contingencies, and Section 52 does no more than enable the duly authorized officer to meet contingencies and deal with various situations as they arise. The same considerations will apply to Sections 53 and 139(*c*). The matter however need not be pursued further, as it has already been dealt with elaborately in the case referred to.

45. I now proceed to deal with a group of sections in regard to which I find myself in agreement up to a point with the views expressed by the High Court. Section 12 of the Act provides inter alia that no person shall possess or sell or buy liquor and Section 13 provides inter alia that no person shall consume or use liquor. Substituting for the word "liquor" occurring in these two sections the definition of that word as given in clause (*a*) of Section 2(24) of the Act, the effect of these two sections is that no person shall possess, or sell or buy or consume or use "spirits of wine, methylated spirit, wine, beer, toddy and all liquids consisting of or containing alcohol". I have

already held that under Entry 51 of List II, the Bombay legislature was quite competent to make a law with respect to "liquor" even as broadly defined. It is however contended that the power of making laws has to be exercised subject to the other provisions of the Constitution and in particular to those relating to the fundamental rights guaranteed under Part III of the Constitution. The provisions to which I have referred have been assailed on the ground that they are in conflict with Article 19(1)(*f*) of the Constitution which guarantees that all the citizens shall have the right "to acquire, hold and dispose of property". This clause is wide enough to include movable as well as immovable property. The provisions in question undoubtedly prevent a citizen from possessing, selling, buying, consuming or using "liquor" as defined, and therefore they prima facie infringe the fundamental right of the Indian citizens to acquire, hold and dispose of a kind of property, namely, "liquor" as defined in Section 2(24) of the Act, and as such would be void under Article 13. The question to be considered is whether they can be saved by clause (5) of Article 19, which runs as follows:

> "Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

46. The question boils down to ascertaining whether the restrictions imposed by the provisions to which reference has been made are reasonable. In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of State policy set forth in Article 47 of the Constitution, "The State is charged with the duty of bringing about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health". That the restrictions imposed by the sections on the right of a citizen to possess, or sell or buy or consume or use spirits of wine, methylated spirits, wine, beer, toddy are in view of the aforesaid directive principles of State policy quite reasonable, has not been disputed before us. The controversy has centred round the words "and all liquids consisting of or containing alcohol". It is said that those words include "all liquids, toilet or medicinal preparations containing alcohol" and the restrictions imposed upon the ordinary use of such toilet or medicinal preparations are unreasonable and therefore void. So far as these preparations are concerned, the High Court has dealt with the matter as follows:

> "To put it in a simple form, the question to which we have to address ourselves is whether the legislature can prohibit the legitimate use of an article which ordinarily is not drunk, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition Act. Let us take the concrete case of eau-de-cologne or lavender water. Their legitimate use is only for the purpose of toilet. They contain spirit and it may be that an addict deprived of his drink may drink it in order to satisfy his thirst. Is it permissible to the legislature under such circumstances to deprive the general public of the legitimate use of eau-de-cologne or lavender water as articles of toilet? The legislature may prevent the abuse of these articles, but can it prevent their legitimate use? It is difficult to understand how any restriction on the legitimate use of these articles can be in the interests of the general public so as to make these restrictions reasonable within the meaning of Article (19)(5). If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is acting against public interest. Therefore, in our opinion, while it was open to the legislature to provide against the abuse of these articles, it was not open to it to

prevent its legitimate use. But the legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Government. It is contended by the Advocate-General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold and dispose of property, and, in our opinion, that restriction is not reasonable. The same argument applies to medicinal and toilet preparations containing alcohol. Therefore we hold that to the extent to which the Prohibition Act prevents the possession, use and consumption of non-beverages and medicinal and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(1)(*f*) of the Constitution even if they may be within the legislative competence of the Provincial Legislature."

47. The next step in the argument is that as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. This line of reasoning, no doubt, seeks to find support from the observations made in the majority decisions of this Court in *Romesh Thappar* v. *State of Madras*[25] and in *Chintaman Rao* v. *State of Madhya Pradesh*[26] but in my opinion those observations do not apply to the case before us. It will be noticed that the legislature has defined the term "liquor" as including several distinct categories of things followed by a general category. There can be no doubt whatever that the earlier categories of liquor, namely, spirits of wine, methylated spirit, wine, beer, toddy, are distinctly separable items which are easily severable from the last category, namely, all liquids consisting of or containing alcohol. These items being thus treated separately by the legislature itself and being severable, and it not being contended, in view of the directive principles of State policy regarding prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties are unreasonable, the impugned sections must be held valid so far as these categories are concerned. The next question is whether those sections are void insofar as they purport to impose restrictions on the citizens' right to acquire, hold or dispose of all liquids consisting of or containing alcohol. It is said that this is one general item and it cannot be split up into different sub-categories and therefore the sections insofar as they relate to this general item must be held to be void. This argument at first appears to have some force but a close scrutiny will reveal that it is not in the circumstances of this case sound. Section 139 of the Act authorises the Provincial Government, by general or special order, to exempt any intoxicants or class of intoxicants from all or any of the provisions of the Act. An order made by the Provincial Government in exercise of the power conferred by this section owes its legal efficacy to this section and therefore in the eye of the law the notification has the force of law as if made by the legislature itself. In exercise of powers vested in it by Section 139(*d*) the Provincial Government issued an order No. 10484/45(*e*) exempting intoxicants specified in column 1 of the Schedule thereto annexed from the provisions of the Act specified against them in column 2 of that Schedule. Turning to the Schedule, we find that in Item (1) duty-paid perfumed spirits (except eau-de-cologne), in Item (3) dutypaid spirituous toilet preparations (except lavender water) and in item (4) duty-paid spirituous medicinal preparations other than 123 specified liquids, are exempted from the operation of Sections 12(*c*) and (*d*) and 13(*b*) to the extent specified therein. This notification was superseded on 1st April, 1950, by another notification which is more liberal in certain respects, and these notifications, being made in exercise of the power given by the Act itself, have undoubtedly the force of law and must be read along with the Act. So read, it is quite clear that "all liquids consisting of or containing alcohol" are capable of being split up into and have in fact been split up into several distinctly separate sub-

items including liquid toilet and medicinal preparations containing alcohol. The legislature itself contemplated this sub-division, for by Section 139 it authorised the Provincial Government to exempt any intoxicant or class of intoxicants from the operation of the Act. This circumstance takes the case out of the principles laid down in the two cases mentioned above and the item being thus severable I am free to consider whether the restrictions imposed on a sub-item, namely, liquid toilet and medicinal preparations containing alcohol, are reasonable or not. I am substantially in agreement with the line of reasoning adopted by the High Court and I consider that the Act is not a law imposing reasonable restrictions so far as medicinal and toilet preparations containing alcohol are concerned. The National Prohibition Act or the Volstead Act of America, to which I have referred, was also an Act relating to prohibition, but toilet and medicinal preparations containing alcohol were expressly excluded from the scope of that Act. I refer to that Act simply to show that a complete scheme of prohibition can be worked without including such articles among those prohibited. Again, Article 47 of the Constitution also takes note of the fact that medicinal preparations should be excluded in the enforcement of prohibition. I do not consider that it is reasonable that the possession, sale, purchase, consumption or use of medicinal and toilet preparations should be prohibited merely because there is a mere possibility of their being misused by some perverted addicts.

48. It was contended that there was no meaning in declaring the provisions relating to purchase, sale, possession, use and consumption of medicinal and toilet preparations containing alcohol to be invalid, since in Notification No. 10484/45, issued by the Provincial Government on the 1st April which is no part of the Act, the Government have exempted duty-paid perfumed spirits (including eau-de-cologne), duty-paid spirituous toilet preparations and certain classes of duty-paid spirituous medicinal preparations from the following provisions of the Act:

(*i*) Section 12(*c*);

(*ii*) Section 12(*d*), insofar as it relates to buying of such preparations;

(*iii*) Section 13(*b*), insofar as it relates to use of such preparations.

49. But it is to be noted that the *sale* of these articles is not covered by the above notification, but is regulated by two other notifications, namely, Notification No. 2843/49, dated the 6th April, 1950, and Notification No. 2843/49, dated 11th April, 1950. In these two notifications, there are provisions imposing limits on sales. For example, in the first notification issued on 6th April, Rule 10(1) provides as follows:

"The licensee shall not sell to any person on any one day any kind of perfumed spirits, spirituous toilet preparations or essences in excess of such quantity as may be prescribed by the Commissioner under the Act."

50. Similarly, in the second notification of 11th April, Rules 9 and 10 run as follows:

"9. The licensee shall not sell medicated tonics or medicated wines containing more than 10 per cent of alcohol (or containing alcohol in strength more than 17.5 per cent of proof spirit) except those which are classified as spirituous medicinal preparations and regulated as such under the Drugs Act, 1940.

10. Subject to the provisions of Rule 9 the licensee shall not sell the following spirituous medicinal preparations to any person unless he produces a medical prescription in that behalf, namely:

(*a*) medicated tonics and medicated wines;

(*b*) asaves and arishtas specified in the Schedule hereto annexed;

(*c*) any other spirituous medicinal preparations containing more than 10 per cent of alcohol (or containing alcohol in strength more than 17.5 per cent of proof spirit) which are intended for internal use:

Provided that the following spirituous medicinal preparations may be sold

to any person without the production by such person of any medical prescription, namely, ..."

51. In view of the restrictions imposed on the sale of these preparations, it is pertinent to enquire whether those restrictions will not also affect their purchase, possession, use and consumption, and whether the so called exemptions contained in the notification of the 1st April really go as far as they purport to go: (vide in this connection conditions in column 7 of Notification No. 10484/45(*a*) of the 1st April, 1950). Again, in Notification No. 10484/45 of 1st April, only 8 medicinal preparations are totally exempted as regards their purchase, possession, and use, and so far as medicinal preparations for internal consumption are concerned, only those containing not more than 10% of alcohol or 17.5% of proof spirit are exempted. This notification has to be read along with another Notification No. 10484/45(*a*) of the same date, which was to remain in force till 31st March, 1951 only. In the latter notification, for the purpose of possession, purchase, consumption and use, the quantity of medicinal preparations containing not more than 10% of alcohol etc. is restricted to such quantity as may be prescribed by a registered medical practitioner. Even these notifications may be withdrawn, superseded or amended at any moment by the Provincial Government, as was done in the case of the notifications issued on 16th June, 1949, which have been referred to. An ordinary citizen may find it a perplexing task to attempt to extract information out of the long series of complicated regulations, as to the true nature and extent of the right which the law confers upon him. Indeed it was only with the help of the learned counsel appearing for the parties that we were able to know what the position was up to 31st March, 1950, and what changes were made on 1st April, 1950. But in the bundle of notifications which have been placed before us, there is no notification stating what step has been taken after 31st March, 1951, and none was brought to our notice in the course of the arguments. Having given my careful consideration to the matter, I am of the opinion, that the restrictions imposed by the Act even when read with the above notifications are not reasonable, and I would affirm the conclusion arrived at by the High Court.

52. The next group of sections which the High Court has held to be invalid, are Sections 23(*a*) and 24(1)(*a*) insofar as they refer to "commending" any intoxicant, Section 23(*b*) in its entirety, and Section 24(1)(*b*) insofar as it refers to "inciting or encouraging" any individual or class of individuals or the public generally "to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence, etc." These provisions run as follows:

"23. No person shall—

(*a*) commend, solicit the use of, or offer any intoxicant or hemp, or

(*b*) incite or encourage any member of the public or any class of individuals or the public generally to commit any act which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder, or ...

24. (1) No person shall print or publish in any newspaper, news-sheet, book, leaflet, booklet or any other single or periodical publication or otherwise display or distribute any advertisement or other matter.

(*a*) which commends, solicits the use of or offers any intoxicant or hemp, or

(*b*) which is calculated to encourage or incite any individual or class of individuals or the public generally to commit an offence under this Act, or to commit a breach of or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence, permit, pass or authorization granted thereunder."

53. Sections 23(*a*) and 24(1)(*a*) insofar as they refer to "commending" any intoxicant are said to conflict with the fundamental right guaranteed by Article 19(1)(*a*) namely, the right to freedom of speech and expression and there can be no doubt

that the prohibition against "commending" any intoxicant, is a curtailment of the right guaranteed and it can be supported only if it is saved by clause (2) of Article 19 which, as it stands at present, provides that "nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State". It seems to me that none of the conditions mentioned in clause 2 applies to the present case, and therefore the provisions in question must be held to be void. Section 23(*b*) must also be held to be void, because the words "incite" and "encourage" are wide enough to include incitement or encouragement by words and speeches and also by acts. The words "which frustrates or defeats the provisions of the Act or any rule, regulation or order made thereunder" are so wide and vague that it is difficult to define or limit their scope. I am therefore in agreement with the view of the High Court that this provision is invalid in its entirety. So far as Article 24(1)(*b*) is concerned the judgment of the High Court in regard to it cannot be upheld. The learned counsel for the petitioner also conceded before us that he was not going to assail this provision.

54. The High Court has also declared Sections 136(1), 136(2)(*b*), 136(2)(*c*), 136 (2)(*e*), 136(2)(*f*) to be void as offending against various provisions of Article 19 the Constitution, but no argument was addressed to us on behalf of the Government of Bombay assailing the judgment of the High Court with regard to these provisions. The judgment of the High Court in regard to them will therefore stand.

55. I will now deal with two Notifications No. 10484/45(*c*) and 2843/49(*a*), dated 30th March, 1950, which the High Court has held to be invalid. As regards the first notification, the High Court has stated that Section 139(*c*) having been held to be ultra vires the legislature, this notification, which was issued under that section is ultra vires the Bombay Government. But, since this Court has taken a different view in regard to the validity of Section 139(*c*), the decision of the High Court as regards the above notification cannot stand. It appears from certain observations in the judgment under appeal, firstly that the High Court upheld Section 40(1)(*c*)(*i*) and (*ii*), which deals with the grant of permits to foreigners who do not intend to stay permanently in India, merely because the Explanation to that section provided that "a person shall be deemed to be residing or intending to reside in India temporarily, if the period of his residence does not exceed six months"; and secondly, that the High Court would have found it difficult to uphold the classification on which Section 40(1)(*c*) is based if the restriction regarding six months' residence was not there, as would be the result of reading the section subject to the above notification. I am however unable to see how the notification will turn a classification which is otherwise a good classification into a bad one. There is nothing unreasonable in a law relating to prohibition discriminating between Indian citizens against whom it is primarily to be enforced, and foreigners who have no intention of permanently residing in this country. The condition of six months' residence which is laid down in the Explanation to Section 40 is somewhat arbitrary, and the mere fact that the Government by notification withdrew this condition cannot in principle alter the basis of the classification.

56. The High Court has declared the other notification issued by the Government on 30th March, 1950, to be invalid on grounds which are stated in these words:

> "That notification exempts persons holding permits under clause (*c*) of sub-section (1) of Section 40, special permits under Section 41, or interim permits under Section 47, from the provisions of Section 23(*a*) insofar as it relates to the offering of foreign liquor to persons holding similar permits. This is clearly not justified. Having created a class, having given to that class the right of obtaining a permit on grounds other than those of health, it will be totally wrong to permit that class not to abide by the same provisions with regard to permits as others to whom

permits have been given. The restrictions placed by the legislature itself on a permit-holder regarding the use and consumption of his stock of liquor is to be found in Section 43 under which the permit-holder shall not allow the use and consumption by any person who is not a permit-holder. That restriction must apply equally to permits issued under Section 40 to Indian citizens as well as foreigners, and in our opinion it is improper to allow a foreigner permit-holder to stand drinks to other permit holders and to deny that privilege to Indian permit-holders. The guarantee of equality before the law extends under our Constitution not only to legislation but also to rules and notifications made under statutory authority and even to executive orders and as the notification offends against the principle of equality it is, therefore, void."

57. In order to understand these remarks, it will be necessary to state that persons holding permits under clause (*c*) of sub-section (1) of Section 40 are foreigners as described in sub-clauses (*i*) and (*ii*) of clause (*c*), that persons holding special permits under Section 41 are foreign sovereigns, ambassadors etc. and that persons holding interim permits under Section 47 are persons applying for permits under either Section 40, or Section 41. The last class will include not only foreigners but also Indian citizens applying for permits on the ground that their health will be seriously and permanently affected if they are not permitted to use or consume liquor. Thus, the assumption on which the conclusion of the High Court is based, does not appear to be correct. Besides, I do not find anything in this notification which violates the principle of equality. It simply enables a certain class of persons holding permits to offer drinks to persons holding similar permits. This is in accord with the principle underlying the provisions of Section 43 which has not been assailed before us and which provides that "no holder of a permit granted under Section 40 or 41 shall allow the use or consumption of any part of the stock held by him under the permit to any person who is not the holder of such a permit". In my opinion, there is no substantial ground for holding the notification to be invalid. The points relating to the notifications are extremely small, and the subtle distinctions upon which they are based, are hardly worth the attention which the High Court has bestowed on them.

58. There is another point which arises on the judgment of the High Court which may also be noticed. The point is set out in that judgment in these words:

> "When a person applies for a permit on the ground of health he has to forward with it a certificate from the medical board and when we turn to the form of this certificate, it requires the medical board to declare the applicant an addict. Therefore the position is that it is only on the applicant being found an addict by the medical board that he would be entitled to a permit if his health would be seriously and permanently affected if he was not permitted to use or consume liquor. It is not only in the case of addicts that such a contingency would arise. Even persons who are not addicts may have been accustomed to drink for a long period of time and a sudden discontinuance of drink may seriously and permanently affect their health. It may also happen that without being accustomed to drink at all a person may contract an illness which may require the use by him of alcoholic drink under medical opinion. To be an addict, in our opinion, means something more than being merely accustomed to drink. We must give to it its plain natural meaning. It is certainly not a term of art, and giving to it its plain natural meaning, the expression 'addict' does carry with it a sense of moral obloquy. The intention of the Government seems to be that only persons who confess that they are deviating from standards of morality should be given permits. Now insistence upon a medical certificate in this form is not at all warranted by the provisions of the Act."

59. The point is a small one but it seems to me that there is some substance in it. In my opinion, the word "addict" in the medical certificate should be replaced by the

words used in Section 40(1)(*b*) of the Act or words corresponding to them.

60. The only other point which remains to be decided is whether as a result of some of the sections of the Act having been declared to be invalid, what is left of the Act should survive or whether the whole Act should be declared to be invalid. This argument was raised before the High Court also, but it was rejected and it was held that it was not possible on a fair review of the whole matter to assume that the legislature would not have enacted the part which remained without enacting the part that was held to be bad. It is to be noted that upon the findings of the High Court, the question should have assumed a more serious aspect than it presents now, because the High Court has declared several important sections of the Act including the definition of "liquor" to be ultra vires the legislature. I have now examined those sections and have held many of them to be valid. The provisions which are in my view invalid cannot affect the validity of the Act as a whole. The test to be applied when an argument like the one addressed in this case is raised, has been very correctly summed up by the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada*[22] in these words:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

61. It is quite clear that the provisions held by me to be invalid are not inextricably bound up with the remaining provisions of the Act, and it is difficult to hold that the legislature would not have enacted the Act at all without including that part which is found to be ultra vires. The Act still remains substantially the Act as it was passed i.e. an Act amending and consolidating the law relating to the promotion and enforcement of the policy of prohibition and also the Abkari law in the Province of Bombay.

62. In the result, I declare the following provisions of the Act only to be invalid:

(*1*) clause (*c*) of Section 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(*2*) clause (*d*) of Section 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol.

(*3*) clause (*b*) of Section 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

(*4*) clause (*a*) of Section 23, so far as it prohibits the commendation of any intoxicant or hemp.

(*5*) clause (*b*) of Section 23, in entirety.

(*6*) clause (*a*) of sub-section (1) of Section 24, so far as it prohibits commendation of any intoxicant or hemp.

(*7*) sub-section (1) of Section 36, in entirety.

(*8*) clauses (*b*), (*c*), (*e*), and (*f*) of sub-section (2) of Section 136, in their entirety.

63. I hold that the rest of the provisions of the Act are valid, and I also hold that my decision declaring some of the provisions of the Act to be invalid does not affect the validity of the Act as it remains. Appeal No. 182, preferred by the State of Bombay, is therefore substantially allowed and Appeal No. 183 preferred by the petitioner is dismissed.

64. On the question of costs, I am disposed to make the same order as the High Court has made, not only because some of the provisions of the Act are still found to be invalid, but also because the present case appears to have been instituted to test the validity of a controversial measure and to secure a final decision on it to set at rest

the doubts and uncertainties which may have clouded the minds of a section of the public as to how far the provisions of the Act conform to law and to the Chapter on Fundamental Rights in the present Constitution.

M. PATANJALI SASTRI, J.:— I agree and have nothing more to add.

B.K. MUKHERJEA, J.:— I have read the judgment of my learned Brother Mr Justice Fazl Ali and I am in entire agreement with his conclusions and reasons. There is nothing further which I can usefully add.

S.R. DAS, J.:— I agree and I have nothing further to add.

VIVIAN BOSE, J.:— I also agree.

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* Appeal under Article 132(1) of the Constitution of India from the Judgment and Order dated 22nd August, 1950, of the High Court of Judicature at Bombay in Miscellaneous Application No. 139 of 1950.

[1] (1942) FCR 17 at 25

[2] (1949) FCR 650

[3] Vide *United Provinces* v. *Atiqa Begum*, (1940) FCR 110 at 134

[4] (1939) FCR 18

[5] (1945) FCR 179 at 191

[6] (1937) AC 863 at 870

[7] 7 AC 829

[8] (1947) FCR 28

[9] (1947) FCR at p 51

[10] (1948) FCR 207 at 225

[11] (1949) FCR 650 at 655

[12] 1827) 25 US 419

[13] (1827) 25 US at p 439

[14] (1827) 25 US at p 447

[15] (1827) 25 US at p 441

[16] 135 US 100

[17] (1942) FCR 90

[18] (1942) FCR 90 at 106-7

[19] (1942) FCR 17 at 27

[20] 7 AC 829 at p. 839

[21] The *Encyclopaedia Britannica*, 14th Edn., Volume 14, page 191

[22] (1950) SCR 869

[23] *Constitutional Law*, by Prof Willis, (1st Edition) p 578

[24] Reported infra

[25] (1950) SCR 594

[26] (1950) SCR 759

[27] (1947) AC 505 at 518

OBJECTIONS/ COMMENTS ON THE DRAFT CERC (PROCEDURE, TERMS AND CONDITIONS FOR GRANT OF TRADING LICENCE AND OTHER RELATED MATTERS) REGULATIONS, 2019

A. Background

1. The Electricity Act, 2003, is a comprehensive legislation, which covers generation, transmission, distribution and trading of electricity. A reading of the Preamble of the 2003 Act will confirm that the Parliament intended to provide measures for conducive development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity in all areas etc. It is in this context, one has to review the role and jurisdiction of the Appropriate Commission constituted under the Act, which are vested with various functions such as licensing, tariff determination, adjudication of disputes etc.

2. The Statement of Objects and Reasons in paragraph 4 while dealing with the main features of the bill in the context of "trading", states as follows:

> "4. The main features of the Bill are as follows:
>
> ... ...
>
> (ix) Trading as distinct activity is being recognised with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.
>
> (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.

... ..."

3. Under Section 12 of the Electricity Act, 2003, trading of electricity is a licensed activity, for which a license can be granted in terms provided under sections 14 and 15 of the Electricity Act, 2003. Section 79 and 86 deal with the various functions of the Central and State Commissions respectively. A careful perusal of section 79(1) will reveal that while the Central Commission has the power to "regulate" tariff for generating companies owned by the Central Government and those which have a composite scheme for generation and sale of electricity in more than one State. The Central Commission also exercises regulatory jurisdiction over inter-State transmission of electricity. In section 79(1)(j), the Parliament has vested the following jurisdiction on the Central Commission in relation to electricity trading:

> "79. Functions of Central Commission
>
> (1) The Central Commission shall discharge the following functions, namely:
>
> ... ...
>
> (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
>
> ... ..."

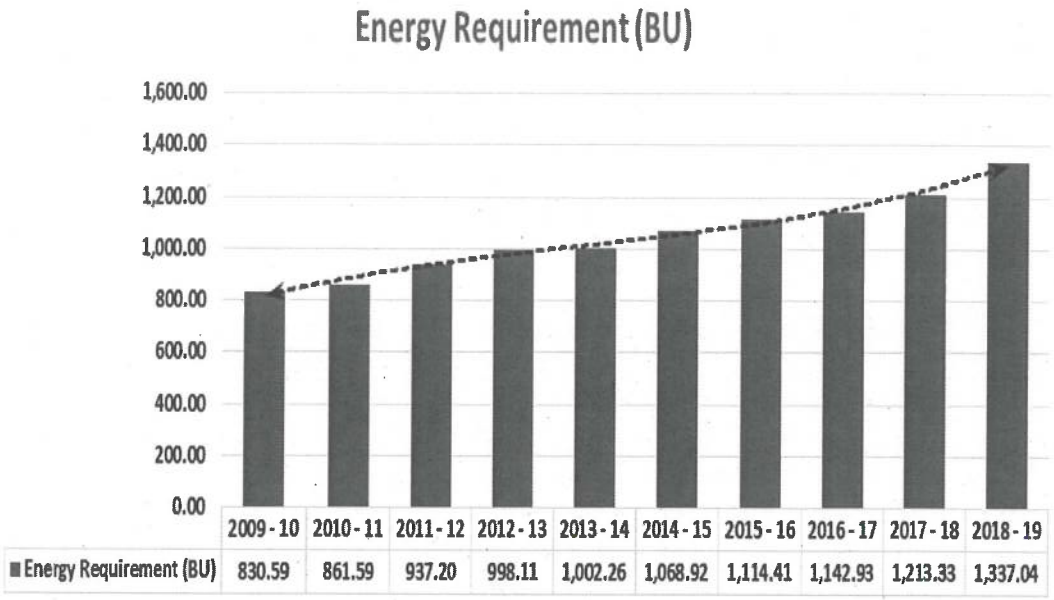
4. The aforesaid reveals that while the power to regulate is available over generation and transmission of electricity, no such power has been vested in the Central Commission in matters relating to trading of electricity. The power in this context is limited only to fix the trading margin, and that too, if considered, necessary. Similarly, under Section 86, the State Commission has powers to determine tariff for generation, supply, transmission and wheeling of electricity

and also the power to regulate the purchase and procurement process of electricity by a distribution company. However, in relation to trading of electricity, the jurisdiction is limited.

5. The aforesaid jurisdictional limitations have to be considered while framing a delegated legislation, whose purpose is to implement the provisions of the statute and not in any manner offend the letter or spirit of the statute.

6. As will be seen from the present submission, the draft regulations constitute a regulatory overreach, and stifles the growth of the power market and will reduce competition.

7. The quantum of power in the Indian power market has gone up over the last 15 years, and has subsequently resulted in the entry of many intermediaries in the sector, each of whom play a significant role in ensuring the viability of the power sector in India. Consumer open access is a reality only on account of the aggressive manner in which electricity traders have been able to deliver power to industrial consumers in an innovative manner. The table below demonstrates the growth of the power market:



	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Energy Requirement (BU)	830.59	861.59	937.20	998.11	1,002.26	1,068.92	1,114.41	1,142.93	1,213.33	1,337.04

Source: Central Electricity Authority LGBR 2009-2018

8. The Draft CERC (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters) Regulations, 2019 under Regulation No. ECO-14/06/2019-CERC dated 24.07.2019 (hereinafter referred to as the 'Draft Regulations') makes excessive inroad in market operation. CERC (Procedure, Terms and Conditions for Grant of Trading Licence and Other Related Matters) Regulations, 2009 (hereinafter referred to as the 'Current Regulations') in its current form itself had to be rationalized.

9. Before proceeding further, the following needs to be highlighted:

   (i) The Draft Regulations seek to impose certain unreasonable conditions on the Trading Licensees, which could result in adverse effects in the market, leading to survival of only a handful of traders having high net worth through parent organisation;

(ii) The Draft Regulations are highly arbitrary in nature and does not take into account the problems associated with the trading of electricity by the Trading Licensee. It must be noted that despite the growth of exchanges, there is a need for customized products offered by trading licensees. As the market gets matured, the role of trading licensees increases as they facilitate competition and drive efficiencies;

(iii) Furthermore, the number of trading companies has doubled from 14 in 2009 to 28 in 2017-18 and the volume of electricity transacted through traders has increased from ~22 BU in 2009 to ~39 BU in 2017-18 representing a CAGR of 6%. Therefore, traders act as market makers and liquidity providers by connecting suppliers with the best suited buyers;

(iv) The trading licensees offer the ability to pioneer new product development in power markets and hence take a central role in increasing competition, driving efficiency in markets and in realizing lower power prices;

(v) Instead of encouraging trading as an activity, the Draft Regulations proceeds with an element of distrust and consequently works against market principles. Further, the stringent policies which is sought to be implemented through the Draft Regulations will lead to derailment of the trading sector by wiping out the traders who are service based, having built their net-worth from trading of electricity over the years (and not relied on large capital base of their parent or associate companies). This will lead to a scenario wherein only the institutional based trading licensees will be left;

(vi) Institutional based traders have a high net worth and support from parent institution thereby giving them an advantage over

the service-based trading licensees. This is due to the fact that service-based trading licensees have their core business as trading of electricity and do not have the support of any other organisation for finance;

(vii) The Draft Regulations seek to promote only such entities/ traders who have the high net worth to the prejudice of traders with lower net worth, which will in turn lead to wiping out such traders. This will greatly reduce competition which would consequentially lead to market manipulation by certain bigger traders having a high net worth. This would go to the root of the intent of the Act, which is succinctly provided in the Preamble of the said Act.

10. In view of the above, while finalizing the draft Regulations, the ultimate test has to be whether the said Draft Regulations are promoting competition or is it inherently anti-competition.

11. Hence, the amendments proposed under the Draft Regulations have to be seen in a holistic manner, in order to understand and mitigate the serious ramifications for traders which shall be caused if the Draft Regulations, in their present form, are notified.

