

(1964) 10 BOM CK 0012

In the Bombay High Court

Case No : Misc. Petition No. 135 of 1963

Amichand Valanji and Others

APPELLANT

Vs

G.B. Kotak and Others

RESPONDENT

Date of Decision : 09-10-1964

Acts Referred:

Constitution of India, 1950 — Article 226
Defence of India Act, 1962 — Section 3(1), 3(2), 40, 44

Citation : AIR 1966 Bom 70 : (1965) 67 BOMLR 234

Hon'ble Judges : Tambe, J;Naik, J

Bench : Division Bench

Advocate : Porus Mehta, S.J. Sorabjee and S.B. Sukthankar, instructed by Gagrut and Co. Attorneys, for the Appellant; K.H. Bhabha and A.B. Diwan, instructed by P.G. Gokhale, Attorney, for the Respondent

Judgement

Tambe, J.—This is a petition under art. 226 of the Constitution of India, wherein the vires of the Gold Control Rules, contained in Part XIIA of the Defence of India Rules, have been challenged. In the prayer clause of the petition, no doubt, validity of the entire rules were not challenged, but only some of them were mentioned. But the arguments advanced before us were in respect of rules in general. It would not, therefore, be necessary to consider each rule separately. The two petitioners before us are dealers in gold. They profess and practice Jain religion. The two petitioners carry on the business in the name and style of "Messrs. Chandkumar Amichand & Co.". The principal business of the petitioners is in bullion. They buy and sell gold in course of their business. In their petition, they say that the business carried on by them is on a vast scale. Eleven persons are employed by them in the firm and the annual salary paid by the firm to their employee's amounts to Rs. 20,000. The firm is also a registered dealer for the purposes of the sales-tax, and the petitioners claim that the sales-tax paid by them in S.Y. 2018 amounted to Rs. 2,56,395.72 nP.

2. The challenge made by the petitioners is in substance now confined to two grounds. Firstly, it is contended that the rules made are in excess of the rule

making power of the Central Government, and, secondly, that, at any rate, the rules contravene the fundamental rights conferred on the petitioners under arts. 25 and 26 of the Constitution of India. The other contentions which have been raised by the petitioners in the petition were not argued before us. But Mr. Mehta, learned counsel for the petitioners, stated before us that he did not advance any arguments on those contentions, because the matter stood concluded by the recent decision of their Lordships of the Supreme Court in *Makhan Singh v. State of Punjab* [1964] AIR S.C. 381. Mr. Mehta, however, stated that the petitioners may raise these contentions in the Supreme Court if so advised.

3. To appreciate the contentions raised before us, it would be necessary to refer to the incidents relating to the promulgation of these impugned rules. It is common knowledge that on September 8, 1962, Chinese troops crossed the Indian border. By October 20, 1962, the aggression by China on the Indian borders was on a large scale. On October 26, 1962, the President of India, in exercise of the powers conferred on him by art. 352 of the Constitution, declared that a grave emergency exists, whereby the security of India is threatened by external aggression. By reason of this proclamation, the provisions of art. 358 of the Constitution immediately came into play. That article provides that while a proclamation of emergency is in operation, nothing in art. 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect. The declaration of emergency further under art. 359 empowered the President

to declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

It is also necessary to notice two other articles, and they are arts. 250 and 353(b). Article 250 provides:

250. (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things

done or omitted to be done before the expiration of the said period.

Article 353, cl. (b) provides that

while a proclamation of emergency is in operation, then--the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

We have already stated that the emergency was proclaimed by the President on October 26, 1962. On the same day, in exercise of the powers under art. 123, the President promulgated an Ordinance, styled as "The Defence of India Ordinance". It is not necessary for the purposes of this case to refer to the provisions of the Defence India Ordinance, for it is not in dispute that the provisions of the Defence of India Ordinance have now been incorporated in the Defence of India Act, 1962. On November 3, 1962, the President, in exercise of powers conferred on him by cl. (1) of art. 359 of the Constitution, by a Gazette Notification, declared that

the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder.

By a further proclamation, art. 14 also was added to this notification. The combined effect of all the aforesaid provisions was that the Parliament gained authority to legislate on subjects contained in Lists I, II and III, as it deemed proper during the emergency. The fetter on the legislative power of Parliament contained in art. 19 was removed. Further, if the fundamental rights of a citizen under arts. 14, 21 and 22 were contravened by any rule or order made by the Central Government under the Defence of India Ordinance or Act, recourse to Court for enforcement of those fundamental rights was barred during the period of emergency. The Defence of India Act enacted by Parliament came into force on December 12, 1962. The preamble of the Defence of India Act (hereinafter called "the Act") declares that it is

An Act to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith.

The preamble then refers to the external aggression and the declaration of emergency by the President, and thereafter, it is therein stated:

AND WHEREAS it is necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial

of certain offences and for matters connected therewith;

BE it, therefore, enacted by Parliament in the Thirteenth Year of the Republic of India as follows:

Sub-section (3) of s. 1 provides that the Act

shall remain in force during the period of operation of the Proclamation of Emergency issued on the 26th October 1962, and for a period of six months thereafter.

The clauses of sub-s. (3) provided for saving of certain things, with which we are not here concerned. Section 2 contains definitions of certain expressions. The expression "defence of India" has not been defined in s. 2, though "civil defence" has been defined. Section 3 confers power on the Central Government to make rules, and the Gold Control Rules have been framed by the Central Government in exercise of its powers under s. 3 of the Act, The Central Government promulgated the Defence of India Rules on November 5, 1962. However, there were no rules controlling or regulating dealings in gold by these rules. By a further amendment to the Defence of India Rules, Gold Control Rules were introduced in the Defence of India Rules, as Part XIIA of the Defence of India Rules. They came into force on January 10, 1963. The preamble of these rules reads:

In exercise of the powers conferred by section 3 of the Defence of India Act, 1962 (51 of 1962), the Central Government hereby makes the following further amendment in the Defence of India Rules, 1962, namely:--

And the short title reads: "These rules may be called the Defence of India (Amendment) Rules, 1963." The heading of Part XIIA of the Defence of India Rules is "Gold Control". It consists of rules 126A to 126Z, and these rules are generally called and known as "Gold Control Rules", and I would hereafter also refer to these Rules as the Gold Control Rules. The Rules initially framed on January 10, 1963, were further amended by two amendments to the Defence of India Rules--(1) by the 7th amendment which came into force on June 24, 1963, and (2) by the 9th amendment which came into force on September 23, 1963. It would be sufficient for the purposes of this case to refer to the provisions of the Gold Control Rules as they stand after both these amendments. It may also be stated that for the purpose of administration of these Gold Control Rules, initially an All India Board called "Gold Board" was constituted. At the time of the hearing of this petition, however, by reason of the amendment of the Gold Control Rules, the administration of Gold Control is not in the hands of the "Gold Board", but is in the hands of the Administrator, respondents Nos. 1 to 4 to this petition are members of Gold Board. No order can be passed against the Gold Board. The other two respondents are--the Collector of Central Excise, Bombay, and the Union of India.

4. Rule 126A is an interpretation clause. A dealer has been defined in sub-cl. (c)

as

any person who carries on, directly or otherwise, the business of-

(i) making, manufacturing, buying, selling, melting, processing or converting gold for the purpose of making or manufacturing ornaments,

(ii) buying, selling, supplying, distributing, melting, processing or converting gold for the purpose of making or manufacturing ornaments,

whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration.

There is inclusive clause including an undivided Hindu family, which carries on business, company, society etc., but it is not necessary for the purposes of this case to refer to these various clauses. Clause (d) defines gold:

"gold" means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold.

Clause (f) defines ornament:

"ornament" means any article in a finished form, meant for personal adornment or for the adornment of any idol, deity or any other object of religious worship, made of, or manufactured from, gold, whether or not set with stones or gems, real or artificial, or with pearls, real, cultured or imitation or with all or any of them and includes parts, pendants or broken pieces of ornaments;

Clause (g) defines

"primary gold" as gold in any unfinished form and includes all ingots, bars, blocks, slabs, billets, shots, pellets, rods and wires.

Clause (h) defines a "refiner" as the owner or occupier of a refinery; and cl. (i) defines a "refinery" as a place where gold is melted, processed, converted or refined. Part XII-A has been sub-divided into six chapters. The first chapter, containing rules 126B, 126C and 126D relate to control of business in gold, and these provisions are most important provisions for the purposes of this petition. Chapter 3 deals with licensing of dealers and refiners. Chapter 4 relates to returns and accounts. Chapter IV-A which has been amended by the amendment effected in September, 1963, has made certain concessions in favour of petty goldsmiths, called certified goldsmiths. Chapter V relates to declaration of gold by individuals; and Chapter VI is a miscellaneous chapter. In my opinion, it is not necessary to refer in detail to the provisions of these various rules in the six chapters, but it would be sufficient to state the combined effect of these rules, so far as it is material for the purposes of this case. The business of gold has been controlled by these rules, principally by prohibiting manufacture of articles of gold other than ornaments, by placing certain restrictions on making of

ornaments, by imposing certain restrictions and prohibition in the matter of grant of loan by the bankers or the money-lenders on hypothecation of gold, and by requiring the dealers, refiners, money-lenders and persons other than the dealers or refiners, in other words, a common man, to submit certain returns periodically in certain forms. The provisions of these rules thus affect dealers, refiners, money-lenders as well as a common man. Now, the term "dealer" would include persons dealing in gold as well as persons dealing in ornaments, and also include persons who are doing the business of goldsmith. I would now proceed to summaries how these rules affect these different categories of persons.

5. Dealer: We first proceed with the category of a "Dealer". He cannot make or manufacture any article of gold except ornaments; but after June 24, 1963, a dealer is allowed to make articles other than ornaments, on obtaining authorization in this respect from the Administrator. He cannot accept any ornament of a purity exceeding 14 carats for polishing or repair. No dealer can make or manufacture any article of gold of a purity exceeding 14 carats. He cannot manufacture, prepare, sell or otherwise transfer, agree to sell or agree to transfer or expose or offer to sell or offer to transfer any ornament having gold of a purity exceeding 14 carats. It may, however, be stated that one month's period from the commencement of these rules was allowed to the dealers for disposal of stock of gold ornaments which was already in their possession. A dealer was required to convert the primary gold already in his possession prior to the coming into force of these rules into gold of a purity of 14 carats. He is also similarly required to convert within a week gold that might be subsequently coming into his possession. A dealer cannot carry on the business of money-lending on the same premises in which he is carrying on the business of a dealer. He cannot sell or otherwise transfer to any person any gold on hypothecation, pledging, mortgage or charge on which he has advanced any loan irrespective of the fact whether the loan was advanced before or after the commencement of the order. This additional condition has been imposed by the amendment which came into effect on June 24, 1963. He cannot deliver back the gold to the borrower even where the loan has been repaid by him, much less before, without the permission of the Administrator. A dealer, who has been registered under the Sales Tax Act, cannot any more carry on business except on obtaining the license from the Administrator. Such a dealer is required to make an application for a license. If a dealer, who is required to make an application for a license, fails to apply, or whose application has been rejected or cancelled, has to sell or otherwise transfer all the gold in his possession to another dealer or refiner licensed under the Act within the given time. A dealer who is required to make an application for license or to whom a license has been granted, has to file periodically returns relating to gold in his possession, stating therein the quantity of gold in his possession, description of gold in his possession or under his control, and to give such further particulars as may be prescribed from time to time. In the periodical returns, which he is required to submit, he has to show the additional gold coming into his possession after he has last made his return.

A dealer cannot acquire or agree to acquire or buy gold, other than ornaments or declared gold, from any person other than licensed dealer or refiner. He cannot sell gold, other than ornaments to any person, other than a person holding a permit, or a licensed dealer or refiner.

6. Refiner: A refiner cannot make or manufacture any article of gold other than primary gold. However, after June 24, 1963, he is allowed to make or manufacture articles other than ornaments of any purity on obtaining authorization in that respect from the Administrator. A refiner was required to convert gold in his possession of a purity exceeding 14 carats into gold of purity not exceeding 14 carats within a week of the date, or such further period as may be allowed from the date, the rules came into force. Similarly, he is required to convert the primary gold acquired by him subsequently into gold of purity not exceeding 14 carats. The Administrator, however, could authorise a refiner to keep in his custody or control any primary gold exceeding 14 carats. The primary gold manufactured or sold by a refiner after the date the rules came into force is required to be stamped by a stamp approved by the Administrator giving certain prescribed particulars including the date of manufacture, its purity and identity of the maker or manufacturer. By a subsequent notification issued on May 1, 1964, however, this rule has been relaxed and exemption has been granted in respect of articles such as foils, leaves and wires. But these articles are required to be labeled for the purposes of identification with reference to purity, date of make or manufacture, maker or manufacturer. A refiner is required to obtain a license from the Administrator in order to enable him to continue the business of a refiner. He has to make periodical returns of the gold in his possession or under his control, giving certain details as prescribed including the quantity and description thereof. He has to maintain account-books in the prescribed forms. He cannot sell or deliver gold to any person other than a dealer or a person holding a permit from the Administrator.

7. Common man: As regards a common man, which includes a minor, a lunatic, deity, trusts, Court of Wards, Receiver, Official Assignee, a Hindu undivided family, company, firm, wakf, institution, and an individual, he cannot place any order with any dealer, whether licensed or not, for making, manufacturing or preparation of ornaments having gold of a purity exceeding 14 carats. He has within 30 days of the date on which the rules came into force, to declare gold other than ornaments in his possession, in excess of 20 grams in the case of a minor, and 50 grams in the case of any other person. He cannot buy or otherwise acquire gold not being ornament except on succession, testamentary or otherwise, or on obtaining a permit from the Administrator. Gold so acquired has to be declared by a further declaration. Gold acquired on a permit cannot be sold without a permit. Gold not required to be declared cannot be sold without a permit. It may, however, be stated that after certain concessions having been granted to certified goldsmiths, it is possible for the common man to convert his old ornaments into new ornaments not exceeding that purity.

8. Concessions granted to Certified Goldsmiths: This is a concession granted to petty dealers who were not registered for the purposes of Sales Tax, and who were carrying on business of goldsmith since before the coming into force of the Gold Control Rules, on obtaining a certificate from the Administrator. They are allowed to do certain kind of business. They can accept from any person other than a dealer or a refiner, any ornament or ornaments of a purity in excess of 14 carats for the purpose of making or manufacturing new ornaments subject to the restriction that the gold contained in the new ornament does not exceed purity and total quantity of gold contained in the ornaments accepted. He can also make or manufacture primary gold of purity exceeding 14 carats by melting or procuring or converting any ornaments subject to the restriction that he cannot have at any time primary gold in excess of 100 gms. On cancellation of his certificate, he has to sell or transfer gold to a dealer or a refiner.

9. These in brief are the restrictions and prohibitions imposed by the Gold Control Rules on dealers, refiners, money-lenders and other persons. It is hardly necessary to state that the effects of the Gold Control Rules are far-reaching and largely affecting these persons. The effect in short is that business in gold exceeding purity more than 14 carats has been brought practically to a standstill. It is only open to convert old ornaments into new ornaments of a purity exceeding 14 carats. The other effect is that persons in possession of gold other than ornaments, over certain very small quantity, have to declare gold in their possession; and thirdly, from the periodical returns which are required to be furnished by persons falling in the aforesaid categories, the Administrator is able to exercise control over the business of gold. It is these provisions which have been challenged before me by the petitioner who is a dealer in gold.

10. I have already stated the two principal contentions which have been raised on behalf of the petitioner. The arguments advanced by Mr. Mehta, learned counsel for the petitioner, in short, is that s. 3 of the Act authorises the Central Government to make rules for certain purposes mentioned in sub-s. (1) of s. 3. The rules framed have no intimate, real or proximate connection with any of those purposes. On the other hand, the rules have been framed for the purposes of bringing about a socio-economic reform with a view to changing the age-long habits of the people of India, a purpose entirely outside the scope of sub-s. (1) of s. 3 of the Act. In other words, the argument of Mr. Mehta is that the rules framed are not within the competence of the Central Government inasmuch as they are in excess of the rule making power contained in sub-s. (1) of s. 3 of the Defence of India Act, and is a colourable piece of legislation. According to Mr. Mehta, there are on the statute book various enactments relating to the control or smuggling of gold and foreign exchange in India. If really the Government wanted to control smuggling, they could easily have achieved this purpose by suitably amending those enactments; but in framing these rules, the Government has not really the motive of controlling the smuggling of gold, but, on the other hand, has the motive of effecting a socio-economic reform, with a view to make people change their habits. The other aspect of the argument of

Mr. Mehta is that the rules violate the provisions of s. 44 of the Act, inasmuch as they excessively and unnecessarily interfere with the ordinary avocations of life and the enjoyment of property of persons. The other contention is violation of arts. 25 and 26 of the Constitution.

11. Mr. Bhabha, learned counsel for the respondents, on the other hand, argues that in construing the rules, the Court has to approach keeping in view that these rules have been placed before the Parliament as required by s. 41 of the Act. The Parliament has not thought it necessary either to modify or annul these rules. The fetter imposed on the legislative power by art. 19 stands suspended by virtue of the provisions of art. 358 of the Constitution. Enforcement of fundamental rights under arts. 14, 21 and 22 have been barred. The entire legislative power rests with the Parliament by reason of the provisions of arts. 250 and 353(6) of the Constitution. The power to make rules is not confined to sub-s. (1) of s. 3. On the other hand, the Legislature in enacting sub-s. (2) of s. 3 has declared its intention that rules made under any one or more of the clauses of sub-s. (2) would necessarily be for securing any one or more of the purposes of the Act. Therefore, where it is shown that the rules fall under any one or more of the clauses of sub-s. (2), it is no more necessary for the respondents to establish any nexus or real or proximate connection between the rules framed and the purposes mentioned in sub-s. (1). Such rules can be struck down only if it is shown by the person challenging the rules that they are totally incapable of being related to or not germane to the purposes mentioned in sub-s. (1) of s. 3 of the Act. According to Mr. Bhabha, the rules fall under cls. 23 and 33 of sub-s. (2) of s. 3. In the alternative, Mr. Bhabha contends that there is a real and proximate connection between the rules framed and the purposes mentioned in sub-s. (1) of s. 3 of the Act. The object of these rules is to arrest smuggling, and thereby to improve the position of the Government relating to foreign exchange. This object has a direct and proximate connection with the "defence of India" and also for maintaining the civil services essential to the life of the community. According to Mr. Bhabha, these rules serve the purpose of conservation of foreign exchange. It was also the argument of Mr. Bhabha that the expression "defence of India" is a term of wide amplitude, and would include even an economic measure found necessary by the Government to secure the purposes mentioned in sub-s. (1) of s. 3 of the Act. There is a presumption in favour of validity of exercise of the power and the burden lies heavily on the person challenging its validity. Section 44 of the Act imposes no restrictions on the rule making power of the Central Government. As regards the argument of Mr. Mehta that the Government could have achieved the object by suitably amending other enactments, Mr. Bhabha contends that it is not open to this Court to make any inquiry as to the necessity of making these rules or consider the question whether the Central Government could have achieved the object by doing something else. The powers conferred on the Central Government under s. 3 are of very wide amplitude, and the matter has been left to the discretion of the Central Government entirely. As regards the challenge under art. 25 and art.