Proposed Amendment

I. Regulation 7 - Applicability of Trading Margin

12. The Regulations 7 & 8 of the Draft Regulations are set out herein below:

Regulation 7:

"Trading margin shall be applicable to the following types of contracts undertaken by the Trading Licensee:

(a) Short term contracts (where period of the contract of the Trading Licensee with either or both the seller and the buyer is up to one year including transactions undertaken through power exchanges);

(b) Long term contracts and medium-term contracts (where period of the contract of the Trading Licensee with both the seller and the buyer is more than one year);

(c) Back to Back deals;

(d) Cross Border Trade of Electricity"

Submissions regarding the general power of the Commissions to fix trading margins

13. It is submitted that as per Regulation 7, the capping of trading margin has been provided for short term, medium term and long-term contracts entered into by a trading licensee. This is a complete departure from the existing trading margin regulations, which provide a margin cap for only short-term transactions. The relevant provision of the existing CERC (Fixation of Trading Margin) Regulations, 2010 is set out herein below:

> "2. Applicability: These regulations shall apply to the short-term buy-short-term sell contracts for the inter-State trading in electricity undertaken by a licensee."

There is no perceived logic to include medium-term and long-term contracts within the purview of margin caps. The provisions in relation to trading margin is applicable on short term contracts, long term contracts, medium-term contracts as well as back to back deals.

14. At the outset, it is pertinent to mention herein that the methodology adopted for capping trading margin, under the Draft Regulations, is

in direct contravention/ contrast with the provisions of Section 49 of the Act. Section 49 of the Act is reproduced herein below:

> **"Section 49. (Agreement with respect to supply or purchase of electricity):**
>
> Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."

In addition to the above, reference be made to Sections 61, 62, 63, 79(1)(a), 79(1) (b), 86(1)(a) and 86(1)(b) of the Act. From the said provisions it is clear that the regulatory commissions do not at all determine tariff/ price of electricity for a consumer availing open access.

15. The trading margin sought to be imposed by the Draft Regulations, 2019 is in contravention to Section 49 of the Act. Section 49 of the Act entitles any two entities, which includes the generator as well as the consumer/ beneficiary to mutually enter into an Agreement for Sale and Purchase of Power on such terms and conditions as may be mutually agreed between them including the tariff. Such autonomy necessarily includes the freedom to enter into any arrangement to supply power, which may also include a trader. Hence, on the basis of Section 49 of the Act, any regulatory intervention in any manner is prohibited, including the terms under which the contracting parties take the services of a trader.

16. It is submitted that under an open access transaction as per Section 49 of the Act, a generator can directly enter into an agreement for the supply of power to a consumer. In such an event, a generator is

allowed to charge whatever tariff it intends to, in case the consumer agrees. As such, Section 49 projects the autonomy and independence of a private transaction for purchase of electricity. Hence, it defies logic when trading margin is capped just because a trading licensee is involved in a transaction between a generator and a consumer.

Therefore, in the light of Section 49, in an open access transaction, there is no jurisdiction to cap trading margins. Trading margins should be left open to the market forces. On account of increased competition as a result of huge number of trading licensees, coupled with the ability of the generators to directly enter into contracts with consumers, such competition would ensure that high trading margins are not charged by the trading licensees.

17. It is stated that Section 49 ensures that the tariff payable by a consumer under open access, is beyond any regulatory intervention, and that the same is purely within the discretion and decision of such consumer, or contracting parties. The said tariff, for a consumer, is inclusive of the trading margin which a trader may charge, in a Section 49 transaction. Hence, by virtue of Section 49, the tariff, including margin, is free from any regulatory intervention.

18. As per Section 2(49) of the Act, the definition of "person" is very wide and includes an electricity trader. Hence, as per Section 49, there is no regulatory control or supervision when a consumer and a person (trader) enters into an agreement to supply electricity, which can be done upon mutual terms and conditions, including tariff. A trader arranges power from a generator, for supply to a consumer. Hence, a trader has to recover the cost of arranging power, from the consumer, when it supplies the said power under open access. Apart from the said cost, a trader also earns a trading margin from the consumer, which is the difference between the costs incurred in

arranging power and the price/ tariff at which the power is supplied to the consumer.

This means that the "tariff" payable by a consumer to an electricity trader, in a Section 49 transaction, is inclusive of the trading margin to be charged by the said trader. Hence, by virtue of Section 49, the terms and conditions of an open access transaction, including tariff, which would include margin, are beyond any regulatory control.

19. In this context, reference be made to Sections 79(1)(j) and 86(1)(j) of the Act which provides that margins can only be fixed, if considered necessary. This means that fixing of trading margins is not mandatory as per the provisions of the Act. In furtherance of the above intent of Section 79(1)(j) of the Act, the same leads to the question as to under what circumstances and situations can the discretion of fixing a trading margin cap be contemplated.

In order to answer the above question, the only transaction where possibly any trading margin can be capped, is when a trading licensee supplies power distribution licensee, since in such an event, it is the distribution licensee which has to recover the cost from the consumers under retail supply. Any additional cost of purchase of power, is a pass through for a distribution licensee, to be ultimately borne by the end consumers, and such consumers have to compulsory procure electricity from the said distribution licensee, as only a handful of consumers are allowed open access. Therefore, when a trading licensee supplies electricity to a distribution licensee, only in such a transaction can capping of trading margin be considered. In fact, sale of electricity to a distribution licensee is always regulated. In this context, reference may be made to section 62(1), 86(1)(a) and 86(1)(b) of the Electricity Act, 2003.

20. As such, by virtue of Section 49, transactions which relate to retail sale of electricity, can only have an element of regulatory intervention, and not otherwise. There is no jurisdiction to provide for a trading margin, if a sale to a distribution licensee is not involved. This Hon'ble Commission has to consider the same while finalising the draft regulations.

Re: Submissions regarding specific provisions restricting margins

21. Under Regulation 7(a) of the Draft Regulations, the definition of short-term contracts has been changed to include a situation involving a transaction, where even one of the contracts of the trader with a buyer or a seller, is of less than one year, then the margin cap of zero to ₹ 0.07 per Unit [as per Regulation 8(1)(c)] would be applicable. This works against market principles. If general economic growth has to be achieved, the traders have to be encouraged to create product that suit the market conditions prevalent at a given point of time.

22. It is submitted that in order to ease out of the above regulation, a trader has to find both, generator and buyer/ consumer which are willing to enter into long-term transactions/ contracts, i.e. for a period more than one year. In this context, it needs to be considered that electricity market is extremely dynamic, and that very rarely a generator, trader or a consumer would agree to enter into long-term contracts for purchase of power under "open access", with a fixed tariff. The generators and consumers always like to have the flexibility to change their power source in the event there is a cheaper alternative source available by availing open access. Also, as the Consumer tariff is changed every financial year, therefore, the Consumer seeks flexibility to procure power as per market conditions rather than entering into long term contracts. Such flexibility is the beauty of open access.

23. This Hon'ble Commission, being the sector regulator, is very much aware of the practical impossibilities in execution of long-term open access contracts between traders and consumers. This means that the provision for capping of margin from zero to ₹ 0.07 per Unit, is with an intent to restrict the open access market development and growth.

24. The Draft Regulations seek to prevent traders from earning a revenue of more than ₹ 0.07 per unit under open access transactions covered under Section 49 of the Act, while on the other hand, a generator is free to charge a tariff of its choice from a consumer under the said Section. This is discriminative and goes against the economics of market that requires to be rightly regulated.

25. Therefore, it is evident that the draft regulations seek to create a class within a class, under open access transactions covered under Section 49 of the Act. In other words, a trading licensee is being discriminated, vis-à-vis a generator or a consumer, qua the ability to have complete freedom while incorporating terms/ clauses in the open access contract, included consideration/ tariff.

26. It is a settled principle of law that a subclass, or class within a class, cannot be treated unless mandated under the parent Act. In this context, reference be made to the following judgments of the Hon'ble Supreme Court:

a) In ***Western U.P. Electric Power & Supply Company Limited vs State of U.P. [(1969) 1 SCC 817]***, the Apex Court held as hereunder:

> *"(7) Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discrimination*

treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law."

A copy of the judgment passed in ***Western U.P. Electric Power & Supply Company Limited vs State of U.P. [(1969) 1 SCC 817]***, is annexed herewith and marked as **ANNEXURE A.**

b) In ***State of Jammu & Kashmir vs Triloki Nath Khosa [1974 (1) SCC 19]***, the Constitution Bench of the Supreme Court held as hereunder:

"...
(29) But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

(30) Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class.
..."

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A copy of the judgment passed in ***State of Jammu & Kashmir vs Triloki Nath Khosa [1974 (1) SCC 19]***, is annexed herewith and marked as **ANNEXURE B.**

c) *In* ***Kunnathat Thatehunni Moopil Nair vs State of Kerala (AIR 1961 SC 552)***, the Hon'ble Supreme Court held as hereunder:

> "...
>
> *(8) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification.*
>
> *After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to*

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enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself.

..."

(underline supplied)

A copy of the judgment passed in ***Kunnathat Thatehunni Moopil Nair vs State of Kerala (AIR 1961 SC 552)***, is annexed herewith and marked as **ANNEXURE C.**

27. It is further submitted that it is absolutely unclear as to what is the objective behind inserting Regulation 7(a) in its present form. If a consumer wishes to avail power under long term arrangement from a trader, then it may happen that the quantum of required power is arranged from more than one generator and such arrangement may be through different short-term arrangements. In such a situation, for the consumer the tariff continues to be the same, irrespective of the fact as to whether the trading margin for the licensee is capped or not.

Hence, there is no difference in tariff for a consumer who receives supply of power from a trader under long-term, either through a generator under a long-term arrangement (by virtue of Regulation 8(1)(d) of the Draft Regulations) or through different generators under short term arrangements.

28. Therefore, when there is no apparent benefit or logic behind Regulation 7(a) of the Draft Regulations, then it makes no sense, whatsoever, to forcefully cap the ability of a trading licensee to earn revenue in an open access transaction under Section 49 of the Act, especially when a generator, which directly enters into a bilateral arrangement with a consumer, is allowed to charge a tariff of its

choice. Such discrimination is nowhere provided under the provisions of the Act.

In view of the above, Regulation 7(a) of the Draft Regulations, ought to be revised.

29. Similarly, Regulation 7(b) of the Draft Regulations, which specify that long-term and medium-term contracts are those in which period of contract of the trading licensee, with both the seller and the buyer, is more than one year, also needs to be revised. In view of the submissions made hereinbefore, it is evident that there is no perceived benefit out of the above stipulation. Hence, it would be completely arbitrary to fix trading margins as contemplated under the Draft Regulations, as there is no supporting provision under the Act which enables such micro-management of the trading licensee, including its inability to earn revenue through trading margin. This makes the Draft Regulations as completely contrary to the provisions of the Act, thereby also being against the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India.

30. It is further submitted that from a reading of the Draft Regulations, it is evident that the same is meant to be the death knell for trading licensees.

31. In this context, reference be made to Regulations 7(c) and 8(1)(e) of the Draft Regulations under which back-to-back deals executed through a trader, are being capped at the margin of zero to ₹ 0.01 per unit. No justification or logic can justify the above abysmally low margin.

32. In relation to 'back to back deals' it is necessary to look at the definition of 'back to back deals', as provided under Power Market Regulations, 2010, the same is reproduced hereunder:

> "The interstate transaction in which an Electricity Trader buys a specific quantity of power for a particular duration from one party and simultaneously sells it to another party on same terms and conditions. Such transaction does not expose the trader to any price risk. It may expose the trader to credit risk and operational risk."

33. It is submitted that in case of sale and purchase of power through long-term or medium-term open access, the Commission in the existing regulations intentionally decided not to impose capping of trading margin taking into account the factor that in such transactions, the cost involved for payment of trading margin is inclusive of the tariff and there is no distress purchase of power in medium-term and long-term open access transactions.

34. However, the Commission in the Draft Regulations has categorically included long term contract, medium term contract as well as back-to-back deals within the purview of the Draft Regulations which is violative of the provisions of the existing Regulations, Section 49 of the Act as well as Articles 14 and 19(1)(g) of the Constitution of India.

The Draft Regulations failed to take into consideration the fact that in long-term and medium-term contracts no question arises of hampering the interest of the consumer/ ultimate beneficiary due to the absence of the factor of distress purchase of power on account of non-availability of deficiency of the contracted capacity.

Further, any transaction can be termed as a back-to-back transaction which involves the entire chain of transactions for purchase of power from the generator, and subsequent sale thereof to the ultimate beneficiary/ consumer in which the trading licensee acts as an intermediary/ conduit providing a service to both the parties involved. By way of the Draft Regulations, the Commission intends to

encompass any and all kind of back-to-back deals within margin restrictions, irrespective of the same being effectuated by way of obtaining medium-term or long-term open access.

This clearly goes to reflect that the Commission is trying to bring under its purview all the transactions which can be undertaken by a trading licensee, irrespective of the tenure of the open access, which is contradictory and violative of the intent of the Commission itself in terms of the earlier regulations as well as Section 49 of the Act and Article 19(1)(g) of the Constitution of India.

35. It is submitted that the logic which is being provided for the above capping of trading margin in a back-to-back transaction, is that there are no alleged risks involved in such a transaction for a trader. This is a completely arbitrary and wrongful reasoning, without any logic. It is submitted that there is no difference between back to back transaction or any other transaction. In a back to back transaction, the trading licensee has a good title for the power purchased for subsequent sale. Section 2(71) of the Act defines 'trading' as purchase of electricity for resale thereof and the expression trade shall be construed accordingly. The Draft Regulations cannot create a sub class within a class, by discriminating between traders on account of the alleged nature of a transaction.

36. It needs to be appreciated that a trading licensee will charge margin for the following reasons:

a) the ability of traders to maintain a ready database with respect to the eligible and willing consumers, and the willing generators who have surplus generation capacity available for sale;

b) a trading licensee has to deploy dedicated team which contacts various consumers for advising them on energy saving by availing power under open access;

c) the trading licensee arranges power as per the procurer's requirement, identifies the seller, manages entire transaction such as open access, scheduling, energy accounting, facilitates energy settlement and supply of power from alternate sources in case of generator outages;

d) The role of the trading licensee from a seller's perspective is to arrange for off-take of power, market discovery for implementing banking/ swap contracts, ensuring payment security etc;

e) Traders participate in a number of tenders and out of which they manage to win only a few, however, they have to absorb the cost associated with the said bid participations;

e) In the absence of a trading licensee, it would very difficult for a generator to know or contact consumers who are desirous of availing cheaper power under open access. This will result in reducing the options for a generator, or a consumer, to enter into open access transactions which will ultimately reduce competition thereby pushing the prices.

Hence, in view of the above, the much larger evil of reduction in competition and possibly higher electricity prices under open access, has to be avoided, rather than resorting to cap trading margins thereby making it extremely difficult for trading licensees to survive which will lead to their wiping out, or in other words, going against the intent of the Act which is to promote competition.

37. It is for the above purpose/ USP of a trading licensee, that they charge margins. For a robust electricity market, where power is freely available to consumers under open access, it is necessary that the trading licensees are encouraged and motivated for the purpose of fulfilling the mandate of the Act, which is to enable open access consumers who have cheap power available readily. The said purpose can only be achieved in the event there are a number of trading licensees in the market, which can only happen if the competitive market is allowed to operate freely.

The Draft Regulations are completely against trading licensees by providing completely unjustifiable and unreasonable margin caps, which will ultimately filter out such licensees thereby leaving only institutional based players with high net worth. This will render the entire intent of the Act, qua competition, completely otiose.

38. It is, therefore, pertinent to mention herein Section 79(1)(j) of the Act, which provides that this Hon'ble Commission is mandated to fix trading margins, only if it is considered necessary. The above provision puts an enormous onus upon the Commission to come out with a compelling reason, as a justification, for imposing fixed trading margins. For the various reasons cited above, there appears to be no compelling or justifiable reason in unreasonably and unjustifiably capping trading margins, especially for the reason that a trading licensee is not the only entity which is entitled to facilitate a transaction under open access, as the generators and consumers can individually enter into bilateral agreements without such trading licensees. As such, there is no iota of monopoly which can be exercised by a trading licensee in an open access transaction falling under Section 49 of the Act.

It needs to be further considered that the consumers and generators are also free to purchase or sell electricity through power exchanges.

Therefore, trading licensees have no ability, whatsoever, to control or have a monopoly qua the open access market.

Hence, there remains no reason for the necessity to exercise the discretionary jurisdiction under Section 79 (1) (j) of the Act.

39. It is a settled principle of law that for imposing any restrictions qua undertaking business transactions, either the same has to be expressly provided under the statute/ parent Act, or there has to be a compelling reason. In this context, reference be made to the following judgments:

a) In ***Chintaman Rao and Others vs State of Madhya Pradesh (AIR 1951 SC 118)***, wherein the question was whether the statute under the guise of protecting public interest arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation, thereby being violative of article 19(1)(g) of the Constitution. The Hon'ble Supreme Court in Para 8 held as hereunder:

> *"(6) The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in*

article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality."

A copy of the judgment passed in ***Chintaman Rao and Others vs State of Madhya Pradesh (AIR 1951 SC 118)***, is annexed herewith and marked as **ANNEXURE D.**

b) In ***State of Bombay and Another vs F.N. Balsara (AIR 1951 SC 318)***, the Hon'ble Supreme Court held as hereunder:

"(46) The question boils down to ascertaining whether the restrictions imposed by the provisions to which reference has been made are reasonable. In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of State policy set forth in Article 47 of the Constitution, "The State is charged with the duty of bringing about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health". That the restrictions imposed by the sections on the right of a citizen to possess, or sell or buy or consume or use spirits of wine, methylated spirits, wine, beer, toddy are in view of the aforesaid directive principles of State policy quite reasonable, has not been disputed before us. The controversy has centred round the words "and all liquids consisting of or containing alcohol". It is said that those words include "all liquids, toilet or medicinal preparations containing alcohol" and

the restrictions imposed upon the ordinary use of such toilet or medicinal preparations are unreasonable and therefore void. So far as these preparations are concerned, the High Court has dealt with the matter as follows:

"To put it in a simple form, the question to which we have to address ourselves is whether the legislature can prohibit the legitimate use of an article which ordinarily is not drunk, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition Act. Let us take the concrete case of eau-de-cologne or lavender water. Their legitimate use is only for the purpose of toilet. They contain spirit and it may be that an addict deprived of his drink may drink it in order to satisfy his thirst. Is it permissible to the legislature under such circumstances to deprive the general public of the legitimate use of eau-de-cologne or lavender water as articles of toilet? The legislature may prevent the abuse of these articles, but can it prevent their legitimate use? It is difficult to understand how any restriction on the legitimate use of these articles can be in the interests of the general public so as to make these restrictions reasonable within the meaning of Article (19)(5). If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is acting against

public interest. Therefore, in our opinion, while it was open to the legislature to provide against the abuse of these articles, it was not open to it to prevent its legitimate use. But the legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Government. It is contended by the Advocate-General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold and dispose of property, and, in our opinion, that restriction is not reasonable. The same argument applies to medicinal and toilet preparations containing alcohol. Therefore we hold that to the extent to which the Prohibition Act prevents the possession, use and consumption of non-beverages and medicinal and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(1)(f) of the Constitution even if they may be within the legislative competence of the Provincial Legislature."

A copy of the judgment passed in ***State of Bombay and Another vs F.N. Balsara (AIR 1951 SC 318)***, is annexed herewith and marked as **ANNEXURE E.**

In the present case, there seems to be no compelling reason for the purpose of exercise of the discretionary power provided under Section 79(1)(j) of the Act.

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Re: Margins should be left to be decided by market forces

40. This Hon'ble Commission needs to consider that by letting the margin being determined by market forces, the same is in long-term consumer interest and in the interest of competition. There is no overwhelming data which supports the fact that unregulated trading margin will lead to pushing up of prices at which consumers procure electricity access, thereby invoking jurisdiction under Section 79(1)(j) of the Act.

41. In fact, the data is to the contrary, which can be ascertained from the fact that most State Commissions do not have any margin restrictions for intra-state trading of electricity. In this context, reference be made to the proviso of Regulation 2 of the existing CERC (Fixation of Trading Margin) Regulations, 2010, which is reproduced herein below:

> "2. Applicability: These regulations shall apply to the short-term buy-short-term sell contracts for the inter-State trading in electricity undertaken by a licensee.
>
> Provided that these regulations shall not apply to the intra-State trading in electricity undertaken by the licensee by virtue of the provisions of Rule 9 of the Electricity Rules, 2005, on the basis of the inter-State trading licence granted by the Commission."
>
> (underline supplied)

The above provision even exempts trading licensees which have been granted inter-state trading license, who undertake intra-state trading under Rule 9 of the Electricity Rules, 2005.

42. There is no data, whatsoever, which has been considered by this Hon'ble Commission which supports that the non-fixation of trading margins by a host of State Commissions, has led to considerable

increase in electricity prices for the consumers availing power under open access. Without such detailed analysis, the Hon'ble Commission should not have issued the Draft Regulations in the present form. This lack of analysis goes to the root of the Draft Regulations, and the said aspect cannot at all be ignored.

43. It is further submitted that the Act was enacted with the main objective of introduction of competition. For the said purpose, concepts of open access and trading licensees was introduced. Further, generation of electricity was de-licensed. In addition to the said reforms, under Section 49, the Act provided that a consumer can enter into any arrangement with any "person", which means a generator or a trader, at a mutually decided tariff. This means that generators can directly enters into arrangements with consumers, and the involvement of a trader is not compulsory.

Hence, by virtue of the above provision, the Act guaranteed that a consumer is not dependent solely upon a trading licensee to arrange power under open access. The said provision made the entire open access market as highly competitive. With such free market and competition, it makes no sense to then arbitrarily cap trading margins of the electricity traders. Had the Act mandated that in every open access transaction, an electricity trader has to be involved, then it would have made sense to regulate or cap trading margins.

44. It is submitted that this Hon'ble Commission is under a completely mistaken notion that capping of trading margins can help in reduction of costs or tariff for end consumers, or that the said capping is necessary to check any abuse of market or manipulation by electricity traders.

In this regard, it must be noted that the defaults committed by one or two traders in the market cannot be made a basis to paralyse the

entire trading sector. In case any trader defaults as stipulated in the SOR to the Draft Regulation, this Commission has power to deal with such default by imposing penalty on such defaulting trader in accordance with the Regulations but resorting to arbitrary capping of the trading margin amongst other restrictive conditions vide the Draft Regulations is not just and fair. The Draft Regulations seeks to impose restrictions which will cause an impediment for the service-based traders to carry out free trade in accordance with Article 19(1)(g) of the Constitution of India.

45. The above is for the reason that in the open market envisaged under the Act, there is no monopoly which is being exercised by electricity traders. Otherwise, the open access tariffs, in Section 49 transactions qua intra-state trading, where there are no regulations for capping trading margin, should have gone abnormally high. This fact completely demolishes any justification or argument that any capping of trading margins would help in checking any increase in tariffs.

46. It needs to be considered as to what was the need to introduce the concept of trading licensees. A trading licensee can only survive in a hugely competitive electricity market by having a complete database of consumers who require electricity under open access, and the willing electricity generators having untied generation capacity. However, at the same time the Act enables a direct bilateral commercial/ merchant arrangement between a generator and a consumer falling under Section 49. This ability to engage in sale of electricity by a generating company, takes away any ability of an electricity trader(s) to manipulate the market, or to take consumers for a ride. In addition to the above, there can be multiple trading licensees as there is no restriction for granting such licenses under the provisions of the Act. As such, in such a highly competitive

market, it serves no purpose or logic to cap, or fix a ceiling, qua trading margins.

47. It would be noteworthy to see a comparison of global power markets covering mature markets (Europe and USA) and emerging markets (Brazil) vis-à-vis India:

Parameter	Germany	USA	Brazil	India
Generation	Deregulated – Privately Owned	Deregulated – Privately Owned	Public power generation utilities, IPP, CGP	Public power generation utilities, IPP, CGP
Transmission	Controlled by four privately owned TSAs	Controlled by Independent System Operator which provides non-discriminatory open access	Government controlled entities with open access available to free consumers	Controlled by Central/ State Transmission Utility which provides non-discriminatory open access
Distribution	The four major Transmission System Operator (TSOs) also act as Distribution System Operators.	Independent System Operator (ISO) controls wholesale electricity while retail activities are managed by local utility companies/ electricity retailers	Majority DISCOMs are privately operated with a few public DISCOMs	Predominantly controlled by State Distribution Companies
Type of Market	Energy Markets	Mostly energy markets with	Mostly capacity markets ~	Mostly capacity markets only

(Energy/ Capacity)		less/ no capacity markets	20-30% energy trading	~ 10% is traded
Nature of Products Traded	Term ahead physically settled contracts and financially settled derivatives	Term ahead physically settled contracts and financially settled derivatives	Physically settled contracts	Physically settled contracts
Wholesale Markets	Over the Counter trade and Trading through Commodity Exchange	Physical contracts are traded through ISO, Financial Derivatives are exchange traded	Largely through traders as over the counter trades. Trading through electricity exchange	Trading through Power Exchange and OTC arrangement with trading licensees
Selling/ Buying price in Wholesale Market	Reference price for trading set based on prices in day ahead markets	Price for day ahead market determined based on marginal pricing at a location by ISO which acts as reference price for other trading instruments	Prices in free market are negotiated between traders and their counter parties	Price discovery in short term markets is done through e-bidding portals, Price in day ahead market is determined through exchange
Determination of trading margin	Market driven	Market driven	As part of negotiation between traders and sellers	Regulations determine the margin cap

Ownership of Exchanges	EEX – the largest commodity exchange is privately held. Nord Pool is owned by regional transmissio n operators	ISOs were formed out of regional transmission operators – overseen by state and federal regulators. NYMEX – Privately owned commodities exchange for derivatives trading	Privately owned trading platforms and exchange	Privately owned exchange

48. Apart from the aforementioned inability to fix trading margins in Section 49 transactions, it is submitted that based upon feedback and experience gained from 2006 Regulations and considering various risks associated with the electricity trading business, CERC revised the trading margin in 2010. As per the CERC (Fixation of Trading Margin) Regulations, 2010, the trading licensees were allowed to charge trading margin up to 7 paise/kWh in case the sale price exceeds Rs. 3/kWh, and 4 paise/kWh where the sale price is less than or equal to Rs. 3/kWh in the case of short-term open access transactions.

The trading licensees have been charging the trading margin as per the above regulations. Due to stiff competition amongst the trading licensees, the trading margin charged by the trading licensees was always less than the ceiling margin allowed in the trading margin regulations.

49. Following data is as per the Report on Short-term power market in India 2017-18 published by this Hon'ble Commission which

substantiates the above fact that the trading licensee in reality does not enjoy much revenue while charging trading margin:

Period	Trading Margin (Rs/kWh)
2008-09	0.040
2009-10	0.040
2010-11	0.050
2011-12	0.050
2012-13	0.041
2013-14	0.035
2014-15	0.038
2015-16	0.032
2016-17	0.032
2017-18	0.031

Note 1: Weighted Average Trading Margin is computed based on volume and margin of all Inter-state Trading Transactions.

50. The above clearly shows that an electricity trader under the Act, does not earn a substantial amount by charging trading margins. Therefore, it would be unfair on the part of the traders to be further restricted, as per the Draft Regulations, which seeks to cap the trading margin at a lower rate than even the 2010 Regulations.

51. It is further submitted that this Hon'ble Commission used to publish generic tariff orders for wind and solar power plants under Section 62 of the Act. However, when competitive bidding under Section 63 of the Act was introduced in wind and solar sector, then it is evident that the tariffs discovered in such bidding were much lower than the generic tariffs determined by this Hon'ble Commission. This means that when there is competition, and free market, there should not be any regulatory intervention for achieving the desired results. Hence, the margin aspect has to be left to the open market, and such margins need not be artificially capped.

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Re: Micro-management of trading licensees

52. It is submitted that the Draft Regulations seek to cap the trading margin to 1 paise/kwh in case an escrow arrangement or irrevocable, unconditional and revolving letter of credit is not provided by the trading licensee. The said capping will lead to denying the traders their genuine right enshrined under Section 49, by restricting the ability of such traders to decide by their free will the terms and conditions of a contract.

53. The above scenario can further be explained by way of an illustration as hereunder:

Eg: RTC Power Procurement

Power Procurement Tender issued by Utility				
Requisition as per Tender Document				
Period		**Duration (Hrs)**		**Quantum (MW)**
1-Aug-19	31-Aug-19	0.00	24.00	400
1-Sep-19	30-Sep-19	0.00	24.00	400

Bank Guarantee (as per Proposed Quantum)									
						Rate of CPG (Rs./MW/Month/Lakhs)			2.00
						Rate of EMD (Rs./MW/Month/Lakhs)			0.30
Period		**Duration (Hrs)**		**Quantum (MW)**	**Days**	**Hours (Rs.)**	**Quantum (MUs)**	**Amount of EMD (Rs./Lakhs)**	**Amount of CPG (Rs./Lakhs)**
1-Aug-19	31-Aug-19	0.00	24.00	100	31	24.0	74.40	31.00	206.67
1-Sep-19	30-Sep-19	0.00	24.00	100	30	24.0	72.00	30.00	200.00
Total							**146.40**	**61.00**	**406.67**

Margin Money & Collateral against Bank Guarantee @ 45% of BG Amount	27.45	183.00
Interest cost Payable to Bank against Margin Money (15% p. a.)	3.09	13.73
Interest cost receivable from Bank against Margin Money (FD) (6% p.a.)	1.24	5.49
Extra cost against BG	1.85	8.24
Guarantee Commission @ 2.1% p.a.	0.96	4.27
GST 18%	0.17	0.77
P & T Charges	0.01	0.01
Total BG Charges	2.99	13.28

PFC Consulting Ltd. Requisite Fees (as per Bidding Quantum)							
Applicable Tax Rate (%)				18%			
Rate of Requisite Fees (Rs.)				500			
Period		Duration (Hrs)		Quantum (MW)	Amount of Requisite Fees (Rs./Lakhs)	Amount of Applicable Tax (Rs./Lakhs)	Total Amount Payable (Rs./Lakhs)
1-Aug-19	31-Aug-19	0.00	24.00	400	2.00	0.36	2.36
1-Sep-19	30-Sep-19	0.00	24.00	400	2.00	0.36	2.36
Total					4.00	0.72	4.72
Interest cost Payable to Bank against Margin Money (15% p. a.)							0.53
Requisite Fees against LOI received from Utility to Trader for sale of 100 MW Power							1.18
Total Requisite Fees							1.71

Total Expenses	
Particulars	Paisa/Unit
EMD	0.20434
CPG	0.90701
PFC	0.11687

Total	1.2282

Eg: Non-RTC Power Procurement

Power Procurement Tender issued by Utility				
Requisition as per Tender Document				
Period		Duration (Hrs)		Quantum (MW)
1-Aug-19	31-Aug-19	18.00	24.00	400
1-Sep-19	30-Sep-19	18.00	24.00	400

Bank Guarantee (as per Proposed Quantum)									
				Rate of CPG (Rs./MW/Month/Lakhs)					2.00
				Rate of EMD (Rs./MW/Month/Lakhs)					0.30
Period		Duration (Hrs)		Quantum (MW)	Days	Hours (Rs.)	Quantum (MUs)	Amount of EMD (Rs./Lakhs)	Amount of CPG (Rs./Lakhs)
1-Aug-19	31-Aug-19	18.00	24.00	50	31	6.0	9.30	3.88	25.83
1-Sep-19	30-Sep-19	18.00	24.00	50	30	6.0	9.00	3.75	25.00
Total							18.30	7.63	50.83
Margin Money & Collateral against Bank Guarantee @ 45% of BG Amount								3.43	22.88
Interest cost Payable to Bank against Margin Money (15% p. a.)								0.39	1.72
Interest cost receivable from Bank against Margin Money (FD) (6% p.a.)								0.15	0.69
Extra cost against BG								0.23	1.03
Guarantee Commission @ 2.1% p.a.								0.12	0.53
GST 18%								0.02	0.10
P & T Charges								0.01	0.01
Total BG Charges								0.38	1.66

Manikaran Power Ltd.

PFC Consulting Ltd. Requisite Fees (as per Bidding Quantum)							
Applicable Tax Rate (%)					18%		
Rate of Requisite Fees (Rs.)				500			
Period		Duration (Hrs)		Quantum (MW)	Amount of Requisite Fees (Rs./Lakhs)	Amount of Applicable Tax (Rs./Lakhs)	Total Amount Payable (Rs./Lakhs)
1-Aug-19	31-Aug-19	18.00	24.00	400	2.00	0.36	2.36
1-Sep-19	30-Sep-19	18.00	24.00	400	2.00	0.36	2.36
Total					**4.00**	**0.72**	**4.72**
Interest cost Payable to Bank against Margin Money (15% p. a.)							**0.53**
Requisite Fees against LOI received from Utility to Trader for sale of 50 MW Power							**0.59**
Total Requisite Fees							**1.12**

Total Expenses	
Particulars	Paisa/Unit
EMD	0.20673
CPG	0.90940
PFC	0.61257
Total	**1.7287**

54. It is evident in the light of the aforementioned illustration that the EMD cost and the CPG cost itself comes over and above 1.0 Paisa/ kWh. In such a case, the capping of trading margin to 1.0 paisa/ kWh is financially and economically unviable as well as arbitrary and unreasonable. Therefore, imposing a condition of maintenance of escrow arrangement or opening of letter of credit is unjustifiable and will put additional burdens. The Draft Regulations fails to take into consideration the fact that the cost of opening the letter of credit or

maintenance of Escrow account is to be borne by the Trader. This would make the open access transactions totally unviable leading to wiping out the small players from the market.

55. With respect to the above micro-management of trading licensees, at the cost of repetition, it is submitted that Section 49 of the Act was inserted for promoting competition in Open Access. As per the said provision, there is no regulatory intervention for the purpose of defining the terms and conditions, including tariff, between a consumer and any other person in the event of an open access transaction.

In other words, there is complete mutuality between the consumer and the person who wishes to supply power to such consumer under open access. When an Agreement is entered into by and between a generator and a consumer, the same cannot be regulated under the provisions of the Act. Therefore, mere involvement of a Trading Licensee will not empower the Commission to regulate the trading margin. It is for this reason that various State Commissions have not specified trading margin caps for intra-state trading.

56. It is further submitted that Regulation 8(1)(d) of the Draft Regulations has created a peculiar condition of maintaining an escrow account or opening of letter of credit in order to be entitled for mutual determination of trading margin by a trading licensee in a long-term or medium-term transaction. In this regard, it is to be noted that any contract entered into by and between the parties, including the trading licensee is based on the goodwill of a particular trading licensee.

The imposition of a condition of maintaining an escrow account or opening of letter of credit is arbitrary and without any logical or legal

reasoning. The Draft Regulations seeks to impose high qualification in terms of net worth for enabling a trading licensee to initiate or to undertake any trading of power. The Draft Regulations fail to encompass the fact that the net worth of any entity/ trader is dependent upon the assets possessed by it. However, maintenance of an escrow account, as well as opening of letter of credit, leads to freezing of a particular amount till the existence/ term of such escrow account or letter of credit. Due to such freezing of finances, the trading licensee is barred from utilising the said sum for any other purpose, which in turn would lead to reduction of net worth of a trading licensee.

57. Apart from the said fact, it is also necessary to be highlighted that the purpose of maintaining an escrow account or opening of letter of credit is to protect the party to the contract from any future contingencies or risks. The said factor is solely dependent upon the free will of the parties, and the Commission cannot undertake to micromanage the terms of a pure commercial contract, especially in the light of Section 49 of the Act.

In the later part of the present objections, it has been highlighted that there is no jurisdiction vested with a court of law for writing the terms of a contract, especially in an unregulated transaction as provided under the Act, and as such the aforementioned requirement of opening an escrow account or a letter of credit, is completely illegal.

58. It is submitted that, if the Draft Regulations intends to protect the party who enters into a contract with the trading licensee from any future risk, then there should be an equivalent arrangement to protect the trading licensee from any future risks associated with the default of the party, timely payment, funding from banks, including the generator/ consumer/ ultimate beneficiary.

The Draft Regulations fail to provide a level playing field to the trading licensee and is intending to impose harsh and completely unreasonable conditions only on the trading licensee, by shifting all the risk associated in a transaction on such licensee.

59. In view of the above, it is concluded that the Draft Regulations are bad in law and are required to be thoroughly revised, to the extent they seek to impose unreasonable conditions or restrictions upon a person/ trader engaged in a Section 49 transaction undertaken as per the Electricity Act, 2003.

Manikaran Power Ltd.

ANNEXURE-A

(1969) 1 Supreme Court Cases 817

(BEFORE J.C. SHAH AND V. RAMASWAMI, JJ.)

(*From Allahabad*)

WESTERN U.P. ELECTRIC POWER AND SUPPLY COMPANY LTD. . . Appellant;

Versus

STATE OF U.P. AND ANOTHER . . Respondents.

Civil Appeal No. 2482 of 1968, decided on 7th March, 1969

1. Constitution of India — Articles 14 and 31(2) — Order of the Government to supply electricity directly to a company in the supply area of the appellant licensee.

2. Indian Electricity Act 9 of 1910, Sections 3(1) and (2) as amended by the U.P. Act 30 of 1961 — Whether Government decision that supply is "necessary in public interest" can be reviewed by the courts.

The Appellant company held licence under Section 3(1) of the Indian Electricity

Act, 1910, to supply electricity in certain areas in Uttar Pradesh. Hind Lamp Company was receiving energy from the appellant company and represented several times to the State Government that the supply of energy was inadequate and fluctuating. There was no improvement in supply position in spite of meetings held between the appellant Company, State Official and Hind Lamps Company. On the application of Hind Lamp Co., the State Government exercised powers under Section 3(2)(e)(iii) of the Act as amended by U.P. Sanshodhan Adhiniyam, 1961, directing the State Electricity Board to supply electrical energy to Hind Lamps Co., on terms and conditions similar to those applicable to other customers. On representation from appellant Company, the State Government replied that the decision was necessitated in the public interest and that there was no justification for revising the order.

Appellants' petition for writ of certiorari was rejected by the High Court on the ground that the order could not be challenged for being discriminatory as it was not established by evidence; that the order was made in public interest; that the granting of direct supply of electrical energy to Hind Lamps did not amount to compulsory acquisition of property of the Company without payment of compensation, and that no rules of natural justice were violated.

Held :

(i) Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminating treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.

The impugned Section 3(2)(e) of the Act did not violate Article 14 because (a) there was no discrimination between Hind Lamps and other consumers within the area of supply in respect of which appellant company held the licence as they did not belong to the same class — in one case energy was being supplied by the Company and in the other by the State Electricity Board and there was no grievance made by any consumer that he was by the grant of preferential rates to Hind Lamps prejudicially treated;(b) there was no evidence that different rates were charged by the State Electricity Board for the supply to Hind Lamps and Company and the Company being a distributor and Hind Lamps being a consumer they did not belong to the same class.

Western U.P. Electric Power and Supply Co. Ltd. v. *State of U.P.*, AIR 1968 SC 1099, *distinguished*

(ii) The satisfaction of the Government under Section 3(2) of the Act that the supply was necessary in the public interest is in appropriate cases not excluded from judicial review. The exercise of power is conditioned by the Government deeming it necessary in public interest to make such supply and if challenged the Government must show that exercise of the power was necessary in public interest. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are fulfilled. The order to the State Electricity Board to supply energy to Hind Lamps in the circumstances of the case was unquestionably in public interest.

(Paras 11, 12, 13 and 14)

(iii) By the grant of a licence under the Indian Electricity Act, 1910, no monopoly was created in favour of the Company as the statute expressly reserved the right of the State to authorise supply of electrical energy through another

licensee in the same area or to a consumer directly through the State Electricity Board. By the order granting direct supply of electrical energy ownership of property or right to possession of property was not transferred to the State or to a corporation owned or controlled by the State. Therefore, Article 31(2) of the Constitution, was not violated. The Company might suffer loss but Article 31(2) does not guarantee protection against that loss.

(Para 15)

(iv) The Company was afforded sufficient opportunity to make its representation before and after the impugned order was passed.

(Para 16)

Appeal dismissed.

Mohan Behari Lal, Advocate for Appellant;

O.P. Rama, Advocate for Respondents 1 and 2.

C.K. Daphtary and B.R.L. Iyenger. Senior Advocates (Bishambher Lal and H.K. Puri, Advocate with him) for Respondent 3.

The Judgment of the Court was delivered by

J.C. SHAH, J.— The Western U.P. Electric Power and Supply Company Ltd. hereinafter called "the Company" — holds a licence under Section 3(1) of the Indian Electricity Act 9 of 1910 to supply electricity in certain areas in the State of U.P. Hind Lamps Private Ltd., set up a factory for manufacturing electrical equipment within the area of supply of the Company. Hind Lamps was receiving energy from the Company. Hind Lamps made several representations to the State Government that the supply of energy by the Company was inadequate to meet its requirements and was "interrupted and fluctuating". Meetings were held between the Company, the State officials and Hind Lamps for devising means to ensure uninterrupted and adequate supply of energy required by Hind Lamps, but there was no improvement in the supply position.

2. Hind Lamps then applied to the Government of U.P. to grant direct supply of electrical energy from the State Electricity Board. The State Government by order, dated December 26, 1961, issued in exercise of the powers conferred by Section 3(2)(*e*)(*ii*) of the Indian Electricity Act, 1910, as amended by the Indian Electricity (Uttar Pradesh Sanshodhan) Adhiniyam, 1961, directed the State Electricity Board "to supply electrical energy directly to Hind Lamps upon terms and conditions similar to those on which it supplied electrical energy to other consumers". In reply to a representation to reconsider the decision, the Government informed the Company that the "decision was

necessitated in the public interest and there was no justification for revising it." Another representation made by the Company was also turned down and direct supply of electrical energy was commenced by the State Electricity Board to Hind Lamps.

3. A petition moved by the Company in the High Court of Allahabad for a writ of certiorari quashing the order, dated December 26, 1961, was rejected by R.S. Pathak, J. In appeal under the Letters Patent against the order passed by the learned Judge, counsel for the Company applied for leave to plead that the order, dated December 26, 1961, resulted in discrimination between Hind Lamps and other consumers within the area of supply of the Company, and also between Hind Lamps and the Company and the order was on that account invalid. The High Court permitted the Company to raise the contention, but declined to give opportunity to "enlarge the evidence on record at that stage". Sole reliance was therefore placed by counsel for the

company on para 2 of the Government Gazette Notification issued by the U.P. Government on April 24/28, 1962, containing the revised tariff for the supply of electrical energy to licensees obtaining bulk supply from the U.P. State Electricity Board and to other consumers. It stated:

> "The revised tariff shall, except in the case of the licensees, be applicable to consumers in respect of consumption in the month of May, 1962. In the case of licensees, obtaining bulk supply of energy from the Board, the revised tariff shall apply to supplies made from 1st July, 1962 and onwards."

The Schedules in the Gazette Notification set out the rates at which electrical energy was to be supplied by the Board to licensees as well as to diverse classes of consumers who received supply of energy from the Board. The High Court held that there was no evidence on the record to prove the rates at which energy was being supplied to the Company on December 25, 1961, and the rates at which the energy was being supplied to Hind Lamps. The High Court observed that before the order, dated December 26, 1961, could be challenged on the ground of discrimination between Hind Lamps and other consumers as also between Hind Lamps and the Company, it was necessary for the Company to establish by evidence the rates of supply of energy to the Company, to Hind Lamps and to the other consumers obtaining at the time of the impugned order i.e. December 26, 1961, and in the absence of that evidence the plea of discrimination must fail.

4. The High Court also rejected the contentions raised by the Company that the impugned order was not made in public interest, that granting direct supply of electrical energy to Hind Lamps amounted to compulsory acquisition of property of the Company without payment of compensation, and that in refusing to give an opportunity to the Company to object the rules of natural justice were violated.

5. The Indian Electricity Act 9 of 1910, makes provision by Section 3 for the grant of a licence to supply energy in any specified area and also to lay down or place electric supply-lines for transmission of energy. Clause(*e*) of sub-section (2) as amended by U.P. Act 30 of 1961, and sub-section (3) provide:

> "(2)(*e*) grant of a licence under this part for any purpose shall not in any way hinder or restrict—
>
> *(i) the grant of licence to another person within the same area of supply for a like purpose; or*
>
> *(ii) the supply of energy by the State Government or the State Electricity Board within the same area, where the State Government deems such supply necessary*

in public interest.

(3) Where the supply of energy in any area by the State Electricity Board is deemed necessary under sub-clause (*ii*) of clause (*e*) of sub-section (2), the Board may, subject to any terms and conditions that may be laid down by the State Government, supply energy in that area notwithstanding anything to the contrary contained in this Act or the Electricity Supply Act, 1948."

The State Government may grant a licence to supply electrical energy to consumers within a specified area on terms and conditions prescribed in the licence and subject to statutory conditions, but on that account the

State Government is not debarred from granting a licence to another person or to supply energy directly to a consumer within the same area if the State Government deemed it necessary so to do in the public interest.

6. Section 3(2)(*e*) is challenged on the ground of denial of the guarantee of the equal protection clause of the Constitution. Strong reliance was placed by counsel for the appellant upon a recent judgment of this Court: *Western U.P. Electric Power and Supply Co. Ltd.* v. *State of U.P.*[1]. In that case the Government of U.P. had by Notification, dated September 21, 1966, authorised the State Electricity Board to supply energy directly to consumers in the area of supply for which a licence was already granted. This Court held that a licensee supplying electrical energy in an area has no monopoly under its licence; but the Notification issued by the U.P. Government directing the State Electricity Board to supply energy directly to a consumer at a rate lower than the rate at which it was supplied to the licensee Company amounted to discrimination between that consumer and the other consumers and also between the consumer and the licensee and the Notification on that account was invalid. Counsel for the Company says that the question which falls to be determined in the present appeal is concluded by the judgment in *Western U.P. Electric Power and Supply Company case*[1] for the court in that case held that the Notification of the Government of U.P. directing the State Electricity Board to supply energy directly to certain concerns at a rate lower than the rate at which energy was supplied to the licensee Company amounts to discrimination between those concerns on the one hand and the other consumers on the other, and also between the concerns and the Company.

7. Article 14 of the Constitution ensures equality among equals; its aim is to protect persons similarly placed against discriminatory treatment. It does not, however, operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law. In the present case, there is no evidence about the rate charged for energy supplied by the State Electricity Board to the Company on December 26, 1961, nor is there any evidence on the record about the rates charged for electrical energy supplied to the consumers by the Company.

8. The plea of discrimination has to be considered from two different points of view; (*1*) the discrimination between Hind Lamps and the other consumers within the area of supply in respect of which the Company held the licence; and (*2*) discrimination in the rates of supply charged by the State Electricity Board to the Company and to Hind Lamps. There is no evidence on the record about the operative rates on the date of the impugned order. Again Hind Lamps was a consumer of electrical energy and so were

the other consumers within the area of supply in respect of which the Company held the licence. But on that account it does not follow that they belong to the same class. In one case energy is being supplied by the Company and in the other by the State Electricity Board. Again, there is no grievance made by any consumer of energy that he is by the grant of preferential rates to Hind Lamps prejudicially treated. Other consumers of energy and Hind Lamps, therefore, do not belong to the same class, and there is no grievance by any consumer of any prejudicial treatment accorded to him.

9. There is also no evidence that the rates charged by the State Electricity Board to Hind Lamps were lower than the rates charged to the Company. The Company and Hind Lamps again do not belong to the same class. The Company is a distributor of electrial energy, whereas Hind Lamps is a consumer. If the State Government charged different rates from persons belonging to the same class, in the absence of any rational basis for that treatment, the plea of discrimination founded on differential rates may probably have some force. But the Company and Hind Lamps did not belong to the same class, and there is no evidence that for energy supplied different rates were charged. In *Western U.P. Electric Power and Supply Co. Ltd.* v. *State of U.P.* the position was different. That case was decided on the footing that the consumer and the Western U.P. Electric Power and Supply Co. Ltd. belonged to the same class, and the Board charged higher rates from the distributing Company than the rate charged from the third respondent in that case. The Court observed in that cases :

> " ... the notification and the Government's direction to the Board therein results in clear discrimination. If the Board were to supply energy directly to the 3rd respondent, it has to do so at rates lower than the rates at which electricity is supplied by it to the petitioner company. The petitioner company being thus charged at higher rates from its other consumers with the result that the 3rd respondent would get energy at substantially lower rates than other consumers including other industrial establishments in the area. The notification thus results in discrimination between the 3rd respondent on the one hand and the other consumers on the other as also between the 3rd respondent and the petitioner company."

The first contention was, therefore, rightly negatived by the High Court.

10. By the amendment made by U.P. Act 30 of 1961, electrical energy may be supplied by the State Government or the State Electricity Board within the same area in respect of which a licence is granted only if the State Government deems such supply "necessary in public interest". The High Court observed that "the State Government was the sole Judge of the question whether direct supply of energy to Hind Lamps was or was not in the public interest. The test is of a subjective nature, no objective test being contemplated. Thus, it is not open to this Court to examine whether it was necessary in the public interest. The subjective opinion of the Government is final in the matter, and the same is not justiciable or subject to judicial scrutiny as to the sufficiency of the grounds on which the State Government has formed its opinion. In other words, the Legislature has left it to the sole discretion of the State Government to decide whether a direct supply of energy was in the public interest."

11. We are unable to agree with that view. By Section 3(2)(*e*) as amended by the U.P. Act 30 of 1961, the Government is authorised to supply energy to consumers

within the area of the licensee in certain conditions: exercise of the power is conditioned by the Government deeming it necessary in public interest to make such supply. If challenged, the Government must show that exercise of the power was necessary in public interest. The Court is thereby not intended to sit in appeal over the satisfaction of the Government. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are

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fulfilled. Normally a licensee of electrical energy, though he has no monopoly, is the person through whom electrical energy would be distributed within the area of supply, since the licensee has to lay down electric supply-lines for transmission of energy and to maintain its establishment. An inroad may be made in that right in the conditions which are statutorily prescribed. In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review.

12. But the decision of the High Court must still be maintained. The order issued by the Government recited:

> "The Governor is satisfied that it is necessary in the public interest for the State Electricity Board to make the supply of electricity direct to the industry (Hind Lamps Private Ltd.) and is, therefore, pleased to order in exercise of the powers vested in him under Section 3(*2*)(*e*)(*ii*) of the Indian Electricity Act, 1910 (Act 9 of 1910) as amended by the Indian Electricity (Uttar Pradesh *Sanshodhan*) *Adhiniyam*, 1961 (U.P. Act 30 of 1961) that the U.P. State Electricity Board make the supply of electricity direct to the Hind Lamps Ltd., Shikohabad."

13. There is ample evidence on the record to prove that uninterrupted supply of electrical energy to Hind Lamps was necessary in public interest, and the Company was unable to ensure it. The only averment made in the petition filed by the Company before the High Court was that "the giving of the supply to Hind Lamps (Private) Ltd. could not be said to be in public interest as required by Section 3(2)(*e*)(*ii*) of the Indian Electricity Act, 1910, as amended by Indian Electricity (U.P. Amendment) Act, 30 of 1961". No particulars were furnished in the petition. In the affidavit filed on behalf of the State Electricity Board it was affirmed that Hind Lamps was engaged in the manufacture of electric bulbs, fluorescent tubes, etc. and the process required uninterrupted supply; that it was one of the major industries of the State and was the only industry of its kind in the State; that as a result of the defective supply by the Company, Hind Lamps felt dissatisfied and informed the Government that if the supply position was not improved it would be forced to shift its factory from the State to some other State; that the industry gave employment to a number of people in the State and saved a large amount of foreign exchange and on that account the State Government was keen to give it fair and due protection that it deserved; that the total supply of electricity to the Company was 1700 K.W. and even if the entire supply under the agreement was made available by the Company to Hind Lamps it would fall short of its requirements. It was, therefore, in public interest that direct supply of energy should be made available to Hind Lamps. An affidavit containing similar averments was also filed on behalf of the State of Uttar Pradesh.

14. There is no evidence on behalf of the Company to the contrary. For maintaining effective working of a large industry which gave scope for employment to the local population and earned foreign exchange, if it was necessary to give direct supply of electrical energy to Hind Lamps, the order to the Electricity Board to make direct

supply of electrical energy to Hind Lamps was unquestionably in public interest within the meaning of Section 3(2)(*e*)(*ii*) of the Act.

15. There is no substance in the contention that by the issue of the order, dated December 26, 1961, there was compulsory acquisition of the property of the Company without providing for compensation. By the grant of a

licence under Act 9 of 1910, no monopoly was created in favour of the Company. The statute expressly reserves the right of the State to authorise supply of electrical energy through another licensee in the same area or to a consumer directly through the State Electricity Board. Assuming that the right to supply electrical energy is property (on that question we express no opinion), we are of the view that there is no infringement of the guarantee under Article 31(2) of the Constitution. Clause (2) of Article 31 as amended by the Constitution (Fourth Amendment) Act, 1955, insofar as it is material, provides:

> "No property shall be compulsorily acquired ... save for a public purpose and save by authority of a law which provides for compensation for the property so acquired ... and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; ...."

Clause (2-A) in substance defines compulsory acquisition or requisitioning of property within the meaning of clause (2). It provides:

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

By clause (2-A) there is no compulsory acquisition or requisitioning of property, unless ownership or right to possession of the property stands transferred to the State or a corporation owned or controlled by the State. By the order granting direct supply or electrical energy ownership of property or right to possession of property was not transferred to the State or to a corporation owned or controlled by the State, and on that limited ground it must be held that Article 31(2) has no application. The Company may, it may be assumed, as a result of direct supply of electrical energy to Hind Lamps, suffer loss; but Article 31(2) does not guarantee protection against that loss.

16. The Company was afforded sufficient opportunity to make its representation before and after the impugned order was passed. Hind Lamps had submitted several representations to the Government of U.P. regarding inadequate and irregular supply of electrical energy. The Company was informed about the complaints made by Hind Lamps. Meetings were held in which certain steps to be taken by the Company to make the supply regular were agreed upon, but they were not carried out, presumably because the Company had not the requisite equipment for that purpose. The Company was asked to supply electrical energy as released in favour of Hind Lamps; it failed to do so. Representations made by the Company, after the order was passed, requesting that the order, dated December 26, 1961, be withdrawn, were also considered by the Government and rejected. Adequate opportunity of making a representation was afforded to the Company to satisfy the State Government that it was not in the public interest to supply electrical energy directly to Hind Lamps.

17. The appeal fails and is dismissed with costs.

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[1] AIR 1968 SC 1099

ANNEXURE-B

(1974) 1 Supreme Court Cases 19 : 1974 Supreme Court Cases (L&S) 49

(From Jammu & Kashmir High Court)

(BEFORE A.N. RAY, C.J. AND D.G. PALEKAR, Y.V. CHANDRACHUD, P.N BHAGWATI AND V.R. KRISHNA IYER, JJ.)

STATE OF JAMMU AND KASHMIR . . Appellant;

Versus

SHRI TRILOKI NATH KHOSA AND OTHERS . . Respondents.

Civil Appeal No. 2134 of 1972, decided on September 26, 1973

Government Servants — Conditions of service — Change in — Retrospective operation — Whether operation of a service rule be deemed retrospective for reason that it applies to existing employees.

Government Servants — Conditions of service — Change in — Whether Government can alter terms and conditions of some of its employees unilaterally — Whether consent is a pre-condition for validity of rules of service.

Constitution of India — Articles 16 & 14 — Onus — Change in long standing conditions of service — Whether onus on State to justify departure from existing order and need to create classification — General rule of presumption of constitutionality of an enactment.

Constitution of India — Articles 16 & 14 — Classification in matters of promotion — Academic or technical qualification as basis — Challenge to classification, held, cannot be based on matters of policy — A matter for legislative determination.

Constitution of India — Articles 14, 32 & 226 — Pleadings — Petitioner must specifically show classification unreasonable and having no rational relation to the object — Remand if may be granted.

Constitution of India — Articles 16 & 14 — Equality in matters of employment — Classification test — Nature of — Scope & extent of judicial examination — Classification should not be arbitrary or absurd and object a pretence for imposing inequility.

Constitution of India — Articles 16 & 14 — Promotion — Educational qualifications as a basis of classification for promotion.

Constitution of India — Article 14 — Classification — Validity of — To be judged on the facts and circumstances of each case — Historical perspective and present state of affairs relevant.

Constitution of India — Articles 16 & 14 — Promotion — Direct recruits and promotees — Whether any classification based on educational qualification can be made for promotion after integration into one class — Whether such classification hit by ruling in Roshan Lal Tandon case.

Constitution of India — Article 14 — Temporary inequality produced in implementing reforms does not render the scheme unconstitutional.

Constitution of India — Articles 16 and 14 — Promotion — Educational qualification as a basis of classification for promotion within an integrated service of direct recruits and promotees — Classification between degree and diploma-holders in Engineering for purposes of promotion — Whether violative of Article 16 — J & K Engineering (Gazetted) Service Recruitment Rules, 1970 — Validity — Government servants.

Constitution of India — Article 14 — Classification — Reasonableness of — Held, relevant material always admissible to show the reasons and justification

for the classification — Not necessary that such reasons appear on the face of the impugned rule or law — R.K. Dalmia case followed.

(Para 25)

The respondents are serving in different branches of State of Jammu & Kashmir (appellants) as Assistant Engineers by promotion from the Subordinate Engineering Services. The scale of pay admissible to the Assistant Engineers during 1960 to 1966 was Rs 300-20-500. Their conditions of services were then governed by the relevant rules of 1939, under which graduates in Civil Engineering were alone eligible for direct appointment as Assistant Engineers. Only departmental promotions could be made from amongst diploma-holders and that too if they had put in 5 years' service in the cadre of Supervisors. In 1962 and 1968 the State Government undertook two general revisions of pay scales by framing the J & K Civil Services (Revision of Pay) Rules.

Then came the J & K Engineering (Gazetted) Service Recruitment Rules, 1970 superceding the old rules on the subject. As regards promotion to the posts of Executive Engineers, and to those only, it was provided therein that only those Assistant Engineers would be eligible for promotion who possessed a bachelor's degree in the engineering or held the qualification of a.m.I.E. section A & B and who had put in at least 7 years service in the J & K Engineering (Gazetted) Service. This is the Rule impugned by the respondents who are diploma-holders. The impugned rules, according to the respondents, brought about a reduction in rank, deprived their of equal opportunity in the matter of promotion and were violative of Articles 14 and 16 of the Constitution of India. Finally, the respondents contended by their petition that it was not competent to the Government to change the service conditions unilaterally to the disadvantage of its employees so as to deprive them of their vested right of promotion by giving retrospective effect to the Rules

Held :

Per Ray, C.J.. Palekar, Chandrachud, Bhagwati and Krishna Iyer, JJ.

(i) It is wrong to characterise the operation of a service rule as restrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes undoubtedly operates on those who entered service before the framing of the Rule, but it operates in future, in the sense that it governs the future right of promotion of those who are already in service. The Rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity by extending its arms over the past.

(Para 16)

(ii) It is well settled that though employment under the Government like that under any other master may have a contractual origin, the Government servant acquires a "status" on appointment to his office. As a result, his rights and obligations are liable to be determined under statutory or constitutional authority which, for its exercise, requires no reciprocal consent. The Government can alter the terms and conditions of some of its employees unilaterally and though in modern times consensus in matters relating to public services is often attempted to be achieved, consent is not a precondition of the validity of rules of service, the contractual origin of the service notwithstanding.

(iii) Where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the Rules offend Article 14 the burden is on him to plead and prove the infirmity. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A rule cannot be struck down as discriminatory on any a priori reasoning.

(Para 18)

The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts for there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification, between degree

holders and diploma-holders. Unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16.