26 of the Constitution, Mr. Bhabha contends that the respondents by their return have denied the allegations of facts made in the petition. The decision of this question thus involves the decision of disputed questions of fact, and, therefore, could not be gone into in this petition. If at all the Court feels inclined to go into these questions, the matter be remanded to the trial Court for recording evidence on this matter. We should have stated earlier that this petition has been filed on the Original Side of the High Court and has been referred to us.

12. The first question that arises is the construction of s. 3 of the Act. Material part of s. 3 reads:

The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters, namely:--....

(23) the control of trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to articles or things of any description whatsoever which may be used in connection with the conduct of military operations or civil defence or for maintaining supplies and services essential to the life of the community;....

(33) controlling the possession, use or disposal of, or dealing in, coin, bullion, bank notes, currency notes, securities or foreign exchange;

Turning to sub-s. (1) of s. 3, it authorises the Central Government to make rules for securing the following purposes:

- (1) the defence of India;
- (2) civil defence;
- (3) public safety;
- (4) maintenance of public order;
- (5) efficient conduct of military operations; and
- (6) maintaining supplies and services essential to the life of the community.

For securing these purposes, the Central Government is empowered to "make such rules as appear to it necessary or expedient". It would thus be seen that the power conferred by sub-s. (1) of s. 3 is conditioned by two circumstances: The first is that the power can be exercised only for securing one or more of the authorised purposes, and the other is that the Central Government on application of its mind may find or it may appear to the Central Government necessary or

expedient to exercise it for securing the prescribed purpose. This is obviously so because the rules and regulations made in times of emergency entrench on the rights and liberties of persons, and it is, therefore, that the Parliament requires the Central Government to apply its mind and consider whether it is necessary in the circumstances of the case to make such rules. It follows that merely because the rules relate to the purposes mentioned in sub-s. (1) of s. 3, by itself is not sufficient to sustain the rules. It has further to be established that not only that the rules secure the authorised purposes, but it has appeared to the Central Government that it is necessary or expedient to make those rules. Similarly, it is not sufficient to show that it appeared to the Central Government that it is necessary or expedient to make those rules, but the rules must be for securing any of the authorised purposes. In other words, there must be a connection between the rules framed and the authorised purposes mentioned in sub-s. (1) of s. 3. To the extent or nature of the connection, we will advert later.

13. In my view, it is a well-settled principle that when a particular legislation is impugned, the Court has to see whether the Legislature has acted within its powers, and the second thing it has to see is whether in exercising its powers it has not transgressed any of the limits imposed on it by the Constitution in Part III of the Constitution. In other words, the Court has to see whether in enacting a particular legislation the Legislature has not violated any of the fundamental rights of the citizen. These principles, in my opinion, would equally apply when the Court is called upon to consider the validity or otherwise of a delegated legislation, or a legislation made by an authority to which the Legislature had delegated powers. I have already referred to removal of certain fetters imposed on the Legislature by Part III of the Constitution, by reason of the declaration of emergency and the orders made by the President suspending the enforcement of fundamental rights in arts. 14, 21 and 22. In fact, it has not been canvassed before us that the rules contravene any of the articles other than arts. 25 and 26 of the Constitution. I have, therefore, first to consider whether the rules made fall within the rule making power of the Central Government. The ambit and extent of the power of the Central Government under sub-s. (1) I have already stated. The question which next arises is whether sub-ss. (2) and (3) confer any additional power on the Central Government to make rules. It is the contention of Mr. Bhabha that sub-s. (2) of s. 3 confers additional independent power. I find it difficult to sustain this argument of Mr. Bhabha so broadly made. It may be noticed that the word "rules" in sub-s. (2) is preceded by the prefix "the". The prefix particularises the rules, and when sub-s. (2) is read in the context of sub-s. (1), it appears to me that the rules mentioned in sub-s. (2) are the rules which are referred to in sub-s. (1) of s. 3. The rule making power conferred by sub-s. (2), therefore, is subject to the same limitations as are imposed by sub-s. (1) of s. 3. To hold otherwise would amount to conferral of uncanalised control and power on the Central Government. Could it be said that the rules falling under any of the clauses of sub-s. (2) are valid rules even though they have no relation whatsoever with any of the purposes mentioned in sub-s. (1) of s. 3 of the Act? 1

would illustrate: Clause (6) of sub-s. (2) empowers the Central Government to make rules "regulating the publication of news and information". Is it open to the Government to require the newspapers to publish certain news which have no connection whatsoever with any of the purposes mentioned in sub-s. (1), for instance, the births and marriages at the place of a Government servant? "When I put the question to Mr. Bhabha in this form, Mr. Bhabha replied that this entry being ambiguous, it may be open to the Court to investigate the matter further. But it had been the argument of Mr. Bhabha that cl. (33) is specific and there is no ambiguity about it. Turning to cl. (33), it, inter alia, authorises the Central Government to make rules "controlling the use.... of bullion", and according to Mr. Bhabha, bullion includes gold ornaments. I asked Mr. Bhabha that if a rule is made by the Central Government that no person shall put on ornaments in his possession on any day including a festival day, would it be a valid rule? I did not receive a satisfactory answer. Obviously, if cl. (33) is interpreted as Mr. Bhabha wants me to interpret, the assumed rule would fall under that clause. It is obvious that such a rule can have no connection whatsoever with the purposes mentioned in sub-s. (1) of s. 3. I, therefore, find it difficult to accept Mr. Bhabha's contention so broadly stated. It appears to me that the Legislature having generally stated in sub-s. (1) of s. 3 the power conferred on the Central Government, have projected its mind into future envisaging certain subjects relating to which the Central Government may have to frame rules for securing the purposes mentioned in sub-s. (1) of s. 3, if it appears to the Central Government necessary or expedient to do so. In other words, the Legislature in enacting sub-s. (2) has given a guidance to the Central Government in the matter of what it can do for securing the aforesaid purposes in exercise of the power conferred on it by sub-s. (1) of s. 3 of the Act. Sub-section (2) does not in any manner restrict the power conferred by sub-s. (1), because sub-s. (2) in terms states that it is without prejudice to the generality of the powers conferred by sub-s. (1); nor does it confer any additional power on the Central Government in the matter of framing rules. It would, therefore, follow that when it is shown that the rules framed fall in any one or more of the clauses of sub-s. (2), the Court will presume that the rules would have a bearing on any one or more of the purposes mentioned in sub-s. (1) of s. 3. The burden of proving the contrary would lie, and would lie heavily, on the party which challenges this position. I find it difficult to take the matter any further than this. Apart from the construction of the section, there is also guidance in this respect from the decided cases relating to the provisions similar to the one with which I am concerned here.

14. The first is a decision of their Lordships of the Privy Council in *King-Emperor v. Sibnath Banerji* (1945) L.R. 72 I241, S.O. 48 Bom. *Sibnath Banerji and others* were detained pursuant to orders made under r. 26 of the Defence of India Rules, 1940. These orders were signed by the order of the Governor. The said r. 26 was purported to have been made under s. 2(2) (x) of the Defence of India Act, 1939. It was held by the Courts in India, following the decision of the Federal

Court in *Keshav Talpade v. King Emperor* [1943] F.C.R. 49 L.R. 1. that the rule was ultra vires of the rule-making power of the Government of India under s. 2(2)(x), and the detention, therefore, was bad. An appeal was taken on behalf of the King Emperor. To appreciate the decision of their Lordships, it would be convenient to reproduce the relevant provisions of the said s. 2 of the Defence of India Act, 1939:--

2. (1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1) the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely:--

If the aforesaid provisions of s. 2 of the Defence of India Act, 1939, are placed in juxtaposition with the provisions of s. 3 of the Defence of India Act, 1962, it would be seen that the provisions are identical except that certain more purposes have been added in sub-s. (1) of s. 3 of the Act. The preamble of sub-s. (2) of s. 2 of the Defence of India Act, 1939, is identical with the preamble of sub-s. (2) of s. 3 of the present Act. The Federal Court in Talpade's case in construing r. 26 which had been framed under s. 2(2) (x), observed (P. 68):-

...The Legislature having set out in plain and unambiguous language in paragraph (x) the scope of the rules which may be made providing for apprehension and detention in custody, it is not permissible to pray in aid the more general words in s. 2(1), in order to justify a rule which so plainly goes beyond the limits of paragraph (x); though if paragraph (x) were not in the Act at all,..... We are compelled therefore to hold that rule 26 in its present form goes beyond the rule-making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid.

The line of reasoning adopted by the Federal Court was not accepted by their Lordships. Dealing with the aforesaid view, their Lordships observed at page 258 of the report:

Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statements of the relative positions of sub-ss. 1 and 2 of s. 2 of the Defence of India Act, and Counsel for the respondents in the present appeal was unable to support that statement, or to maintain that r. 26 was invalid. In the opinion of their Lordships, the function of sub-s. 2 is merely an illustrative one; the rule-making power is conferred by sub-s. 1, and "the rules" which are referred to in the opening sentence of sub-s. 2 are the rules which are authorised by, and made under, sub-s. 1; the provisions of sub-s. 2 are not restrictive of sub-s. 1, as, indeed, is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-s. 1".

From the aforesaid observations of their Lordships, it is clear that their Lordships were considering the relative positions of sub-s. (1) and sub-s. (2) of s. 2 of the Defence of India Act, 1939, and the relative positions are that the rule making power is contained in sub-s. (1), and the clauses of sub-s. (2) are merely illustrative of that power. The illustrations given are not exhaustive and do not restrict the scope of sub-s. (1), but the position of the clauses is not anything more than mere illustrations of the power contained in sub-s. (1).

15. The next decision is Santosh Kumar Jain Vs. The State Union Of India (Intervener), . The provisions that were construed by their Lordships of the Supreme Court in this case are the orders made under sub-s. (2) of s. 3 of the Essential Supplies (Temporary Powers) Act, 1946. Sub-section (1) of s. 3 empowered the Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of an essential commodity, or for securing their equitable distribution and availability at fair prices, by notified order, to provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Sub-section (2) provided that "without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide...". It would be seen that sub-s. (2) of s. 3 of the Essential Supplies (Temporary Powers) Act is not in identical terms with sub-s. (2) of s. 3 of the Defence of India Act. There is a variation. The expression used in the Defence of India Act is "the rules", while the expression used in the Essential Supplies (Temporary Powers) Act is "an order made thereunder". Construing these provisions, Mr. Justice Patanjali Sastri, delivering the judgment of the Court, at page 310 of the report, observed:

It is manifest that sub-section (2) of section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is "an order made thereunder" that may provide for one or the other of the matters specifically enumerated in sub-section (2), which are only illustrative, as such enumeration is "without prejudice to the generality of the powers conferred by sub-section (1)". Seizure of an article being thus shown to fall within the purview of sub-section (1), it must be competent for the Central Government or its delegate, the Provincial Government, to make an order for seizure under that sub-section apart from and irrespective of the anticipated contravention of any other order as contemplated in clause (j) of sub-section (2)...

The view we have expressed above receives support from the decision of the Privy Council in Sibnath Banerjee's case.

It would be seen that though there is a slight variation in the language used in s. 2(2) of the Defence of India Act, 1939. and s. 3(2) of the Essential Supplies (Temporary Powers) Act, 1946 the principle governing both the decisions is the same, namely the relative position of the two sub-sections. On this aspect of the case, it is also necessary to refer to the decision of the Privy Council in Attorney-General for Canada v. Hallet & Carey Ltd. [1952] A.C. 427, a decision on which very strong reliance has been placed by Mr. Bhabha not only on this aspect, but

from other aspects of the case with which I am concerned. It would, therefore, be convenient to deal with this case in detail at this stage and then refer to the passages on which Mr. Bhabha has placed reliance in support of his argument on different aspects of this case. Facts giving rise to this decision in brief were : This case went to the Privy Council from Canada. During the last "War, the Canadian Legislature enacted ""War Measures Act". On the termination of the war, and emergency, it was found that it was necessary to continue certain provisions of the Emergency Act as well as to make certain other provisions for certain other purposes. The National Emergency Transitional Powers Act, 1945 was, therefore, enacted. Section 2(1) of the Act provided:

The Governor-in-Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purposes of... maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace.

In exercise of the aforesaid powers conferred by sub-s. (1) of s. 2, an Order-in-Council was made on April 3, 1947, which by cl. 22 provided that

all oats and barley in commercial positions in Canada with certain specified exceptions are hereby vested in the Canadian Wheat Board.

The respondent, who hold a large stock of barley, about 40,000 bushels, was affected by the order. The validity of this Order-in-Council was challenged by the respondent. One of the arguments was that Government was not empowered to expropriate wheat or barley under s. 2(1) of the Act. As against that the claim of Government was that expropriation was allowed under sub-s. (1) of s. 2 of the Act. The argument on behalf of the respondent was that expropriation was in terms allowed by a clause of sub-s. (2) of the War Measures Act. In express terms such power was not conferred by s. 2(1) on the Governor in Council by the National Emergency Transitional Powers Act. It had, therefore, been argued that the Governor had no such power. On the other hand, the argument advanced on behalf of the Government was that there was no curtailment of the Governor's powers under the National Emergency Transitional Powers Act. The powers were identical with the powers under the War Measures Act though the power exercisable under sub-s. (1) of s. 2 of the Transitional Powers Act was limited to certain other purposes only. It may be noticed that between sub-s. (1) of s. 3 of the War Measures Act and sub-s. (1) of s. 2, there was not much material difference except as to the purposes. The contentions raised on behalf of the respondent, which were based on the aforesaid difference in the two Acts--the War Measures Act and the National Emergency Transitional Powers Act--were not accepted by the Privy Council. Dealing with the relative position of sub-s. (2) and sub-s. (1) of s. 3 of the War Measures Act, their Lordships observed (pp.

448-449) :

...So to hold would threaten the very basis of the Act. Their Lordships think that there is not by now any room for doubt as to the function performed by the list of permitted subjects in section 3 of the War Measures Act. The form adopted is plainly borrowed from section 91 of the British North America Act, 1867. They do not extend the purposes already defined, for they are directed to explaining what can be done, not the object for which things may be done: they do not extend any more than they limit its powers, for all that they permit is already permitted by the general words that precede them.... What they do is to state explicitly certain things that are to be treated as falling within the range of the general powers already conferred. In that sense alone they extend, because they amplify, those powers.

Mr. Bhabha has laid emphasis on the clauses "what can be done", "are to be treated as falling within the range", "they extend, because they amplify those powers", and it is his argument that this decision is an authority for the proposition that sub-s. (2) of s. 3 of the Act confers independent and additional power on the Central Government. In my opinion, the argument is not well founded. It is true that the clauses on which emphasis has been laid by Mr. Bhabha, if read in isolation of its context, may give an impression that sub-s. (2) confers power to make rules on the subjects mentioned in its clauses in addition to and independently of the provisions of sub-s. (1). But reading those clauses in isolation would not be a permissible way. All the connected observations have to be read as a whole and when so read, it is abundantly clear that sub-s. (2) does not confer any independent rule-making power, but only amplifies or illustrates what is contained in sub-s. (1). In these observations, their Lordships have pointed out that the function performed by the list of permitted subjects is not to extend the purpose already defined sub-s. (1). They are only directed to explaining what can be done in exercise of power under sub-s. (1). The rule making power on the subjects mentioned in sub-s. (2) has to be exercised only when it is required for securing the purposes mentioned in sub-s. (1). Their Lordships pointed out:

They do not extend the purposes already defined, for they are directed to explaining what can be done, and not the object for which things may be done: they do not extend any more than they limit its powers.

It is in the context of this statement of law that the other observations of their Lordships have to be understood.

16. Mr. Bhabha also has referred us to a passage from the judgment of the Supreme Court in *Makhan Singh v. State of Punjab* [1964] AIR S.C. 381. The observations on which he placed reliance are contained in para. 38 of their Lordships' judgment (p. 401):--

...In the present cases, one has merely to read section 3(1) and the detailed provisions contained in the several clauses of section 3(2) to be satisfied that the

attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority that it would be idle to contend that the Act has delegated essentially legislative function to the rule-making authority.

Now these observations have been made in repelling the contention that s. 3 of the Act, with which I am here concerned, suffered from the vice of excessive delegation of legislative powers. These observations, in my opinion, do not assist the contention of Mr. Bhabha that an additional or independent rule making power has been conferred by sub-s. (2) of s. 3 of the Act. These are all the authorities to which counsel for the parties have drawn our attention. In my opinion, therefore, no additional or independent rule making authority or power has been conferred on the Central Government in any of the clauses of sub-s. (2) of s. 3 of the Act. It, therefore, follows that the limitation imposed in sub-s. (1) of s. 3 would equally be applicable to and govern the rule making power of the Central Government relating to the subjects mentioned in cls. 1 to 57 of sub-s. (2) of s. 3 of the Act. In other words, the power of the Central Government to make rules on any of those subjects is exercisable only for securing the purposes authorised by sub-s. (1) of s. 3, in the event the Central Government forms an opinion that it was necessary or expedient for it to do so. A challenge to the validity of the rules made under any of the clauses of sub-s. (2) or under sub-s. (1) on either or both these grounds would, in my opinion, therefore, be a justiciable issue.

17. I would, however, assume that sub-s. (2) confers an independent and additional rule making power on the Central Government and proceed to examine whether the Gold Control Rules fall either under cl. (23) or (33) of sub-s. (2) of s. 3 of the Act. I have already reproduced these clauses. The argument of Mr. Bhabha relating to cl. (23) is that this clause authorises the Central Government to control trade or industry in respect of the articles or things of any description. The expression "articles or things of any description" is wide enough to include gold; Gold Control Rules have been made for the control of trade in gold; these rules, therefore, fairly fall under cl. (23) of sub-s. (2) of s. 3 of the Act. It is indeed true that cl. (23) permits the Central Government to make rules to control trade or industry in respect of articles or things of any description but on that power, the clause itself has placed certain limitations. The limitation is that the rules could be made only for the purposes of regulating or increasing the supply of such articles which may be used in connection with the conduct of military operations or civil defence or for maintaining the supplies or services essential to the life of the community. The rule making power conferred under this clause is to enable the Government to obtain an adequate supply of articles required for securing the aforesaid purposes. I have already stated that the effect of the rule is that for all practical purposes dealings in gold of a purity in excess of 14 carats have been brought to a stand still. New ornaments of gold of

purity in excess of 14 carats is prohibited save and except converting old ornaments into new ones. In the circumstances, I fail to see how these rules could be said to be made for the purposes of "regulating or increasing supply of gold." In fact, it is the case of the respondents in their return that the object of the rules is to stop smuggling of gold. If that be so, I again fail to see how it could be said that gold is an article which is required in connection with the conduct of military operations or civil defence or for maintaining supplies and services essential to the life of the community. I may also further state that in the return, it is nowhere stated that the rules made either fall under cl. (23) of sub-s. (2) of s. 3 of the Act, or that the rules have been framed in exercise of the powers conferred by the said clause. In my opinion, therefore, the rules do not fall under the said cl. (23).