(Para 18)

Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality. Formal education may not always produce excellence but a classification founded on

variant educational qualifications is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the fact of it and the onus therefore cannot shift from where it originally lay.

(Para 19)

Ram Krishna Dalmia v. *Justice S.R. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279, 297 : 1959 SCJ 147, *relied on*

State of U.P. v. *Kartar Singh*, AIR 1964 SC 1135 : (1964) 6 SCR 679, 687 : (1964) 2 SCJ 666, *relied on*

G.D. Kelkar v. *Chief Controller of Imports and Exports* AIR 1967 SC 839 : (1967) 2 SCR 29, 34 : (1967) 2 SCJ 182, *relied on*

(iv) Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the stand point of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld.

(Para 20)

(v) Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. It was therefore incumbent on the respondents to plead and show that the classification of Assistant Engineers into those who hold diplomas and those who hold degrees is unreasonable and bears no rational nexus with its purported object. Omission to furnish the necessary particulars has been construed by the Supreme Court as indicating that the plea of unlawful discrimination had no basis.

(Para 21)

Katra Educational Society v. *State of U.P.*, AIR 1966 SC 1307 : (1967) 1 SCJ 5 : (1966) 3 SCR 328, 336 and 337, *relied on*

Probhudas Morarjee Rajkotia v. *Union of India*, AIR 1966 SC 1044, 1047, (1967) 1 SCJ 52. *relied on*

State of M.P. v. *Bhopal Sugar Industries*, (1964) 6 SCR 846 : AIR 1964 SC 1179 : (1964) 1 SCJ 555, *relied on*

(vi) Article 16 of the Constitution which ensures to all citizens equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in Article 14. The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals.

(Para 29)

Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class. A classification of employees can therefore be made, for first identifying and then distinguishing members of one class from those of another.

(Para 30)

Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints. classification must be truly founded on substantial differences which distinguish person grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

(Para 31)

Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation

of the basis of classification, for were such an inquiry permissible it would be open to the Court to substitute their own judgment for that of the legislature of the Rule-making authority on the need to classify or the desirability of achieving a particular object

(Para 32)

(vii) Educational qualification is a safe criterion for determining validity of a classification. If the object of the classification is to achieve administrative efficiency in Engineering Services, the classification is clearly co-related to it for higher educational qualifications are at least presumptive evidence of a higher mental equipment. Efficiency which comes in the trial of a higher mental equipment can reasonably be attempted to be achieved by restricting promotional opportunities to those possessing higher educational qualifications. This is not to suggest that administrative efficiency can be achieved only through the medium of those possesing comparatively higher educational qualifications but that is beside the point. One has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.

(Para 34)

It is relevant that the object to be achieved is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterised as arbitrary or absurd. That is the farthest that judicial scrutiny can extend. The Court is concerned with the reasonableness of the classification, not with the precise accuracy of the decision to classify nor with the question whether the classification is scientific.

(Paras 33 and 34)

Joseph Radice v. *People of State of New York*, 68 L Ed 690, 696, *referred.*

American Sugar Ref. Co. v. *Louisiana*, 45 L Ed 102, 103, *referred.*

Arkansas Natural Gas Co. v. *Railroad Commission*, 67 L Ed 705, 710, *referred.*

State of Mysore v. *Narasing Rao*, (1968) 1 SCR 407 : AIR 1968 SC 349 : (1968) 2 Lab LJ 120, *relied on*

Ganga Ram v. *Union of India*, (1970) 3 SCR 481, 488 : (1970) 1 SCC 377, *relied on*

Union of India v. *Dr (Mrs.) S.B. Kohli*, (1973) 3 SCC 592 : 1973 SCC (L&S) 136, *relied on*

(viii) One has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification.

(Para 34)

(ix) All that Roshan Lal case lays down is that direct recruits and promotees lose their birth-marks on fusion into a common stream of service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Roshan Lal case is thus no authority for the proposition that if direct recruits and promotees are integrated into one class, they cannot be classified for purposes of promotion on a basis other than the one that they were drawn from different sources. In the instant case, classification rests fairly and squarely on the consideration of educational qualifications: Graduates alone shall go into the higher post, no matter whether they were appointed as Assistant Engineers directly or by promotion. The discrimination therefore is not in relation to the source of recruitment as in Roshan Lal case. The ratio of Roshan Lal case can at best be an impediment in favouring persons drawn from one source as against those drawn from another for the reason merely that they are drawn from different sources.

(Paras 45, 46 and 47)

Roshan Lal Tandon v. *Union of India*, AIR 1967 SC 1889 : (1968) 1 SCR 185 : (1968) 1 SCJ 746, *distinguished.*

Mervyn Continho v. *Collector of Customs Bombay*, AIR 1967 SC 52 : (1966) 3 SCR 600 : (1967) 1 Lab LJ 749, *distinguished.*

S.M. Pandit v. *State of Gujarat*, AIR 1972 SC 252 : (1972) Lab LJ 127 : 1972 Lab IC 155, *distinguished.*

(x) It is often imposible or at any rate inexpedient to reach and remedy all

forms of evil, wherever present. Reform must begin somewhere if it has to begin at all and therefore the administrator who has nice and complex problems to solve must be allowed the freedom to proceed tentatively, step by step.

(Para 37)

Bain Peanut Co. v. *Pinson*, 7 L Ed 482, 489 (1931), *referred.*

Miller v. *Wilson*, 59 L Ed 632, *referred.*

Kookee Consol Coke Co. v. *Taylor*, 58 L Ed 1288, 1289, *referred.*

(xi) Thus though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers be classified on the basis of educational qualifications. The Rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Articles 14 and 16 of the Constitution and must be upheld. The differences between the two classes — graduates and diploma-holders — furnish a reasonable basis for separate treatment and bear a just relation to the purpose of the impugned provision.

(Paras 50 and 34)

However, this judgment will not be construed as a charter for making minute and microcosmic classification. Excellence is, or ought to be, the goal of all good government and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants,

(Para 51)

Per Krishna Iyer & P.N. Bhagwati, JJ. (supplementing)

In this unequal world the proposition that all men are equal has working limitations, since absolute equality leads to Procrustean cruelty or sanctions indolent inefficiency. Necessarily, therefore, an imaginative and constructive modus vivendi between commonness and excellence must be forged to make the equality clauses viable.

While striking a balance between the long hunger for equal chance of the lowlier and the disturbing concern of the community for higher standards of performance, the State should not jettison the germinal principle of equality altogether. The dilema of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees.

Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straight-forward classifications plainly promoting elevant goals can have constitutional validity. To overdo classification is to undo equality .

(Paras 54, 56 and 57)

Appeal allowed. M/1734/CL

The Judgments of the Court were delivered by

Y.V. CHANDRACHUD, J. (*for himself, Ray, C.J., Palekar, Chandrachud, Bhagwati and Krishna Iyer, JJ.*)— If persons drawn from different sources are integrated into one class, can they be classified for purposes of promotion on the basis of their educational qualifications? That is the issue for consideration before us.

2. Respondents, who are Diploma Holders in Engineering, filed in the High Court of Jammu and Kashmir a petition under Article 226 of the Constitution to challenge the validity of certain Service Rules framed by the Government of Jammu and Kashmir. A learned Single Judge

dismissed the petition but in appeal a Division Bench of the High Court took the view that the impugned rules were violative of Articles 14 and 16 of the Constitution. The correctness of that view is challenged by the State of Jammu and Kashmir in this appeal by special leave.

3. Respondents, who are serving in different branches of the Engineering Service of the appellants, were appointed as Assistant Engineers between 1960 and 1966 by

promotion from the Subordinate Engineering Service. Their conditions of service were then governed by the Rules published under Order No. 1328-C of 1939. Those rules, to the extent material, read thus:

"The following rules prescribing the procedure relating to recruitment to the gazetted services are sanctioned.

(3) Special qualifications — Under Rule 18 of the Kashmir Civil Services Rules (General), the following special qualifications are prescribed in the case of candidates for direct recruitment or recruitment by transfer, as the case may be, to the services mentioned below: -

* * *

KASHMIR ENGINEERING SERVICE

Category 2 of Class II	(Assistant Engineer)	Direct	.	Degree in Civil Engineering of any recognised University
		By transfer	.	(*i*) Degree or diploma in Civil Engineering of any recognised University or Upper Subordinates Diploma of any recognised College of Engineering and
				(*ii*) Service as a Supervisor for a period of not less than 5 years on duty
Class III	(Ground Engineer)	Direct	.	Certificate of Ground Engineering prescribed by the Government of India.

KASHMIR ELECTRICAL SERVICE

Category 2 of Class II	(Assistant Electrical Engineer)	Direct	.	(*i*) Degree in Electrical Engineering of any recognised University, and
				(*ii*) Practical training in an Electrical Power Station.

		By transfer	.	(*i*) Degree or Diploma in Electrical Engineering of any recognised University and
				(*ii*) Practical experience in an Electric Power Station."

4. The Rules further provided that appointments by transfer (that is, by promotion) to the cadre of Divisional Engineers (now known as Executive Engineers) could be made only from the cadre of Assistant Engineers. Promotions to the cadre of Assistant Engineers could, in turn, be made only from the cadre of Supervisors in the Subordinate Service. Recruitment by transfer was to be made "on the basis of merit, ability and the previous record of the candidates, seniority being considered only in case of equality of merit, ability and excellence of record". The scale of pay admissible to the Assistant Engineers was 300 — 20 — 500.

5. In 1962, the appellants undertook a general revision of pay scales and framed "Jammu and Kashmir Civil Services (Revised Pay) Rules", which were gazetted on August 6, 1962. Rule 12 divided the Assistant Engineers into two categories, datewise. Those appointed prior to August 1, 1960 were placed in Grade I while those appointed subsequently were placed in Grade II, regardless of whether appointments to the posts of Assistant Engineers were made directly or by promotion and whether the incumbents held a degree or a diploma. Those in Grade I were put in the pay scale of 300 — 700 while those in Grade II were put in the scale of 250 — 600. Officers in Grade II were entitled to go into Grade I after completing two years' service, subject to the availability of vacancies.

6. A further revision of pay scales was effected under the "Jammu and Kashmir Civil Services (Revised Pay) Rules, 1968" which were gazetted on February 27, 1968. Under Rule 10 (IIB)(*i*), Assistant Engineers were granted a new pay scale of Rs 300 — 30 — 540 — EB — 35 — 610 — QB/ 35 — 750, but it was provided that the "QB at Rs 610 will not be crossed by Assistant Engineers with Diploma Course". This rule was challenged by the respondents insofar as it denied to them an opportunity to cross the qualification bar.

7. Then came the "Jammu and Kashmir Engineering (Gazetted) Service Recruitment Rules, 1970", gazetted on October 12, 1970. These rules provide for appointments to the gazetted posts in various branches of the Engineering Service of the appellants and supersede the old rules on the subject. By Rule 3(*f*) "promotion" is defined to mean promotion from one class, category or grade to another class, category or grade on the basis of merit and efficiency, seniority being considered

only when merit was equal. Under the Schedule annexed to these Rules, recruitment to the cadre of Executive Engineers and above was to made only by promotion. But as regards promotion to the posts of Executive Engineers, and to those only, it was provided that only those Assistant Engineers would be eligible for promotion who possessed a bachelor's degree in engineering or held the qualification of a.m.I.E. (Section A & B) and who had put in at least 7 years service in the J & K Engineering (Gazetted) Service. This is the second of the two Rules impugned in this appeal.

8. The case of the respondents as disclosed in their petition was that under the Rules of 1939, Assistant Engineers were entitled to be promoted to the higer cadre on the basis of their merit and record and no distinction was made between degree-holders and diploma-holders for the purposes of such promotion. The discrimination made by the impugned rules between degree-holders and diploma-holders was arbitrary and capricious because academic or technical qualifications could be germane only at the time of recruitment. For purposes of promotion, efficiency and experience alone must count. Respondents further contended that once the Government appointed candidates with different academic or technical qualifications to the same cadre, having the same pay scale and similar duties, such candidates would form one

class and they cannot be further classified for purposes of promotion on the basis of their educational qualifications. The impugned Rules, according to the respondents, brought about a reduction in rank, deprived them of equal opportunity in the matter of promotion and were violative of Articles 14 and 16 of the Constitution of India. Finally, the respondents contended by their petition that it was not competent to the Government to change the service conditions unilaterally to the disadvantage of its employees so as to deprive them of their vested right of promotion by giving retrospective effect to the Rules.

9. The appellants, by their counter affidavit, traversed these averments thus: It was within the competence of the Government to grant a higher pay scale to persons with higher educational qualifications. Under the Rules of 1968 a higher slab of pay was sanctioned for Assistant Engineers with higher educational qualifications and the qualification bar was imposed so as to exclude diploma-holders, with a view to ensuring administrative efficiency in the Engineering service. Under the Rules of 1970, the Governor had laid down the method of recruitment and had prescribed qualifications for appointment to various categories of posts in the engineering department keeping in view the nature of duties and responsibilities attached to those posts. Classification, for purposes of promotion, on the basis of educational qualifications has an intelligible differentia and was therefore not violative of the constitutional provisions of equality. Lastly, the appellants disputed that the application of the Rules to existing employees made the Rules "retrospective" in any sense.

10. The learned Single Judge who heard the petition rejected the respondents' contentions but that judgment was reversed in appeal by a Division Bench of the High Court. Briefly, the Division Bench held

that though it was open to the Government to make a reasonable classification of its employees, where the employees were grouped together and integrated into one unit without reference to their qualifications, they formed a single class in spite of initial disparity in behalf of their educational qualifications and no discrimination could thereafter be made between them on the basis of such qualifications; that the discrimination made under the Rules of 1968 between diploma-holders and degree-holders was unconstitutional and that having prescribed a diploma or degree in engineering with practical experience as a minimum qualification for entry into service, it was not open to the Government to prescribe higher educational qualifications for promotion from the cadre of Assistant Engineers to that of Executive Engineers. The main judgment was delivered by Mufti Bahauddin J. who confined his view to the vice attaching to the Rules by reason of their retrospectivity. The learned Chief Justice, by a concurring judgment, struck down the Rules for all time. They were, according to him, bad insofar as they applied to existing employees and would be bad if applied to those who may join the cadre in future.

11. The learned Attorney-General, who appears on behalf of the appellants, contends that it is always open to the Government to classify its employees so long as the classification is reasonable and has nexus with the object thereof: that a classification cannot be held to infringe the equality clause unless it is actually and palpably arbitrary; that if there are different sources of recruitment, the employees recruited from different sources can either be allowed different conditions of service and so continue to belong to different classes or the Government may integrate them into one class: that once the employees are integrated into one class, they cannot, for

purposes of promotion, be classified again into two different classes on the basis of differences existing at the time of recruitment but, after integration into one class, the employees can, in the matter of promotion, be classified into different classes on the basis of any intelligible differentia as, for example, educational qualifications, which has a nexus with the object of classification, namely efficiency in the post of promotion.

12. Mr Setalvad who led for the respondents contended that neither at the time of appointment to the post of Assistant Engineers nor for the purposes of promotion to the post of Divisional Engineers (now called "Executive Engineers"), was any distinction made by the Rules of 1939 between diploma-holders and degree-holders; that rules governing condition of service could not be changed retrospectively to classify employees on the basis of educational qualifications so as to deny promotion to the diploma-holders; that there was in the instant case no nexus between the classification and the object sought to be achieved thereby and in fact the classification defeated that object; that having regard to the fact that from 1939 to 1970 holders of diplomas and degrees were treated alike, the onus lay heavily on the appellants to prove the necessity for differentiating between the two, which onus was not discharged of the record of the case; and that, if the object of the classification was the attainment of efficiency, the Government could

have achieved that object, and perhaps in a better measure, by making talent, experience and efficiency as criteria for determining promotional opportunities.

13. Mr Gupte, appearing for Respondents 18 to 29, took the stand that once there is a class of equals no discrimination can be made among them on any ground whatsoever. Therefore, if chances of promotion are denied to a few within a class of equals, there is an inherent vice attaching to the classification and no question of the reasonableness of the new yardstick can possibly arise. In the alternative, Mr Gupte contended, possession of a degree qualification was not a reasonable basis for segregating degree-holders and diploma-holders into water tight compartments. The impugned Rule of 1970 was made in the awareness that only some Assistant Engineers were graduates and the facts of the case disclosed no reasonable basis for differentiation between them and the diploma-holders in regard to promotion as Executive Engineers. Finally, the learned counsel contended that the unreasonableness of the classification was patent from the fact that a degree qualification was prescribed as a pre-condition for promotion to the post of Executive Engineers but not to higher posts. There was neither rhyme nor reason in a rule which permitted a diploma-holder to occupy the post of a Superintending Engineer or the highest post of a Chief Engineer but barred him from being considered for a lower post in the cadre of Executive Engineer.

14. Mr Garg, who appears for one of the respondents, laid particular stress on the question of onus. He contended that the heavy onus which lay on the appellants to justify the classification remained wholly undischarged in the context, especially, of the background that between 1939 and 1970 holders of degrees and diplomas were treated alike in the matter of promotion from the post of an Assistant Engineer to that of an Executive Engineer. A system which had stood the test of time, could not, reasonably, be proclaimed unworkable or inefficacious unless the entire context and requirements of the system had undergone some significant change. Of that, says the counsel, there is just no evidence.

15. Most of the arguments advanced for the respondents have been considered and rejected by this Court in some case or the other but before coming to that, a few points may be kept out of way.

16. An argument which found favour with Mufti Bahauddin J., one of the learned fudges of the Letters Patent Bench of the High Court, and which was repeated before us is that the "retrospective" application of the impugned Rules is violative of Articles 14 and 16 of the Constitution. It is difficult to appreciate this argument and impossible to accept it. It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, undoubtedly operates on those who entered service before the framing of the Rule but it operates *in future*, in the sense that it governs the future right of promotion of those who are already in service. The impugned Rules do not recall a promotion already made or reduce a pay scale already

granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment. Whether a classification founded on such a consideration suffers from a discriminatory vice is another matter which we will presently consider but surely, the Rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity be extending its arms over the past. If rules governing conditions of service cannot ever operate to the prejudice of those who are already in service, the age of superanuation should have remained immutable and schemes of compulsory retirement in public interest ought to have foundered on the rock of retroactivity. But such is not the implication of Service Rules nor is it their true description to say that because they affect existing employees they are retrospective. It is well settled that though employment under the Government like that under any other master may have a contractual origin, the Government servant acquires a "status" on appointment to his office. As a result, his rights and obligations are liable to be determined under statutory or constitutional authority which, for its exercise, requires no reciprocal consent. The Government can alter the terms and conditions of its employees unilaterally and though in modern times consensus in matters relating to public services is often attempted to be achieved, consent is not a pre-condition of the validity of rules of service, the contractual origin of the service notwithstanding.

17. The argument on the question of onus is largely founded on the context of facts obtaining in the case. It is urged that for purposes of promotion to higher posts diploma-holders were treated on par with degree-holders from 1939 to 1970 and therefore, the onus must be on the appellants to prove facts and circumstances which necessitated a radical departure from the old and established order. If diploma-holders could competently fill higher posts for over three decades, reasons leading to the Rule which renders them wholly ineligible even from being considered for promotion to the post of Executive Engineer ought to be established by the appellants and, it is urged, no evidence is disclosed in support of such reasons.

18. This submission is erroneous in its formulation of a legal proposition governing onus of proof and it is unjustified in the charge that the record discloses no evidence to show the necessity of the new Rule. There is always a presumption in favour of the constitutionality of an enactment and the burden upon him who attacks it to show that there has been a clear transgression of the constitutional principles.[1] A rule cannot be struck down as discriminatory on any *a priori* reasoning. "That where a party seeks to

impeach the validity of a rule made by a competent authority on the ground that the Rules offend Act. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration." The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce

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"cogent and convincing evidence" to prove those facts for "there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification".[2] In *G.D. Kelkar* v. *Chief Controller of Imports and Exports*[3] Subba Rao, C.J., speaking for the Court has cited three other decisions of the Court in support of the proposition that "unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution".

19. Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality. Formal education may not always produce excellence but a classification founded on variant educational qualifications is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the face of it and the onus therefore cannot shift from where it originally lay.

20. Respondents have assailed the classification in the clearest terms but their challenge is purely doctrinaire. "Academic or technical qualification can be germane only at the time of initial recruitment; for purposes of promotion, efficiency and experience alone must count" — this is the content of their challenge. The challenge, at best, reflects the respondent's opinion on promotional opportunities in public services and one may assume that if the roles were reversed, respondents would be interested in implementing their point of view. But we cannot sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents is not to be preferred. Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if, looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld.

21. Our reason for saying this is to emphasize that the respondents ought to have furnished particulars as to why, according to them, the classification between diploma-holders and degree-holders is not based on a rational consideration having nexus with the object sought to be achieved. In order to establish that the protection of the equal opportunity clause has been denied to them, it is not enough for the respondents to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with others similarly circumstanced. Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. It was therefore incumbent on the respondents to plead and show that the classification of Assistant Engineers into those who hold diplomas and those who

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hold degrees is unreasonable and bears no rational nexus with its purported object. Rather than do this, the respondents contented themselves by propounding an

abstract theory that educational qualifications are germane at the stage of initial recruitment only. Omission to furnish the necessary particulars was construed by this Court in two cases as indicating that the plea of unlawful discrimination had no basis.[4] Such an infirmity in pleadings led this Court in *State of Madhya Pradesh* v. *Bhopal Sugar Industries Ltd.*[5] to remand the matter to the High Court in order to enable the petitioner therein to amend its petition.

22. Mr Garg asked for a remand so that the respondents could have an opportunity to plead the necessary facts but we declined to do so as we did not propose to allow the appeal on the narrow ground that the respondents' plea of discrimination was inadequate. Nor indeed did the learned Attorney-General press for a decision on any such ground. We have heard the learned counsel fully on the merits of the matter, especially as the question of onus was not presented before the High Court in the form in which it was presented before us. We will now advert to the merits of the other contentions.

23. The proviso to Rule 10 (IIB)(*i*) of the 1968 Rules under which diploma-holders were debarred from crossing the qualification bar placed at Rs 610 need not detain us because the learned Attorney-General states that the bar has since been removed with retrospective effect. The 1968 scale of pay will therefore apply equally to the degree-holders and diploma-holders in the cadre of Assistant Engineers, with effect from the date on which the 1968 Rules came into force. Respondents, accordingly, will be eligible to reach the ceiling of the scale regardless of the fact that they held a diploma and not a degree in Engineering.

24. The main question for decision arises out of the challenge to the Rules of 1970 under which diploma-holders in the cadre of Assistant Engineers are not entitled even to be considered for promotion to the next higher cadre of Executive Engineers. Under the Schedule to those Rules, recruitment to the cadre of executive engineers can be made only by promotion from amongst Assistant Engineers. To that is added the impugned rider that only those Assistant Engineers will be eligible for promotion who possess a bachelor's degree in Engineering or who hold the qualification of A.M.I.E. (Section A and B) and who have put in at least seven years' service. Diploma-holders in Engineering, like the respondents, are thus rendered ineligible for promotion as Executive Engineers.

25. We have observed earlier while dealing with the question of onus that there was no justification for the respondents' plea that the record does not disclose the necessity for the impugned Rule of 1970.

We will draw attention to the relevant material, which is always admissible to show the reason and the justification for the classification. Such reasons need not appear on the face of the Rule or law which effects the classification.[6]

26. The seniority list of Assistant Engineers as of January 1, 1971 discloses a significant phenomenon. The list comprises 78 Assistant Engineers and omitting the very first amongst them who was only a matriculate, the remaining 77 were appointed as Assistant Engineers between October 19, 1960 and December 24, 1970. Prior to August 6, 1962 when the Rules of 1962 came into force, only 7 Assistant Engineers held an Engineering Degree as against 13 who held a diploma. The position on February 27, 1968 when the Rules of 1968 came into force was that the number of degree-holders had increased to 38 while that of diploma-holders went up from 13 to 21 only. On October 12, 1970 when the impugned Rules now under consideration

came into force, there were 48 degree-holders and 26 diploma-holders in the cadre of Assistant Engineers, excluding the last one at Item 78 who was promoted after the promulgation of the Rules but who is also a degree-holder. We have advisedly taken no note of two instances in one of which the incumbent was not appointed as a regular Assistant Engineer and the other where, though appointed, the person concerned did not join the Department.

27. It is transparent from this analysis that till about 1968 there was a dearth of Engineering graduates. In 1962, the ratio between graduates and diploma-holders was 1: 2. In 1968 it became almost 2: 1 and in 1970 the position remained more or less unchanged. The appellants were entitled to take into account this spurt in the availability of person with higher educational qualifications for manning the next higher post of promotion. In fact, it may not be overlooked, that even under the Recruitment Rules of 1939 graduates in Civil Engineering were alone eligible for direct appointment as Assistant Engineers in the Kashmir Engineering Service. Only departmental promotions could be made from amongst diploma-holders and that too if they had put in 5 years' service in the cadre of Supervisors. There is therefore no substance in the contention that the record sheds no light on why a change was thought necessary in a system that had stood the test of time. In 1968 itself when there was a proliferation in the ranks of graduates, an attempt was made which was later rectified, to offer a higher incentive to graduates by the placement of a qualification bar. We are not called upon to adjudge its validity for reasons already mentioned but it is obvious that the impact of the changing pattern had to receive its due recognition.

28. But then Mr Setalvad contends that if the nature of duties and responsibilities of the post of Executive Engineer has undergone no significant change, there would be no justification for restricting the field of choice to graduates. Talent and efficiency could be found in the

ranks of diploma-holders in an equal measure and it is urged that rather than display a mere fancy for graduates and restrict its choice, the State should have, in the interest of an efficient service, laid the promotional chances open to both the ranks on the basis of talent, experience and efficiency.

29. This argument, as presented, is attractive but it assumes in the Court a right of scrutiny somewhat wider than is generally recognized. Article 16 of the Constitution which ensures to all citizens equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in Article 14. The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

30. Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class. A classification of employees can therefore be made for first identifying and then distinguishing members of one class from those of another.

31. Classification, however, is fraught with the danger that it may produce artificial

inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

32. Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permisible it would be open to the Courts to substitute their own judgment for that of the legislature or the Rule-making authority on the need to classify or the desirability of achieving a particular object.

33. Judged from this point of view, it seems to us impossible to accept the respondents' submission that the classification of Assistant Engineers into degree-holders and diploma-holders rests on any unreal or unreasonable basis. The classification, according to the appellants, was made with a view to achieving administrative efficiency in the Engineering services. If this be the object, the classification is clearly co-related to it, for higher educational qualifications are at least presump-

tive evidence of a higher mental equipment. This is not to suggest that administrative efficiency can be achieved only through the medium of those possessing comparatively higher educational qualifications but that is beside the point. What is relevant is that the object to be achieved here is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterized as arbitrary or absurd. That is the farthest that judicial scrutiny can extend.

34. On the fact of the case, classification on the basis of educational qualifications made with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstance and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. The provision in the 1939 Rules restricting direct recruitment of Assistant Engineers to Engineering graduates, the dearth of graduates in times past and their copious flow in times present are all matters which can legitimately enter the judgment of the Rule-making authority. In the light of these facts, that judgment cannot be assailed as capricious or fanciful. Efficiency which comes in the trail of higher mental equipment can reasonably be attempted to be achieved by restricting promotional opportunities to those possessing higher educational qualifications. And we are concerned with the reasonableness of the classification, not with the precise accuracy of the decision to classify nor with the question whether the classification is scientific. Such tests have long since been discarded. In fact American decisions have gone as far as saying that classification would offend against the 14th Amendment of the American Constitution only if it is "purely arbitrary, oppressive or capricious"[7] and the inequality produced in order to encounter the challenge of the Constitution must be "actually and palpably unreasonably and arbitrary".[8] We need not go that far as the differences between the two classes — graduates and diploma-holders — furnish a reasonable basis for separate treatment and bear a just relation to the purpose of the impugned provision.

35. . Educational qualifications have been recognized by this Court as a safe criterion for determining the validity of classification. In *State of Mysore* v. *P. Narasing*

Rao[9] where the cadre of Tracers was reorganized into two, one consisting of matriculate Tracers with a higher scale of pay and the other of non-matriculates in a lower scale, it was held that Articles 14 and 16 do not exclude the laying down of selective tests nor do they preclude the Government from laying down qualifications for the post in question. Therefore, it was open to the Government to give preference to candidates having higher educational qualifications. In *Ganga Ram* v. *Union of India*[10] it was observed that "The State which encounters diverse problems arising from a variety of circumstances is entitled to lay down conditions of efficiency

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and other qualifications for securing the best service for being eligible for promotion in its different departments." In *Union of India* v. *Dr (Mrs.) S.B. Kohli*[11] a Central Health Service Rule requiring that a professor in Orthopaedics must have a post-graduate degree in the particular speciality was upheld on the ground that the classification made on the basis of, such a requirement was not "without reference to the objectives sought to be achieved and there can be no question of discrimination". The argument that a degree qualification was not the only criterion of suitability was answered laconically as "strange".

36. Under the Schedule to the 1970 Rules a degree qualification is prescribed as a condition for promotion to the post of an Executive Engineer from the cadre of Assistant Engineers. But there is no rule requiring a similar qualification for promotion to the post of Superintending Engineer which is next higher to the post of Executive Engineer or for promotion to the apex post of the Chief Engineer. The Schedule provides that recruitment to these two categories of posts shall be made by promotion from amongst persons in cadres next below, who possess experience for a stated number of years. This circumstance is pressed into service by the respondents in support of their plea that the whole basis of classification is unreal and that the true object could not be the attainment of higher administrative efficiency. If it was thought necessary to prescribe a degree qualification in order to achieve efficiency in the post of Executive Engineers, *ex hopethesi* it should have been equally imperative, if not more to provide for a similar condition in regard to promotion to higher posts — thus runs the argument.

37. This argument means that any service reform must embrace every hierarchy or none at all. It is often impossible or at any rate inexpedient to reach and remedy all forms of evil, wherever present. Reform must begin somewhere if it has to begin at all and therefore, the administrator who has nice and complex problems to solve must be allowed the freedom to proceed tentatively, step by step. Justice Holmes gave in a similar context a significant warning that: "We must remember that the machinery of Government would not work if it were not allowed a little play in its joints."[12]

38. The seniority list of January 1, 1971 shows how very unreal the argument is that the qualification rule not having been extended to the higher echelons of service, it can bear no nexus with the attainment of administrative efficiency in a comparatively lower hierarchy of Assistant. Engineers. On January 1, 1971 which was soon after the publication of the 1970 Rules, there were 6 persons in the cadre of Superintending Engineers all of whom, except one, are graduates. The one at the top is an L.E.E. but he entered service in 1939 and must not be quite on the verge of retirement. There is therefore but slender chance that a non-graduate could climb into the top position of a Chief Engineer, which post can, under the Rules of 1970, be filled only by promotion from amongst Superintending Engineers. Pro

motion to the cadre of Superintending Engineers can he made only from amongst Executive Engineers and the seniority list shows that out of 22 Executive Engineers, 19 are graduates and only 3 are diploma-holders. Out of the 19, the first 15 according to seniority are all graduates so that the chances of a diploma-holder being promoted as a Superintending Engineer are fairly remote. With the new Rules coming into force, all Executive Engineers will, after October 12, 1970, be appointed from amongst graduates in the rank of Assistant Engineers and therefore the cadre of Executive Engineers will soon consist of graduates exclusively. The Governor was entitled to give weight to these practical considerations and of restrict the operation of the impugned Rule to cases where their application was imperative. Dealing with practical exigencies, a rule-making authority may be guided by the realities of life, just as the legislature, while making a classification "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest.[13] If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied[14].

39. Only one point remains to be considered and it requires a close attention as it claims to have the authority of leading decisions rendered by this Court. We have relegated this point to a rear position because it was necessary, for a proper understanding thereof, to clear the ground of various other doubts dealt with above. A neat point can now be framed and discussed.

40. If persons recruited from different sources are integrated into one class, they cannot thereafter be classified so as to permit in favour of some of them a preferential treatment in relation to others. That is the argument before us which, applied to be facts of the case, means in plain terms this: Direct recruits and promotees having been appointed as Assistant Engineers on equal terms, they constitute an integrated class and for purposes of promotion they cannot be classified on the basis of educational qualifications.

41. We have drawn attention to three decisions of this Court (*Narasing Rao case, Ganga Ram case* and Dr (*Mrs*) *Kohli case*) in which classification on the basis of educational qualifications was upheld. In *Narasing Rao case*, Tracers doing equal work were classified into two grades having unequal pay, the basis of the classification being higher educational qualifications. In Dr (*Mrs*) *Kohli case*, as refined a classification as between an F.R.C.S. in general surgery and an F.R.C.S. in Orthopaedics was upheld in relation to appointment to the post of a Professor of Orthopaedics. But these cases are sought to be distinguished on the authority of the decision of this Court in *Roshan Lal Tandon* v. *Union of India*[15]. That case is

crowded with facts and requires a careful consideration for its proper understanding.

42. Vacancies in Grade 'D' of Train Examiners were filled in *Roshan Lal case* by (*a*) direct recruits i.e. apprentice train examiners and (*b*) promotees from the class of skilled artisans, in the ratio of 50 : 50. Promotion from Grade 'D' to Grade 'C' was to be made on the basis of seniority-cum-suitability. In October 1965 the Railway Board issued a notification providing that 80% of the vacancies in Grade 'C' would be filled up from the class of apprentice train examiners recruited on and after April 1, 1966

and the remaining 20% from amongst the train examiners in Grade 'D'. The notification further provided that apprentice train examiners who were absorbed in Grade 'D' before April 1966 would be accommodated en bloc in Grade 'C' in the 80% of the vacancies, without undergoing any selection. With regard to 20% of the remaining vacancies it was provided that the promotion would be on the basis of selection and not on the basis of seniority-cum-suitability. The petitioner, Roshan Lal Tandon, who had entered Railway service in 1954 as a skilled artisan and was later selected and confirmed in Grade 'D' as a train examiner, filed a writ petition in this Court challenging under Articles 14 and 16 of the Constitution, that part of the notification which gave favourable treatment to apprentice train examiners who had already been absorbed in Grade 'D'. His case was that he, along with direct recruits, formed one class in Grade 'D' and according to the conditions of service applicable to them, seniority was to be reckoned from the date of appointment as train examiners in Grade 'D' and promotion to Grade 'C' was to be on the basis of seniority-cum-suitability, irrespective of the source of recruitment. His contention was that since he was appointed to Grade 'D' after undergoing the necessary selection and training and since he was integrated with the others who were appointed to Grade 'D' by direct recruitment, no differentiation could be made as between him and the direct recruits in the matter of promotion to Grade 'C'.

43. The Constitutional objection taken by Roshan Lal was upheld by this Court with these observations:

> "At the time when the petitioner and the direct recruits were appointed to Grade 'D', there was one class in Grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'. In the present case, it is not disputed on behalf of the first respondent that before the impugned notification was issued there was only one rule of promotion for both the departmental promotees and the direct recruits and that rule was seniority-cum-suitability, and there was

no rule of promotion separately made for application to the direct recruits. As a consequence of the impugned notification a discriminatory treatment is made in favour of the existing Apprentice Train Examiners who have already been absorbed in Grade 'D' by March 31, 1966, because the notification provides that this group of Apprentice Train Examiners should first be accommodated en bloc in Grade 'C' up to 80% of vacancies reserved for them without undergoing any selection. As regards the 20 per cent of the vacancies made available for the category of Train Examiners to which the petitioner belongs the basis of recruitment was selection on merit and the previous test of seniority-cum-suitability was abandoned. In our opinion, the present case falls within the principle of the recent decision of this Court in *Mervyn* v. *Collector* (1966) 3 SCR 600."

44. The key words of the judgment are: "The recruits from both the *sources* to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one *source* as against the recruits from the other *source* in the matter of promotion to Grade 'C', (emphasis supplied). By this was

meant that in the matter of promotional opportunities to Grade 'C', no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice train examiners who were recruited directly to Grade 'D' as train examiners formed one common class with skilled artisans who were promoted to Grade 'D' as train examiners, no favoured treatment could be given to the former merely because they were directly recruited as train examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning of the observation extracted above and no more than this can be read into the sentence next following: "To put it differently, once the direct recruits and promotees are absorved into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'." In terms, this was just a different way of putting what had preceded.

45. Thus, all that *Roshan Lal case* lays down is that direct recruits and promotees lose their birth-marks on fusion into a common stream of service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again.

46. *Roshan Lal case* is thus no authority for the proposition that if direct recruits and promotees are integrated into one class, they cannot be classified for purposes of promotion on a basis other than the one that they were drawn from different sources. In the instant case, classification rests fairly and squarely on the consideration of educational qualifications: Graduates alone shall go into the higher post, no matter whether they were appointed as Assistant Engineers directly or by pro-

motion. The discrimination therefore is not in relation to the source of recruitment as in *Roshan Lal case.*

47. It is relevant, though inconclusive, that the very Bench which decided *Roshan Lal case* held about a fortnight later in *Narsing Rao case* that higher educational qualifications are a relevant consideration for fixing a higher pay scale and therefore matriculate Tracers could be given a higher scale than non-matriculate Tracers, though their duties were identical. Logically, if persons' recruited to a common cadre can be classified for purposes of pay on the basis of their educational qualifications, there could be no impediment in classifying them on the same basis for purposes of promotion. The ratio of *Roshan Lal case* can at best be an impediment in favouring persons drawn from one source as against those drawn from another for the reason merely that they are drawn from different sources.

48. There is an aspect of *Roshan Lal case* which may not be ignored. The Union of India had contended by its counter-affidavit therein that the reorganization of the service was made with a view to obtaining a better and more technically trained class of train examiners which had become necessary on account of the acquisition of modern types of Rolling Stock, complicated designs of carriages and wagons and greater speed of trains under the dieselisation and electrification programmes. This contention, though mentioned in the affidavit, was not placed before the Court as is transparent from the judgment. What its impact would have been on the ultimate conclusion need not be speculated, for it is enough for understanding the true ratio of the judgment to say that the case was decided on the sole basis that persons recruited from different sources were classified according as whether they were appointed

directly or by promotion. That is why the key passage cited by us from the judgment winds up by saying that the "case falls within the principle of ... the decision ... in *Mervyn* v. *Collector*".

49. *In Mervyn Coutinho* v. *Collector of Customs, Bombay*[16], no question arose in regard to the validity of a classification based on educational qualifications. The question there was whether a rotational system for fixing seniority was discriminatory if the recruitment was partly by promotion and partly directly. It was held that there is no inherent vice in such a system if the service is composed in fixed proportion of direct recruits and promotees. The rotational system could therefore be adopted in fixing seniority in the cadre of Appraisers, to which recruitment was in actual practice made directly and by promotion in the ratio of 50: 50. But different considerations were held to arise when the same system was applied for fixing seniority in the cadre of Principal Appraisers because there was only one source from which the Principal Appraisers were drawn, namely Appraisers. The ratio of the judgment is: "The rotational system cannot ... apply when there is only one source of recruitment". This is the principle within which *Roshan Lal case* was expressed to fall. Neither the one nor the other of the two cases was concerned with the question which

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arises for consideration before us. The classification of which we have to determine the validity is not made in relation to the source of recruitment. Therefore cases like *Roshan Lal, Mervyn Coutindo* and *Pandits*[17] fail in a class apart. The case last mentioned is a typical instance of that class, where directly appointed Mamlatdars were accorded a favoured treatment qua the promotee Mamlatdars in the matter of promotion to the post of Deputy Collector. Mamlatdars, whether appointed directly or by promotion, constituted one class and therefore it was held no reservation could be made in favour of the directly appointed Mamlatdars for promotion to the cadre of Deputy Collectors.

50. We are therefore of the opinion that though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The Rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Articles 14 and 16 of the Constitution and must be upheld.

51. But we hope that this judgment will not be construed as a charter for making minute and microcosmic classifications. Excellence is, or ought to be, the goal of all good governments and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants. But let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: What after all is the operational residue of equality and equal opportunity?

52. For reasons indicated, we allow the appeal but there will be no order as to costs.

V.R. KRISHNA IYER, J.(*for himself and Bhagwati, J.*)(*supplementing*)— We fully endorse what has been said by our learned Brother Chandrachud, J., but the profound depths of equal justice in public employment touched in his final para (with which we ardently agree) impel a few concurring observations of our own.

54. In this unequal world the proposition that all men are equal has working limitations, since absolute equality leads to Procrustean cruelty or sanctions indolent inefficiency. Necessarily, therefore, an imaginative and constructive *modus vivendi* between commonness and excellence must be forged to make the equality clauses viable. This pragmatism produced the judicial gloss of "classification" and "differentia", with the by-products of equality among equals and dissimilar things having to be treated differently. The social meaning of Articles 14 to

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16 is neither dull uniformity nor specious "talentism". It is a process of producing quality out of larger areas of equality extending better facilities to the latent capabilities of the lowly. It is not a methodology of substitution of pervasive and slovenly medicority for activist and intelligent — but not snobbish and uncommitted — cadres. However, if the State uses classification casuistically for salvaging status and elitism, the point of no return is reached for Articles 14 to 16 and the Court's jurisdiction awakens to deaden such manoeuvres. The soul of Article 16 is the promotion of the common man's capabilities, over-powering environmental adversities and opening up full opportunities to develop in official life without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule, wriggling out of the democratic imperative of Articles 14 and 16 by the theory of classified equality which at its worst degenerates into class domination.

55. The relevance of these abstract remarks to the present case is obvious. Engineers with diplomas are likely to be drawn from poorer families and not necessarily because they are incapable of making the "degree" grade. An opportunity for them to level up, through experience and self-study, with their more fortunate degree-holding meritocracy, is of the essence of equal opportunity for people with dragging backgrounds. If economically, and therefore educationally, handicapped men distinguish themselves, they are heroes and should be honoured and not kept humble through life on account of the original sin of inferior qualifications. Indeed, diploma holders in that Himalayan State were good enough, in the past decades, to go to the top of the ladder, as the facts of this case admittedly disclose. However, in these young days few engineering graduates in the State and few engineering colleges in the country compelled Government to recruit diploma holders and promote them to higher offices. But circumstances have changed, needs have increased, availabilities have expanded and inequalities at the educational level have been partly eliminated. And so personal (*sic* personnel) policy, with an eye on efficiency, has changed. While we agree with counsel that "chill penury" should not "repress their noble rage", still during our transitional developmental stage the sacrifice of technical proficiency at the alter of wooden equality is an unreasonable injury the State cannot afford to self-inflict. The technology of equal opportunity is to assume diffusion of talent and to afford in-service facilities, through relaxation of rules and otherwise, to the weaker members to acquire better skills.

56. The wise and tonic words of our learned Brother, if we may say so with great deference, are however portentous. While striking a balance between the long hunger for equal chance of the lowlier and the disturbing concern of the community for higher standards of performance, the State should not jettison the germinal principle of equality altogether. The dilemma of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the

constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees. These are perhaps meta-judicial matters left to the other branches of Government, but the Court must hold the Executive within the leading strings of egalitarian constitutionalism and correct, by judicial review, episodes of subtle and shady classification grossly violative of equal justice. That is the heart of the matter. That is the note that rings through the first three fundamental rights the people have given to themselves.

57. Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality. If in this case Government had prescribed that only those degree holders who had secured over 70 per cent marks could become Chief Engineers and those with 60 per cent alone be eligible to be Superintending Engineers or that foreign degrees would be preferred we would have unhesitatingly voided it.

58. The role of classification may well recede in the long run, and the finer emphasis on broader equalities implicit in the concluding thought of the leading judgment will abide. The decision in this case should not — and does not — imply that by an undue accent on qualifications the Administration can cut back on the larger tryst of equalitarianism or may hijack the founding and fighting faith of social justice into the enemy camp of intellectual domination by an elite. The Court, in extreme cases, has to be the sentinel on the *qui-vive.*

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[1] *Ram Krishan Dalmia* v. *Justice S. R. Tendolkar* AIR 1958 SC 538 : 1959 SCR 279, 297(b) : 1959 SCJ 147

[2] *State of U. P.* v. *Kartar Singh* AIR 1964 SC 1135 : (1964) 6 SCR 679, 687 : (1964) 2 SCJ 666.

[3] AIR 1967 SC 839 : (1967) 2 SCR 29, 34 : (1967) 2 SCJ 182

[4] (a) *Katra Educational Society* v. *State of U. P.* AIR 1966 SC 1307 : (1966) 3 SCR 328, 336-37 : (1967) 1 SCJ 5.

(b) *Probhudas Morarjee Rajkotia* v. *Union of India* AIR 1966 SC 1044, 1047 : (1967) 1 SCJ 52.

[5] AIR 1964 SC 1179 : (1964) 6 SCR 846 : (1964) 1 SCJ 555

[6] *Ram Krishan Dalmia* v. *Justice S. R. Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279, 307-08 : 1959 SCJ 147

[7] *Joseph Radice* v. *People of the State of New York*, 68 L. Ed. 690, 695 *American Sugar Ref. Co.* v. *Louisiana*, 45 L. Ed. 102, 103.

[8] 68 L. Ed. 690, 695; *Arkansas Natural Gas Co.* v. *Railroad Commission* 67 L. Ed. 705, 710.

[9] AIR 1968 SC 349 : (1968) 1 SCR 407 : (1968) 2 Lab LJ 120.

[10] (1970) 1 SCC 377, 382 : (1970) 3 SCR 481, 488

[11] (1973) 3 SCC 592 : 1973 SCC (L&S) 136.

[12] *Bain Peanut Co.* v. *Pinson*, 7 L.Ed. 482, 489 (1931)

[13] *Miller* v. *Wilson*, 59 L. Ed. 632.

[14] *Keokee Consol. Coke Co.* v. *Taylor* 58 L. Ed. 1288, 1289.

[15] AIR 1967 SC 1889 : (1968) 1 SCR 185 : (1968) 1 SCJ 746

[16] AIR 1967 SC 52 : (1966) 3 SCR 600 : (1967) 1 SCJ 574 : (1967) 1 LLJ 749

[17] *S. M. Pandit* v. *State of Gujarat* AIR 1972 SC 252 : (1972) 1 LLJ 127 : 1972 Lab 1 C 155

ANNEXURE-C

(1961) 3 SCR 77 : AIR 1961 SC 552

In the Supreme Court of India

(BEFORE BHUVANESHWAR PRASAD SINHA, C.J. AND S.J. IMAM, A.K. SARKAR, K. SUBBA RAO AND J.C. SHAH, JJ.)

KUNNATHAT THATEHUNNI MOOPIL NAIR, ETC. ... Petitioners;

Versus

STATE OF KERALA AND ANOTHER ... Respondents.

Petition Nos. 13 to 24, 42 and 46 to 54 of 1958*, decided on December 9, 1960

Advocates who appeared in this case :

In Petitions Nos. 13-18, and 46-54 of 1958

M.C. Setalvad, Attorney-General for India; Dr Syed Mahmud, Advocate, and J.B. Dadachanji, S.N. Andley, Rameshwar Nath & P.L. Vohra, Advocates of R.N. & Co., with him, for the Petitioners;

In Petitions Nos. 19-24 of 58

C.K. Daphtary, Solicitor-General of India; Dr Syed Mahmud, Advocate, and J.B. Dadachanji, S.N. Andley, Rameshwar Nath & P.L. Vohra, Advocates of R.N. & Co., with him.

In Petition No. 42 of 58

S.N. Andley, Rameshwar Nath, J.B. Dadachanji & P.L. Vohra, Advocates of R.N. & Co.

K.V. Suryanarayana Iyer, Advocate-General of Kerala; Sardar Bahadur, Advocate with him, for the Respondents.

The Judgment of the Court was delivered by

BHUVANESHWAR PRASAD SINHA, C.J.— In this batch of 22 petitions under Article 32 of the Constitution, the petitioners impugn the constitutionality of the Travancore Cochin Land Tax Act, 15 of 1955, as amended by the Travancore-Cochin Land Tax (Amendment) Act, 10 of 1957, which hereinafter will be referred to as the Act. The Act came into force on June 21, 1955, and the Amending Act on August 6, 1957. The petitioners are owners of forest areas in certain parts of the State of Kerala, which, before the reorganisation of States, formed part of the State of Madras. The respondents to the petitions are: (*1*) the State of Kerala, and (*2*) the District Collector, Palghat.

2. These petitions are based on allegations, which are, more or less, similar, and the following allegations made in Writ Petition No. 42 of 1958 may be taken as typical and an extreme case, which was placed before us in detail to bring into bold relief the full significance and effect of the legislation impugned in these cases. The petitioner in Petition 42 of 1958 is a citizen of India, who owns forests in certain parts of Palghat Taluk in Palghat District, which was part of the State of Madras before the reorganisation of States. These forests are now in the State of Kerala. Up to the time that these forests were in the State of Madras, as it then was, the Madras Preservation of Private Forests Act, Madras Act 27 of 1949, governed these forests. Even after these areas were transferred to the State of Kerala, the said Madras Act, 27 of 1949, continued to apply to these forests. Under the said Madras Act the owners of forests, like the petitioner, could not sell, mortgage, lease or otherwise alienate any portion of their forests without the previous sanction of the District Collector; nor could they, without similar permission, cut trees or do any act likely to denude the forest or diminish its utility, as such. The District Collector, in exercise of the powers under the

Act, does not ordinarily permit the cutting of more than a small number of trees in the forest. Thus the petitioner has not the right fully to exploit the forest wealth in his forest area and has to depend upon the previous permission of the Collector. In exercise of the powers given to the Collector under the Madras Act aforesaid, the petitioner's lessee was given permission to cut certain trees in his forest, which brings to the petitioner by way of income from the forest, a sum of Rs 3100 per year. Under the Act, a tax called land tax at a flat rate of Rs 2 per acre has been imposed on the petitioner. In pursuance of the provisions of the Act, as amended as aforesaid, the District Collector of Palghat, purporting to act under the provisions of Section 5-A of the Act, issued a notice to the petitioner provisionally assessing the petitioner's forest under the said Act to a sum of fifty thousand rupees per annum and informing the petitioner that, if no representation was made within thirty days, the said provisional assessment would be confirmed and a demand notice would be issued. As there has been no survey of the area of forest land in the petitioner's possession, the District Collector has conjectured the said area to be twenty-five thousand acres. The Petitioner had made an application to the District Collector under the Madras Preservation of Private Forests Act for felling trees in an area of one thousand acres, but the Collector was pleased to grant permission to cut trees from 450 acres only in the course of five years at the rate of 90 acres a year. The petitioner has leased out that right to another person, who made the highest bid of Rs 3100 per year, as the landlord's fee for the right to cut and remove the trees, and other minor produce. Besides the demand aforesaid, the Revenue Authorities have levied about four thousand rupees as tax on the surveyed portions of the forest. The petitioner's forest has large areas of arid rocks, rivulets and gorges. The petitioner, in those circumstances, questions the constitutional validity of the Act, the provisions of which will be examined hereinafter.

3. These petitions have been opposed on behalf of the first respondent and the allegations and submissions made in the petitions are sought to be controverted by a counter affidavit sworn to by an Assistant Secretary of the Kerala Government in the Revenue Department. It is in similar terms, as a matter of fact printed in most of these cases. It is contended therein on behalf of the respondent that the petitions are not maintainable inasmuch as no fundamental rights of the petitioners have been infringed; that the allegations about the income, from the forest lands are not admitted; and by way of submission, it is added, they are irrelevant for the purposes of these petitions. It is stated that the Act was passed with a view to unifying the system of land tax in the whole of the State of Kerala. It is submitted that the validity of the Act has to be determined in the light of Article 265 of the Constitution and that Articles 19 and 31 were wholly out of the way. It is denied that the tax imposed was harsh or arbitrary, or has the effect of violating the petitioner's right of holding property; and it was asserted that the allegations in respect of income from the forests are entirely irrelevant, as the tax was not a tax on income, but was an "impost on land". It is equally irrelevant whether the land is productive or not. It is also contended that, in view of the provisions of Article 31(5)(*b*)(*i*) of the Constitution, Article 31(2) could not be relied upon by the petitioners. The allegation of the petitioners that the Act is a device to confiscate private forests is denied. It is admitted that, except in certain cases, the entire area is unsurveyed and that steps are being taken for surveying those areas. It is also stated that the areas shown in the notices served on the petitioners are based on information available to the Collector of the District; and lastly, it is stated that only notice has been issued calling upon the petitioners to make their representations, if any, to the proposed provisional assessments. The assessments have not yet been made, and, therefore, there is no question of demand of tax being enforced by coercive processes. Finally, it is suggested that the Act has been enacted for the legitimate revenue purposes of the

State.

4. Before entering upon a discussion of the points in controversy, it is convenient at this stage to indicate briefly the relevant provisions of the Act which is impugned by the petitioners as ultra vires the State Legislature. The preamble of the Act is in these terms:

> "Whereas it is deemed necessary to provide for the levy of a low and uniform rate of basic tax on all lands in the State of Travancore-Cochin."

Basic tax has been defined as "the tax imposed under the provisions of this Act". Section 3 lays down that the arrangement made under the Act for the levy of the basic tax shall be deemed inter alia to be a general revenue settlement of the State, notwithstanding anything in any statute, grant, deed or other transaction subject to certain provisos not material for our present purposes. The charging section is Section 4, which is in these terms:

> "Subject to the provisions of this Act, there shall be charged and levied in respect of all lands in the State, of whatever description and held under whatever tenure, a uniform rate of tax to be called the basic tax."

Section 5 lays down the rate of the tax which, by the amendment, has been raised to Rs 2 per acre (two pies per cent of land per annum) and the basic tax charged and levied at that rate shall be the tax payable to the Government in lieu of any existing tax in respect of land. Section 6 lays down that any stipulation in any contract or agreement or lease or other transaction to pay land revenue assessment of any land shall be construed as stipulation for the payment of the amount of basic tax, as charged and levied under the Act. Section 7 is in these terms:

> "This Act is not applicable to lands held or leased by the Government or any land or class of lands which the Government may, by notification in the Gazette, either wholly or partially exempt from the provisions of this Act."

Sections 8 and 9 provide for the continuance of the liability to pay certain dues in respect of existing tenures in addition to the basic tax in respect of lands covered by those tenures. Section 10 abolishes the irrigation assessment charged on certain tank beds and other water reservoirs named and described therein. Section 11 preserves the right of the Government to levy certain irrigation and water cesses and lays down that the Act shall not affect the power of the Government to levy any rate or alter any existing rate of irrigation or water cess on any land, as they deem fit. Cesses, other than those mentioned in Section 11, are also abolished by Section 12. Section 13 authorises the Government to appoint such officers as they deem necessary for the purpose of the Act. Section 14 lays down the bar of suits against the Government in respect of anything done or any order passed under the Act. Section 15 saves the right of the Government which accrued to it before the Act came into force as also the conditions of any agreement grant or deed relating to any land, except to the extent indicated in the Act. Section 16 vests the Government with the power to make rules for carrying into effect the provisions of the Act, with particular reference to the power to make rules for the apportionment of the basic tax charged on certain kinds of holdings, for defining the powers and duties of the officers appointed under the Act and for determining the kist instalments and the due date for the payment thereof. These in short are the provisions of the Act. The Act, as indicated above, was amended by Act 10 of 1957 which substituted the words "State of Kerala" for the words "State of Travancore-Cochin" and made certain other consequential changes. The amending Act introduced Section 5-A, which has been very much assailed in the course of the argument before us and it is, therefore, necessary to set it out in full. It is in these terms:

> "5-A. *Provisional assessment of basic tax in the case of unsurveyed lands.*—(1) It shall be competent for the Government to make a provisional assessment of the

basic tax payable by a person in respect of the lands held by him and which have not been surveyed by the Government, and upon such assessment such person shall be liable to pay the amount covered in the provisional assessment.

(2) The Government after conducting a survey of the lands referred to in sub-section (1) shall make a regular assessment of the basic tax payable in respect of such lands. After a regular assessment has been made, any amount paid towards the provisional assessment made under sub-section (1) shall be deemed to have been paid towards the regular assessment and when the amount paid towards the provisional assessment exceeds the amount payable under the regular assessment, the excess shall be refunded to the person assessed."

By Section 9, Section 3 of the Madras Revenue Recovery Act, 1864, has been substituted in these terms:

"3. *Landholder when and to whom to pay kist.*—Every landholder shall pay to the Collector or other officer empowered by him in this behalf the land tax due from him on or before the day fixed for payment under the rules framed under Section 16 of the Land Tax Act, 1955."

From a review of the provisions of the Act, as amended as aforesaid, it will be clear that the provisions of the Act lay down in barest outline the policy to impose a uniform and, what is asserted to be, a low rate of land tax on all lands in the State of Kerala. Unlike other taxing statutes, it does not make any provision for issue of notice to the assessee, nor is there any provision for submission of a return by the assessee. By Section 5-A, it authorises the Government to make a "provisional assessment" in respect of land, which has not been surveyed, and such provisional assessment is made payable by the person made liable under the Act. It does not make any provision for any appeals in cases where the assessee may feel dissatisfied with the assessment. The Act does contemplate the making of "a regular assessment of the basic tax". But it does not indicate as to when the regular assessment would be made, except indicating that it can be made only after a survey has been made in respect of the land assessed. The Act could not have been cast in more general terms and the proceedings under the Act could not have been more summary. It has thus the merit of brevity as also of simplicity, derived from the fact that a tax is levied at a flat rate, irrespective of the quality of the land and consequently of its productive capacity. Under the Act, the charge has to be levied, whether or not any income has been derived from the land. The legislature was so much in earnest about levying and realising the tax that it could not even wait for a regular survey of the lands to be assessed with a view to determining the extent and character of the land.

5. Such are the provisions and the effect of the Act, which has been assailed on a number of grounds on behalf of the petitioners. It is contended, in the first instance, that inequality is writ large in the provisions of the Act, which is clearly discriminatory in character and effect and thus infringes Article 14 of the Constitution. As the Act does not have any regard to the quality of the land or its productive capacity, and a tax at a flat rate of Rs 2 per acre is proposed to be levied under the Act, it is further contended, it imposes very unreasonable restrictions on the right to hold property and is thus an invasion on the rights guaranteed to the petitioners under Article 19(1)(*f*) of the Constitution. The Act does not lay down any provision calling for a return from the assessee, for any enquiry or investigation of facts before the provisional assessment is made or for any right of appeal to any higher authority from the order of provisional assessment; in fact, there is no provision for hearing the assessee at any stage. The Act is of an arbitrary character and is thus wholly repugnant to the guaranteed rights of the petitioners. Section 7 quoted above gives uncanalised, unlimited and arbitrary power to the Government to pick and choose in the matter of grant of total or partial exemption from the provisions of the Act. It also suffers from the vice of

discrimination. It has also been vehemently argued that the Act, though it purports to be a tax on land, is really a law relating to forests in possession of the petitioners and would not come within the purview of Entry 18 read by itself or in conjunction with Entry 45 of List II, but is law relating to forests under Entry 19. If we tear the veil in which the real purpose and effect of the Act has been shrouded, it will appear that the true character and effect of the Act is not to levy a tax on land, but to expropriate the private owners of the forests without payment of any compensation whatsoever. Lastly, it has been urged that the whole Act has been conceived with a view to confiscating private property, there being no question of any compensation being paid to those who may be expropriated as a result of the working of the Act. This last argument is based on the assertion that the tax proposed to be levied on private property in the State of Kerala has absolutely no relation to the paying capacity of the persons sought to be taxed, with reference to the income they could derive, or actually did derive from the property.