18. Turning to cl. (33), which confers power on the Central Government to make rules for controlling the possession, use or disposal of, or dealing in, certain articles including bullion, it is the contention of Mr. Bhabha that the word "bullion" is wide enough to cover gold ornaments and articles of gold, which is the subject-matter of Gold Control Rules. On the other hand, Mr. Mehta contends that the word "bullion" is not wide enough to include ornaments or articles of gold. The word only means mass of gold. The first question, therefore, that arises is what meaning is attributable to the word "bullion". Counsel for both the sides have referred us to the ordinary meaning of the expression "bullion" as contained in various dictionaries. Mr. Bhabha referred us to the meaning of "bullion" as given by Jowitt in the Dictionary of English Law, Webster's Dictionary, and in the new Encyclopedia Britannica, Vol. 4. Mr. Mehta, on the other hand, referred us to the meaning of the expression in Murray's Dictionary. Jowitt defines "bullion" as

uncoined gold and silver in the mass. These metals are called so, either when smelted from the native ore and not perfectly refined, or when they are perfectly refined, but melted down into bars or ingots, or into any unwrought body, of any degree of fineness.

Webster defines bullion as

gold or silver considered merely as so much metal without regard to any value imparted to it by its form... uncoined gold or silver in the shape of bars, ingots, or comparable masses; an ornamental metal boss used on harness, jewellery, or other objects.

In the Encyclopedia, the meaning given is:

the name given to gold and silver considered solely as merchandise. When coin and specie are treated as bullion it is their weight and fineness which are reckoned, not their face value. Bullion thus means the gold and silver of the mines brought to a standard of purity.

Murray gives the meaning as

Precious metal in the mass. Gold or silver in the lump, as distinguished from coin or manufactured articles; also applied to coined or manufactured gold or silver when considered simply with reference to its value as raw material.

It would be seen that in these books, "bullion" has been described as mass of gold, not converted into any articles or ornaments. It would be clear that the rules which regulate the preparation of ornaments and also regulate the borrowing of money on the hypothecation of gold or gold ornaments, can hardly be said to be falling under cl. (33) of sub-s. (2) of s. 3 of the Act. It is, however, the argument of Mr. Bhabha that cl. (33) empowers the Central Government to make rules controlling possession, use or disposal or dealing in bullion. It would necessarily follow that the Central Government would also have implied powers to make rules in order to enable it to exercise power which is conferred on it. According to Mr. Bhabha, rules relating to controlling possession, use or disposal or dealing in ornaments as well as dealings in ornaments and gold by hypothecation would fall within the exercise of this implied power. Now, the principle of implied power is well-settled and the principle is that they are such powers without the exercise of which the power expressly conferred cannot be exercised. The power expressly conferred is of "controlling the possession, use or disposal of or dealing in... bullion." It has to be shown that for the exercise of this power it was absolutely essential or necessary to control the possession, use or disposal of or dealing in ornaments. We do not find anything stated in the affidavit of the respondents showing how the exercise of the claimed implied power was necessary for the exercise of the power expressly granted under cl. (33) of sub-s. (2) of s. 3 of the Act. In absence of any material placed before us, it is difficult to accept this contention of Mr. Bhabha. In *Bidi Leaves etc. Assoc. v. The State*, (1961) 64 Bom. L.R. 375, s.c. [1962] AIR S.C. 486. their Lordships of the Supreme Court after considering certain authorities, and after citing the observations of Pollock relating to the doctrine of implied power, observed (p. 384):--

...In other words, the doctrine of implied power can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead letter and cannot be enforced unless subsidiary power is implied.

It has not been made out either in the affidavit filed by the respondents or in the course of the arguments that such a position exists, nor has it been shown that it was impossible for the Central Government to exercise the power under the said cl. (33) of sub-s. (2) of s. 3 without making rules relating to preparation of

ornaments or hypothecation of ornaments. I, therefore, find it difficult to accept this aspect of the argument of Mr. Bhabha. Mr. Bhabha has also referred us to the definitions of "bullion" and "gold" given in the different Acts, viz., the Foreign Exchange Regulation Act, the Reserve Bank of India Act, Public Debts Act. I do not consider it necessary to deal in detail with these; definitions as, in my opinion, these definitions can hardly be of any useful assistance in construing the meaning of the word "bullion" in cl. (33). I may also state that in the notification bringing in force the Gold Control Rules, it has not. been mentioned that the rules have been made in exercise of the power conferred on the Central Government under s. 3(2) (33). On the other hand, it has been stated that the rules have been framed in exercise of the powers under s. 3. It is true that the omission to mention that the rules have been made under s. 3(2) (33) would not be fatal to the argument advanced by Mr. Bhabha, if it could have been shown that the rules made were referable to the said clause. I have already stated that, in my opinion, the rules framed do not squarely fall under the said cl. (33).

19. This brings me to the consideration of the question whether the rules framed fall within sub-s. (1) of s. 3 of the Act. It is, therefore, necessary to see whether the rules have been made for securing any one or more of the authorised purposes mentioned in sub-s. (1), and it has also to be ascertained whether opinion has been formed by the Government that it was necessary or expedient for securing the authorised purposes. As regards the first aspect, there has been considerable arguments at the bar. On the question as to what should be the nature of the connection between the object sought to be achieved by the rules and the purposes mentioned in sub-s. (1) of s. 3 of the Act, the contention of Mr. Mehta had been that the connection must be real and proximate and not hypothetical and remote. On the other hand, the contention of Mr. Bhabha had been that if it is shown that the objects sought to be achieved by the rules are capable of being related to the purposes mentioned in sub-s. (1) of s. 3, that is sufficient for the purposes of sustaining the rules. A number of authorities have been cited by counsel on both the sides. It has been the argument of Mr. Mehta that the connection between the objects sought to be achieved by these rules and the purposes is too remote. Rules have been made with the object of changing the habits of the people of India of making gold ornaments or hoarding gold. It is expected that if these habits are changed, then the demand for gold would be reduced. If the demand for gold is reduced, prices of gold would fall, and if prices of gold fall, smuggling will be reduced. If smuggling is reduced, more foreign exchange would be available to the Central Government. According to Mr. Mehta, the connection between the object of the rules and the securing of the purposes is very remote and problematic. It has also been the argument of Mr. Mehta that by these rules smuggling will never stop; people will never cease to buy or prepare gold ornaments. Counsel for parties have cited considerable number of authorities in support of their respective contentions, and it would be convenient at this stage, in my view, to refer to these authorities.

20. Mr. Mehta has referred me to the decisions reported in *Rex v. Basudeva* AIR

[1950] F.C. 67.; The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia, .; Azim Khan v. Emperor [1945] AIR Lah.; 154. AIR 1943 41 (Lahore) .; Chester v. Bateson [1920] 1 K.B. 829; and Attorney-General v. De Keyser's Royal Hotel [1920] A.C. 508.

21. Mr. Bhabha has referred me to certain observations in the decision in Attorney General for Canada v. Hallet & Carey Ltd., and Ross-Clunis v. Papadopoulos [1958] 1 W.L.R. 546.

22. Rex v. Basudeva: Respondent, Basudeva, was a dealer in kerosene oil, which was an essential commodity as defined in the U.P. Prevention of Black-Marketing (Temporary Powers) Act. On the allegation that the Provincial Government was satisfied that the respondent habitually indulged in black marketing, he was arrested and ordered to be detained in exercise of the power conferred by s. 3(1) (i) of the Act. The contention raised on behalf of Basudeva was that his detention was unlawful as the provisions were void and inoperative as being ultra vires of the Provincial Legislature. The claim made on behalf of the Provincial Government was that the Legislature was competent to enact an Act in exercise of its legislative power conferred on it by Entry I, List II, Schedule VII of the Government of India Act, 1935, read together with s. 100 of the Act. The entry read: "Preventive detention for reasons connected with the maintenance of public order". The question that arose before their Lordships was whether the preventive detention provided in s. 3 (1)(i) was the preventive detention for reasons connected with maintenance of public order. In other words, the question was whether the preventive detention on the ground of habitual indulgence in black-marketing was a preventive detention connected with the maintenance of public order. The contention raised on behalf of the Government had not been accepted by the Courts below. The matter was, therefore, taken to the Federal Court at the instance of the Government. The Advocate General appearing for the Government contended before the Federal Court that habitual black marketing in essential commodity was bound sooner or later to cause dislocation of the machinery of control and distribution, which in turn might lead to breach of peace, and that, therefore, detention with a view to prevent such black marketing was covered by the entry. This argument was repelled by their Lordships. Mr. Justice Patanjali Sastri, as he then was, delivering the judgment of the Court, observed (p. 68):

...It is true that black-marketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated food stuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry 1 of List II... The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical.

23. The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia: The decision in Basudeva's case has been approved by their Lordships of the

Supreme Court in Lohia's case. The question that arose there related to the validity of s. 3 of the U.P. Special Powers Act, 1932. That section provided:

Whoever, by word, either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250, or with both.

R.M. Lohia was prosecuted under this section for delivering certain, speeches instigating cultivators not to pay enhanced irrigation rates to the Government. He applied to the High Court for a writ of habeas corpus, inter alia, on the ground that the said section was inconsistent with art. 19(1)(a) of the Constitution, which conferred on the citizen a fundamental right of freedom of speech. The claim made on behalf of the State was that the restriction imposed fell within the permissible limits stated in cl. (2) of art. 19 of the Constitution. Clause (2) of art. 19 empowered the Legislature to impose reasonable restrictions on the exercise of the fundamental right of freedom of speech in the interest of security of the State, friendly relations with foreign States, public order, decency, morality, or in relation to contempt of Court, defamation or incitement to an offence. The claim made on behalf of the State was that the restrictions imposed were in the interest of public order. The contention was negated by the High Court and the matter went to the Supreme Court at the instance of the State Government. Their Lordships dismissed the appeal of the State, and it was held that in order to sustain the Act claiming to impose restrictions, under cl. (2) of art. 19, it is necessary to establish that the connection between the Act and the public order sought to be maintained by the Act, is intimate. Their Lordships apart from the aforesaid conclusion further considered another limitation contained in the clause itself, viz. that the restriction must be reasonable. At page 835 of the report, their Lordships observed:

...The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause.

Their Lordships also cited with approval the aforesaid decision in Basudeva's case, and observed that the decision contained some observations which gave considerable assistance in construction of the words.

24. The decision in Azim Khan v. Emperor does not relate to the consideration of the question of validity of the legislation in relation to its legislative powers, but, on the other hand, only deals with the question as to whether a particular act fell

within the provisions of the Act. In other words, the question considered was whether the particular conduct on the part of the person constituted an offence within the meaning of the Act. It is, therefore, not necessary to consider this case.

25. Similar also is the case in *Lahore E. S. Co. v. Punjab Province*, which relates to the validity of an administrative act done in exercise of the power conferred on the Government under the statute.

26. The question that arose in *Chester v. Bateson*, related to the validity of Regulation No. 2A(2) of the Defence of the Realm Regulations. That regulation provided that

No person shall, without the consent of the Minister of Munitions take... any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house in which a munition worker is living, and which is situate in an area declared by order of the Minister of Munitions to be a "special area".

The said regulation was framed in exercise of the power conferred on the Government by sub-s. (1) of s. 1 of the Defence of the Realm Consolidation Act, 1914, and on behalf of the executive Government it was claimed that the regulation was valid because it had been framed for securing public safety and defence of the Realm, and sub-s. (1) of s. 1 of the Defence of the Realm Consolidation Act, 1914, empowered His Majesty in Council to issue regulations for securing this purpose. It was held that the regulation was ultra vires of the regulation making power conferred on His Majesty in Council by sub-s. (1) of s. 1 of the Act. The question posed by *Darling J.* has been expressed in following terms (p. 833):

...and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it.

And it was held that it cannot be said to be a reasonable way of aiding in securing the public safety and the defence of the realm. Similar view also has been taken by the other Judges.

27. The question considered in *Attorney-General v. De Keyser's Royal Hotel* related to the validity of the regulation 2 of the Defence of the Realm Regulations, issued under the Defence of the Realm Consolidation Act, 1914. Certain piece of land was sought to be acquired without paying any compensation in the manner provided by an earlier Act. The question arose related to the validity of the power claimed under the regulation. As already stated, the regulation was issued in exercise of the power conferred on His Majesty in Council under the Defence of the Realm Consolidation Act, which enabled His Majesty in Council to make regulations inter alia for the safety of the

realm. It was held that the claim made for acquisition of property without payment of compensation under the regulation was invalid inasmuch as though taking of the property may be necessary for the defence of the realm, non-payment of compensation was not. These are all the cases which have been referred to by Mr. Mehta.

28. Turning to the decisions on which reliance has been placed by Mr. Bhabha, I have already referred to the facts in the Attorney-General v. Hallet & Carey Ltd. The observations on which reliance has been placed by Mr. Bhabha are at page 450. They are:

...That does not allow him (Governor in Council) to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way.

I may as well reproduce the sentence immediately following the observations on which Mr. Bhabha has placed reliance:

But then, expropriation is altogether capable of being so related.

These observations were made in considering the arguments advanced on the basis of the general principle that the statutes which encroached upon the right of the subject, whether as regards person or property, are subject to the strict construction. Their Lordships explained that the general principle means no more than that where the import of some enactment is inclusive or ambiguous, the Court may properly lean in favour of the interpretation that leaves private rights undisturbed. But this principle would have no application when a statute in express terms permits interference with those rights. It appears that an argument was advanced that Parliament had chosen to say explicitly that the Governor-in-Council shall do "whatever things he may deem necessary or advisable". The expropriation, therefore, was within the powers of the Governor. The claim so broadly made was not accepted by their Lordships, and it was pointed out that that does not mean that the statute allowed the Governor-in-Council to do whatever he may be inclined, but, on the other hand, what he does must be capable of being related to one of the prescribed purposes. Their Lordships then examined the provisions relating to expropriation and came to the conclusion that expropriation was altogether capable of being related to the prescribed purposes. It would thus be seen that even on this authority, on which reliance has been placed by Mr. Bhabha, it is open to the Court to see whether there is a connection between the impugned rules and the prescribed purposes for securing which the rule making power has been conferred on the Central Government. The argument of Mr. Bhabha, however, is that the nature of connection which need be established is not "proximate" or "real" one, but it is sufficient to show that the rules made are "capable of being related" in some manner with the prescribed purposes.

29. The other decision, on which reliance has been placed, *Ross-Clunis v. Papadopoulos*, related to the validity of Regulation No. 3 made under sub-s. (1)

of s. 3 of the Emergency Powers Order in Council, 1939, which empowered the Governor to make regulations as appeared to him to be necessary or expedient for securing public safety, maintenance of public order, etc. Regulation No. 3 empowered the Commissioner with the approval of the Governor to order that a fine be levied collectively on the assessable inhabitants of the area in circumstances mentioned in the said regulation No. 3. The circumstances mentioned were:

where the Commissioner has reason to believe that all or any of the inhabitants of the certain area have... failed to take reasonable steps to prevent the commission of the offence; or to render all the assistance in their power to discover the offender or offenders.

Offence had been defined in the Regulation as

an offence, commission of which were prejudicial to the internal security of the colony or maintenance of public order in the colony.

The Commissioner with the previous approval of the Governor had imposed a collective fine on the inhabitants in certain area on being satisfied that in his opinion offences were committed by the inhabitants of a particular area commission of which was prejudicial to the internal security of the colony. The question arose about the validity of this order. It may be noticed that the power conferred to make those orders was for securing the public safety or maintenance of the public order. Their Lordships held the regulation authorising imposing of collective fine to be a valid regulation. Their Lordships after quoting the observations in *Attorney General for Canada v. Hallet & Carey Ltd.* (which we have also reproduced) have held:

In Their Lordships' opinion, Regulation 3 is clearly related to the purposes prescribed in s. 6(1) of the Order-in-Council. There can be no doubt as to the purpose of imposing a collective fine in a case where crimes have been committed in a particular area, and some or all of the inhabitants of the area have failed to take reasonable steps to prevent the commission of the offence.

It would again be seen that here also the Privy Council has considered whether the regulation made by the Commissioner in exercise of the power conferred by s. 6 was related to the purposes prescribed in s. 6, and they came to the conclusion that the regulation clearly related to the purposes mentioned in s. 6.

30. Considering all these authorities together, one thing is clear that when validity of an act, rule, regulation or order made by an executive authority, to which the power has been delegated by the legislation, is challenged, then, it is open to the Court to see whether the act done by the delegated authority has any connection with securing or realization of the purposes for which the power has been conferred on the delegated authority. The question next arises is as to what is the degree or nature of connection that is required to be established in the instant case. *Basudeva's* case has expressed the connection to be "real and

proximate and not far-fetched or problematical". The Supreme Court in Lohia's case has recorded its approval of the view taken in Basudeva's case. The test is laid down at page 836 of the report:

...The decision (in Basudeva's case), in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

Their Lordships of the Privy Council in the two appeals--one from Canada and the other from Cyprus--have, in the context of the provisions it was considering, characterised the connection as "capable of being related to the authorised purposes".

31. The question to be considered is which of these two tests would be the appropriate one. And that, in its turn, raises a question whether there is any difference in principle in the tests laid down by the Federal Court and the Supreme Court on the one hand and the Privy Council on the other. The other question that arises is whether the tests laid down in these different decisions are tests of general application. In my opinion, there is some difference in one of the positive tests laid down by the Federal Court and approved by the Supreme Court on one hand, and that by the Privy Council on the other. For a thing to be capable of being related to another, the relation need not necessarily be proximate. A reasonable nexus or connection between the two would be sufficient to show that one is capable of being related to another. That which serves to promote a particular purpose can be said to be capable of being related to that purpose; and that is the test laid down by the Privy Council. Mr. Mehta, however, contends that there may be some difference in the tests laid down by the Supreme Court and the Federal Court on one hand and the Privy Council on the other, but the test which ought to govern the decision of this case is the test laid down by the Federal Court and the Supreme Court. That would indeed have been the position had I come to the conclusion that the tests laid down in those cases were of general application. But I find it difficult to take such a view. In my view, the tests laid down are in the context of the contents of the relevant legislative power which their Lordships were considering in each case. The legislative power in the context of which the Federal Court has laid down the test is one contained in Entry No. I, of List II of Schedule VII, read with s. 100 of the Government of India Act, 1935, and that entry among other things related to "preventive detention for reasons connected with maintenance of public order". Their Lordships were considering the connection that is required to be established between the preventive detention and the maintenance of public order. It would be noticed that there was no latitude in the matter left to the Legislature, and it is in this context that the test has been laid down. Similarly, the test laid down by the Supreme Court in Lohia's case was in the context of the legislative power conferred by cl. (2) of art. 19 to restrict exercise of certain

fundamental rights conferred on the citizen under that article. The clause considered by their Lordships was "reasonable restriction on the exercise of right in the interest of... public order", and it is in this context that the test has been laid down. It would be seen that there is also no latitude left to the Legislature for exercise of this power. In the context of the legislative power it is not sufficient to show that legislative authority has thought it necessary to impose those restrictions in the interest of public order, but it has to be established that it is necessary to impose those restrictions in the interest of public order. The test laid down by the Privy Council is in the context of the legislative power contained in sub-s. (1) of s. 2 of the National Emergency Transitional Powers Act, 1945. The power conferred is in following terms:

The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may by reason of the continued existence of the national emergency arising out of the war with Germany and Japan, deem necessary or advisable for the purpose of...

It is in the context of exercise of this power that the test has been laid down by the Privy Council in both these cases. It would be seen that the ambit of the power conferred is wider leaving considerable latitude to the Governor-in-Council. The context in which we have to consider the scope and ambit of the legislative power in this case is contained in s. 3(1) of the Act. The power is similar to the one contained in sub-s. (1) of s. 2 of the aforesaid National Emergency Transitional Powers Act. It in express terms authorises the Central Government to make such rules as appear to it necessary or expedient for securing the aforesaid six authorised purposes. That being the position, in my opinion, the aforesaid test laid down by the Privy Council would be the apposite test, and not the test laid down by the Federal Court and the Supreme Court. The other positive test which has been laid down by the Federal Court and approved by the Supreme Court is that the connection must be real. There is hardly any difference in respect of this aspect of the test. A connection which is not a real connection can hardly be said to be one which is capable of being related. Similar also would be the position in relation to the negative test, which has been laid down by the Federal Court and the Supreme Court. A connection which is far-fetched, problematical or hypothetical or too remote also can hardly be said to be one capable of being related. Thus, the connection that is required to be established between the rules framed and the purposes prescribed under s. 3(1) of the Defence of India Act, must be one which is real and not far-fetched, problematical, hypothetical or too remote. It need not necessarily be proximate. In my opinion, therefore, Rules which would, if observed, serve to promote one or more of the purposes mentioned in sub-s. (1) of s. 3 of the Act would be within the rule making power conferred on the Central Government thereunder.

32. The question which next arises is whether any such connection has been established between the object sought to be achieved by the rules framed and the purposes authorised in sub-s. (1) of s. 3 of the Act. I have already stated

that it has been the respondents' case in the return that the rules were framed with a view to put restrictions on smuggling and on the use of gold already smuggled into India. According to the respondents, smuggling of gold was causing a drain on the foreign exchange, and preventing smuggling would result in increasing the foreign exchange reserves of the Central Government, which was very necessary for the purposes of defence of India as well as maintenance of supplies and civil services essential to the life of the community. According to the respondents, the rules serve the purpose of conservation of foreign exchange. It is the argument of Mr. Mehta that the rules *ex facie* nowhere say that they have been framed to secure the aforesaid purposes. There is no preamble to the rules stating that it has appeared to the Central Government necessary or expedient to frame these rules for the aforesaid purposes. According to Mr. Mehta, the case now put forward is not the correct position, and the real purpose for which these rules have been framed is to effect a socioeconomic reform. The rules have been framed for the purpose of curing the alleged habits of the people of India of using gold ornaments and hoarding gold. Mr. Mehta in support of his contention has invited my attention to the speeches of the then Finance Minister in the Lok Sabha made on March 6, 1963, when the Gold Control Rules were being discussed in the Parliament. He also invited our attention to the statement made by the Finance Minister in Parliament on September 21, 1963, on Gold Control. He also invited our attention to the speech made by Mr. Bhagat, Minister for Planning, in the Parliament on June 4, 1964, at the time of introduction of the Gold Control Bill, and the statement of objects and reasons. He also invited our attention to cl. (2) of Rule 126-J. Mr. Bhabha, on the other hand, referred us to Finance Minister's broadcast made on the eve of promulgating these rules on January 9, 1963. A copy of the broadcast has been annexed to the return as exh. 4 filed by the respondents in Special Civil Application No. 830 of 1963, in which also challenge to the Gold Control Rules has been raised. In the return filed in this case, in para. 14, the respondents have placed reliance on this broadcast in support of their case. Mr. Bhabha argued that the only relevant material to which I can refer is the aforesaid broadcast and the other pieces of evidence or the documents to which Mr. Mehta referred are not relevant and, therefore, inadmissible.

33. It is indeed true that there is no preamble to these rules indicating that the Central Government has framed these rules because it was of the opinion that it was necessary or expedient to frame them for securing the aforesaid purposes. It is also true that reading the rules by themselves, it does not become clear that the rules are directed for the purposes of arresting or restricting smuggling of gold. It would, therefore, be necessary to refer to certain other material in order to appreciate the case put forward by the respondents. I would state the case put forward by the respondents in brief: The import of gold into India has been stopped from the year 1939. There is very little production of gold in India. Gold available in the internal markets in India is gold which has been brought from countries other than India. People of India have the habit of preparing ornaments

and articles of gold as well as of hoarding gold. The prices of gold in India are, therefore, necessarily very high and lucrative as compared with prices of gold in other countries, and that is an incentive and inducement to people to smuggle gold. If gold is to be made available to people in sufficient quantity at prices prevailing in other countries to meet the demands, the Central Government would have to expend about 50 to 60 crores of rupees per year. That would result in expending foreign exchange to that extent for the purchase of gold. The various legislations made have not been sufficiently effective to check smuggling of gold. Smuggling of gold is adversely affecting to a great extent India's foreign exchange reserves. For arresting these mischief's, it was necessary to control the internal market and business in gold for the purpose of conservation of foreign exchange which was very essential in the times of emergency, for the defence of India as well for maintenance of essential commodities and services, and it is for this reason and to achieve these objects that the Gold Control Rules have been promulgated. In other words, the said rules which, inter alia, drastically restrict dealings in gold have been framed to arrest the root cause that has made gold smuggling such a lucrative business and thereby conserve foreign exchange which is so essential for the defence of India. It has been well settled that the circumstances in which an enactment has been passed is a relevant circumstance from which assistance could be sought by Court. At page 119 (Fifth ed.) Craies on Statute Law, four circumstances, from which a Court can legitimately seek assistance, have been stated:

- (1) What was the Common Law before the making of the Act?
- (2) What was the mischief and defect for which the Common Law did not provide?
- (3) What remedy the Parliament hath resolved and appointed to cure the disease of the Common Law; and
- (4) The true reason of the remedy.

It is clear that it is permissible for the Court to ascertain the conditions prevailing which caused the mischief to cure which the enactment was directed. The conditions prevailing relating to smuggling of gold have been noticed by their Lordships of the Supreme Court in considering the vires of s. 178-A of the Sea Customs Act. Their Lordships referred to the factual position prevailing at the time of the amendment of that section, and for that purpose, reproduced the following passage from the Taxation Enquiry Commission's Report 1953-54, which pointed out the factual position relating to existence of wide-spread smuggling in certain commodities including gold. The position has been so stated *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, :--

Smuggling now constitutes not only a loophole for escaping duties but also a threat to the effective fulfillment of the objectives of foreign trade control. The existence of foreign pockets in the country accentuates the danger. The extent of the leakage of revenue that takes place through this process cannot be estimated even roughly, but, we understand, it is not unlikely that it is

substantial. Apart from its deleterious effect on legitimate trade, it also entails the outlay of an appreciable amount of public funds on patrol vessels along the sea coast and permanent works along the land border, and watch and ward staff on a generous scale. It is, therefore, necessary, in our opinion, that stringent measures, both legal and administrative, should be adopted with a view to minimising the scope of this evil.

After reproducing the aforesaid passage, their Lordships concurring with the opinion expressed by the Enquiry Commission, observed: "The deleterious effects of smuggling as pointed out in the extract from the Report, are real..." The position prevailing has also been similarly described in detail by Mr. Justice M.G. Abrol and Another Vs. Amichand Vallamji and Others, . Now, gold is such a commodity that it is easy to smuggle and pass it on in the internal market in the country. The original identity of the smuggled gold can easily be effaced; when it comes into the internal market, it passes on as genuine gold; it is not possible for bona fide honest customers to ascertain or find out that it is smuggled gold. This facility and the high prices prevailing in India is a great inducement to people to smuggle gold into India. It can hardly be disputed that the problem is a vast and real one. As pointed out by the Supreme Court, it has a deleterious effect on the national economy, adversely affecting India's position relating to foreign exchange. It is not in dispute that these circumstances were prevailing at the time of declaration of emergency. The question is, is it to remedy this mischief that these rules have been framed?

34. And this brings me to the admissibility of the different pieces of material on which reliance has been placed by counsel. A Division Bench of this Court in Pukhraj Champalal Jain Vs. D.R. Kohli, . has held that

speech made in Parliament by the sponsor of a Bill may be referred to by the Court for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce it and the extent and urgency of the evil which he sought to remedy.

The speech of the Minister of Industry was also referred to by Mr. Justice Fazl Ali in Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, . From the observations of Bhagwati J. at page 1237 in A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another, . it is clear that such a course is permissible for the limited purpose of ascertaining the condition prevailing at the time which necessitated the making of the law. I am here concerned with the rules promulgated by the Central Government. Necessarily, therefore, there is no speech by the sponsor in the Parliament at the time of introduction as such, but the broadcast of the Finance Minister on the eve of the promulgation of these rules can as well be equated with the speech of the sponsor at the introduction of the Bill, explaining the position prevailing which necessitated the Bill. Similar would also be the case of the speech made by the Finance Minister on March 6, 1963. Section 41 of the Defence of India Act requires rules made by the Central Government under the Act to be laid on the table of the Parliament. These rules

have been so laid before the Parliament on February 20, 1963, and were discussed in Parliament on March 5 and 6, 1963. The Finance Minister made a speech in the debate on March 6, 1963, giving his reasons for this measure. This speech, in my opinion, would also have relevance to the explaining of the prevailing situation and the reasons that actuated the promulgation of these rules. As regards the other materials, to which our attention was drawn by Mr. Mehta, the material is not relevant and it would not be permissible to refer to it. The statement made by the Finance Minister on September 21, 1963, is not for the purpose of giving reasons for framing rules, but is a statement on the working of the scheme of gold control. That hardly, in my opinion, has any relevance for the purpose of understanding the situation at the time of the bringing these rules into force. Similar also is the position of the objects and reasons of the Gold Control Bill and the speech of Mr. Bhagat. In my opinion, the only material on which reliance could be placed is the broadcast of the Finance Minister made on January 9, 1963, and the speech of March 6, 1963. The very opening sentence in the broadcast indicates that the reason for promulgation of these rules is to arrest smuggling which is costing large sums for foreign exchange to India which are so urgently needed for the defence and development of India. This is what the Finance Minister stated in the opening paragraph:

Early in November, I spoke to you at some length on the subject of gold. On that occasion I tried to explain how the habit of buying gold in our country has led to extensive smuggling of gold from abroad in recent years. This smuggling has cost us large sums in foreign exchange which we need so urgently for our defence and development.

It was in this context that I announced that the Government proposed to take measures in the near future to reduce smuggling and to bring about a progressive reduction in the demand for gold. These measures have now been finalised and will be brought into force tomorrow in the form of Gold Control Rules under the Defence of India Act; and it is about these measures that I wish to speak to you tonight.

The Finance Minister has then in his broadcast explained the position which had brought into existence this evil, and had shown how it has affected the economy of India and having deleterious effect on the economy of India. He also appealed that people should give up their attachment to gold. In his appeal he says:

It is my earnest hope that every teacher in the country, every social worker and leader of public opinion would make it his or her business to explain to the young and the old, the rich and the poor what the attachment to gold and gold ornaments means in terms of the strain it puts on the resources we need for defence and development. Let all young boys and girls growing up in the country be made to realise that they can help build a safe and prosperous India by insisting that no gold be bought at the time of their marriages.

In his broadcast, the Finance Minister has also brought to the notice of the nation the magnitude on the drain of the country's resources which smuggling has caused. The broadcast hardly leaves any doubt that the rules have been brought into force with a view to arrest smuggling, and thereby saving foreign exchange which was so essential for the purposes of defence as well as development. In his speech made on March 6, 1963, for the purpose of expressing his views and the reasons for bringing into force these Gold Control Rules, the Finance Minister has again pointed out why he has brought into force these rules. This is what he says:

Let us examine why this has been done. That is a question which has been asked of me. It is primarily brought in to remove smuggling of gold which is hitting this country economically in a very bad way and for several years past, and it is growing. As prosperity grows, the lure for gold increases, and more and more gold goes and it is being smuggled and more and more foreign exchange is getting lost.

The Finance Minister then again in his speech explained the problems in detail, and has observed:

Therefore this measure has been brought to remove this foreign exchange drain and that can be done only if the lure of gold disappears. If the lure of gold remains, it can go on happening.

Reading the broadcast and the speech as a whole, I have little doubt that the primary reason why these rules which control the internal market have been framed is for the purpose of arresting smuggling which has been costing a heavy drain on the foreign exchange, which at this particular time of emergency was required for the purpose of defence of India. Laying emphasis on certain paragraphs of the speech, Mr. Mehta argued that that is not the real reason, but the real reason is to bring about a social reform. He referred to the following passage from the speech at column 2636:

We are at a very critical stage in our country when we have to defend our freedom, when we have to defend our integrity. I do not say that if I get all the gold, I will defend my country better than without that. Even if I do not get any gold, I will certainly defend my country and with success. That is not the stake at issue. What is at issue is to prevent the drain on the economic life of this country through the drain of foreign exchange and the senseless sinking of all surpluses and saving into gold which remains locked up in their houses.

Laying emphasis on this part of the speech, Mr. Mehta argues that the Finance Minister has clearly admitted that he does not require gold for defence. It is purely an economical measure. In my opinion, reading this passage in isolation would not be a permissible procedure for understanding what really actuated the Central Government to bring into force these rules. I have already pointed out the passages which clearly indicate that the reason for bringing into force these rules was to arrest smuggling with a view to secure foreign exchange for the

purpose of defence as well as development. It is indeed true that in this passage the Finance Minister says that he does not want gold for the defence of India. But it must be understood that this speech was in reply to the debate, and one of the responsibilities of the Finance Minister was to keep the morale of the country high in times of emergency. The speech has to be read as a whole for the purpose of understanding the real reason for the promulgation of these rules. Mr. Mehta also referred us to certain other passages which refer to the habit of people purchasing gold and sinking their moneys in purchase of gold affecting production. He also referred us to certain paragraphs of the Finance Minister's speech where he has referred to the abolition of Sati, abolition of the evil custom of debarring daughters from inheriting their father's property, introduction of the law of monogamy and divorce, and has argued that by introducing these rules, the Finance Minister has also aimed at a similar social reform of breaking the people of their gold habits. Again, in my opinion, for reasons already stated, it will not be a permissible procedure for understanding the real reason which has actuated the Finance Minister in introduction of this Bill. Mr. Mehta also referred us to the observations of the Finance Minister about his thinking of introducing similar measure for about 8 months prior to its promulgation. It is his contention that at that time there was no emergency. The Finance Minister must have realised that if such a measure was passed, it would not stand the test of constitutional validity. The Finance Minister has only taken advantage of the emergency and suspension of the exercise of certain fundamental rights, and has introduced these rules. It is true that the Finance Minister has stated that he had come to the conclusion about eight months prior to the date of introduction of these rules that a measure similar to the rules would be required to be introduced in Parliament. But it is also to be noticed that he has made it clear that since then he has been thinking and considering the problem in its various aspects in framing the rules. It can hardly be doubted that by reason of the emergency the problem became more acute. Conservation of foreign exchange, which in peace time, was essential for the purpose of development of the national economy, also became necessary for the purpose of defence of India, and it is these reasons which the Finance Minister says have actuated him in bringing into force these rules. There is hardly any reason to doubt this statement of the Finance Minister, and to hold that the real reason for bringing into force these rules was to bring about only a socio-economic reform, and that the rules have no concern whatsoever with the defence of India or maintenance of supplies and civil services essential to the life of the community. I have already discussed that the object sought to be achieved was to arrest smuggling by controlling dealings in gold so as not to make it possible for people in India to legitimately buy or freely deal in gold in open market. It can hardly be said that the aforesaid objective of arresting smuggling is not capable of being related to the purpose, namely, the defence of India. It also cannot be said that the rules if observed would not go to achieve the objective. I have already stated that the arresting of smuggling according to the view taken by the Central Government would result in conservation of foreign exchange which is so essential for the

purpose of the defence of India. The object sought to be achieved by these rules clearly serves to promote the purpose of defence. In my opinion, therefore, the connection between the rules and the prescribed purposes is a real one. Considering the two speeches of the Finance Minister, it is also equally clear that the Central Government had brought into force these rules because it was in its opinion necessary or expedient to bring them into force. These two requisite conditions having been established, challenge to the validity of these rules cannot be sustained on the ground that the rules framed are in excess of the rule making power of the Central Government or that the rules are a colourable piece of legislation in the sense that the rules have been framed for some purpose other than the prescribed purposes in sub-s. (1) of s. 3 of the Act.

35. Mr. Mehta in support of his aforesaid argument also has drawn our attention in this connection to the provisions of cl. (2) of rule 126-J, which imposes a duty that

It shall be the duty of the Administrator by such measures as he may think fit,

- (a) to discourage the use and consumption of gold;
- (b) to bring about conditions tending to reduce the demand for gold; and
- (c) to advise the Central Government on all matters relating to gold.