6. On behalf of the State of Kerala, the learned Advocate-General has argued that, though in most of the cases, that is to say, except in seven petitions (Petitions 21, 22, 47, 49, 50, 51 and 54) the lands have not been surveyed, the areas mentioned in the notices proposing provisional assessment have been ascertained through the local agencies of the Government. It was further contended that the State had only declared the liability to the payment of the tax at a flat rate of Rs 2 per acre in respect of land, irrespective of the income to be derived therefrom. Hence there was no necessity for making provision for a detailed enquiry or investigation. The rate of the tax being known, and the area of the land to be taxed having been locally ascertained, even though without any regular survey, what remained was merely quantifying the tax, which was of a purely administrative character. The local agencies estimated the land in possession of particular persons. Those persons were called upon to pay provisionally at the rate fixed by the statute. The State has, by executive action, appointed authorities who are expected to act in accordance with the principle of natural justice. There was, therefore, no need for laying down any elaborate procedure as in other instances of taxing statutes. There is a presumption that the authority appointed by the Government would act bona fide and in a proper manner. If there was any case of unfair dealings, the matter could be brought to the Court. It was greatly emphasised that as a flat rate of taxation had been envisaged by the Act and as ultimately the tax at that rate would be realised from land found to be in possession of particular persons after a regular survey, the regular survey to be ultimately made would automatically determine the amount of tax to be paid and the adjustment of the taxes already paid could be made on that basis. On the legal aspect of the controversy raised on behalf of the petitioners, it was argued that the Act has its justification in Article 265 of the Constitution, which was not subject to the provisions of Part III of the Constitution and that, therefore, Articles 14, 19, 31 could not be pressed in aid of the petitioners. It was also contended that even if the Act is, in effect, confiscatory, it cannot be questioned, being a taxing statute. Finally, it was urged that the question of the amount of income derived by the petitioners from the property sought to be taxed is wholly irrelevant, because the Act was not a tax on income but it was a tax on the property itself.

7. The most important question that arises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Article 265 of the Constitution is a complete answer to the attack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article. Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax

proposed to be levied must be within the legislative competence of the legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution. One of such conditions envisaged by Article 13(2) is that the legislature shall not make any law which takes away or abridges the equality clause in Article 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Article 14 of the Constitution, it must be struck down as unconstitutional. For the purpose of these cases, we shall assume that the State Legislature had the necessary competence to enact the law, though the petitioners have seriously challenged such a competence. The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does mean that if property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. It must, therefore, be held that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the Court might think more just and equitable. The Act has, therefore, to be examined with reference to the attack based on Article 14 of the Constitution.

8. It is common ground that the tax, assuming that the Act is really a taxing statute and not a confiscatory measure, as contended on behalf of the petitioners, has no reference to income, either actual or potential, from the property sought to be taxed. Hence, it may be rightly remarked that the Act obliges every person who holds land to pay the tax at the flat rate prescribed, whether or not he makes any income out of the property, or whether or not the property is capable of yielding any income. The Act, in terms, claims to be "a general revenue settlement of the State" (Section 3). Ordinarily, a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made, with due diligence, and, therefore, is levied with due regard to the incidence of the taxation. Under the Act in question we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is arid desert. The second one does not make any income, but could raise some crop after a disproportionately large investment of labour and capital. A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the

Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay from their own pockets, if they could afford the tax. If they cannot afford the tax, the property is liable to be sold, in due process of law, for realisation of the public demand. It is clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification. It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution. Furthermore, Section 7 of the Act, quoted above, particularly the latter part, which vests the Government with the power wholly or partially to exempt any land from the provisions of the Act, is clearly discriminatory in its effect and, therefore, infringes Article 14 of the Constitution. The Act does not lay down any principle or policy for the guidance of the exercise of discretion by the Government in respect of the selection contemplated by Section 7. This Court has examined the cases decided by it with reference to the provisions of Article 14 of the Constitution, in the case of *Shri Ram Krishna Dalmia* v. *Shri Justice S.R. Tendolkar*[1]. S.R. Das, C.J., speaking for the Court has deduced a number of propositions from those decisions. The present case is within the mischief of the third proposition laid down at pp. 299 and 300 of the Report, the relevant portion of which is in these terms:

> "A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself". (p. 299 of the Report).

The observations quoted above from the unanimous judgment of this Court apply with full force to the provisions of the Act. It has, therefore, to be struck down as unconstitutional. There is no question of severability arising in this case, because both the charging sections, Section 4 and Section 7, authorising the Government to grant exemptions from the provisions of the Act, are the main provisions of the Statute, which has to be declared unconstitutional.

9. The provisions of the Act are unconstitutional viewed from the angle of the provisions of Article 19(1)(*f*) of the Constitution, also. Apart from the provisions of Sections 4 and 7 discussed above, with reference to the test under Article 14 of the Constitution, we find that Section 5-A is also equally objectionable because it imposes unreasonable restrictions on the rights to hold property, safeguarded by Article 19(1)(*f*) of the Constitution. Section 5-A declares that the Government is competent to make a provisional assessment of the basic tax payable by the holder of unsurveyed land. Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing

any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher civil court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the landholders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character. Again, the Act does not impose an obligation on the Government to undertake survey proceedings within any prescribed or ascertainable period, with the result that a landholder may be subjected to repeated annual provisional assessments on more or less conjectural basis and liable to pay the tax thus assessed. Though the Act was passed about five years ago, we were informed at the Bar that survey proceedings had not even commenced. The Act thus proposes to impose a liability on landholders to pay a tax which is not to be levied on a judicial basis, because (*1*) the procedure to be adopted does not require a notice to be given to the proposed assessee; (*2*) there is no procedure for rectification of mistakes committed by the Assessing Authority; (*3*) there is no procedure prescribed for obtaining the opinion of a superior civil court on questions of law, as is generally found in all taxing statutes, and (*4*) no duty is cast upon the Assessing Authority to act judicially in the matter of assessment proceedings. Nor is there any right of appeal provided to such assessees as may feel aggrieved by the order of assessment.

10. That the provisions aforesaid of the impugned Act are in their effect confiscatory is clear on their face. Taking the extreme case, the facts of which we have stated in the early part of this judgment, it can be illustrated that the provisions of the Act, without proposing to acquire the privately owned forests in the State of Kerala after satisfying the conditions laid down in Article 31 of the Constitution, have the effect of eliminating the private owners through the machinery of the Act. The petitioner in petition No. 42 of 1958 has been assumed to own 25 thousand acres of forest land. The liability under the Act would thus amount to Rs 50,000 a year, as already demanded from the petitioner on the basis of the provisional assessment under the provisions of Section 5-A. The petitioner is making an income of Rs 3100 per year out of the forests. Besides, the liability of Rs 50,000 as aforesaid, the petitioner has to pay a levy of Rs 4000 on the surveyed portions of the said forest. Hence, his liability for taxation in respect of his forest land amounts to Rs 54,000 whereas his annual income for the time being is only Rs 3100 without making any deductions for expenses of management. Unless the petitioner is very enamoured of the property and of the right to hold it, it may be assumed that he will not be in a position to pay the deficit of about Rs 51,000 every year in respect of the forests in his possession. The legal consequences of his making a default in the payment of the aforesaid sum of money will be that the money will be realised by the coercive processes of law. One can, easily imagine that the property may be sold at auction and may not fetch even the amount for the realisation of which it may be proposed to be sold at public auction. In the absence of a bidder forthcoming to bid for the offset amount, the State ordinarily becomes the auction purchaser for the realisation of the outstanding taxes. It is clear, therefore, that apart from being discriminatory and imposing unreasonable restrictions on holding property, the Act is clearly confiscatory in character and effect. It is not even necessary to tear the veil, as was suggested in the course of the argument, to arrive at the conclusion that the Act has that unconstitutional effect. For these reasons, as also for the reasons for which the provisions of Sections 4 and 7 have been declared to be unconstitutional, in view of

the provisions of Article 14 of the Constitution, all these operative sections of the Act, namely 4, 5-A and 7, must be held to offend Article 19(1)(*f*) of the Constitution also.

11. The petitions are accordingly allowed with costs against the contesting respondent, the State of Kerala.

A.K. SARKAR, J.— These petitions were filed under Article 32 of the Constitution, challenging the validity of the Travancore-Cochin Land Tax Act, 1955, as amended by Act 10 of 1957. The principal Act was passed by the legislature of the State of Travancore-Cochin and the Amending Act, by the legislature of the State of Kerala, in which the State of Travancore Cochin had been merged. The petitioners are owners of lands in the State of Kerala. The Act as amended and hereafter referred to as "the Act", levied a certain basic tax on all lands in the State of Kerala. The petitioners say that the levy is illegal and violates their fundamental rights.

13. It appears from the preamble that the Act was passed as it was deemed necessary to provide for the levy of a low and uniform rate of basic tax on all lands in the State. The Act provides that the arrangement made by it for the levy of the basic tax is to be deemed to be a general revenue settlement of the State. Section 4 of the Act is the charging section and it lays down that there shall be charged and levied in respect of all lands in the State, of whatever description and held under whatever tenure, a uniform rate of tax to be called the basic tax. Section 5 fixes the rate of the tax at 2 n.p. per cent which works out at Rs 2 per acre per annum. This section also provides that the basic tax shall be the tax payable to the Government in lieu of any other existing tax in respect of land. Section 12 abolishes all cesses on land except irrigation cess.

14. The first ground on which the validity of the Act is challenged is that it offends the provision as to the equal protection of the laws contained in Article 14 of the Constitution. The Act applies to all lands in the State and it imposes an uniform rate of tax, namely, Rs 2 per acre. It is said that all lands in the State have not the same productive quality; that some are waste lands and others, lands of varying degrees of fertility. The contention is that the tax weighs more heavily on owners of waste lands than on owners of fertile lands. It is said that it is bound to happen that some owners make no income out of their lands or make a small income and they would have to pay the tax out of their pocket while the owners of better classes of lands yielding larger income would be able to pay the tax out of the income from the lands. It is contended that the Act therefore discriminates between several classes of owners of lands in the State and is void as infringing the equality clause in the Constitution. It may be conceded that all lands in the State are not of the same degree of fertility. I am however unable to see that because of that, the Act can be said to discriminate between the owners of them.

15. What is really said appears to be that the Act makes a classification of the owners of lands according to areas. Assume that the Act does so. The question then is, is such a classification illegal? The equal protection clause in the Constitution does not mean that there shall be no classification for the purpose of any law. It has been said by this Court in *Budhan Choudhury* v. *State of Bihar*[2]: "It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the statute in question."

16. On the argument of the petitioners, the Act makes a classification between owners of lands using as the differentia, the area of the land held by them. The

question then, is, is that differentia intelligible and has that differentia a rational relation to the object of the Act? Now it seems to me that both the tests are satisfied in the present case. The taxpayers are classified according to the area of lands held by them. That is quite an intelligible basis on which to make a classification; holders of varying areas of land can quite understandably be placed in different classes. Next, has such a basis of classification, a rational relation to the object of the Act? The Act is a taxing statute. It is intended to collect revenue for the governmental business of the State. It says that one of its objects is to provide a low and uniform rate of basic tax. Another object mentioned is to replace all other dues payable to the Government in respect of the ownership of the land by a uniform basic tax. Why is it to be said that the use of the area of land held as the basis of classification has no rational relation to these objects. I find no reason. The object is to tax land held in the State for raising revenues. It is the holding of the land in the State that makes the owner liable to pay tax. It would follow that the quantum of the tax can be reasonably linked with the quantum of the holding.

17. Why is it said that the classification on the basis of area is bad? It is only because it imposes unequal burden of the tax on the owners of land; because owners of less productive land would have a larger burden put on them. Now if this argument is right, then tax on land can be imposed only according to its productivity. I have not been shown any authority which goes to this length. I am further unable to see how productivity as the basis of classification could be said to have a more rational relation to the object of a statute collecting revenue by taxing land held in the State. The tax is not levied because the land is productive but because the land is held in the State. Again if the tax which could be imposed on land had to be correlated to its productivity, then the State would have no power to tax unproductive land and the provision in the Constitution that it would have power to tax land would, to that extent, be futile. It seems to me that a contention leading to such a result cannot be accepted.

18. Reliance was placed for the petitioners on *Cumberland Coal Company* v. *Board of Revision on Tax Assessments*[3] in support of the contention that a tax on land not based on its productivity, violates Article 14. I am unable to hold that this case supports the contention. What had happened there was that a certain statute had imposed a tax ad valorem on all coal situated in a certain area and in assessing the tax, the coal of the Cumberland Coal Company had been assessed by the authorities concerned at its full value while the coal of the rest of the class liable to the tax had been assessed at a lower value. Thereupon it was held that "the intentional systematic undervaluation by State Officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed on the full value of his property". On this view of the matter the Supreme Court of America directed readjustment of the assessments. The statute with which this case was concerned had levied the tax ad valorem which, it may be, is the same thing as a tax correlated to productivity. The case had therefore nothing to do with the question that a tax on coal otherwise than ad valorem would be unconstitutional. In fact this case did not declare any statute invalid.

19. Then it seems to me that if the contention of the petitioners is right, and land could be taxed only on its productivity, for the same reason, taxes on all other things would have to be correlated to the income to be derived from them. The result would be far reaching. I am not prepared to accept a contention producing such a result and no authority has been cited to lead me to accept it.

20. It may be that as lands are not of equal productivity, some tax payers may be able to pay the tax out of the income of the land taxed while others may have to find the money from another source. To this extent the Act may be more hard on some than on others. But I am unable to see that for that reason it is unconstitutional. All

class legislation puts some in a more disadvantageous position than others. If the classification made by the law is good, as I think is the case with the present Act, the resultant hardship alone cannot make it bad. It was said in *Magoun* v. *Illinois Trust and Savings Bank*[4], "It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity."

21. It is then said that sub-section (1) of Section 5-A, which was introduced into the Act by the amending Act, offends Article 14. The impugned provision is in these terms:

> "5-A. (*i*) It shall be competent for the Government to make a provisional assessment of the basic tax payable by a person in respect of the lands held by him and which have not been surveyed by the Government, and upon such assessment such person shall be liable to pay the amount covered in the provisional assessment.
>
> * * *"

This section was enacted as at the date of the Act, all lands had not been surveyed and so the areas of all holdings were not known. In the absence of such knowledge the tax which was payable on the basis of the areas of the holdings could not be assessed on unsurveyed lands, so the section provides that pending the survey, the Government will have power to make a provisional assessment on unsurveyed lands. This provision was necessary as the survey was bound to take time.

22. The contention is that Section 5-A(1) gives arbitrary power to the Government to make a provisional assessment on any person it chooses, leaving out others from the provisional assessment. I am unable to read the sub-section in that way. It may be that it leaves it to the Government to make a provisional assessment if it chooses. This does not result in any illegal classification. The surveyed lands and unsurveyed lands are distinct classes of properties and may be differently treated. Again, all unsurveyed lands would on survey have to pay tax from the beginning. It would follow that the holders of both classes of lands are eventually subjected to the same burden. As to the contention that under this section the Government has the right to levy the provisional assessment at its choice on some and not on all holders of unsurveyed lands, I am unable to agree that this is a proper reading of the section. In my view, the expression "a person" in the section does not lead to that conclusion. That expression should be read as "all persons" and it is easily capable of being so read. The section says, "It shall be competent for the Government to make a provisional assessment of the basic tax payable by a person". Now the basic tax is payable by all persons holding land. So the provisional assessment, if made, has to be on all persons holding lands whose lands have not been surveyed. The Government cannot, therefore, pick and choose. A statute is intended to be legal and it has therefore to be read in a manner which makes it legal rather than in a manner which makes it illegal. If the Government did not make the provisional assessment in the case of all liable to such assessment, then the Government's action could be legitimately questioned. It has however not in fact been said in these petitions that in deciding to make the provisional assessment the Government has made any discrimination between the persons liable to such assessment.

23. Section 5-A(1) is also attacked on the ground that it is against rules of natural justice in that it does not say that in making the provisional assessment, any hearing would be given to the person sought to be assessed or requiring a return from him or giving him a right of appeal in respect of the provisional assessment made. It is true that the section does not expressly provide for a hearing being given. It seems to me however that if according to the rules of natural justice the assessee was entitled to a hearing, an assessment made without giving him such a hearing would be bad. The Act must be read so as to imply a provision requiring compliance with the rules of

natural justice. Such a reading is not impossible in the present case as there is nothing in the Act indicating that the rules of natural justice need not be observed.

24. It was said in *Spackman* v. *Plumstead Board of Works*[5] where a statute requiring an architect to give a certain certificate which did not provide the procedure as to how the architect was to conduct himself, came up for consideration that, "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated". Again in *Maxwell on Statutes* (10th Edn.) p. 370 it has been said, "In giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure, such, for instance, as that which requires that before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself". Insofar as this Act confers a power on the Government to discharge the judicial duty of making a provisional assessment, which the petitioners say, it does, it must imply that the judicial process has to be observed.

25. As regards the return, that seems to me not to be of much consequence. If the assessee is entitled to be heard, the fact that he is not asked to make a return, would not constitute a departure from the rules of natural justice. Likewise, the absence of a right of appeal is not something on which the petitioners can rely. Rules of natural justice do not require that there must always be a right of appeal. Under the Act it is the Government which makes the assessment and it would not be unreasonable to hold that in view of the high authority of the person assessing, the absence of a right of appeal is not likely to cause any miscarriage of justice. I am therefore unable to hold that in the absence of express provisions laying down the procedure according to which the provisional assessment is to be made, the Act has to be held invalid.

26. It may here be stated that in those instances where, in the present cases, provisional assessments had been made, the, assessees had either themselves supplied the area of the lands held by them or the area had been determined after giving them a hearing. After the area has been determined, the amount of the tax payable is decided by a simple calculation at the rate of Rs 2 per acre of land held and with regard to this, no hearing is required.

27. Then again sub-section (2) of Section 5-A provides that the Government after conducting a survey of the lands mentioned in sub-section (1) under which provisional assessment is to be made, shall make a regular assessment and adjustments would have to be made in regard to tax already paid on the basis of the regular assessment. A point is made that there is no time limit fixed within which the regular assessment is to be made and so the Act leaves it to the arbitrary decision of the Government when to make the regular assessment. I do not think that this contention is correct. Properly read, the section in the absence of any indication as to time, means that regular assessment would have to be made as soon after the survey, as is reasonably possible.

28. It is also said that Section 7 of the Act offends Article 14. This section gives power to the Government to exempt from the operation of the Act such lands or class of lands as the Government may by notification decide. This section does not indicate on what grounds the exemption is to be granted. It therefore seems to me that it gives arbitrary power to the Government and offends Article 14. But the section is clearly severable from the rest of the Act. If the section is taken out of the Act, the operation of the rest of the Act will not in the least be affected. The only effect will then be that the Government will have no power to exempt any land from the tax. That will not in any way affect the other provisions of the Act. The invalidity of this section is therefore no reason for declaring the entire Act illegal. It may be pointed out

that it is not alleged in the petitions that the Government has exempted any lands or class of lands from the operation of the Act.

29. It is contended that Section 8 of the amending Act also shows the arbitrary nature of the Act. That section provides that if any difficulty arises in giving effect to the provisions of this Act, the Government may by order do anything not inconsistent with such provisions which appears to it to be necessary or expedient for removing the difficulty. This is a common form of provision now found in many Acts. The power given under it cannot be said to be uncontrolled for it must be exercised consistently with the Act and to remove difficulties arising in giving effect to the Act. In any event, this provision is contained in the amending Act only. Even if the section be held to be invalid that would not affect the rest of the amending Act or any question that arises on these petitions.

30. The validity of the Act is also challenged on the ground that it infringes Article 19, clause (1), sub-clauses (*f*) and (*g*). This challenge seems to me to be wholly untenable. Apart from the question whether a taxing statute can become invalid as offending Article 19, as to which the position on the authorities does not seem to be very clear, it is plain that Article 19 permits reasonable restrictions to be put on the rights mentioned in sub-clauses (*f*) and (*g*). Now there is no dispute that the rate of tax fixed by the Act is a very low rate. It has not been said that the rate fixed is unreasonable. It clearly is not so. The restrictions on these rights under Article 19(1), (*f*) and (*g*) put by the Act, if any, are clearly reasonable. These rights cannot therefore be said to have been infringed by the Act.

31. The lands of the petitioners are lands on which stand forests. It is said that under the Madras Preservation of Private Forests Act, (Act 27 of 1949), which applies to the lands with which we are concerned as they are situated in an area which previously formed part of the State of Madras, the owners of the forests can work them only with the permission of the officer mentioned in that Act. It is said that the control imposed by the officer has been such that the income received from the forest is much less than the tax payable under the Act in respect of the land on which the forest stands. Taking by way of illustration Petition No. 13, it is pointed out that the income from the forest with which that petition is concerned was Rs 8477 for the year 1956-57 while the tax payable under the Act for more or less the same period was Rs 1,51,000. I am unable to hold that because of this the Act offends Article 19(1), (*f*) and (*g*). It is not stated that the land is not capable of producing any income other than the income from the forest standing on it. There is nothing to show that in all times to come the income from the land including the income from the forest, will be less than the tax imposed on it by the Act. The area of the land concerned in Petition No. 13 is enormous being about 75,500 acres. I am further unable to hold the impugned Act to be invalid because of action that may be taken under another Act, namely, the Madras Act 27 of 1949.

32. The validity of the Act is challenged also on the ground that it offends Article 31 of the Constitution. I am unable to see any force in this contention. If the statute is otherwise valid, as I have found the present Act to be, it cannot, even if it deprives any person of property, be said to offend Article 31(1). It has been held by this Court in *Ramjilal* v. *Income Tax Officer, Mohindargarh*[6] that "clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Article 265 becomes wholly redundant". No question of clause (2) of Article 31 being violated arises here for the Act does not deal with any acquisition of property.

33. It is also said that the Act is a colourable piece of legislation, namely, that though in form a taxing statute it, in effect, is intended to expropriate lands, held by the citizens in the State by imposing a tax too heavy for the land to bear. As was said

in *Raja Bhairebendra Narayan Bhup* v. *State of Assam*[7] "The doctrine of colourable legislation is relevant only in connection with the question of legislative competency". In the present case, there being in my view, no want of legislative competency in the legislature which passed the Act in question, the Act cannot be assailed as a piece of colourable legislation. I may add that I do not accept the argument that the Act is in its nature expropriatary or that the tax imposed by it is really excessive.

34. I come now to the last argument advanced by the petitioners. It is said that the Act was beyond the legislatative competence of the State Legislature. It is conceded that the State Legislature has power to impose a tax on land under Entry 49 of List 2 in the Seventh Schedule to the Constitution, but it is said that land as mentioned in that entry does not include lands on which forests stand. It is contended that the State Legislature has power to legislate about forests under Entry 19 of that List and also as to lands under Entry 18. There is however no power to impose a tase on forests while there is power under Entry 49 of that list to tax land. Therefore, it is said, that there is no power to impose tax on lands on which forests stand and the Act insofar as it imposes tax on lands covered by forests, which the lands of the petitioners are, is hence incompetent.

35. It is not in dispute that a State Legislature has no power to impose a tax on a matter with regard to which it has the power to legislate but has been given no express power to impose a tax. Therefore, I agree, that a State Legislature cannot impose tax on forests. I am however not convinced that "land" in Entry 49 is not intended to include land on which a forest stands. No doubt, a forest must stand on some land. In *Shorter Oxford Dictionary*, one of the meanings of "forest" is given as an extensive tract of land covered by trees and undergrowth, sometimes intermingled with pastures. The concepts of forest and land however are entirely different. The principal idea conveyed by the word "forest" is the trees and other growth on the land. Under Entry 19 there may no doubt be legislation with regard to land insofar it is necessary for the purpose of the forest growing on it. It is well known that entries in the legislative lists have to be read as widely as possible. It is not necessary to cut down the plain meaning of the word "land" in Entry 49 to give full effect to the word "forest" in Entry 19. In my view, the two entries namely, Entry 49 and Entry 18 deal with entirely different matters. Therefore, under Entry 49 taxation on land on which a forest stands is permissible and legal.

36. For these reasons I would dismiss these petitions.

ORDER

37. In accordance with the opinion of the majority of the Court, these Petitions are allowed with costs against the contesting Respondent, the State of Kerala.

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* (Under Article 32 of the Constitution of India for enforcement of Fundamental Rights).

[1] (1959) SCR p. 279

[2] (1955) I SCR 1045, 1049

[3] 76 LEd 146

[4] 42 LEd 1037, 1043

[5] 10 AC 229, 240

[6] (1951) SCR 127, 136

[7] (1956) SCR 303

ANNEXURE-D

1950 SCR 759 : AIR 1951 SC 118

In the Supreme Court of India

(BEFORE HIRALAL KANIA, C.J. AND MEHER CHAND MAHAJAN, B.K. MUKHERJEA, S.R. DAS AND CHANDRASEKHARA AIYAR, JJ.)

CHINTAMAN RAO ... Appellant;

Versus

STATE OF MADHYA PRADESH ... Respondent.

With

RAM KRISHNA ... Appellant;

Versus

STATE OF MADHYA PRADESH ... Respondent.

Petition Nos. 78 and 79 of 1950*, decided on November 8, 1950

Advocates who appeared in this case :

G.N. Joshi, for the Petitioners;

S.M. Sikri, for the Respondent.

The Judgment of the Court was delivered by

MEHER CHAND MAHAJAN, J.:— These two applications for enforcement of the fundamental right guaranteed under Article 19(1)(*g*) of the Constitution of India have been made by a proprietor and an employee respectively of a bidi manufacturing concern of District Sagar (State of Madhya Pradesh). It is contended that the law in force in the State authorizing it to prohibit the manufacture of bidis in certain villages including the one wherein the applicants reside is inconsistent with the provisions of Part III of the Constitution and is consequently void.

2. The Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 44 of 1948, was passed on 19th October, 1948 and was the law in force in the State at the commencement of the Constitution. Sections 3 and 4 of the Act are in these terms:

> "3. The Deputy Commissioner may by notification fix a period to be an agricultural season with respect to such villages as may be specified therein.
>
> 4.(1) The Deputy Commissioner may, by general order which shall extend to such villages as he may specify, prohibit the manufacture of bidis during the agricultural season.
>
> (2) No person residing in a village specified in such order shall during the agricultural season engage himself in the manufacture of bidis, and no manufacturer shall during the said season employ any person for the manufacture of bidis."

3. On 13th June, 1950 an order was issued by the Deputy Commissioner of Sagar under the provisions of the Act forbidding all persons residing in certain villages from engaging in the manufacture of bidis. On 19th June, 1950 these two petitions were presented to this Court under Article 32 of the Constitution challenging the validity of the order as it prejudicially affected the petitioners' right of freedom of occupation and business. During the pendency of the petitions the season mentioned in the order of 13th June ran out. A fresh order for the ensuing agricultural season — 8th October to 18th November, 1950 — was issued on 29th September, 1950 in the same terms. This order was also challenged in a supplementary petition.

4. Article 19(1)(*g*) runs as follows:

"All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business."

The article guarantees freedom of occupation and business. The freedom guaranteed herein is, however, subject to the limitations imposed by clause (6) of Article 19. That clause is in these terms:

"Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

4. The point for consideration in these applications is whether the Central Provinces and Berar Act 44 of 1948 comes within the ambit of this saving clause or is in excess of its provisions. The learned counsel for the petitioners contends that the impugned Act does not impose reasonable restrictions on the exercise of the fundamental right in the interests of the general public but totally negatives it. In order to judge the validity of this contention it is necessary to examine the impugned Act and some of its provisions. In the preamble to the Act, it is stated that it has been enacted to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas. Sections 3 and 4 cited above empower the Deputy Commissioner to prohibit the manufacture of bidis during the agricultural season. The contravention of any of these provisions is made punishable by Section 7 of the Act, the penalty being imprisonment for a term which may extend to six months or with fine or with both. It was enacted to help in the grow more food campaign and for the purpose of bringing under the plough considerable areas of fallow land.

5. The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in Article 19(1)(*g*) of the Constitution. Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it.

6. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.

7. Clause (6) in the concluding paragraph particularizes certain instances of the nature of the restrictions that were in the mind of the constitution-makers and which have the quality of reasonableness. They afford a guide to the interpretation of the clause and illustrate the extent and nature of the restrictions which according to the statute could be imposed on the freedom guaranteed in clause (*g*). The statute in substance and effect suspends altogether the right mentioned in Article 19(1)(*g*) during the agricultural seasons and such suspension may lead to such dislocation of the industry as to prove its ultimate ruin. The object of the statute is to provide

measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season. Even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of bidis and regulate the hours of the working of the industry, would not have amounted to a complete stoppage of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act, however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right. Further the statute seeks to prohibit all persons residing in the notified villages during the agricultural season from engaging themselves in the manufacture of bidis. It cannot be denied that there would be a number of infirm and disabled persons, a number of children, old women and petty shopkeepers residing in these villages who are incapable of being used for agricultural labour. All such persons are prohibited by law from engaging themselves in the manufacture of bidis; and are thus being deprived of earning their livelihood. It is a matter of common knowledge that there are certain classes of persons residing in every village who do not engage in agricultural operations. They and their womenfolk and children in their leisure hours supplement their income by engaging themselves in bidi business. There seems no reason for prohibiting them from carrying on this occupation. The statute as it stands, not only compels those who can be engaged in agricultural work from not taking to other avocations, but it also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of bidi making and thus earning their livelihood. These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

8. Mr Sikri for the Government of Madhya Pradesh contends that the legislature of Madhya Pradesh was the proper judge of the reasonableness of the restrictions imposed by the statute, that that legislature alone knew the conditions prevailing in the State and it alone could say what kind of legislation could effectively achieve the end in view and would help in the grow more food campaign and would help for bringing in fallow land under the plough and that this Court sitting at this great distance could not judge by its own yardstick of reason whether the restrictions imposed in the circumstances of the case were reasonable or not. This argument runs counter to the clear provisions of the Constitution. The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court. In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in

exercising its functions it has the power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Constitution. We are therefore of opinion that the impugned statute does not stand the test of reasonableness and is therefore void.

9. The result therefore is that the orders issued by the Deputy Commissioner on 13th June, 1950 and 26th September, 1950 are void, inoperative and ineffective. We therefore direct the respondents not to enforce the provisions contained in Section 4 of the Act against the petitioners in any manner whatsoever. The petitioners will have their costs of these proceedings in the two petitions.

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* Application under Article 32 of the Constitution of India for a writ of mandamus

ANNEXURE-E

1951 SCR 682 : AIR 1951 SC 318 : (1951) 52 Cri LJ 1361

In the Supreme Court of India

(BEFORE SAIYID FAZL ALI, M. PATANJALI SASTRI, B.K. MUKHERJEA, S.R. DAS AND VIVAN BOSE, JJ.)

STATE OF BOMBAY AND ANOTHER ... Appellant;

Versus

F.N. BALSARA ... Respondents.

F.N. BALSARA ... Appellant;

Versus

STATE OF BOMBAY AND ANOTHER ... Respondents.

Civil Appeal Nos. 182 to 183 of 1951*, decided on May 25, 1951

Advocates who appeared in this case :

M.C. Setalvad and C.K. Daphtary (M.M. Desai and H.M. Seervai with them), for the Appellants in Case No. 182 and respondents in Case No. 183;

N.P. Engineer (G.N. Joshi, R.J. Kolah and N.A. Palkiwala, with him), for the Respondent in Case No. 182 and Appellant in Case No. 183.

The Judgment of the Court was delivered by

SAIYID FAZL ALI, J.:— These appeals arise from the judgment and order of the High Court of Judicature at Bombay upon the application of one F.N. Balsara (hereinafter referred to as the petitioner), assailing the validity of certain specific provisions of the Bombay Prohibition Act, 1949 (Bombay Act 25 of 1949), as well as of the Act as whole. The petitioner, claiming to be an Indian citizen, prayed to the High Court inter alia for a writ of mandamus against the State of Bombay and the Prohibition Commissioner ordering them to forbear from enforcing against him the provisions of the Prohibition Act and for the issue of a writ of mandamus ordering them (*1*) to allow him to exercise his right to possess, consume and use certain articles, namely, whisky, brandy, wine, beer, medicated wine, eau-de-cologne etc. and to import and export across the customs frontier and to purchase, possess, consume and use any stock of foreign liquor, eau-de-cologne, lavender water, medicated wines and medicinal preparations containing alcohol, and (*2*) to forbear from interfering with his right to possess these articles and to take no steps or proceedings against him, penal or otherwise, under the Act. The petitioner also prayed for a similar order under Section 45 of the Specific Relief Act against the respondents. The High Court, agreeing with some of the petitioner's contentions and disagreeing with others, declared some of the provisions of the Act to be invalid and the rest to be valid. Both the State of Bombay and the petitioner, being dissatisfied with the judgment of the High Court, have appealed to this Court after obtaining a certificate from the High Court under Article 132(1) of the Constitution.

2. The Act in question was passed by the legislature of the Province of Bombay as it was constituted in 1949, and was published in the Bombay Government Gazette on 20th May, 1949, and came into force on 16th June, 1949. The Act consists of 148 sections with 2 Schedules and is divided into 11 chapters. It is both an amending and consolidating Act and incorporates the provisions of the Bombay Abkari Act which it repeals and also those of the Bombay Opium and Molasses Acts and contains new provisions for putting into force the policy of prohibition which is one of the objects mentioned in the preamble of the Act. The most important provision in Chapter I is the definition of "liquor" which has been vigorously assailed as being too wide and

therefore beyond the powers of the Provincial Legislature. Chapter II relates to establishment and is not relevant to the present appeal. Chapter III, which contains a number of prohibitions in regard to liquor as defined in the Act, is said to enact sweeping provisions which are liable to be assailed. Sections 12 and 13 and the relevant provisions of Sections 23 and 24 in this chapter may be quoted:

12. No person shall—

(*a*) manufacture liquor;

(*b*) construct or work any distillery or brewery;

(*c*) import, export, transport or possess liquor; or

(*d*) sell or buy liquor.

13. No person shall—

(*a*) bottle any liquor for sale;

(*b*) consume or use liquor; or

(*c*) use, keep or have in his possession any materials, still, utensils, implements or apparatus whatsoever for the manufacture of any liquor.

23. No person shall—

(*a*) commend, solicit the use of, offer any intoxicant or hemp, or

(*b*) incite or encourage any member of the public or any class of individuals of the public generally to commit any act, which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder, or ....

24. (1) No person shall print or publish in any newspaper, news-sheet, book leaflet, booklet or any other single or periodical publication or otherwise display or distribute any advertisement or other matter—

(*a*) which commends, solicits the use of, or offers any intoxicant or hemp.

(*b*) which is calculated to encourage or incite any individuals or the public generally to commit an offence under this Act, or to commit a breach of or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence, permit, pass or authorisation granted thereunder."

3. Chapter IV relates to "control, regulation and exemptions", and contains inter alia Sections 30 to 38 and Section 44 which provide for cases in which licenses for the manufacture, export, import, transport, sale or possession of liquor may be granted; Section 39, which authorises the Government to permit the use or consumption of foreign liquor on cargo boats, warships, troopships and in military and naval messes and canteens; Section 40, which provides for the grant of permits for the use or consumption of foreign liquor to persons whose health would be seriously and permanently affected if they were not permitted to use or consume such liquor and to foreigners who do not intend to stay permanently in India; Section 41, which enables special permits to be granted to diplomats and foreign sovereigns; Section 45, which authorises use of liquor for sacramental purposes; Section 52, which empowers an authorized officer to grant licenses, permits etc. in cases not specifically provided for; Section 53, which deals with the form in which and the conditions under which licenses etc. may be granted; and Section 54 which provides for the cancellation or suspension of licenses and permits. The other material chapters of the Act are Chapter VII, which provides for offences and penalties, and Chapter IX which deals with "powers and duties of officers and procedure". Sections 118 and 119 of the Act declare the offences under the Act to be cognisable and some of them to be non-bailable. Under Section 121, any authorised prohibition officer or any police officer may open any package and examine any goods and may stop any vessel, vehicle or other means of conveyance and search for any intoxicant. Section 136(1) provides that if any of the officers mentioned therein is satisfied that any person is acting or is likely to act in a manner which amounts to preparation, attempt, abetment or commission of any of the

offences punishable under Section 65 or 68 of the Act, he may arrest such person without a warrant and direct that such person shall be committed to such custody as such officer may deem fit for a period not exceeding 15 days. By Section 136(2), the State Government is given the extraordinary power of imposing restriction on the right of free movement of any person if it is satisfied that such person is acting or is likely to act in the manner aforesaid. Chapter XI contains certain miscellaneous provisions and the only sections of this Chapter which need be referred to are Section 139(*c*), which states that the State Government may by general or special order exempt any person or class of persons or institution or class of institutions from the observance of all or any of the provisions of the Act or any rule, regulation or order made thereunder, and Section 147, which declares that nothing in the Act shall be deemed to apply to any intoxicant or other article in respect of its import or export across the customs frontier as defined by the Central Government.

4. The High Court accepted the contention of the petitioner that the definition of "liquor" in the Act was too wide and went beyond the power vested in the legislature to legislate with regard to intoxicating liquors under Item 31 of List II. It also held the following sections to be invalid:

Sections 23(*a*) and 24(1)(*a*) so far as they refer to 'commending' Section 23(*b*); 24(1)(*b*) so far as it refers to 'evasion' Section 39; Section 52; Section 53 in part; Section 136(1); Section 136(2)(*b*), (*c*), (*e*), (*f*); and Section 139(*c*). The High Court also held Rule 67 of the Bombay Foreign Liquor Rules and Notifications Nos. 10484/45(*c*) and 2843/49(*a*), dated 30th March, 1950, invalid. It further held that the word 'addict' in the medical certificate was not warranted by the provisions of the Act.

5. The two important questions which this Court is called upon to decide in these appeals are:

(*1*) whether there are sufficient grounds for declaring the whole Act to be invalid; and

(*2*) to what extent the judgment of the High Court can be upheld with regard to the specific provisions of the Act which have been declared by it to be void.

6. It seems to me that it will be convenient to deal in the first instance with the argument assailing the validity of the Act as a whole, which is based on three grounds, these being:

(*1*) that the law is an encroachment on the field which has been assigned exclusively to the Central legislature under Entry 19 of List I;

(*2*) that some of the material provisions of the Act interfere with or are calculated to interfere with inter-State trade and commerce and as such transgress the provisions of Section 297 of the Government of India Act, 1935; and

(*3*) that the High Court having held a number of material provisions to be void, should have declared the Act as a whole to be invalid, especially as the provisions found by the High Court to be void are not severable from the rest of the Act and it cannot be said that the legislature would have passed the Act in the truncated form in which it is left after the decision of the High Court.

7. It is obvious that the proper occasion to deal with the third ground will be after examining the specific provisions which have been declared by the High Court to be void, but the first two grounds may be dealt with at once.

8. The first question is whether the impugned law can be said to have made any encroachment upon the field of legislation assigned to the Centre. In order to decide this point, it will be necessary to refer to Entry 31 in List II, under which the law purports to have been made, and Entry 19 of List I, which is said to have been transgressed. These entries run as follows:

Entry 31, List II. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

Entry 19, List I. Import and export across customs frontiers as defined by the Dominion Government.

9. Prima facie, it would seem that there is no real conflict between these two entries, because Entry 31 of List II has no reference to import or export but merely deals with production, manufacture, possession, transport, purchase and sale. Dealing with this entry, Gwyer, C.J. observed as follows in the case of *Bhola Prasad* v. *King-Emperor*[1]:

"A power to legislate 'with respect to intoxicating liquors' could not well be expressed in wider terms, and would, in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, undoubtedly include the power to prohibit intoxicating liquors throughout the Province or in any specified part of the Province."

10. Thus, under Entry 31, the Provincial Legislature can pass any law regarding production, manufacture, transport, purchase, possession and sale of intoxicating liquor. But the point that is pressed for our consideration is that "import" does not end with mere landing of the goods on the shore or their arrival in the customs house, but it implies that the imported goods must reach the hands of the importer and he should be able to possess them. On this basis, it is contended that there is no difference in effect between a power to prohibit the possession and sale of an article and a power to prohibit its import or introduction into the country, since the one would be a necessary consequence of the other. This contention is based upon some American cases to which I shall refer later, but it may be stated at once that the point which is raised in this case is precisely the point which was raised and negatived in *Kishori Shetty* v. *King*[2]. In that case, the appellant had been convicted under Section 14-B of the Bombay Abkari Act, 1878, as amended by the Bombay Abkari (Amendment) Act, 1947, for having in her possession a certain quantity of foreign liquor in excess of the limit prescribed by a notification issued under the following provision of the Act:

"14-B. (2) ... the Provincial Government may by notification in the Official Gazette prohibit the possession by any individual or a class or a body of individuals or the public generally, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe."

11. The main argument advanced in that case was reproduced in the judgment in these words:

"But counsel for the appellant drew attention to Item 19 of List I which covers 'Import and export across customs frontiers as defined by the Dominion Government', and argued that if 'intoxicating liquors' in Item 31 of List II were held to include also liquors imported from abroad, then the Provincial Legislature, by prohibiting possession of such liquors by all persons, whether private consumers, common carriers or warehousemen, could defeat the power of the Federal Legislature to regulate imports of foreign liquors across the sea or land frontiers of British India which are customs frontiers as defined by the Central Government and thus seriously jeopardise an important source of central customs revenue. As under Section 100 of the Constitution Act the Provincial legislative powers under List II were subject to the exclusive powers of the Federal Legislature in List I, the Bombay Act to the extent to which it trenched upon the subject of Item 19 of the latter list must, it was submitted, be regarded as a nullity."

12. It will be seen that the rationale of the argument there is the same as that of the argument advanced in the present case, but it was rejected for reasons which are clearly set out in the following passage:

> "These is, in our view, no irreconcilable conflict here such as would necessitate recourse to the principle of federal supremacy laid down in Section 100 of the Constitution Act. Section 14-B does not purport to restrict or prohibit dealings in liquor in respect of its importation or exportation across the sea or land frontiers of British India. It purports to deal with the *possession* of intoxicating liquors which, in the absence of limiting words, must include foreign liquors. It is far-fetched, in our opinion, to suggest that, insofar as the provision covers foreign liquors, it is legislation with respect to import of liquors into British India by sea or land."

13. Since the enactment of the Government of India Act, 1935, there have been several cases in which the principles which govern the interpretation of the Legislative Lists have been laid down. One of these principles is that none of the items in each list is to be read in a narrow or restricted sense[3]. The second principle is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. This principle has been stressed in a number of cases by the Federal Court as well as by the Privy Council. In *In re The Central Provinces and Berar Act 14 of 1938*[4] the question arose as to whether a tax on the sale of motor spirits was a tax on the sale of goods within Entry 48 of the Provincial List or a duty of excise within Entry 45 of the Federal List. Dealing with the difficulty which arose in that case, Gwyer, C.J. observed as follows:

> "Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship."

14. To the same effect are the following observations made by the Judicial Committee of the Privy Council in *Governor-General-in-Council* v. *Province of Madras*[5] after referring to Section 100 of the Government of India Act, 1935:

> "Their Lordships do not doubt that the effect of these words is that, if the legislative powers of the Federal and Provincial Legislatures, which are enumerated in List I and List II of the Seventh Schedule, cannot fairly be reconciled, the latter must give way to the former. But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear".

In the present case, as already pointed out the words "possession and sale" occurring in Entry 31 of List II are to be read without any qualification whatsoever, and it will not be doing any violence to the construction of that entry to hold that the Provincial Legislature has the power to prohibit the possession, use and sale of intoxicating liquor absolutely. If we forget for the time being the principles which have been laid down in some of the American cases, it would be difficult to hold that the word "import" standing by itself will include either sale or possession of the article imported into the country by a person residing in the territory in which it is imported. There is thus no

real conflict between Entry 31 of List II and Entry 19 of List I, and I find it difficult to hold that the Bombay Prohibition Act insofar as it purports to restrict possession, use and sale of foreign liquor, is an encroachment on the field assigned to the Federal Legislature under Entry 19 of List I.

15. There is also another way of dealing with the contention raised before us. It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, and therefore, it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another legislature. This was emphasised very clearly in *Gallagher* v. *Lynn*[6] in these words:

> "It is well established that you are to look at the true nature and character of the legislation: *Russell* v. *Queen*[7] '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 authorised field."

16. In *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna*[8] the question arose before the Privy Council whether the Bengal Moneylenders Act, 1940, which provided that no borrower shall be liable to pay after the commencement of the Act more than a limited sum in respect of principal and interest, was intra vires the Provincial Legislature as dealing in pith and substance with moneylending and moneylenders, a subject-matter within the competence of the Provincial Legislature under Entry 27 of List II, or whether it trenched on "promissory notes" and "banking", which were subjects reserved for the Federal Legislature under Entries 28 and 38 respectively of List I. The Privy Council, notwithstanding the fact that loans on promissory notes would also have been subject to the provisions of the impugned Act, held that the Act was valid, and, while rejecting the argument that it was beyond the legislative competence of the Provincial Legislature which had enacted it, Their Lordships observed as follows:

> "As Sir Maurice Gwyer, C.J. said in the *Subrahmanyam Chettiar case*: 'It must invevitably 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 inter-twined that blind observance 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 purpose of determining whether it is legislation with respect to matters in this list or in that. Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion legislation.[9]"

17. The same principle was reiterated by the Federal Court in *Ralla Ram* v. *Province of East Punjab*[10] and was also referred to in *Miss Kishori Shetty* v. *King*[11] in the following passage:

> "It may be that a general adoption of the policy of prohibition by the Provinces will lead to a fall in the import of foreign liquors and to a consequential diminution of the Central customs revenue, but where the Constitution Act has given to the Provinces legislative power with respect to a certain matter in clear and unambiguous terms, the court should not deny it to them or impose limitations on its exercise, on such extraneous considerations. It is now well settled that if an

enactment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a Federal subject."

18. The short question therefore to be asked is whether the impugned Act is in pith and substance a law relating to possession and sale etc. of intoxicating liquors or whether it relates to import and export of intoxicating liquors. If the true nature and character of the legislation or its pith and substance is not import and export of intoxicating liquor but its sale and possession etc. then it is very difficult to declare the Act to be invalid. It is said that the prohibition of purchase, use, possession, transport and sale of liquor will affect its import. Even assuming that such a result may follow, the encroachment, if any, is only incidental and cannot affect the competence of the Provincial Legislature to enact the law in question.

19. On these considerations, there is really nothing else to be said on the question before us, but in view of the very great stress laid upon the American doctrine of "original package", it seems necessary to deal with what that doctrine means and under what conditions it was evolved. The wide meaning of "import" on which reliance was placed on behalf of the petitioner was adopted for the first time by Marshall, C.J. in *Brown* v. *Maryland*[12] in which the facts were these: The State of Maryland had passed an Act prohibiting importers of foreign goods from selling their goods without taking a license for which a certain amount had to be paid. The question which was raised in that case was that the Act was repugnant to the provisions of the Constitution which provided that "no State shall without the consent of Congress allow any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws". In the course of his judgment, Marshall, C.J. observed inter alia as follows:

> "There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer."[13]

20. The learned Chief Justice further observed:

> "Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorise importation, but to authorise the importer to sell."[14]

21. Upon principles so stated, what is known as the "original package" doctrine was evolved in America, which was applied not only to commodities imported from foreign countries but also to commodities which were the subject of inter-state commerce. This doctrine laid down that importation was not over so long as the goods were in the original package and hence a State had no power to tax imports until the original package was broken or there was one sale while the goods were still in the original package. The principle upon which this doctrine was founded is explained by Marshall, C.J. in the case referred to in these words:

> "There must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country .... It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the

taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form of package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."[15]

22. The doctrine was reiterated in a number of cases, and in *Leisy* v. *Hardin*[16] it was laid down that "the importers had the right to sell in the original packages unopened and unbroken, articles brought into the State from another State or territory notwithstanding a statute of the State prohibiting the sale of such articles except for purposes mentioned therein and under a license from the State". The American writers have however pointed out the difficulty which arose from time to time in applying the "original package" doctrine, since sometimes very intricate questions arose before the courts, such as whether the doctrine applied to the larger cases only or to the smaller packages contained therein, or whether it applied to smaller paper packages of cigarettes taken from loose piles of packages at the factory and transported in baskets. The difficulty in applying the doctrine was particularly experienced in working prohibition schemes, and to combat its mischief and uncertainty, new legislative measures had to be passed by the Congress like the Wilson Act, Webb-Kenyon Act etc. I do not wish to pursue the matter, but wish only to point out that the doctrine has no place in this country, having regard to the scheme of legislation that has been outlined in the Government of India Act, 1935, and in the present Constitution, in which the various entries in the Legislative Lists have been expressed in clear and precise language. In *Province of Madras* v. *Boddu Paidanna and Sons*[17] Gwyer, C.J., while expressing his profound respect for the views expressed by Marshall, C.J. in *Brown* v. *Maryland*[12] mildly hinted that it was easier to follow the line of reasoning of Thompson, J. in his dissenting judgment in that case and concluded with the following remarks:

> "Next, it is to be observed that the American Constitution also provides that Congress alone has power 'to regulate commerce with foreign nations, among the several States, and with the Indian tribes', and it was held that the Maryland tax was no less repugnant to this provision also. Marshall, C.J. asked: 'To what purposes should the power to allow importation be given, unaccompanied with the power to authorise the sale of the thing imported? Congress has a right, not only to authorise importation, but to authorize the importer to sell....What does the importer purchase, if he does not purchase the privilege to sell? On this view of the Commerce Clause, it would indeed be difficult to recognize the right of the State to impose a tax upon the first sale of the commodity, at any rate so long as it remained in the importer's hands. In the Indian Constitution Act no such question arises; and the right of the Provincial Legislature to levy a tax on sales can be considered without any reference to so formidable a power vested in the Central Government. Lastly, the prohibition in the American Constitution is against the laying of 'any imposts or duties on imports or exports' the prohibition is not merely against the laying of duties of customs, but is expressed in what we conceive to be far wider terms; and it does not appear to us that it would necessarily follow from the principle of the Maryland decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of license or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax. That was the view which commended itself to the Court in the *Maryland case*[18] and it was a view adopted and argued before us. The analogy with the American case is an attractive one, but for the reasons which we have given we are wholly unable to accept it."[18]

23. I find considerable force in the opinion thus expressed by Gwyer, C.J. and agree that the "original package" doctrine has no application to this country. In the United States, the widest meaning could be given to the Commerce clause, for there was no question of reconciling that clause with another clause containing the legislative power

of the State. Under the provisions of the Government of India Act, a limited meaning must be given to the word "import" in Entry 19 of List I in order to give effect to the very general words used in Entry 31 of List II.

24. The second attack on the Act is founded upon the provision contained in Section 297(1)(*a*) of the Government of India Act, 1935, and it is contended that the prohibitions contained in the impugned Act in regard to the use, consumption, purchase, transport, possession and sale of intoxicating liquor will necessarily amount to prohibiting and restricting inter-provincial commerce, and inasmuch as they tend to stop and restrict entry into or export from the Province of Bombay of goods of a particular class or description, the Act contravenes Section 297(1)(*a*). This section runs as follows:

> "No Provincial Legislature or Government shall—
>
> (*a*) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that List relating to the production, supply and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from the Province of goods of any class or description...."

25. It should be noticed that this provision refers to "trade and commerce within the Province", which is the subject of Entry 27 of List II and to "production, supply and distribution of commodities", which is the subject of Entry 29 of List II. The provision virtually means that import into or export from a Province of goods of any class or description cannot be prohibited or restricted on the ground that it will affect, trade and commerce within the Province or the production, supply and distribution of commodities. If therefore by any law framed by a Provincial Legislature relating to or based on the subjects of Entry 27 or Entry 29 of List II, the entry into or export from the Province of any goods is prohibited or restricted, such a law will be invalid. But, here, we are concerned not with a law which purports to be made and was made by virtue of Entry 27 or Entry 29 of List II, but a law which is claimed to have been made and was made by virtue of Entry 31 of that List and certain other entries therein. Section 297(1)(*a*) therefore has no application to the present case. This was clearly pointed out in the case of *Bhola Prasad* v. *King-Emperor*[19]. In that case, the Bihar Excise (Amendment) Act, 1940, which amended the Bihar and Orissa Excise Act, 1915, was challenged as contravening Section 297(1)(*a*), but it was held to be a valid Act on grounds already stated, as will appear from the following observations of Gwyer, C.J.:

> "The second point raised on behalf of the appellant was that Section 19(4) of the Act of 1915, as amended by the Act of 1940, is invalid because repugnant to Section 297(1)(*a*) of the Constitution Act. We confess that we have difficulty in appreciating this argument. Section 297(1)(*a*) enacts that.... It is plain beyond words that this provision only refers to legislation with respect to Entry 27 and Entry 29 in the provincial Legislative List; it has no application to legislation with respect to anything in Entry 31. A Provincial Legislature, if it desires to pass a law prohibiting export from, or import into, the Province, must therefore seek for legislative authority to do so in entries other than Entry 27 or Entry 29. If it can point to legislative powers for the purpose derived from any other entry in the Provincial Legislative List, then its legislation cannot be challenged under Section 297(1)(*a*). There is no substance at all in the appellant's arguments on this point."

26. Having dealt with and negatived the first two contentions upon which the validity of the entire Act was assailed, I now proceed to deal with certain sections of the Act, the validity of which also was brought into question. The provision which was most vigorously assailed and in regard to which the attack was successful in the High Court, is the definition of the word "liquor" in Section 2(24) of the Act. The definition

runs thus:

'Liquor' includes

(*a*) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and

(*b*) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act.

27. The High Court has held that the word "liquor" ordinarily means "a strong drink as opposed to soft drink" but it must in any event be a beverage which is ordinarily drunk. Proceeding upon this view, the High Court has held that although the legislature may while legislating under Entry 31 prevent the consumption of non-intoxicating beverages and also prevent the use as drinks of alcoholic liquids which are not normally consumed as drinks, it cannot prevent the legitimate use of alcoholic preparations which are not beverages nor the use of medicinal and toilet preparations containing alcohol. This view of the High Court was very strongly supported on the one hand and equally strongly challenged on the other before us, and I therefore proceed to deal with the question at some length.

28. In the *Oxford English Dictionary*, edited by James Murray, several meanings are given to the word "liquor", of which the following may be quoted:

"Liquor ... *1.* A liquid; matter in a liquid state; in wider sense a fluid.

2. A liquid or a prepared solution used as a wash or bath, and in many processes in the industrial arts.

3. Liquid for drinking; beverage, drink. Now almost exclusively a drink produced by fermentation or distillation. Malt liquor, liquor brewed from malt; ale, beer, porter etc.

4. The water in which meat has been boiled; broth, sauce; the fat in which bacon, fish or the like has been fried; the liquid contained in oysters.

5. The liquid produced by infusion (in testing the quality of a tea). In liquor, in the state of an infusion."

29. Thus, according to the dictionary, the word "liquor" may have a general meaning in the sense of a liquid, or it may have a special meaning, which is the third meaning assigned to it in the extract quoted above viz. a drink or beverage produced by fermentation or distillation. The latter is undoubtedly the popular and most widely accepted meaning, and the basic idea of beverage seems rather prominently to run through the main provisions of the various Acts of this country as well as of America and England relating to intoxicating liquor, to which our attention was drawn. But at the same time, on a reference to these very Acts, it is difficult to hold that they deal exclusively ... with beverages and are not applicable to certain articles which are strictly speaking not beverages. A few instances will make the point clear. In the National Prohibition Act, 1919, of America (also known as the Volstead Act), the words, liquor and intoxicating liquor, are used as having the same meaning and the definition states that these words shall be construed to "include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by Volume which are fit for use for beverage purposes". Having defined "liquor" and "intoxicating liquor" rather widely, the Volstead Act excepted denatured alcohol, medicinal preparations, toilet and antiseptic preparations, flavoring extracts and syrups, vinegar and preserved sweet cider (Section 4) which suggest that they were included in the definition. In some of these items, we have the qualifying words unfit for use for beverage purposes', but the heading of Section 4 of the Volstead Act, under which these exceptions are enumerated is exempted liquors.

30. The Licensing (Consolidating) Act, 1910, of England was an Act relating to licenses for the sale of intoxicating liquor etc. The definition of "intoxicating liquor" in this Act was as follows:

> "'Intoxicating liquor' means (unless inconsistent with the context) spirits, wine, beer, porter, cider, perry and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without an excise licence."

31. The word "spirits" has been defined in the Spirits Act, 1880, as meaning spirits of any description, and includes all liquors mixed with spirits, and all mixtures, compounds, or preparations made with spirits. It was contended before us that the definition of the word "spirits" in the Spirits Act should not be imported in the Act of 1910, but in our view for the purpose of understanding the definition of "intoxicating liquor", the two Acts should be read together. I do not suggest that the definition of "liquor" in the present Act was borrowed from those Acts, but I am only trying to show that the word "liquor" is capable of being used in a wide sense.

32. Coming now to the various definitions given in the Indian Acts, I may refer in the first instance to the Bombay Abkari Act of 1878 as amended by subsequent Acts, where the definition is substantially the same as in the Act with which we are concerned. In the Bengal Excise Act, 1909, "liquor" is said to mean "liquid consisting of or containing alcohol" and includes "spirits of wine, spirit, wine, tari pachwai, beer, and any substance which the Provincial Government may ... declare to be liquor for the purposes of the Act". In several other Provincial Acts e.g. the Punjab Excise Act, 1914, the U.P. Excise Act, 1910, "liquor" is used as meaning intoxicating liquor and as including all liquids consisting of or containing alcohol. The definition of "liquor" in the Madras Abkari Act, 1886, is the same as in the Bombay Act of 1878. Even if we exclude the American and English Acts from our consideration, we find that all the Provincial Acts of this country have consistently included liquids containing alcohol in the definition of "liquor" and "intoxicating liquor". The framers of the Government India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word "liquor" has been used in the various Excise Acts of this country and, accordingly I consider the appropriate conclusion to be that the word "liquor" covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word "liquor" in common parlance especially when that word is prefixed by the qualifying word "intoxicating", but in my opinion having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term "intoxicating liquor" as used in Entry 31 of List II.

33. There is in my opinion another method of approaching the question which also deserves consideration. Remembering that the object of the Prohibition Act was not merely to levy excise duties but also to prohibit use, consumption, possession and sale of intoxicating liquor, the legislature had the power to legislate upon the subjects included in the Act not only under Entry 31 of List II, but also under Entry 14, which refers inter alia to public health. Article 47 of the Constitution, which contains one of the directive principles of State policy, provides that "the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health". This article has no direct bearing on the Act which was passed in 1949, but a reference to it supports to some extent the conclusion that the idea of prohibition is connected with public health, and to enforce prohibition effectively the wider definition of the word "liquor"

would have to be adopted so as to include all alcoholic liquids which may be used as substitutes for intoxicating drinks, to the detriment of health. On the whole, I am unable to agree with the High Court's finding, and hold that the definition of "liquor" in the Bombay Prohibition Act is not ultra vires.

34. The learned Attorney-General also relied upon Entry 1 of List II which relates among other items to "public order", and though at first sight it may appear to be far-fetched to bring the subject of intoxicating liquor under "public order", yet it should be noted that there has been a tendency in Europe and America to regard alcoholism as a menace to public order. In *Russel* v. *Queen*[7] Sir Montague Smith held that the Canada Temperance Act, 1878, the object and scope of which was to promote temperance by means of a uniform law throughout the Dominion, was a law relating to the "peace, order, and good government" of Canada, and, in so deciding said as follows:

> '*Laws of this nature designed for the promotion of public order*, safety, or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which falls within the general authority of Parliament to make laws for the order and good government of Canada ...."[20]

35. Again, referring to liquor laws and liquor control, a learned British author[21] says as follows:

> "The dominant motive everywhere, however, has been a social one, to combat a menace to public order and the increasing evils of alcoholism in the interests of health and social welfare. The evils vary greatly from one country to another according to differences in climate, diet, economic conditions and even within the same country according to differences in habits, social customs and standards of public morality. A new factor of growing importance since the middle of the 19th century has been the rapid urbanisation, industrialization and mechanization of our modern every day life in the leading nations of the world, and the consequent wider recognition of the advantages of sobriety in safeguarding public order and physical efficiency."