Relying on these provisions Mr. Mehta argues that the real object of the Central Government in framing these rules was to bring about this effect. The discussion above will show that the duty imposed on the Administrator is aimed at removal of the root cause that has been making smuggling a lucrative business. The root cause as would be seen is the habit of the people using gold ornaments and hoarding gold which has induced the smugglers to smuggle gold in large quantities. It has also been argued that the object sought could easily have been achieved by suitably amending the Customs Act and the Foreign Exchange Act. He brought to our notice that a Bill introducing the new Customs Act was introduced in the Parliament on June 8, 1962, introducing certain stringent measures. It was passed into an Act in December 1982 and was brought into force on February 1, 1963. He has also brought to our notice certain portions therein which has conferred on the official's concerned very extensive powers of arrest, powers of search, provisions relating to raising of presumptions, enhanced punishments, etc. According to Mr. Mehta, these stringent provisions would have effectively controlled smuggling. Now, in my opinion, it will hardly be permissible for this Court to embark on such an inquiry whether the objective sought to be achieved by these rules could have been achieved by some other way, inasmuch as in sub-s. (1) of s. 3, the Legislature has left it to the exclusive discretion of the Central Government. By enacting that sub-section, the Legislature has authorised the Central Government to make such rules as appear to it necessary or expedient for securing the authorised purposes. That being the position, it is clear that it would not be open to inquire whether the Central Government could have achieved the same object by some other measures.

Similar argument was advanced before the Supreme Court when a challenge to the validity of rules made under cl. (15) of sub-s. (2) of s. 3 of the Defence of India Act, was made. It was argued that since the Preventive Detention Act, IV of 1950, was already on the statute book, it was hardly necessary for the Legislature to have passed this part of the impugned Act. Repelling this argument, their Lordships observed in *Makhan Singh Tarsikka v. The State of Punjab* (p. 401):--

...It is hardly necessary to emphasise that a plea that an Act passed by a Legislature competent to pass it is a colourable piece of legislation, cannot succeed on such flimsy grounds. Whether or not it was wise that this part of the Act should have been passed, is a matter which is wholly irrelevant in dealing with plea that the Act is a colourable piece of legislation.

36. Another argument was also advanced that if really the object was to arrest smuggling which affects foreign exchange, the rules would have also provided for controlling the market and commodities other than gold which affect the foreign exchange of India. He brought to our notice the provisions of s. 123, sub-s. (2) of the Sea Customs Act, 1962. It is not possible for me to accept this argument of Mr. Mehta also. It is true that sub-s. (2) of s. 123 of the Sea Customs Act enacts that apart from gold, the rule of evidence has been made applicable to diamonds and watches etc., but from that it does not follow that smuggling of these articles affects adversely India's foreign exchange to the same extent as smuggling of gold does. The matter has been left to the discretion of the Central Government, and it is for the Central Government to decide what measures it would bring into force in exercise of its powers under sub-s. (1) of s. 3. Therefore, it is difficult to infer that omission of controlling business in diamonds and watches necessarily leads to the inference that the true object of the Central Government in framing these rules was not to control smuggling of gold.

37. It is next to be seen whether the rules contravene the provisions of s. 44 of the Act. Section 44 reads:

Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocation of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence.

It is the argument of Mr. Mehta that these rules interfere with the ordinary avocation of life and enjoyment of property of the people beyond measure. They can hardly be said to be for securing the purposes mentioned in the section. Mr. Mehta also has argued that the provisions of this section are mandatory and in support of his contention has referred us to the decision of this Court in *Tan Bug Taim Vs. Collector of Bombay*, . Mr. Bhabha, on the other hand, contends that this section has no application or is not a fetter on the rule making power of the Central Government. In the alternative, he argues that even assuming that it is a fetter on the rule making power of the Central Government, the provisions of this

section are not mandatory but directory. He referred to the Full Bench decision of the Lahore High Court reported in Lahore E. S. Co. v. Punjab Province. The first question to be considered, therefore, is whether s. 44 is a fetter on the rule making power of the Central Government conferred on it by s. 3(1) of the Act. Now, on a plain reading of the section, the restrictions imposed by this section are on an authority or a person. It is not in dispute that the Central Government is not a person. Now, the question is whether the expression "any authority" could be said to include the Central Government. In my opinion, the expression "any authority" in s. 44 does not include the Central Government. Section 44 appears in Chapter VII of the Act, which relates to supplemental provisions. The provisions of s. 44 have to be read in the context to understand the true import of the expression "any authority". Section 40 deals with the powers of the Central Government to delegate its powers or its duty of making certain orders to any officer or authority subordinate to the Central Government, and it is in this context that the directions have been given to the authority or person under s. 44 of the Act. The Act itself has used the expressions "Central Government", "authority" in contra-distinction with one another. In my opinion, therefore, the expression "authority" does not include the Central Government, nor has s. 44 imposed any fetter on the rule making power of the Central Government, but is directive relating to administrative or executive acts performed by any person or authority in execution of the powers delegated to them by the Central Government. In this view of the matter, it is not necessary to consider whether the directions contained in s. 44 are mandatory or directory. Suffice it to say that the view taken by the Lahore High Court in respect of the provisions of s. 15 of the earlier Defence of India Act, 1939, is contrary to the view taken by Bhagwati J. in *Tan Bug Taim v. Collector of Bombay*, of the same section. Mr. Justice Bhagwati has held that s. 25 is mandatory. The view taken by the Full Bench of the Lahore High Court is not the same. The provisions of s. 15 of the earlier Act are similar to s. 44 of the present Act. But it is worth noticing that in both these cases, what was challenged was an administrative act of the officers in exercise of the power and duty conferred on them by the orders of the Central Government. For the reasons stated above, the first contention as regards the vires of these rules should fail. Before proceeding to the next point, I may state that in dealing with the first point, I have not discussed such decisions which were cited before me which, in my opinion, were in respect of well established principles of law and which were only repetitive of the principles laid down by their Lordships of the Supreme Court, Federal Court and the Privy Council.

38. And this brings me to the second contention. As already stated, the second contention is that the rules violate exercise of the fundamental rights of the petitioners granted to them under arts. 25 and 26 of the Constitution. Material part of art. 25 is to the following effect:--

25.(2) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

It is not necessary to reproduce the provisions of cl. (2) or the explanations to this article. It is the case of the petitioners that they profess and practice the Jain religion and observe customs, tenets and practices of the Jain religion. According to them there is an ancient and well accepted religious belief, custom and/or practice of the Jain community that persons belonging to the Jain community have to perform certain religious ceremonies like puja. Such puja ceremonies are performed in alia on occasions like births, marriages and deaths. In the course of such puja ceremonies performed as aforesaid, varakh, badla ornaments and articles of pure gold such as "mugnt" (head gear for the idol), kundale (ear ornaments for the idol), necklace, armlets, etc. are offered to the deity. The petitioners further pleaded that they have been performing the aforesaid ceremonies and have been offering the varakh (pure gold leaf), badla, (silver offerings gilted with pure gold) and other ornaments and articles of pure gold to the deity as an essential part of their religious belief, custom and/or practice. The petitioners have further pleaded that according to the religious belief, custom and/or practice of the petitioners, it is derogatory to the deity to be offered impure gold or ornaments and articles of impure gold in the performance of the aforesaid ceremonies and it is enjoined that offerings to the deity should be in the purest form. According to the petitioners, offering of gold ornaments varakh or badla in the purest form, has been their practice from time immemorial, and they have been granted this freedom to continue religious practice uninterrupted under art. 25 of the Constitution. It can hardly be said that this right freely to profess and practice religion is in any way not in conformity with the maintenance of public order, morality and health. Gold Control Rules prohibit purchase or preparation of ornaments or articles of a purity in excess of 14 carats; and therefore, they are violative of the provisions of art. 25 of the Constitution and, therefore, unconstitutional. The respondents in para. 10 of the affidavit, have denied the existence of the alleged custom. The argument of Mr. Mehta has been founded on the form of denial, and it is therefore necessary to reproduce the averments made by the respondents in para. 10 of their affidavit in reply. The Collector, Central Excise, Bombay, respondent No, 5 hereto, has made this affidavit. In para, 10 he says:--

I do not know and am not in a position to admit whether the petitioners profess and practice Jain Religion and observe the customs, tenets and practices of that Religion and put the petitioners to strict proof thereof. As regards the religious ceremonies and the performance thereof as alleged and referred to in the said paragraph, I do not admit the same and put the petitioners to the strict proof thereof. I however deny that for the performance of such religious ceremonies as are referred to therein, ornaments and articles only of pure gold are necessarily offered to the deity or are required to be offered to the deity. Assuming without admitting that either the petitioners or other members of the said community have been in the past offering to the deity articles of pure gold or other articles gilted with pure gold and ornaments as alleged, I deny that there is any religious sanction or custom for offering articles only of pure gold and nothing else. I deny

that according to the religious belief, custom and practice of the said community, it is derogatory to the deity to offer impure gold or ornaments or articles of impure gold in the performance of the said ceremonies, and I deny that it is enjoined that the offerings to the deity should be in the purest form. In any event, and without prejudice to the said contentions, I submit that it may be at the most a practice or custom amongst the said community to offer articles of pure gold, but I submit that such practice or custom is not part of the Jain religion as such. I say that this involves disputed questions of fact not appropriate to be tried in these proceedings and should not be tried as such in these proceedings.

It is the argument of Mr. Mehta that in the first instance, it is not a denial at all, because respondent No. 5 has stated that he does not know and, therefore, is not in a position to admit, and in the second instance, there is no denial that there is a custom of offering ornaments and articles of gold to the deity. The denial only is in respect of the alleged custom of offering ornaments and articles of pure gold. It is the argument of Mr. Mehta that if the custom of offering ornaments and articles of gold to the deity is admitted, it necessarily follows that the ornaments or articles offered to the deity according to the custom must be of pure gold. I am unable to agree with the submission of Mr. Mehta relating to the averments contained in para. 10 of the respondents' affidavit. It is indeed true that respondent No. 5 has stated that he has no knowledge and he is not in a position to admit. That position is only limited to the allegation of the petitioners that they practice Jain religion and observe customs, tenets and practices of the Jain religion. As regards the alleged custom, the denial is not in any manner qualified. It is true that the denial is of the alleged custom of making offerings of ornaments and articles of pure gold to the deity. But these denials have to be read in the context of the pleas raised by the petitioners in para. 4 of the petition. The denial is in respect of these pleas. The denial is in the form in which the plea has been raised. I am unable to read in the averments of the respondents any admission as such of a custom of offering gold ornaments to the deity. In view of these averments contained in para. 10 of the affidavit in reply clearly issues on these disputed questions of fact arise. A decision in respect of this controversy on questions of fact also can not be easily arrived at by merely referring to affidavits. The dispute relates to the existence of custom. By its very nature, it involves a detailed investigation of facts. It cannot appropriately and satisfactorily be done in these proceedings. There is also another difficulty in the way of the petitioners in this matter. The plea raised by the petitioners is that the custom is to make these offerings to a deity. But then there is a judicial pronouncement of their Lordships of the Supreme Court that in Jain religion there is no deity. In *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, their Lordships observed (p. 1023):

...Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism

and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief.

From these observations, it is clear that Jain religion does not believe in God. If that be the position, there can hardly be a custom of making offerings to a deity as such. The issue that arises is a fundamental one. It is true that the issue in this form has not been raised by the respondents in their affidavit. But, I think, it would be permissible for me to take notice of this judicial pronouncement of their Lordships of the Supreme Court. These observations of their Lordships were brought to the notice of Mr. Mehta, and Mr. Mehta stated that what was meant was only an idol and not a deity. The question again arises that if the alleged custom be in respect of making offerings to an idol, then whose idol. The matter remains vague on the pleadings raised. In these circumstances, I do not think it is possible for me to proceed to consider this ground of challenge to the validity of the rules. The matter will have to be left to be decided in a regular suit if the petitioners desire to agitate this question there. I do not, therefore, proceed to decide this question. On account of the aforesaid view taken by me, Mr. Mehta has advanced no argument on behalf of the petitioners in respect of their contention that the rules are violative of art. 26 of the Constitution. The petitioners would be free to agitate the matter in a suit if so advised.

39. For the reasons stated above, in my opinion, the petition is liable to be dismissed. and I would, therefore, discharge the rule.

Naik, J.

40. I agree with the conclusion reached by my learned brother. Since, however, I am approaching some of the questions raised in this case from a slightly different angle of vision, it would be meet and proper to indicate the line of my thinking. The Gold Control Rules, whose validity has been impugned in this petition, have been framed by the Central Government in exercise of the powers delegated to it under s. 3 of the Defence of India Act. These Rules are a species of the genus which is known, in accepted legal parlance, as delegated legislation. The grounds of attack against a delegated legislation have a tendency to get themselves mixed up and, as a matter of fact, in this petition some of them have mixed up, and even in the course of the arguments the line of demarcation has sometimes been blurred. It would not, therefore, be out of place to indicate, in a general way, the broad categories under which delegated legislation is liable to be challenged. These categories are, (1) The Rules suffer from the vice of excessive delegation. This attack is more directed against the statute under which the powers are delegated than the Rules themselves. If the instrument under which the powers have been delegated does not lay down the legislative policy in clear terms, or it does not afford a proper guidance for the framing of the Rules, then it is open to challenge on the ground of excessive delegation. (2) That the

delegated legislation is in excess of the powers of delegation. Side by side with the attack of exceeding the powers delegated, the legislation may also be impugned on the ground of mala fide exercise of those powers, for no authority can be regarded as having been authorised to act in bad faith, and (3) What is known as colourable exercise of the powers of legislation. In substance, this charge is analogous to the charge of excess of powers, the only difference being that here, the excess of powers masquerades under some guise so as to make it appear that it is a legitimate exercise of powers. By way of comparison and contrast, I may also indicate, again in a general way, the ground on which an ordinary legislation, as distinguished from delegated legislation, is liable to be challenged. The first ground that may be raised for impugning an ordinary legislation is that it is in violation of the fundamental rights enshrined in Part III of the Constitution of India. The second is that the Legislature has transgressed the limits of the legislative powers assigned to it under the Constitution and the third is that the legislation is colourable.

41. In this background, I will now proceed to analyse the grounds that have been urged in the present petition, and thereafter I will indicate the grounds which are pressed into service in the course of the arguments. The grounds have been summarised in para. 10 of the petition. Clause (a) of the said paragraph relates to the main charge viz., excessive exercise of the powers conferred by the Parliament under s. 3(I) of the Defence of India Act. Clause (b) refers in particular to s. 3(2) (33) and says that cl. (33) would not empower the Central Government to enact the Rules which have prohibited and have also imposed other restrictions upon the use, disposal of or dealing in gold. At best, it would empower the Central Government to frame rules for the purpose of controlling the possession, use or disposal of, or dealing in, "bullion". Clause (c) relates to the operation of art. 358 of the Constitution and its effect upon the fundamental rights enshrined under art. 19. This point has been given up in view of the decision of the Supreme Court in *Makhan Singh v. State of Punjab* AIR [1904] S.C. 381. Clause (d) asserts that although the avowed and oft-publicized object of the Government in framing the Rules was to check smuggling and to discourage the use and consumption of gold and to bring about conditions tending to reduce the demand for gold, its real object was to discourage people from making uneconomic investment in gold. Reference is then made to the Sea Customs Act of 1878 and also to the new Customs Bill of 1962, which was then on the anvil of the Parliament, and it is pointed out that the object of both these legislations was to prevent smuggling. It is, therefore, suggested that if the object of the Government was to prevent smuggling, then that object could have been achieved either by the old Sea Customs Act or by enacting the Bill, which was on the anvil of the Parliament at the time when the Rules were framed. It is then alleged that the Government has enacted the Gold Control Rules deliberately under the Defence of India Act and with a view to circumvent the constitutional prohibition imposed by arts. 14 and 19(1) (f) and (g) of the Constitution. It is finally asserted that the entire object, motive and intention of

the Government in framing the said Rules was to take undue and improper advantage of the proclamation of emergency and under its guise and cover frame the said Rules and deprive the petitioners and other citizens of India of their fundamental rights under arts. 14 and 19(1) (f) and (g) of the Constitution. It is on this ground that it was suggested that these Rules amount to colourable and fraudulent exercise of the delegated powers. Clause (e) of the same paragraph again refers to the restrictions and curtailment of the fundamental rights under art. 19(1) (f) and (g) of the Constitution and in that connection explains the detailed provisions of the Rules. Clause (l) relates to the so-called fundamental rights of the petitioners of offering and gifting pure gold and ornaments and articles of pure gold to their deity under arts. 25 and 26 of the Constitution which, according to them, have been seriously brought into jeopardy.

42. It will be at once clear that the charge of excessive delegation has not been leveled, nor is it suggested that there has been any abuse of powers or mala fide exercise of powers. All that is suggested is that the exercise of the powers must be regarded as colourable in view of the fact that, firstly, the petitioners and the other citizens have been deprived of the fundamental rights and further in view of the fact that under the guise of promoting the purpose of defence, the Rules are really meant for promoting a socio-economic goal.

43. Before proceeding further, it may be pointed out that in view of the proclamation of emergency made by the President of India and in view of the provisions of art. 250 of the Constitution, one of the fetters imposed upon the Parliament not to legislate any law in regard to the subjects falling within List II of the Seventh Schedule of the Constitution, has been removed. The ground of attack, therefore, viz., that the Parliament has transgressed the limits of its legislative powers, is no longer open for consideration. In the same way, art. 358 of the Constitution suspends the operation of art. 19 thereof during the period of emergency. Again, the President has issued notifications under art. 339 by which he has suspended the operation of arts. 14, 21 and 22 of the Constitution. The result of the suspension of arts. 14, 19, 21 and 22 is that the Defence of India Act as also the Rules framed thereunder have become immune from challenge in so far as that challenge is based under arts. 14, 19, 21 and 22 of the Constitution, during the period the proclamation of emergency is in operation.

44. It will thus be clear that the ground of attack to the validity of the Gold Control Rules narrows down to a very small compass viz., whether these Rules are in excess of the powers delegated to the Central Government under s. 3 of the Defence of India Act and whether they amount to colourable exercise of the powers vested in it.

45. In support of his argument that the Rules are in excess of the powers conferred upon the Central Government by s. 3 of the Defence of India Act, Mr. Mehta contended that the provisions, which conferred powers on the Central Government, are contained in sub-s. (1) of s. 3 of the Defence of India Act. According to him, the clauses which range from (1) to (57) under sub-s. (2) of s.