36. These passages may lend some support to the contention of the learned Attorney-General that the Act comes also within the subject of "public order", but I prefer to leave out of account this entry, which has a remote bearing, if any, on the object and scope of the present Act.

37. I now come to Section 39 of the Act which has been impugned on the ground that it offends against Article 14 of the Constitution which states that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". The meaning and scope of this article has been fully discussed in the case of *Chiranjit Lal Chowdhury* v. *Union of India*[22], and the principles laid down in that case may be summarized as follows:

> (*1*) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.
>
> (*2*) The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.
>
> (*3*) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
>
> (*4*) The principle does not take away from the State the power of classifying

persons for legitimate purposes.

(*5*) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

(*6*) If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

(*7*) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.

38. Similarly, Professor Willis, dealing with the Fourteenth Amendment of the Constitution of the United States, which guarantees equal protection of the laws, sums up the law as prevailing in that country in these words:

"The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'. 'The inhibition of the amendment ... was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation'. It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."[23]

39. With these principles in view, I have to decide whether Article 14 of the Constitution has been violated by the provisions contained in Section 39 of the Act before us. That section runs as follows:

"The Provincial Government may, on such conditions as may be specified in the notification published in the Official Gazette, permit the use or consumption of foreign liquor on cargo boats, warships and troopships and in military and naval messes and canteens."

40. What is contended is that the concession shown to the warships, troopships, and military and naval messes and canteens is a violation of the principle of equality and the legislature has acted arbitrarily and capriciously in selecting certain bodies or groups of people for favoured treatment, while subjecting the petitioner and other citizens to the general provisions of the Act. It is said that the law should have been enforced alike against the civil population and military personnel, between whom no distinction can be made at all on any rational ground in the enforcement of the policy of prohibition.

41. The scheme of Chapter IV of the Prohibition Act, in which the impugned provision finds a place, seems inter alia to relax the law in favour of certain persons or groups of persons or institutions by introducing the system of passes, licences, permits and authorizations. A few examples will show that the legislature did not proceed without making any classification. For instance, Section 35 deals with licences to hotels, Section 37 with licences to dining cars and coastal steamers, Section 38 with licences to shipping companies, Section 40 with permits to foreigners and

persons who need liquor on grounds of health, Section 41 with permits to foreign sovereigns and diplomats, Section 44 with licences to clubs, Section 45 with authorisations for sacramental purposes, Section 46 with visitors' permits, and so on. These sections were not challenged before us, and it may be assumed that the classification made by the legislature has been accepted so far as they are concerned. The question is whether in relaxing the rule in favour of warships, troopships, and military and naval messes and canteens, the legislature has acted arbitrarily and capriciously or it has proceeded here also on the basis of reasonable classification. The learned Attorney-General referred us to several statutes, army regulations and certain provisions of the Constitution, in order to show that the military force has been regarded in this country as a class by itself, and there are many special provisions with regard to it. But it is contended that this is not enough and that no classification can be held to be valid unless it is shown to bear a just and reasonable relation to the objects of the particular legislation before us. The argument, in other words, is this: Assuming that the armed forces may be treated as a class for certain purposes, can it be treated as a class for the purpose of enforcing prohibition? This argument found favour with the High Court, and Section 39 was declared to be void. In my opinion, the judgment of the High Court cannot be supported because I think that there is an understandable basis for the exemptions granted to the military canteens, etc. by the Act. The armed forces have their own traditions and mode of life, conditioned and regulated by rules and regulations which are the product of long experience and which aim at maintaining at a high level their morale and those qualities which enable them to face dangers and perform unusual tasks of endurance and hardship when called upon to do so — qualities such as dash and courage, unbreakable tenacity and energy ready for any sacrifice which should be unfaltering for long days together. By these rules and regulations, drinking among the forces is not prohibited, but it is properly and carefully regulated. It is easy to understand that the legislature chose not to interfere with the mode of life to which the forces have been accustomed, lest such interference should affect their morale and and lead to subterfuges which may prove unwholesome for their discipline and good behaviour. Besides, when drinking is regulated among a class of persons by specific rules and regulations and drunkenness is made an offence, the relaxation of the law of prohibition in their case is not likely to produce the same evil results as it may produce under other circumstances. I find therefore nothing wrong prima facie in the legislature according special treatment to persons who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions. In my opinion, therefore, Section 39, insofar as it affects the military and naval messes and canteens, warships and troop-ships, cannot be held to be invalid. So far as the cargoboats are concerned, it was contended on behalf of the petitioner that no rational differentiation could be made between them and the passenger boats, and there was no conceivable ground for granting exemption or concession of any kind to the former. Here again, we cannot assume that the legislature has proceeded arbitrarily. The cargoboats being slower boats have to be on the sea for long periods, the number of persons affected by the exemption is comparatively small, and they are mostly sojourners who stay at the port for a short time and then go away. These considerations may well have induced the legislature to show some concession to them, and we cannot say that these are irrelevant considerations. The provision relating to exemption of cargoboats should therefore be held to be valid.

42. I have already referred to Section 46 which deals with visitors' permits. That section provides that the Provincial Government may authorize an officer to grant visitors' permits to consume, use and buy foreign liquor to persons who visit the Province for a period of not more than a week. The High Court held this provision to be valid, but it considered Rule 67 of the Bombay Foreign Liquor Rules, framed under

Section 143 of the Act, to be invalid. That Rule provides that any foreigner on a tour of India who enters the State of Bombay and desires to possess, use and consume foreign liquor shall apply to certain officers for obtaining a permit, which may be granted for a period not exceeding one month subject to subsequent renewal. The High Court declared this Rule to be invalid on the ground that it discriminated between foreign visitors and Indian visitors who visit Bombay from neighbouring Provinces. It seems to me that this is hardly a matter which should have been gone into on the petitioner's application, since he claims to be neither a foreigner nor an Indian visitor from another Province. But, in any event, the Rule cannot be assailed on the ground of discrimination, firstly because though it provides for the case of a foreign visitor there is no prohibition against any other outsider being granted a permit, and secondly, because the policy underlying the Rule is quite consistent with the policy underlying Section 40 of the Act which enables permits to be granted to foreigners under certain conditions.

43. The High Court has also declared Sections 52, 53 and 139(*c*) of the Act invalid on the ground that they constitute "delegation of legislative power". The reasons given by the High Court for arriving at this conclusion are stated in its judgment as follows:

> "Under Section 52 power is given to the Government to grant licences in cases other than those specifically provided under any of the provisions of the Act. Under Section 53 Government is inter alia empowered to vary or substitute any of the conditions of the licence laid down in the Act, and under Section 139(*c*) power is given to Government to exempt any person or institution or any class of persons or institutions from the observance of all or any of the provisions of the Act or any rule or regulation or order made thereunder. The policy of legislation has been clearly laid down by the legislature in the Act itself. As pointed out by us before, the legislature intended to grant permits ordinarily only on grounds of health and certain exceptions were made in the case of certain classes. It is always open to the legislature to leave it to the Government to work out the policy in details. It would be impossible for the legislature to provide for all circumstances and all eventualities that may arise in the actual working of the Act. But it is not open to the legislature to permit Government to alter the policy itself. In our opinion, in leaving it to Government to issue permits in cases other than those provided for by the Act, in permitting Government to vary or substitute conditions of the licence, and in permitting Government to exempt persons or classes from the provisions of the Act, the legislature was clearly delegating to Government its own power of legislation. This it can clearly not do."

44. This Court had to consider quite recently the question as to how far "delegated legislation" is permissible, and a reference to its final conclusion will show that delegation of the character which these sections involve cannot on any view be held to be invalid. (See *Special Reference 1* of 1951: *In re Delhi Laws Act, 1912 etc.*[24]) A legislature while legislating cannot foresee and provide for all future contingencies, and Section 52 does no more than enable the duly authorized officer to meet contingencies and deal with various situations as they arise. The same considerations will apply to Sections 53 and 139(*c*). The matter however need not be pursued further, as it has already been dealt with elaborately in the case referred to.

45. I now proceed to deal with a group of sections in regard to which I find myself in agreement up to a point with the views expressed by the High Court. Section 12 of the Act provides inter alia that no person shall possess or sell or buy liquor and Section 13 provides inter alia that no person shall consume or use liquor. Substituting for the word "liquor" occurring in these two sections the definition of that word as given in clause (*a*) of Section 2(24) of the Act, the effect of these two sections is that no person shall possess, or sell or buy or consume or use "spirits of wine, methylated spirit, wine, beer, toddy and all liquids consisting of or containing alcohol". I have

already held that under Entry 51 of List II, the Bombay legislature was quite competent to make a law with respect to "liquor" even as broadly defined. It is however contended that the power of making laws has to be exercised subject to the other provisions of the Constitution and in particular to those relating to the fundamental rights guaranteed under Part III of the Constitution. The provisions to which I have referred have been assailed on the ground that they are in conflict with Article 19(1)(*f*) of the Constitution which guarantees that all the citizens shall have the right "to acquire, hold and dispose of property". This clause is wide enough to include movable as well as immovable property. The provisions in question undoubtedly prevent a citizen from possessing, selling, buying, consuming or using "liquor" as defined, and therefore they prima facie infringe the fundamental right of the Indian citizens to acquire, hold and dispose of a kind of property, namely, "liquor" as defined in Section 2(24) of the Act, and as such would be void under Article 13. The question to be considered is whether they can be saved by clause (5) of Article 19, which runs as follows:

> "Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

46. The question boils down to ascertaining whether the restrictions imposed by the provisions to which reference has been made are reasonable. In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of State policy set forth in Article 47 of the Constitution, "The State is charged with the duty of bringing about prohibition of the consumption, except for medical purposes, of intoxicating drinks and of drugs which are injurious to health". That the restrictions imposed by the sections on the right of a citizen to possess, or sell or buy or consume or use spirits of wine, methylated spirits, wine, beer, toddy are in view of the aforesaid directive principles of State policy quite reasonable, has not been disputed before us. The controversy has centred round the words "and all liquids consisting of or containing alcohol". It is said that those words include "all liquids, toilet or medicinal preparations containing alcohol" and the restrictions imposed upon the ordinary use of such toilet or medicinal preparations are unreasonable and therefore void. So far as these preparations are concerned, the High Court has dealt with the matter as follows:

> "To put it in a simple form, the question to which we have to address ourselves is whether the legislature can prohibit the legitimate use of an article which ordinarily is not drunk, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition Act. Let us take the concrete case of eau-de-cologne or lavender water. Their legitimate use is only for the purpose of toilet. They contain spirit and it may be that an addict deprived of his drink may drink it in order to satisfy his thirst. Is it permissible to the legislature under such circumstances to deprive the general public of the legitimate use of eau-de-cologne or lavender water as articles of toilet? The legislature may prevent the abuse of these articles, but can it prevent their legitimate use? It is difficult to understand how any restriction on the legitimate use of these articles can be in the interests of the general public so as to make these restrictions reasonable within the meaning of Article (19)(5). If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is acting against public interest. Therefore, in our opinion, while it was open to the legislature to provide against the abuse of these articles, it was not open to it to

prevent its legitimate use. But the legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Government. It is contended by the Advocate-General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold and dispose of property, and, in our opinion, that restriction is not reasonable. The same argument applies to medicinal and toilet preparations containing alcohol. Therefore we hold that to the extent to which the Prohibition Act prevents the possession, use and consumption of non-beverages and medicinal and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(1)(*f*) of the Constitution even if they may be within the legislative competence of the Provincial Legislature."

47. The next step in the argument is that as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. This line of reasoning, no doubt, seeks to find support from the observations made in the majority decisions of this Court in *Romesh Thappar* v. *State of Madras*[25] and in *Chintaman Rao* v. *State of Madhya Pradesh*[26] but in my opinion those observations do not apply to the case before us. It will be noticed that the legislature has defined the term "liquor" as including several distinct categories of things followed by a general category. There can be no doubt whatever that the earlier categories of liquor, namely, spirits of wine, methylated spirit, wine, beer, toddy, are distinctly separable items which are easily severable from the last category, namely, all liquids consisting of or containing alcohol. These items being thus treated separately by the legislature itself and being severable, and it not being contended, in view of the directive principles of State policy regarding prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties are unreasonable, the impugned sections must be held valid so far as these categories are concerned. The next question is whether those sections are void insofar as they purport to impose restrictions on the citizens' right to acquire, hold or dispose of all liquids consisting of or containing alcohol. It is said that this is one general item and it cannot be split up into different sub-categories and therefore the sections insofar as they relate to this general item must be held to be void. This argument at first appears to have some force but a close scrutiny will reveal that it is not in the circumstances of this case sound. Section 139 of the Act authorises the Provincial Government, by general or special order, to exempt any intoxicants or class of intoxicants from all or any of the provisions of the Act. An order made by the Provincial Government in exercise of the power conferred by this section owes its legal efficacy to this section and therefore in the eye of the law the notification has the force of law as if made by the legislature itself. In exercise of powers vested in it by Section 139(*d*) the Provincial Government issued an order No. 10484/45(*e*) exempting intoxicants specified in column 1 of the Schedule thereto annexed from the provisions of the Act specified against them in column 2 of that Schedule. Turning to the Schedule, we find that in Item (1) duty-paid perfumed spirits (except eau-de-cologne), in Item (3) dutypaid spirituous toilet preparations (except lavender water) and in item (4) duty-paid spirituous medicinal preparations other than 123 specified liquids, are exempted from the operation of Sections 12(*c*) and (*d*) and 13(*b*) to the extent specified therein. This notification was superseded on 1st April, 1950, by another notification which is more liberal in certain respects, and these notifications, being made in exercise of the power given by the Act itself, have undoubtedly the force of law and must be read along with the Act. So read, it is quite clear that "all liquids consisting of or containing alcohol" are capable of being split up into and have in fact been split up into several distinctly separate sub-

items including liquid toilet and medicinal preparations containing alcohol. The legislature itself contemplated this sub-division, for by Section 139 it authorised the Provincial Government to exempt any intoxicant or class of intoxicants from the operation of the Act. This circumstance takes the case out of the principles laid down in the two cases mentioned above and the item being thus severable I am free to consider whether the restrictions imposed on a sub-item, namely, liquid toilet and medicinal preparations containing alcohol, are reasonable or not. I am substantially in agreement with the line of reasoning adopted by the High Court and I consider that the Act is not a law imposing reasonable restrictions so far as medicinal and toilet preparations containing alcohol are concerned. The National Prohibition Act or the Volstead Act of America, to which I have referred, was also an Act relating to prohibition, but toilet and medicinal preparations containing alcohol were expressly excluded from the scope of that Act. I refer to that Act simply to show that a complete scheme of prohibition can be worked without including such articles among those prohibited. Again, Article 47 of the Constitution also takes note of the fact that medicinal preparations should be excluded in the enforcement of prohibition. I do not consider that it is reasonable that the possession, sale, purchase, consumption or use of medicinal and toilet preparations should be prohibited merely because there is a mere possibility of their being misused by some perverted addicts.

48. It was contended that there was no meaning in declaring the provisions relating to purchase, sale, possession, use and consumption of medicinal and toilet preparations containing alcohol to be invalid, since in Notification No. 10484/45, issued by the Provincial Government on the 1st April which is no part of the Act, the Government have exempted duty-paid perfumed spirits (including eau-de-cologne), duty-paid spirituous toilet preparations and certain classes of duty-paid spirituous medicinal preparations from the following provisions of the Act:

(*i*) Section 12(*c*);

(*ii*) Section 12(*d*), insofar as it relates to buying of such preparations;

(*iii*) Section 13(*b*), insofar as it relates to use of such preparations.

49. But it is to be noted that the *sale* of these articles is not covered by the above notification, but is regulated by two other notifications, namely, Notification No. 2843/49, dated the 6th April, 1950, and Notification No. 2843/49, dated 11th April, 1950. In these two notifications, there are provisions imposing limits on sales. For example, in the first notification issued on 6th April, Rule 10(1) provides as follows:

"The licensee shall not sell to any person on any one day any kind of perfumed spirits, spirituous toilet preparations or essences in excess of such quantity as may be prescribed by the Commissioner under the Act."

50. Similarly, in the second notification of 11th April, Rules 9 and 10 run as follows:

"9. The licensee shall not sell medicated tonics or medicated wines containing more than 10 per cent of alcohol (or containing alcohol in strength more than 17.5 per cent of proof spirit) except those which are classified as spirituous medicinal preparations and regulated as such under the Drugs Act, 1940.

10. Subject to the provisions of Rule 9 the licensee shall not sell the following spirituous medicinal preparations to any person unless he produces a medical prescription in that behalf, namely:

(*a*) medicated tonics and medicated wines;

(*b*) asaves and arishtas specified in the Schedule hereto annexed;

(*c*) any other spirituous medicinal preparations containing more than 10 per cent of alcohol (or containing alcohol in strength more than 17.5 per cent of proof spirit) which are intended for internal use:

Provided that the following spirituous medicinal preparations may be sold

to any person without the production by such person of any medical prescription, namely, ..."

51. In view of the restrictions imposed on the sale of these preparations, it is pertinent to enquire whether those restrictions will not also affect their purchase, possession, use and consumption, and whether the so called exemptions contained in the notification of the 1st April really go as far as they purport to go: (vide in this connection conditions in column 7 of Notification No. 10484/45(*a*) of the 1st April, 1950). Again, in Notification No. 10484/45 of 1st April, only 8 medicinal preparations are totally exempted as regards their purchase, possession, and use, and so far as medicinal preparations for internal consumption are concerned, only those containing not more than 10% of alcohol or 17.5% of proof spirit are exempted. This notification has to be read along with another Notification No. 10484/45(*a*) of the same date, which was to remain in force till 31st March, 1951 only. In the latter notification, for the purpose of possession, purchase, consumption and use, the quantity of medicinal preparations containing not more than 10% of alcohol etc. is restricted to such quantity as may be prescribed by a registered medical practitioner. Even these notifications may be withdrawn, superseded or amended at any moment by the Provincial Government, as was done in the case of the notifications issued on 16th June, 1949, which have been referred to. An ordinary citizen may find it a perplexing task to attempt to extract information out of the long series of complicated regulations, as to the true nature and extent of the right which the law confers upon him. Indeed it was only with the help of the learned counsel appearing for the parties that we were able to know what the position was up to 31st March, 1950, and what changes were made on 1st April, 1950. But in the bundle of notifications which have been placed before us, there is no notification stating what step has been taken after 31st March, 1951, and none was brought to our notice in the course of the arguments. Having given my careful consideration to the matter, I am of the opinion, that the restrictions imposed by the Act even when read with the above notifications are not reasonable, and I would affirm the conclusion arrived at by the High Court.

52. The next group of sections which the High Court has held to be invalid, are Sections 23(*a*) and 24(1)(*a*) insofar as they refer to "commending" any intoxicant, Section 23(*b*) in its entirety, and Section 24(1)(*b*) insofar as it refers to "inciting or encouraging" any individual or class of individuals or the public generally "to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence, etc." These provisions run as follows:

"23. No person shall—

(*a*) commend, solicit the use of, or offer any intoxicant or hemp, or

(*b*) incite or encourage any member of the public or any class of individuals or the public generally to commit any act which frustrates or defeats the provisions of this Act, or any rule, regulation or order made thereunder, or ...

24. (1) No person shall print or publish in any newspaper, news-sheet, book, leaflet, booklet or any other single or periodical publication or otherwise display or distribute any advertisement or other matter.

(*a*) which commends, solicits the use of or offers any intoxicant or hemp, or

(*b*) which is calculated to encourage or incite any individual or class of individuals or the public generally to commit an offence under this Act, or to commit a breach of or to evade the provisions of any rule, regulation or order made thereunder or the conditions of any licence, permit, pass or authorization granted thereunder."

53. Sections 23(*a*) and 24(1)(*a*) insofar as they refer to "commending" any intoxicant are said to conflict with the fundamental right guaranteed by Article 19(1)(*a*) namely, the right to freedom of speech and expression and there can be no doubt

that the prohibition against "commending" any intoxicant, is a curtailment of the right guaranteed and it can be supported only if it is saved by clause (2) of Article 19 which, as it stands at present, provides that "nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State". It seems to me that none of the conditions mentioned in clause 2 applies to the present case, and therefore the provisions in question must be held to be void. Section 23(*b*) must also be held to be void, because the words "incite" and "encourage" are wide enough to include incitement or encouragement by words and speeches and also by acts. The words "which frustrates or defeats the provisions of the Act or any rule, regulation or order made thereunder" are so wide and vague that it is difficult to define or limit their scope. I am therefore in agreement with the view of the High Court that this provision is invalid in its entirety. So far as Article 24(1)(*b*) is concerned the judgment of the High Court in regard to it cannot be upheld. The learned counsel for the petitioner also conceded before us that he was not going to assail this provision.

54. The High Court has also declared Sections 136(1), 136(2)(*b*), 136(2)(*c*), 136 (2)(*e*), 136(2)(*f*) to be void as offending against various provisions of Article 19 the Constitution, but no argument was addressed to us on behalf of the Government of Bombay assailing the judgment of the High Court with regard to these provisions. The judgment of the High Court in regard to them will therefore stand.

55. I will now deal with two Notifications No. 10484/45(*c*) and 2843/49(*a*), dated 30th March, 1950, which the High Court has held to be invalid. As regards the first notification, the High Court has stated that Section 139(*c*) having been held to be ultra vires the legislature, this notification, which was issued under that section is ultra vires the Bombay Government. But, since this Court has taken a different view in regard to the validity of Section 139(*c*), the decision of the High Court as regards the above notification cannot stand. It appears from certain observations in the judgment under appeal, firstly that the High Court upheld Section 40(1)(*c*)(*i*) and (*ii*), which deals with the grant of permits to foreigners who do not intend to stay permanently in India, merely because the Explanation to that section provided that "a person shall be deemed to be residing or intending to reside in India temporarily, if the period of his residence does not exceed six months"; and secondly, that the High Court would have found it difficult to uphold the classification on which Section 40(1)(*c*) is based if the restriction regarding six months' residence was not there, as would be the result of reading the section subject to the above notification. I am however unable to see how the notification will turn a classification which is otherwise a good classification into a bad one. There is nothing unreasonable in a law relating to prohibition discriminating between Indian citizens against whom it is primarily to be enforced, and foreigners who have no intention of permanently residing in this country. The condition of six months' residence which is laid down in the Explanation to Section 40 is somewhat arbitrary, and the mere fact that the Government by notification withdrew this condition cannot in principle alter the basis of the classification.

56. The High Court has declared the other notification issued by the Government on 30th March, 1950, to be invalid on grounds which are stated in these words:

> "That notification exempts persons holding permits under clause (*c*) of sub-section (1) of Section 40, special permits under Section 41, or interim permits under Section 47, from the provisions of Section 23(*a*) insofar as it relates to the offering of foreign liquor to persons holding similar permits. This is clearly not justified. Having created a class, having given to that class the right of obtaining a permit on grounds other than those of health, it will be totally wrong to permit that class not to abide by the same provisions with regard to permits as others to whom

permits have been given. The restrictions placed by the legislature itself on a permit-holder regarding the use and consumption of his stock of liquor is to be found in Section 43 under which the permit-holder shall not allow the use and consumption by any person who is not a permit-holder. That restriction must apply equally to permits issued under Section 40 to Indian citizens as well as foreigners, and in our opinion it is improper to allow a foreigner permit-holder to stand drinks to other permit holders and to deny that privilege to Indian permit-holders. The guarantee of equality before the law extends under our Constitution not only to legislation but also to rules and notifications made under statutory authority and even to executive orders and as the notification offends against the principle of equality it is, therefore, void."

57. In order to understand these remarks, it will be necessary to state that persons holding permits under clause (*c*) of sub-section (1) of Section 40 are foreigners as described in sub-clauses (*i*) and (*ii*) of clause (*c*), that persons holding special permits under Section 41 are foreign sovereigns, ambassadors etc. and that persons holding interim permits under Section 47 are persons applying for permits under either Section 40, or Section 41. The last class will include not only foreigners but also Indian citizens applying for permits on the ground that their health will be seriously and permanently affected if they are not permitted to use or consume liquor. Thus, the assumption on which the conclusion of the High Court is based, does not appear to be correct. Besides, I do not find anything in this notification which violates the principle of equality. It simply enables a certain class of persons holding permits to offer drinks to persons holding similar permits. This is in accord with the principle underlying the provisions of Section 43 which has not been assailed before us and which provides that "no holder of a permit granted under Section 40 or 41 shall allow the use or consumption of any part of the stock held by him under the permit to any person who is not the holder of such a permit". In my opinion, there is no substantial ground for holding the notification to be invalid. The points relating to the notifications are extremely small, and the subtle distinctions upon which they are based, are hardly worth the attention which the High Court has bestowed on them.

58. There is another point which arises on the judgment of the High Court which may also be noticed. The point is set out in that judgment in these words:

"When a person applies for a permit on the ground of health he has to forward with it a certificate from the medical board and when we turn to the form of this certificate, it requires the medical board to declare the applicant an addict. Therefore the position is that it is only on the applicant being found an addict by the medical board that he would be entitled to a permit if his health would be seriously and permanently affected if he was not permitted to use or consume liquor. It is not only in the case of addicts that such a contingency would arise. Even persons who are not addicts may have been accustomed to drink for a long period of time and a sudden discontinuance of drink may seriously and permanently affect their health. It may also happen that without being accustomed to drink at all a person may contract an illness which may require the use by him of alcoholic drink under medical opinion. To be an addict, in our opinion, means something more than being merely accustomed to drink. We must give to it its plain natural meaning. It is certainly not a term of art, and giving to it its plain natural meaning, the expression 'addict' does carry with it a sense of moral obloquy. The intention of the Government seems to be that only persons who confess that they are deviating from standards of morality should be given permits. Now insistence upon a medical certificate in this form is not at all warranted by the provisions of the Act."

59. The point is a small one but it seems to me that there is some substance in it. In my opinion, the word "addict" in the medical certificate should be replaced by the

words used in Section 40(1)(*b*) of the Act or words corresponding to them.

60. The only other point which remains to be decided is whether as a result of some of the sections of the Act having been declared to be invalid, what is left of the Act should survive or whether the whole Act should be declared to be invalid. This argument was raised before the High Court also, but it was rejected and it was held that it was not possible on a fair review of the whole matter to assume that the legislature would not have enacted the part which remained without enacting the part that was held to be bad. It is to be noted that upon the findings of the High Court, the question should have assumed a more serious aspect than it presents now, because the High Court has declared several important sections of the Act including the definition of "liquor" to be ultra vires the legislature. I have now examined those sections and have held many of them to be valid. The provisions which are in my view invalid cannot affect the validity of the Act as a whole. The test to be applied when an argument like the one addressed in this case is raised, has been very correctly summed up by the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada*[27] in these words:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

61. It is quite clear that the provisions held by me to be invalid are not inextricably bound up with the remaining provisions of the Act, and it is difficult to hold that the legislature would not have enacted the Act at all without including that part which is found to be ultra vires. The Act still remains substantially the Act as it was passed i.e. an Act amending and consolidating the law relating to the promotion and enforcement of the policy of prohibition and also the Abkari law in the Province of Bombay.

62. In the result, I declare the following provisions of the Act only to be invalid:

(*1*) clause (*c*) of Section 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(*2*) clause (*d*) of Section 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol.

(*3*) clause (*b*) of Section 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

(*4*) clause (*a*) of Section 23, so far as it prohibits the commendation of any intoxicant or hemp.

(*5*) clause (*b*) of Section 23, in entirety.

(*6*) clause (*a*) of sub-section (1) of Section 24, so far as it prohibits commendation of any intoxicant or hemp.

(*7*) sub-section (1) of Section 36, in entirety.

(*8*) clauses (*b*), (*c*), (*e*), and (*f*) of sub-section (2) of Section 136, in their entirety.

63. I hold that the rest of the provisions of the Act are valid, and I also hold that my decision declaring some of the provisions of the Act to be invalid does not affect the validity of the Act as it remains. Appeal No. 182, preferred by the State of Bombay, is therefore substantially allowed and Appeal No. 183 preferred by the petitioner is dismissed.

64. On the question of costs, I am disposed to make the same order as the High Court has made, not only because some of the provisions of the Act are still found to be invalid, but also because the present case appears to have been instituted to test the validity of a controversial measure and to secure a final decision on it to set at rest

the doubts and uncertainties which may have clouded the minds of a section of the public as to how far the provisions of the Act conform to law and to the Chapter on Fundamental Rights in the present Constitution.

M. PATANJALI SASTRI, J.:— I agree and have nothing more to add.

B.K. MUKHERJEA, J.:— I have read the judgment of my learned Brother Mr Justice Fazl Ali and I am in entire agreement with his conclusions and reasons. There is nothing further which I can usefully add.

S.R. DAS, J.:— I agree and I have nothing further to add.

VIVIAN BOSE, J.:— I also agree.

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* Appeal under Article 132(1) of the Constitution of India from the Judgment and Order dated 22nd August, 1950, of the High Court of Judicature at Bombay in Miscellaneous Application No. 139 of 1950.

[1] (1942) FCR 17 at 25

[2] (1949) FCR 650

[3] Vide *United Provinces* v. *Atiqa Begum*, (1940) FCR 110 at 134

[4] (1939) FCR 18

[5] (1945) FCR 179 at 191

[6] (1937) AC 863 at 870

[7] 7 AC 829

[8] (1947) FCR 28

[9] (1947) FCR at p 51

[10] (1948) FCR 207 at 225

[11] (1949) FCR 650 at 655

[12] 1827) 25 US 419

[13] (1827) 25 US at p 439

[14] (1827) 25 US at p 447

[15] (1827) 25 US at p 441

[16] 135 US 100

[17] (1942) FCR 90

[18] (1942) FCR 90 at 106-7

[19] (1942) FCR 17 at 27

[20] 7 AC 829 at p. 839

[21] The *Encyclopaedia Britannica*, 14th Edn., Volume 14, page 191

[22] (1950) SCR 869

[23] *Constitutional Law*, by Prof Willis, (1st Edition) p 578

[24] Reported infra

[25] (1950) SCR 594

[26] (1950) SCR 759

[27] (1947) AC 505 at 518