3 do not and are not intended to confer any power as such upon the Central Government to frame the Rules. According to his argument, everyone of these clauses under sub-s. (2) must be examined and on examination it must be found to have relation to one of the five purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act. On the other hand, Mr. Bhabha contended that the Gold Control Rules fairly and squarely fall under cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, and once that position is accepted, it is not necessary for the Court to consider as to whether these Rules again have a relation to any of the five purposes mentioned in sub-s. (1) of s. 3. I may hasten to add that Mr. Bhabha also contended that if the Rules do not fall within the purview of cl. (33), they would, of course, be justified under the general purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act. The question raised by Mr. Mehta involves consideration of the relative positions of sub-ss. (1) and (2) of s. 3 inter se. If the argument advanced by Mr. Mehta is correct, then it must follow that the various clauses mentioned in sub-s. (2) are mere surplusages and appendages and that for justifying the Rules framed by the Central Government each time we must fall back upon the general purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act. It must be remembered that sub-s. (2) also forms part of s. 3 and prima facie, it will be somewhat surprising if the validity of one sub-section is required to be tested on the touch-stone of another sub-section of the same section. Mr. Mehta's argument appears to have been based on certain observations made by the Privy Council in *King-Emperor v. Sibnath Banerji* (1945) L.R. 72 I.A. 241, S.C. 48 Bom. as also those made by the Supreme Court in *Santosh Kumar Jain Vs. The State Union Of India (Intervener)*, . I do not propose to deal with the facts of those cases nor for that matter of some of the other cases to which I would have occasion to refer in the course of the judgment, because the facts of most of these cases have been set out by my learned brother in his judgment. In *Keshav Talpade v. King Emperor* [1943] F.C.R. 49 the order detaining Talpade was made under clause (x) of sub-s. (2) of s. 2 of the Defence of India Act of 1939. Sub-section (1) of s. 2 of that Act sets out the general purposes for which rules may be framed. and the purposes are more or less the same as the purposes set out in sub-s. (1) of s. 3 of the Defence of India Act of 1962. Sub-section (2) of s. 2 of the Act of 1939 sets out the various matters in respect of which the Central Government was authorised to make rules. Clause (x) in substance provides that a person who is reasonably suspected of having committed or likely to commit A prejudicial act could be kept detained. Rule 26, which was purported to have been framed under cl. (x), however, stated that the Government could pass an order of detention against a person indulging in prejudicial activities provided it was satisfied in that respect. The Federal Court held that the order of detention was bad, because it went beyond the powers conferred by cl. (x) of sub-s. (2) of s. 2 of the Defence of India Act of 1939, and inasmuch as r. 26 purported to have been framed "under a definite item viz., cl. (x), it was not open to the Government to fall back upon the general purposes enumerated in sub-s. (1) of s. 2 of the Act of 1939. In effect, the Federal Court held that the rule, if it could

not be sustained under which it was purported to be framed, would not be sustained at all under any of the other clauses or even under the general purposes mentioned in sub-s. (1). An identical question came up before the Privy Council in Sibnath Banerji's case. The interpretation of the relative position of sub-ss. (1) and (2) of s. 2 of the Defence of India Act of 1939 came up for consideration and the Privy Council disapproving of the view taken by the Federal Court came to the conclusion that r. 26 could be justified on the general purposes mentioned in sub-s. (1) of s. 2 of that Act. It pointed out that the purposes mentioned in sub-s. (2) are illustrative and could not be restrictive of sub-s. (1). At page 258, the Privy Council observed:

Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-ss. 1 and 2 of s. 2 of the Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that r. 26 was invalid. In the opinion of their Lordships, the function of sub-s. 2 is merely an illustrative one; the rule-making power is conferred by sub-s. 1, and "the rules" which are referred to in the opening sentence of sub-s. 2 are the rules which are authorized by, and made under, sub-s. 1; the provisions of sub-s. 2 are not restrictive of sub-s. 1, as, indeed, is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-s. 1".

It would at once be evident that these observations were made to repel the argument that the powers conferred by sub-s. (2) are restrictive of the powers conferred by sub-s. (1) and that if the rules purported to have been made under any of the powers specified in sub-s. (2) could not be sustained under Those powers, the rules were automatically invalid. The observations made by the Privy Council have been approved by the Supreme Court in Santosh Kumar Jain's case. In that case, the validity of an order of seizure of the stock of five thousand maunds of sugar which purported to have been made under cl (j) of sub-s. (2) of s. 3 of the Essential Supplies (Temporary Powers) Act, 1946, was called in question. Sub-section (1) of s. 3 of that Act mentioned the general purposes for which the Central Government is authorised to make rules, and in effect stated:

The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of an essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order, provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein.

Sub-section (2) opens with the words "without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide..." Clause (j) was one of the clauses, which provided:

for any incidental and supplementary matters.... the seizure by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is

about to be committed....

It was in exercise of the powers conferred by sub-s. (2) (j) of s. 3 of that Act that the order of seizure was made. Patanjali Sastri J. (as he then was) examined the relative positions of sub-ss. (1) and (2) of s. 3 and observed (p. 310):--

It is manifest that sub-section (2) of section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is "an order made thereunder" that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative, as such enumeration is "without prejudice to the generality of the powers conferred by sub-section (1)".

At page 311, his Lordship referred to the decision of the Privy Council in *Sibnath Banerji*'s case and stated:

The view we have expressed above receives support from the decision of the Privy Council in *Sibnath Banerjee*'s case: Section 2(1) of the Defence of India Act, 1939, as amended by section 2 of the Defence of India (Amendment) Act, 1940, empowered the Central Government to make rules for securing the defence of British India, the public safety, the maintenance of public order, etc.. and sub-section (2) enacted "without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for all or any of the following matters..." Among such matters was the detention of any person "reasonably suspected" of having acted etc. in a manner prejudicial to the public safety etc. [Clause (x)]. Rule 26 of the Rules made under the section, however, authorised the Government to detain a person "if it is satisfied" that it was necessary to detain him with a view to prevent him from acting prejudicially.... The Federal Court held that this rule was ultra vires as it went beyond the scope of clause (x) in that it left it to the satisfaction of the Government to decide whether or not it was necessary to detain a person. The decision was reversed and Lord Thankerton, delivering the judgment of the Board, observed:

In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)". There can be no doubt--as the learned Judge himself appears to have thought--that the general language of sub-section (1) amply justifies the terms of rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).

This accords with our view of the effect of sub-sections (1) and (2) of section 3 of the Act.

It is necessary to note that his Lordship laid emphasis upon the expression "all

order made thereunder", which clearly subordinated the matters enumerated in sub-s. (2) to the general purposes stated in sub-s. (1) of s. 3 of that Act.

46. In *Attorney-General for Canada v. II allet & Carey Ltd.* [1952] AC. 427 a question of similar nature arose in the following circumstances: The National Emergency Transitional Powers Act, 1945, of Canada, provided by section 2(1). "The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war... for the purpose of... (c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;..."

47. In ostensible exercise of the powers conferred by s. 2(1) of the Act of 1945, an Order in Council... was made on April 3, 1947, which provided by s. 22 that "all oats and barley in commercial positions in Canada" with certain specified exceptions, "are hereby vested in the Canadian Wheat "Board". The respondent, who held barley stored in various Canadian elevators, challenged the validity of the compulsory acquisition provision of the Order in Council.

48. It may be noted that the order of expropriation was passed in virtue of the general powers conferred by s. 2(1) of the said Act. It was pointed out that in the War Measures Act, 1914, there was a specific power conferred upon the Governor General for passing an order for confiscation in certain circumstances, in the list of subjects, enumerated in sub-s. (2) of s. 3. Sub-section (1) mentioned the general purposes which are similar to those mentioned in sub-s. (1) of s. 3 of the Defence of India Act. It was contended that since there was no similar power conferred upon the Governor General under s. 2(1) of the Act of 1945, it must be held that there was a curtailment of the powers of the Governor General and it was not open to him to pass the order of confiscation under his authority of the general powers vested by sub-s. (1). It was with reference to this argument that their Lordships instituted a comparison between the provisions of sub-ss. (1) and (2) of s. 3 of the War Measures Act. At pages 448 and 449 their Lordships observed:

...Their Lordships think that there is not by now any room for doubt as to the Junction performed by the list of permitted subjects in section 3 of the War Measures Act. The form adopted is plainly borrowed from section 91 of the British North America Act, 1867. They do not extend the purposes already defined, for they are directed to explaining what can be done, not the object for which things may be done; they do not extend any more than they limit its powers, for all that they permit is already permitted by the general words that precede them...What they do is to state explicitly certain things that are to be treated as falling within the range of the general powers already conferred. In that sense alone they extend, because they amplify, those powers, But the Act of 1945 makes no such declaration and offers no such list. It leaves the general

powers that it confers unexplained by statutory definition. It is not as if it made some new declaration and offered some new list, the form of which might appropriately be compared with the form adopted by its predecessor. In such a case changes might indeed be significant. But where, as here, one term of the comparison is lacking altogether there is no firm ground for the inferences that have been drawn as to the intention of the later Act.

In their Lordships' view there is no better way of approaching the interpretation of this Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in the light of that object....

In effect, their Lordships decided that although there was no specific item in the list under which the action of confiscation could be justified, still that action was referable to the general powers mentioned in sub-s. (1) of s. 2 of the National Emergency Transitional Powers Act of 1945. The specific question of the comparison of the powers under sub-ss. (1) and (2) of s. 3 of the War Measures Act, 1914, had not arisen before the Privy Council. It arose by way of comparison of the provisions of the War Measures Act and those of the National Emergency Transitional Powers Act and it was in that context that their Lordships pointed out that after all, the object of enumeration in sub-s. (2) was to elaborate what was contained in sub-s. (1) and that sub-s. (2) did not extend the powers mentioned in sub-s. (1) nor could it restrict those powers.

49. The case which we are considering is somewhat different from all the three cases referred to above. In the present case, the Rules do not purport to have been framed under any of the items mentioned in sub-s. (2) of s. 3 of the Defence of India Act, 1962. The Rules purport to have been framed generally in exercise of the powers under s. 3 of the Defence of India Act. The specific problem, therefore, which arose for consideration in the above cases, does not arise in the present case. At the same time, it is noteworthy that the Privy Council, in the Canada case, has characterised the entries listed in sub-s. (2) as "so many statutory definitions". In my view, in the present case, there is no, and there cannot be any, conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act. According to the Parliament, the clauses listed in sub-s. (2) are mere elaboration of what is stated in a general way in sub-s. (1). These clauses make explicit what is implicit in sub-s. (1). If the clauses in sub-s. (2) are "statutory definitions", evidently, the clauses would stand by themselves, unless there is any ambiguity about any of them. It is not correct to contend that none of these clauses though explicitly and unambiguously worded can stand on their own and must always relate to the general purposes. Mr. Mehta's argument pushed to its logical corollary amounts to this that, in each case it must be demonstrably established that the clauses, which are pressed in service, are related to or referable to one or more of the general purposes mentioned in sub-s. (1) of s. 3. It is clear that the Parliament while enacting those clauses had no doubt in its mind that these clauses fall within the ambit of the general powers. The expression of the parliamentary intent if clear cannot be called into question

by inviting the Courts to embark upon an inquiry for seeing as to whether there is a clear connection between the clauses mentioned in sub-s. (2) and one of the purposes mentioned in sub-s. (1). Of course, it is open to the petitioners to contend that the Gold Control Rules must be referable to one of the items, if not to the general purposes. I do not think that it is open to the petitioners to contend that the clauses in sub-s. (2) should themselves be put to the test laid down in sub-s. (1). The rule of harmonious construction must be adopted, and if that is adopted, there can hardly be any occasion for envisaging any conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act of 1962. The argument advanced by Mr. Mehta was mainly based on cl. (6) of sub-s. (2) of s. 3 which runs thus:

requiring the publication of news and information.

Mr. Mehta contended that the clause is very widely worded and, therefore, unless the publication of news and information is shown to be connected with any of the purposes mentioned in sub-s. (1), an order requiring the publication of news and information would be invalid. The argument is correct, because the clause to which reference is made is vague and ambiguous. When the wording of a clause is vague and ambiguous, it is open to the Court, may it would be necessary for the Court, to make an inquiry as to whether an order purporting to have been passed thereunder could be justifiable on the basis of the existence of any of the general powers mentioned in sub-s. (1). But to argue that even when there is no ambiguity about the wording of a clause the connection between the clause with any of the general purposes must still be established to the satisfaction of the Court would, in my opinion, be to pit one part of the section against the other--a procedure which is not permissible on any canons of construction.

50. It may be pointed out that the clauses enumerated in sub-s. (1) serve and are intended to serve yet another useful purpose and it is this that, in the absence of such an enumeration the delegating legislation may become liable to be charged with the vice of excessive delegation. Enumeration of the various purposes, which, according to the Parliament, form part of the general purposes or follow from the general purposes, gives guidance to the delegate to frame rules and once that is done, the rules cannot be attacked on the ground of excessive delegation. The observations made by the Supreme Court in *Makhan Singh's* case at page 400 may be usefully cited in this connection. In discussing the argument on behalf of the detenu that the Rule (30A) authorising detention which was framed under s. 3(2)(15)(i) of the Defence of India Act of 1962, suffered from the vice of excessive delegation, Gajendragadkar J. (as he then was) referred to sub-s. (1) of s. 3 of the Defence of India Act and the specific clause viz., (15)(i) of sub-s. (2) of s. 3 thereof, and observed (p. 400):

...Section 3(2) provides that without prejudice to the generality of the powers conferred by sub-section (1) the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters; then follow clause (1) to (57), including several sub-clauses which provide for the

matters that may be covered by the Rules. Amongst them is clause (15)(i)....

His Lordship then sets out the clause and proceeds to observe:

The argument is that in conferring power on the Central Government to make rules, the legislature has abdicated its essentially legislative function in favour of the Central Government. In our opinion, this argument is wholly untenable...In the present cases, one has merely to read section 3(1) and the detailed provisions contained in several clauses of section 3(2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority that it would be idle to contend that the Act has delegated essentially legislative function to the rule-making authority. (pp. 400-401).

In *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, their Lordships were considering the effect of s. 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954. Section 3 provided (page 567):--

Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for...

(d) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other diseases or condition which may be specified in rules made under this Act. Power to make rules is laid down in S. 16 which is as follows:--

S. 16(1). The Central Government may by notification in the official gazette make rules for carrying out the purposes of this Act.

The opening words of sub-s. (2) are:

In particular and without prejudice to the generality of the foregoing power, such rules may-

(a) specify any disease or condition to which the provisions of section 3 shall apply.

The first part of s. 16 of the Act authorised the making of the rules to carry out the purposes of the Act and cl. (a) of sub-s. (2) provided that the rules may specify any disease or condition to which the provisions of s. 3 shall apply. Their Lordships observed (p. 567):--

...It is the first sub-section of S. 16 which confers the general rule making power i.e., it delegates to the administrative authority the power to frame rules and regulations to subserve the objective and purpose of the Act. Clause (a) of the second sub-section is merely illustrative of the power given under the first sub-

section; *Emperor v. Sibnath Banerjee*... Therefore sub-section 2(a) also has the same object as sub-section (1) i.e., to carry out the purposes of the Act. Consequently when the rule making authority specifies conditions and diseases in the schedule it exercises the same delegated authority as it does when it exercises powers under sub-section (1) and makes other rules and therefore it is delegated legislation. The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with proper guidance. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in S. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation....

My object in referring to the above decision is to point out that the enumeration contained in sub-s. (2) of s. 3 of the Defence of India Act, 1962, is not just an act of super-arrogation but serves a necessary and useful purpose. In my view, if the Gold Control Rules could be justified by cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, 1962, since the wording of that clause is unambiguous, it is not necessary still to seek to establish connection between the Gold Control Rules and one of the general purposes mentioned in sub-s. (1) thereof, for to do so would be to question the "statutory definition" made by the Parliament itself.

51. That takes me to the consideration of the principal argument advanced by Mr. Mehta viz., that the Rules would become ultra vires unless a direct, proximate or intimate connection is established between the Rules framed and the general purposes stated in sub-s. (1) of s. 3 of the Defence of India Act, 1962. It was also pointed out that the Gold Control Rules contain no preamble and no recital to the effect that it appeared to the Central Government necessary or expedient for securing the purposes set out in s. 3 of the Act of 1962. It was contended by Mr. Mehta that the effect of the absence of the recital as above would be to leave the question about the connection between the Rules and the general purposes at large. I will consider this aspect of the matter at a subsequent stage of the discussion. For the time being, I will concentrate my attention upon the principal argument viz., whether it is necessary to establish a direct, proximate or intimate connection between the Rules framed and the general purposes set out in s. 3(1) of the Defence of India Act, 1962. The edifice of Mr. Mehta's argument in this respect is reared on the basis of the two decisions, one in *Rex v. Basudeva* AIR [1950] F.C. 67 and the other in *The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia*, .

52. In *Rex v. Basudeva* the respondent (Basudeva) was a dealer in kerosene oil and the charge was that he habitually indulged in black-marketing. He was arrested by an order of detention passed in exercise of the powers conferred by s. 3(1)(i) of the U.P. Prevention of Black-Marketing (Temporary Powers) Act,

1947. That Act was passed by the U.P. Legislature by virtue of s. 100 read with Entry 1 of List II, Schedule VII of the Government of India Act, 1935. Section 100 of the Government of India Act, 1935, in effect provided that the Dominion Legislature had power to make laws in respect of various matters enumerated in List I of the Seventh Schedule and the Provincial Legislature had power to legislate in respect of any of the matters enumerated in List II of the Seventh Schedule. Entry 1 of List II of the Seventh Schedule read (relevant portion quoted):--

...preventive detention for reasons connected with the maintenance of public order.

The question for consideration before the Federal Court was whether the legislation, viz., the U.P. Prevention of Black-Marketing (Temporary powers) Act, 1947, could be validly passed by the U.P. Legislature in exercise of the legislative powers conferred upon it under entry 1 of List II of Schedule VII. It was contended for the detenu that the detention was unlawful as the provision aforesaid was void and inoperative as being ultra vires the Provincial Legislature. Patanjali Sastri J. (as he then was), who delivered the judgment of the Court, posed the question, whether the impugned provision falls within the ambit of the legislative power conferred upon the Provincial Legislature by s. 100 read with Entry 1 of List II, Schedule VII of the Government of India Act, 1935. It was contended by the learned Advocate General in that case that habitual black-marketing in essential commodities was bound sooner or later to cause a dislocation of the machinery of controlled distribution, which, in turn, might lead to breaches of the peace and that, therefore, detention with a view to prevent such black-marketing was covered by the entry. His Lordship in repelling this argument referred to the possibility of the rash driving of an automobile or the sale of adulterated foodstuffs leading to the disturbance of public order. At the same time, the consequence was so remote that it could not be "connected with the maintenance of public order". At page 69, his Lordship observed:

...Preventive detention is a serious invasion of personal liberty, and the power to make laws with respect to it is, in the case of Provincial Legislatures, strictly limited by the condition that such detention must be for reasons connected with the maintenance of public order. The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical.

In appreciating the decision of the Federal Court, it is necessary to note that in a federal constitution, there is a meticulous division of powers between the federal union and the federal States. The line of demarcation between the fields of legislation must be fairly clear so that one legislative body could not transgress or trespass upon the field allocated to the other. It is also necessary to note that it is for the judiciary to decide as to whether the Legislature has exceeded the limits of its legislative competence. Judiciary is the sole judge in that respect and it is for the judiciary to jealously safe-guard the delicate balance of the distribution of powers between the two legislative organs. The principle

enunciated in Basudeva's case was followed by the Supreme Court in *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*. In that case, s. 3 of the U.P. Special Powers Act, 1932, made instigation not to pay or defer payment of any liability an offence punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250, or with both. Ram Manohar Lohia was prosecuted under the said section for delivering speeches instigating cultivators not to pay enhanced irrigation rates to the Government. He applied to the High Court for a writ of habeas corpus on the ground, amongst others, that the said section was inconsistent with art. 19(1)(a) of the Constitution and as such void., The High Court decided in favour of the appellant (Lohia) and he was released, The State appealed to the Supreme Court and the question for determination was whether the impugned section embodied reasonable restrictions in the interests of public order and was thus protected by art. 19(2) of the Constitution. Subbarao, J., who delivered the judgment of the Court, put the issue neatly by saying "We shall now proceed to consider the constitutional validity of this section" (page 828). His Lordship pointed out that to sustain any law made by the State under cl. (2) of art. 19 of the Constitution, two conditions must be complied with, viz., (1) the restrictions imposed must be reasonable; and (2) they should be in the interests of public order. His Lordship observed (p. 835):--

...The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved...If the restriction has no proximate relationship to achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause....

Reference was then made to the decision of the Federal Court in Basudeva's case and the relevant passage at p. 69 of that judgment was cited with approval. His Lordship then proceeded to add (p. 836) :

...The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

Just as in the case of *Rex v. Basudeva* the point involved was whether the Provincial Legislature had transgressed the limits of its power, in *Ram Manohar Lohia's* case the question was, whether the Legislature had passed a legislation in violation of the fundamental rights. Subbarao, J. emphasised that the fundamental rights cannot be restricted on hypothetical or problematical considerations.

53. The question for consideration is whether the principle of proximate or intimate connection can be extended in determining the validity of a delegated legislation framed under the Defence of India Act where large powers have been conferred by the Parliament on the delegate coupled with wide discretion for

selecting the topics for legislation. I have already pointed out that the Gold Control Rules have not been challenged on the ground of excessive delegation. I have also pointed out that there is no challenge and there could not be any to the powers of the Parliament to frame laws for the purposes mentioned in s. 3 of the Defence of India Act either on the ground of violation of the fundamental rights under art. 10, which has been suspended under art. 358 or of the fundamental rights under arts. 21 and 22, which have been suspended by a Presidential proclamation. Nor could there be a challenge to the powers of the Parliament on the ground that the Parliament has transgressed the limits of its legislative functions, because the relevant fetters in that regard have been removed by art. 250 of the Constitution. In other words, there is no inherent want of jurisdiction in the Parliament in making laws mentioned in s. 3(1), at any rate, during the period of emergency. There is such an inherent want of jurisdiction in a Legislature with limited powers because of the meticulous division of powers and also because of the existence of fundamental rights. The only question, therefore, that remains to be considered is whether the Parliament, which has plenary powers in making a legislation, has in fact delegated these powers which would sustain the Gold Control Rules. In other words, the question is only of the extent of delegation. Evidently, the delegation is of an extensive character, not merely because of the general purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act but also because discretion has been given to the Central Government to choose the topics. The words "The Central Government may make such rules as appear to it necessary or expedient for securing... etc." in s. 3(1) of the Defence of India Act are extremely important. In this connection, it may be pointed out that when we are considering the question as to whether the Legislature has transgressed the limits of its legislative powers, the choice made by the Legislature is neither here nor there. It is clear that when the Legislature proceeds to legislate on a topic, it proceeds on the footing that the topic falls within the purview of its jurisdiction. In this connection, I may refer to a very significant sentence in the judgment of Basudeva's case at p. 69. It was urged before the Federal Court that if the Legislature thought that prevention of a particular activity was expedient in the interest of maintenance of public order, it was not for the Court to canvass the degree of connection between the two, as that was a matter of policy and not of vires. In repelling this argument, their Lordships observed:

...We cannot accept this wide proposition. Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of vires, where the Legislature concerned has powers to legislate on certain specified matters only. The Court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers.

The effect of the observations of the Supreme Court at page 836 in Ram Manohar Lohia's case is identical:

...We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations....

As pointed out above, under s. 3 of the Defence of India Act, 1962, it is the Central Government, which has been constituted the authority to decide upon the topics on which it could legislate in its capacity as a delegate of the Parliament. I may usefully refer to a passage in the judgment of the High Court of Australia in *Reid v. Sinderberry*: *Reid v. McGrath* (1944) 68 C.L.R. 504, at p. 511 for reinforcing the argument advanced above. I will be referring to this case and also some of the other Australian cases cited before us in the course of the arguments on both sides at a later stage of this judgment. At this stage, it is sufficient to note that the question for consideration in Reid's case was, whether in making a regulation providing for conscription, the Governor General was overstepping the limits of the legislative powers of the Commonwealth Parliament conferred under s. 15(vi) of the Commonwealth Constitution to make laws with respect to naval and military defence. Latham C.J. observed (p. 511):

...When the powers of a legislative authority are limited by law the opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority, unless, indeed, the power was conferred by the law creating the power (in this case the Constitution of the Commonwealth) in terms which provided that the opinion of the authority should be so decisive. But there is no such provision relating to defence in the Constitution. The power of the Commonwealth Parliament is a power to make laws with respect to naval and military defence--see Constitution, s. 51(vi)-- not a power to make laws with respect to any matter which, in the opinion of the Parliament, or of an authority to which Parliament may confide a power of subordinate legislation, is naval or military defence.

On these general considerations, therefore, I am inclined to the view that the test laid down in the two cases relied upon by Mr. Mehta viz., that the connection between the legislation and the powers of the Legislature must be proximate, direct and intimate, cannot possibly be extended to the case of delegated legislation, which is framed by virtue of the wide powers conferred by s. 3 of the Defence of India Act. The test in judging the validity of the Gold Control Rules in a case like this would have to be more flexible than the rigid test of real, proximate and intimate connection. Such a test has been laid down by the Privy Council in *Attorney-General for Canada's case*. In that case, their Lordships were discussing the effect of an order of confiscation, which was made by virtue of the general powers invested in the Governor in Council by s. 2 of the National Emergency Transitional Powers Act, 1945. After referring to the general arguments relating to the real purpose of the powers, their Lordships observed (p. 445):

If, then, the expropriation which the Order in Council prescribes is to be held invalid in law it must be attacked by showing that the Act of 1945, truly interpreted, did not give the Governor the power to carry out what he has

purported to achieve. No other line of attack is open....

A little later, their Lordships observed (p. 446):

...Plainly, within the scope of its wide range of purposes, the Act is conceived in the most fluid and general terms, conferring deliberately the most extensive discretion. To import into such a measure a precise limitation (if so vague a phrase can itself be said to be precise) that no action can be taken that "extends" a particular control of a particular commodity is, in their Lordships' view, a radical misunderstanding of the true nature of such legislation.

Again, at page 449 their Lordships remarked:

In their Lordships' view there is no better way of approaching the interpretation of this Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in the light of that object. There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention. If the Act of 1945 is approached in this way, it is very difficult to see what warrant there is for introducing into it by way of interpretation an implied exclusion of any power in any circumstances to acquire compulsorily any piece of property. For, unless compulsory acquisition is absolutely excluded from the range of things that the Governor may do, any particular exercise of the power is a matter for his discretion and cannot come within the control of the Court.

Again, the observations at page 450 have an important bearing on the question under discussion:

...And the power of the Executive to pursue these purposes, while the national emergency continues, is conferred by Parliament without express reservation and in the amplest terms that statutory language can employ... Most statutes can be shown to achieve such an encroachment (upon the rights of the subject) in some form or another and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the Court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related.

54. In my opinion, the principle that should be applied in testing the validity of the Rules framed on the authority of a section which is as widely worded as s. 3 of the Defence of India Act, 1962, is the principle enunciated by the Privy Council

in Attorney-General for Canada's case. When wide powers have been conferred upon the Central Government and when the Central Government has been given the right to choose the topic in respect of which legislation is to be framed, the principle that would hold good would be the principle whether the Rules framed are capable of being connected with the purposes for which they are intended. In other words, it is not the direct, proximate and intimate connection that should be insisted upon, but some connection which would correlate the Rules with the purposes mentioned in sub-s. (1) or with the matters enumerated in sub-s. (2) of s. 3 of the Defence of India Act, 1962. It may also be pointed out that the principle laid down by the Privy Council in Attorney-General for Canada's case has been followed by the same authority in a subsequent case in *Ross-Clunis v. Papadopoulos* [1958] 1 W.L.R. 546. In that case, s. 6 of the Emergency Powers Order in Council, 1939, empowered the Governor to make such regulations as appeared to him to be necessary or expedient for securing the public safety, the maintenance of public order etc. By virtue of this power the Governor issued the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955. The Commissioner passed an order under the said Regulations levying a collective fine of ₹35,000 after holding an inquiry into the matter as stipulated by the Regulations. In upholding the order, their Lordships referred to the Attorney-General for Canada's case and stated that the test laid down there was the correct one to apply. Mr. Mehta tried to distinguish this case by pointing out that the Regulations defined the word "offence" to mean an offence the commission of which is, in the opinion of the Commissioner, prejudicial to the internal security of the Colony or to the maintenance of public order in the Colony. He contended that in view of this definition, the Court had no other alternative but to hold that the act of levying collective fine was justified. This argument ignores the circumstance that it was the Regulations which defined the word "offence" and not the original Emergency Powers Order in Council, 1939. Mr. Mehta tried to distinguish this case also by suggesting that, as a matter of fact, the Privy Council in *Ross-Clunis*'s case did come to the conclusion that the Regulations were clearly related to the purposes described in s. 6 of the Order of 1939. It is necessary to note that this observation was made after citing with approval the passage in Attorney-General for Canada's case. That means that, according to their Lordships, the Regulations were clearly related to the purposes described in s. 6 of the Order of 1939, because they stood the test laid down in the aforesaid case.

55. According to me, there are two rival tests, one for testing the validity of a legislation passed by a Legislature whose powers have been defined and limited under the Constitution as also a legislation which makes an encroachment or an invasion upon the fundamental rights of the citizens. In judging the validity of a legislation which encroaches upon the legislative functions of another legislative body or which invades upon the fundamental rights of the citizens, the test which must be followed is the test of direct, proximate and intimate nexus between the exercise of the powers and the authority conferred upon the Legislature, In a

matter of this nature, the Court is the sole judge to decide as to whether the powers have been exceeded. Another, in the case of a delegated legislation where there is no inherent lack of jurisdiction in the parent body which delegates the power and where the delegate has been given wide discretion in choosing the topic. In the latter case, the test that will have to be invoked is whether the exercise of the legislative authority is wholly unrelated to the purposes or is not capable of being connected to the purposes for which it is meant to be exercised.

56. Mr. Mehta contended that the decision given in the case of Attorney-General for Canada is of no avail to the Central Government in the present case, because there is no recital in the Rules to show that it appeared to the Central Government either necessary or expedient to proclaim these Rules for securing the various purposes mentioned in cl. 3(1) of the Defence of India Act, 1962. He emphasized that some of the passages in the judgment of the Privy Council in Attorney-General for Canada's case indicate that the decision proceeded on the basis of the presence of the recital to the effect that the Governor in Council deemed it necessary or expedient or both to pass the order in question. It is, therefore, necessary to consider the effect of the absence of the recital to the effect that the Central Government deemed it necessary or expedient to frame the Gold Control Rules for any of the purposes mentioned in s. 3(1) of the Defence of India Act, 1962. In this connection, reference may be made to a passage at page 74 of the Halsbury's Laws of England, 3rd edn., Vol. 39, which runs thus:

It is not open to the court to investigate the necessity or expediency of any defence regulation, and it is bound to assume that an order made under a defence regulation was necessary....

One of the cases cited in support of the above proposition is *Rex v. Comptroller General of Patents: Bayer Products Ltd., Ex parte* [1941] 2 K.B. 306. In that case, certain orders were passed by the Comptroller General of Patents regulating the rights of using an enemy-owned patent. Regulation 60E of the Defence (General) Regulations, 1939, was framed under sub-s (1) of s. 1 of the Emergency Powers (Defence) Act, 1939, which set out the purposes for which His Majesty may make regulations. The purposes were:

...securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

The validity of Regulation 60E was impugned on the ground that it had no relation whatsoever with the object of prosecuting the war. After observing, "...we might have been entitled to say that the purposes stated in the subsection were wide enough to include the framing of this regulation", Scott L.J. proceeded to say (p. 311):

Be that as it may, in my opinion, the effect of the words "as appear to him to be

necessary or expedient" is to give to His Majesty in Council a complete discretion to decide what regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to control by the courts. In my view, the sub-section clearly conferred on His Majesty in Council that ultimate discretion....

In repelling the argument based on the absence of express recital, his Lordship observed on the same page (p. 312) as follows:

...The Order in Council introducing reg. 60 E of necessity records by implication the fact that His Majesty in Council thought it either necessary or expedient, or both, to extend the powers of the Comptroller under the Patents (Emergency) Act, 1939, s.3, in the manner stated in the regulation....

Clauson L.J. has dealt with this question in some detail at page 314:

...The Order in Council does not contain an express recital that it appears to His Majesty to be necessary or expedient for the purposes mentioned to make this particular regulation, but, as a matter of construction of the order, I am clear (and I do not think that anyone in the course of these proceedings has thrown any doubt on the proposition) that it shows plainly that it did appear to His Majesty to be necessary or expedient to make this regulation.

Again, at p. 315 his Lordship observed:

...this application for prohibition can succeed only if it is within the power of this court to investigate the action of His Majesty when he stated, as I conceive that His Majesty did in making the Order in Council, that this regulation appeared to him to be necessary or expedient for the named purpose. In my view, this court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The legislature has left the matter to His Majesty and this court has no control over it. I know of no authority which would justify the court in questioning the decision which His Majesty must be taken to have stated that he has come to, namely, that this regulation is necessary or expedient for the specified purposes. If His Majesty once reaches that conclusion with regard to a regulation, that regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that on which His Majesty has acted, the order can be annulled.

Again, a little later his Lordship stated:

...His Majesty formed the view that it was necessary or expedient, for the purposes mentioned, to make the regulation, and, so far as this Court is concerned, there is an end of the matter....

It would thus be clear that no importance can be attached to the absence of a specific recital as a preamble to the Rules framed.

57. I should not be supposed to hold that in no case it is open to the Court to hold a judicial scrutiny in the matters on which the Rules have been framed. The Privy Council in *Attorney-General for Canada's Case* at p. 450 has indicated that when the instrument impugned is ambiguous it will make room for judicial inquiry. Their Lordships have observed at page 450 as follows:

It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the Court is entitled to read the Act in this way.

It is, however, necessary to consider the scope of the judicial scrutiny in a matter like this, because this will also throw light upon the question of the proper test to be applied in judging the validity of delegated piece of legislation. It has been repeatedly stressed that a wide discretion has been conferred on the Central Government to make a choice of the topics in respect of which it considered it necessary or expedient to make the Rules for the stated purposes. I have also laid emphasis upon the wide range of the purposes mentioned in s. 3(1) of the Defence of India Act, 1962. I have also pointed out that when such a discretion has been given to the Central Government and when such wide powers have been conferred upon it, the test for judging the validity of the Rules framed would be of a flexible character viz., to consider whether the Rules are wholly unrelated or are not capable of being related to the purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act, 1962. If the Court comes to the conclusion that the measure is wholly unrelated or was not capable of being connected with any of the purposes mentioned in sub-s. (1) of s. 3, the Court has jurisdiction to strike it down as invalid. But, the Court cannot strike it down merely because it thinks that the measure is not directly connected with the purposes as interpreted by it. It would, therefore, be interesting to review some of the cases that were cited by Mr. Mehta as also by Mr. Bhabha, which will give us a fairly clear idea about the limits of the scope of the inquiry and also incidentally throw light upon the question of the proper test to be applied. In *Chester v. Bateson* [1920] 1 K.B. 829. Regulation 2A(2) of the Defence of the

Realm Regulations, which was framed under s. 2(1) of the Defence of Realm Consolidation Act, 1914, in effect provided that no proceedings for the recovery of possession of a dwelling house in which a munition worker is living and which is situate in a declared area, could be taken without the consent of the Minister of Munitions. The case came up before the King's Bench Division as a case stated by Justices for Lancashire. It was held that the action taken could not possibly have any connection for securing the public safety. It was also pointed out that shutting out all access of approach to the Court was a grave invasion and so grave an invasion could not have been intended to be accomplished by a delegated legislation. Darling J. raised the question at page 833:

...and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it.

At page 835, Avory J. observed:

...This depends upon whether it can be said, on any reasonable construction of the statute, to be a regulation for securing the public safety and the defence of the realm, and, particularly under s. 1, sub-s. 1(e), whether it can be said to be a regulation to prevent the successful prosecution of the war being endangered....

He further indicated that a regulation providing that no order for ejectment should be made except under the conditions prescribed would probably be held *intra vires* the statute; but the objection which was made to the regulation was that it deprived the King's subjects of their right of access to the Courts of justice. In *Attorney-General v. De Keyser's Royal Hotel* [1920] A.C. 508 he Crown took possession of a hotel for the purpose of housing the headquarters personnel of the Royal Flying Corps, and denied the legal right of the owners to compensation. It was not disputed that the Act of taking was legal. The only question was whether the denial of the right to compensation could be said to be conducive to any of the purposes mentioned in s. 1(2) of the Defence of the Realm Consolidation Act. 1914. Lord Dunedin at page 523 posed the question in the following way:

...The question in the case is therefore narrowed to one point and one point only: the Crown having legally taken, is it bound to pay compensation *ex lege*, or is the offer to pay compensation *ex gratia*, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands?

Lord Dunedin held (p. 529):

...It is clear that under these sub-sections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety or the defence of the realm that payment should not be made, such payment being, on the hypothesis that the views above expressed as to the Act of 1842 were sound, a necessary concomitant to taking.

It was on that short ground that the action of eviction was held to be ultra vires. Both these decisions were relied upon by Mr. Mehta. But, in my opinion, instead of supporting the point of view which he was advancing, these cases show that it is only in cases where the Court feels that the action taken had no connection whatsoever to the purposes of the defence or the safety of the realm, that the action can be declared as ultra vires. Mr. Mehta also referred to a decision in *The King v. Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria: Victoria v. The Commonwealth* (1942) 66 C.L.R. 488. In that case, sub-regulations 8, 9 and 10 of regulation 29 of the National Security (Supplementary) Regulations, purported to control the holidays and remuneration of members of the public service of the State of Victoria, although they were not engaged in work associated with the prosecution of the war. It was held that the sub-regulations were not within the ambit of the defence power of the Commonwealth. In the leading case *Farey v. Burvett*, (1916) 21 C.L.R. 433 to which reference will be made hereafter, the High Court of Australia had held that s. 51 (vi) of the Constitution, which related to naval and military defence of the Commonwealth, must be more liberal in times of war than during times of peace. The question that arose in *The King v. Commonwealth Court of Conciliation and Arbitration* was, whether the sub-regulations were justified on the basis of the extended definition of defence. At page 506, Latham C.J. observed:

...But the most complete recognition of the power and responsibility of Parliament and of the Government in relation to defence does not involve the conclusion that the defence power is without any limits whatever. The existence of the defence power in the Commonwealth Parliament and the exercise of that power do not mean that all governmental power in Australia may, by the action of the Commonwealth Parliament, be concentrated in Commonwealth authorities. The Constitution cannot be made to disappear because a particular power conferred by the Constitution upon the Commonwealth Parliament is exercised by that Parliament.

The learned Chief Justice then proceeded to observe (p. 507):

But such a result cannot follow if the defence power is regarded as enabling the Commonwealth Parliament to make such laws only as have a real connection with defence.

After citing the passage from the judgment of Isaacs J. in *Farey's* case where the learned Judge used words as "conceivably" and "incidentally", Latham C.J. observed (p. 507):

...In spite of the use of the word "conceivably", I do not regard the statement of Isaacs J. which I have quoted as meaning more than this, except that, recognizing the great scope and profound national importance of the defence power, it emphasizes the necessity for care and caution before deciding that a particular measure, put forward as appertaining to defence, in truth and in

substance has nothing to do with defence....

At page 509, the learned Chief Justice observed:

...the defence power should not, in my opinion, be construed as an unlimited legislative power. It should be interpreted upon the same principle as that which is applied to other constitutional powers. If the alleged connection between a particular power of legislation and the subject of defence is either non-existent or so attenuated as to be practically non-existent, the legislation cannot be supported under that power...

Although Mr. Mehta relied upon this case, the observations set out above do not support the proposition he was trying to establish before us, viz., that the connection must be proximate and direct. In *Victorian Chamber of Manufacturers v. The Commonwealth (Industrial Lighting Regulations)*, (1943) 67 C.L.R. 413 regulations known as the National Security (Industrial Lighting) Regulations were passed by virtue of the powers conferred by the National Security Act, 1939-40, under which the Minister was given complete control of the interior artificial lighting standards in the industrial premises. It was argued that good lighting was conducive to industrial efficiency and industrial efficiency was important for the effective prosecution of the war and, therefore, the regulations were valid. In repelling this argument, Latham C.J. observed (p. 417):

...But the same thing might be said of any prescription of standards in factory conditions, or in almost any other conditions affecting human life and well-being. For example, the provision of food, clothing, housing and recreation for workers is required for full industrial efficiency. But, in my opinion, the existence of war does not result in handing over to the Commonwealth general control of these subjects. The existence of war enables the Commonwealth, in my opinion, to deal with war problems and with war-created problems, but it does not produce the result that the Commonwealth Parliament is empowered to legislate upon all subjects whatever.

Starke J. at page 421 stated:

...The question does not depend upon the vividness of our imaginations or conceptions, but upon the law or the regulation being in substance a law or regulation with respect to the public safety and the defence of the Commonwealth.

At page 422 the learned Judge remarked:

In the present case the Regulations are wholly unrelated to and unconnected with the public safety and the defence of the Commonwealth... The Regulations in terms go far beyond any purpose of defence and necessarily operate as a general regulation of industrial lighting conditions beyond the power of the Commonwealth.

Williams J. at page 428 stated:

...I am unable to conceive that the Regulations are required even incidentally for the defence of the Commonwealth. Their whole substance and purpose is to legislate upon a social subject which does not present any features in time of war not present in normal times.

In *Reid v. Sinderberry*'s case the respondents were convicted of an offence under the National Security Act, 1939-1943, in that they failed to comply with a direction given under regulation 15 of the National Security (Man Power) Regulations --Statutory Rules 1942 No. 34 as amended. The validity of the Regulation was challenged. I have already cited a passage at page 511 in another connection. At page 514, Rich J. referred to his own observation made in an earlier case to the effect that the powers conferred by the regulation are capable of being used for necessary purposes incidental to the defence of the Commonwealth. At page 515, Starke J. stated:

...It must have some real connection with defence, afford some reasonable and substantial basis for the conclusion that the law is one with respect to defence...

In *Wertheim v. The Commonwealth* (1945) 69 C.L.R. 601 the Fly and Insect Sprays Order, which was purported to be made under regulation 59 of the National Security (General) Regulations, declared that the objects of the Order were

by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays;

it provided that

a person shall not manufacture or put up any fly spray except under the authority of and in accordance with a licence granted

pursuant to the Order, and it prohibited the disposal or acquisition of any fly spray manufactured or put up in contravention of this Order.

It was held that the Order was not authorised by regulation 59 of the National Security (General) Regulations and was invalid. Williams J. at page 611 stated:

...That is not a purpose which, on its face, appears to me to have any connection with the defence of the Commonwealth or the effectual prosecution of the war or the maintenance of supplies and services essential to the life of the community...

Again, at a later stage on the same page, the learned Judge observed:

...Legislation upon a social subject which does not present any features in time of war not present in normal times is legislation that lies within the legislative province of the States and cannot be enacted by the Commonwealth under the defence power or any delegation of that power.

It may again be pointed out that these cases were relied upon by Mr. Mehta, but

none of them assists him in the theory of proximate and direct connection between the delegated legislation and the purposes for which the powers have been conferred on the delegate. Before concluding the review of the Australian cases, reference may be made to a decision in *Miller v. The Commonwealth* (1946) 73 C.L.R. 187 which was relied upon by Mr. Bhabha, in support of his proposition that the nexus need not be direct or proximate but that it is sufficient if the legislation is capable of being related to the general purposes. In *Miller's* case, Regulation 7(7) of the National Security (Economic Organisation) Regulations provided that

the Treasurer may, after consultation with the Committee of the Associated Stock Exchanges of Australia, by order, determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold.

It was held:

...that this sub-regulation, when made, was within the defence power (s. 51(vi) of the Constitution) as having a direct relation to the organization of the community for the prosecution of a modern war, and that it was still within that power even after the termination of hostilities.

It was argued that the purposes for which the Regulation was passed could never have had any sufficient bearing on the prosecution of the war or the defence of the Commonwealth. In repelling these contentions, Dixon J. observed (P. 202):

I am unable to accept these contentions. In my opinion, at the time when these regulations were adopted, a rigid control of dealings in marketable securities might reasonably have been considered essential to the financial and economic organization of the country to sustain its part in the war. It is not for us to pronounce upon matters of finance and economics. When the connection between a challenged provision and the defence power is financial or economic in character, our province is to say whether the Executive Government in which the responsibility is reposed of adopting by regulation measures required for the prosecution of the war, might reasonably consider that the conduct of the war would be likely to suffer if the challenged provisions were not made.

I do not see how we can say that it might not reasonably be considered that, in the financial or economic exigencies of the war, it was necessary to avoid the inflation or deflation of marketable securities and to control transactions, dealings, or operations which might lead to booms and slumps, or which might form a factor in absorbing funds otherwise available for government loans or other purposes...

58. On a question of ultra vires, when the end is found to be relevant to the power and the means not inappropriate to achieve it, the inquiry stops, Whether less than was done might have been enough, whether more drastic provisions were made than the occasion demanded, whether the financial and economic conceptions inspiring the measure were theoretically sound, these are questions

that. are not in point. They are matters going to the manner of the exercise of the power, not to its ambit or extent.

The principles deducible from a review of the cases referred to above are that the scope of judicial inquiry is limited and that the Court can set aside the Rules if on the face of them, the Rules appear to be wholly unrelated or if it is found on examination that they are not capable of being related to any of the purposes mentioned in s. 3(7) of the Defence of India Act, 1962.

59. That takes me to the question as to whether the Gold Control Rules would fall either cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, 1962, or secondly, under the general purposes mentioned in sub-s. (7) of s. 3 of the said Act. The first purpose in sub-s. (7) of s. 3 of the Act is ""securing the defence of India and civil defence". Entry No. 1 of List I, Seventh Schedule, of the Constitution of India, is in the following terms:

Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilization.

It may be interesting to refer to sub-s. (vi) of s. 51 of the Australian Constitution which relates to the power of the Commonwealth Parliament to legislate on matters of defence:

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

The scope and ambit of this sub-section came up for consideration in *Farey v. Burvett* wherein the validity of the War Precautions Act No. 10 of 1914 as amended by Act III of 1916 was impeached. The Act No, III of 1916 purported to authorise the Governor General to make such regulations as he thinks desirable for the more effectual prosecution of the war, or the more effectual defence of the Commonwealth etc. In dealing with the question as to whether the expression "defence power" has the same meaning at all times whether in peace or in war, Barton J. observed as follows (p. 449):

...Subjects which before that battle seemed only indirectly or remotely connected with defence as the means of winning the war may after the battle be seen quite clearly to be within it. It may be, as Sir William Irvine urged, that the power does not change. If that is so it is because of the perspective of affairs: because the power looks narrower in peace, when it is not in the foreground of our view than it does as a means of present war when war brings us into close contact with it--when its exercise becomes the most vital of our activities. It may be that the power does not become enlarged in war, but that when seen closely we know how large it is in relation to existing war. Then at least we are able to envisage the reach of its long arm. If the thing be capable, during war, of aiding our arms by land or sea, here or elsewhere, we are to say so, but we say no more. It may

be wholly beside the mark in peace, and, if it be so, we are to say so upon due occasion. But the necessity is not for us, when facts of which we take judicial notice establish that the thing is capable of aiding directly the execution of the power. If it is thus capable, then the question of the necessity, or the wisdom or expediency, of invoking such aid, is for Parliament or its duly delegated authority.

It is significant to note that the action fixing the highest price for bread within the limits of a certain locality was held to be intra virus the powers of the Commonwealth Parliament conferred by s. 51 (vi) of the Australian Constitution as interpreted by the learned Judges. Now, entry No. 1 in List 1 of the Seventh Schedule of our Constitution is more widely worded. Not only it relates to the defence of India but also includes

preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilization.

We have to examine the Gold Control Rules in the light of the wider language of the entry relating to the defence of India. The observations of the High Court of Australia in *Farey v. Burvett* will apply with greater force in interpreting the words "the defence of India" in view of the wider definition of that expression in entry No. 1 of List I of the Seventh Schedule.

60. In my view, the Gold Control Rules are clearly referable to cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, 1962. Clause (33) runs thus:

controlling the possession, use or disposal of, or dealing in coin, bullion, bank notes, currency notes, securities or foreign exchange.

Reference was made to the dictionary meaning of the word "bullion" as that word has not been defined in the Defence of India Act, 1962. In general, by bullion is meant "gold or silver in mass or in lump". Mr. Mehta's argument was that, since the clause speaks of "bullion" it would not be logical to hold that the Gold Control Rules, which are meant for imposing prohibitions and restrictions upon the making of ornaments and also on the sale and exchange of ornaments, would fall within the ambit of cl. (33). In the first place, it is necessary to remember that several matters have been brought together under cl. (33). These are coin, bullion, bank notes, currency notes, securities and foreign exchange. The object appears to be that the Central Government should have powers to make rules relating to all matters which affect the economic and financial stability of the country during the period of emergency. Clause (32) of sub-s. (2) of s. 3 of the said Act prohibits the import or export of goods or articles of any description including coin, bullion, bank notes, currency notes, securities and foreign exchange. It is thus clear that the object of the matters mentioned in cl. (33) was to regulate the possession, use or disposal of coin, bullion etc. in the internal market of the country. Although the expression "gold bullion", by itself, may not include gold ornaments, still it is necessary to note that the word "bullion" is preceded by such words as "controlling the possession, use or disposal of, or dealing in". It is not merely the possession of the bullion, not

merely the disposal of or dealing in the bullion in respect of which rules may be framed, but it is also in respect of the use of the bullion. Mr. Mehta suggested that the object underlying cl. (33) was to control dealings in bullion or the transfer or possession of bullion from one hand to other. If that were the only object of cl. (33), it was wholly unnecessary to add the word "use" in that clause. To my mind, the use of gold bullion would include the turning of gold in mass or in lump into ornaments. In the absence of power to control the use of bullion by placing restrictions in respect of turning the bullion into gold ornaments, the power conferred by cl. (33) would have been wholly inconsequential and would not have served any useful purpose. In my view, therefore, full meaning must be given to the expression "controlling the possession, use or disposal of, or dealing in, coin, bullion" etc., so that all these activities can be controlled by framing adequate rules in respect thereof. Financial or economic stability is one of the important considerations so far as defence of the country is concerned and without adequate control on the use of the bullion, it would be difficult to maintain such stability, because gold is a commodity of international exchange and importance.

61. Assuming that the Gold Control Rules do not fall within the purview of cl. (33) of sub-s. (2) of s. 3, then they can fall within the general purposes mentioned in sub-s. (1) of s. 3 of the said Act, and I am entirely in agreement with the view expressed by my learned brother in that respect. There is no substance in the argument advanced by Mr. Mehta to the effect that under the guise of advancing the purpose of the defence of the country, what is attempted is to introduce a socio-economic measure. It is undisputed that smuggling of gold involves a heavy drain on the foreign exchange resources of India. Smuggling, therefore, has to be checked. The measures undertaken under the Sea Customs Act and the Foreign Exchange Regulations have not achieved the purpose of checking smuggling. Once gold is successfully smuggled into this country, it is very easy for the same to find a place in the internal market. It can be easily turned into ornaments and once transformed in the shape of ornaments, it is impossible to recognise that the ornaments have been prepared out of the smuggled gold. The ornaments thus prepared can easily pass off as having been made out of the existing stock or out of indigenous gold. This capacity for quick transformation into ornaments is the principal difficulty in the way of preventing smuggling. Smuggling will continue notwithstanding the enactment of stringent measures so long as it is profitable to smuggle. The trade of smuggling will continue to be profitable so long as people have a hankering or a lure for gold. The best method of preventing smuggling, therefore, is to bring about a shrinkage in the demand for gold. It is for that purpose that the control and restriction on the manufacture and sale of gold ornaments appears to have been devised. It is true that the fondness for gold, or to use the words often used by Morarji Desai, the then Finance Minister, the lure for gold is deep-seated in the habits of the Indian people and would not be removed overnight or within a short period. In that sense, it is undoubtedly a long term measure i.e., making people

to change their age-old habits. In the same sense, it can be styled as a measure of social reform. But the mere fact that it is also a measure of social reform and the further fact that it is a long term measure do not by themselves turn what is essentially a measure for bringing about economic and financial stability, into a social measure. Mr. Mehta contended that in trying to correlate the Gold Control Rules to one of the purposes viz., defence of India, we have to take recourse to a chain of long and circuitous causation. He argued that if one link in the chain snaps, then the entire chain breaks down. According to him, the success of the measure is also problematical. He went so far as to say that the measure has failed to achieve the desired effect. He then went on to suggest alternative measures if the object was to promote the defence of the country. According to him, instead of imposing restrictions upon the manufacture and sale of gold ornaments, it would be more worthwhile if gold had been expropriated by the Government and utilised for War purposes. I do not think that the chain of causations is in any way circuitous or tortious as suggested by Mr. Mehta. There is a direct link between the objective viz., to prevent smuggling and thus reducing the drain on foreign exchange, and imposing the restrictions that have been imposed under the Gold Control Rules. Nor are we concerned with the question of alternative ways of achieving the desired effect. We are not concerned with the effects of the gold control policy, nor with the soundness of that policy, because that is a matter for the Parliament to decide. Incidentally, I may refer to the provisions of s. 41 of the Defence of India Act, 1962, which requires that the rules made by the Central Government must be placed on the table of each House of Parliament. Section 41 empowers the Parliament either to cancel or modify the rules. As a matter of fact, the Gold Control Rules were placed before the Parliament and they have neither been cancelled nor in any way been modified by the Parliament. That means that the policy underlying these Rules has not been rejected by the Parliament. Mr. Mehta's argument viz., that the framing of the Gold Control Rules amounts to a colourable exercise of the powers because there were already other measures which could have been pressed into service for preventing smuggling or because the new Customs Bill was on the anvil of the Parliament, is without substance. It was contended before the Supreme Court in Makkan Singh's case that in view of the existence of the Preventive Detention Act under which orders for detention could be made, Rule 30 made by virtue of the powers conferred upon the Central Government under s. 3 of the Defence of India Act amounts to a colourable piece of legislation. The argument relating to a colourable piece of legislation is essentially an argument about the competency of the Legislature. The Supreme Court in rejecting the argument observed (p. 401):--

...If the legislature thought that having regard to the grave threat to the security of India posed by the Chinese aggression, it was necessary to pass the impugned Act notwithstanding the fact that another Act had already been passed in that behalf, it would be difficult to hold that the legislature had acted mala fide and that the Act must, therefore, be struck down as a colourable exercise of

legislative power. It is hardly necessary to emphasise that a plea that an Act passed by a Legislature competent to pass it is a colourable piece of legislation, cannot succeed on such flimsy grounds....

I agree with my learned brother in the ruling that he has given viz., that the two speeches of Morarji Desai, the then Finance Minister, one on the All-India Radio on the eve of the proclamation of the Gold Control Rules and the other made in the Parliament when the Gold Control Rules were placed on the Table under s. 41 of the Defence of India Act, are relevant. I also agree with the view taken by him that neither the speech made by the Deputy Minister on the floor of the Parliament while introducing; the new Customs Bill nor the speech made by T.T. Krishnamachari, the present Finance Minister while discussing the working of the Gold Control Rules, has any relevance to the question under consideration. I also agree with the view taken by my learned brother viz., that the petitioners cannot impugn the Gold Control Rules as violative of the fundamental rights under arts. 25 and 26 of the Constitution on the state of the averments contained in the petition.

P.C. The rule is therefore, discharged. Having regard to the fact that a large number of dealers, small and big, have been affected by the Gold Control Rules and having regard to the importance of the matter, there will be no order as to costs.