

(1976) 05 CAL CK 0031
In the Calcutta High Court
Case No : Matter No. 395 of 1974

Banku Behari Dutt

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 19-05-1976

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 226, 359
Land Acquisition Act, 1894 — Section 4, 4(1), 5A, 6

Citation : AIR 1976 Cal 393

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : D. Ghose and S.K. Kapoor, for the Appellant; A.G. and C. Roy, for the Respondent

Final Decision : Dismissed

Judgement

Sabyasachi Mukharji, J.—The petitioner is the owner of premises No. 98, Ashutosh Mukherjee Road, Calcutta, with all the structures standing thereon. The petitioner states that the said premises is occupied and partly used by the petitioner for his residential purpose and as partly his business purposes. On 8th January, 1974, the petitioner received a notification published in the Calcutta Gazette. The said notification which is annexure B to the petition, inter alia, states as follows:

"..... Whereas it appears to the Governor that land is likely to be needed for a public purpose, namely, for construction of Mass Rapid Transit System and other connected works relating to the said system from Dum Dum to Tollygunge in the city of Calcutta, it is, hereby notified that piece of land comprising premises Nos. 29 and 98, Ashutosh Mukherjee Road and 1, Mohani Mohan Road, described in Block I and II in the Schedule below altogether measuring, more or less, 0.0891 hectare (0.2201 of an acre), are likely to be needed for the aforesaid purpose at the public expenses within the Ward Nos. 73 and 75 of the Calcutta Municipality in the City of Calcutta.

This notification is made under the provision of Section 4 of Act I of 1894 read with the said notification to all whom it may concern. A plan of the land may be inspected in the Office of the First Land Acquisition Collector, Calcutta, at No. 45, Princep Street (45, Biplabi Anukul Chandra Street), Calcutta.

In exercise of the powers conferred by the aforesaid section, read with the said notification the Governor is pleased to authorise the officers for the time being engaged in the undertaking, with their servants and workmen, to enter upon and survey the land and do all other acts required by that section."

2. In the said notification it is stated that the plan of the land might be inspected in the office of the First Land Acquisition Collector. The petitioner duly took inspection of the said plan. According to the petitioner, the plan, as inspected merely indicated the premises sought to be acquired and did not give any details or particulars or specific reasons or cause for which the said premises was being acquired by the respondents. The petitioner, thereafter caused enquiries in the office of the Land Acquisition Collector, Calcutta, being the respondent No. 2 herein and the petitioner was informed that the said premises of the petitioner was being acquired for construction of A. C. Plant and other electrical arrangements in connection with the said system. The petitioner received no further information regarding the purpose of such acquisition. The petitioner filed objection on the 12th February, 1974, to the said notification. The petitioner took various objections against said acquisition. The petitioner, however, contended that in the absence of further particulars it was not possible for the petitioner to indicate further objection. The petitioner, however, pointed out that two premises, namely No. 28-A and No. 18 both situated at Ashutosh Mukherjee Road, Calcutta, were more suitable for the purpose of A. C. Plant and other electrical arrangements. The petitioner, further, pointed out various other alternative sites were available which would be far more suitable for the purpose of construction of A.C. Plant and other electrical arrangements. Thereafter, there was a hearing on the 19th March, 1974, before the respondent No. 2. It is not necessary to mention the details of hearing but it appears that on or about 19th April, 1974, the petitioner again appeared before the respondent No. 2 and made certain submissions regarding alternative sites. At the said hearing the petitioner again submitted that alternative sites were available and agreed to file further petition showing such alternative sites. Pursuant to the said arrangement, on 27th April, 1974, the petitioner filed further petition along with plans before the respondent No. 2 stating full details of alternative sites which were more suitable. On the 27th April, 1974, the petitioner's advocate received a copy of the letter from the respondent No. 2 stating that a further joint inspection would be held on 3rd May, 1974. The respondent No. 2 also informed the petitioner that M.R.T.S. authorities had examined the sites suggested by the petitioner as alternative to the said premises being acquired and since none of the same would suit the purpose of the requiring authority, joint inspection on 3rd May, 1974 was cancelled. Thereafter, on 3rd May, 1974, the petitioner filed further petition before the respondent No. 2. By the said petition the petitioner duly

recorded that full opportunity had not been given. The petitioner further stated that the first date of hearing the same was adjourned. Again by a letter dated 11th May, 1974, the respondent No. 2 informed the petitioner that local inspection and hearing of objection would be held on 20th May, 1974. The said letter was actually addressed by the respondent No. 2 to the Executive Engineer, M.R.T.S. (Railways Calcutta). The said letter was to the following effect:

"In reply to your memo noted above this is to request you to kindly re-examine the suggestion offered by the owners for alternative sites as communicated to you under this office Memo No. 282 (2) M.T.P. dated 27-4-1974 and obtain views of the Electrical wings, if the alternative sites suggested therein can serve the purpose of the M. T. P. instead of 98, A.T.M. Road. It would be much appreciated if you kindly arrange for appearance of the expert of the Electrical Division to satisfy the Collector during the local inspection and hearing of objection about the reasons for which the alternative sites will not serve their purposes.

The next dates and times for local inspection and hearing of objections have been fixed on 20-5-1974 at 4 p. m. and 21-5-1974 at 3 p. m. respectively. You along with Electrical experts are requested to attend the programme positively."

3. A copy of the said letter was forwarded to the petitioner. Pursuant to the said letter a joint inspection of alternative sites was held on 21st May, 1974. Thereafter, on 23rd July, 1974 the respondent No. 2 informed the petitioner that further hearing of the petitioner's objection would take place on 29th July, 1974. It is the case of the petitioner that at that hearing the respondent No. 2 showed to the petitioner a letter addressed by the Executive Engineer wherein he stated that two premises Nos. 61 and 63, Ashutosh Mukherjee Road together would serve the purpose. Thereafter, it has been mentioned in the affidavit-in-opposition on behalf of the respondent that the suggestion of the petitioner for alternative site was considered and attention of the requiring authority was also drawn to the said alternative suggestion but the requiring authority intimated that premises No. 98, Ashutosh Mukherjee Road was preferred by them for technical considerations. Thereafter, the declaration u/s 6 was issued on the 10th September, 1974. The petitioner states that the petitioner came to know of the said declaration on 7th December, 1974. The said declaration, inter alia, contains the following:

"And whereas the Governor is satisfied that land is needed for a public purpose, namely, for the construction of Mass Rapid Transit System and other connected works relating to the said system from Dum Dum to Tolleygunge in the City of Calcutta, it is hereby declared that pieces of land comprising premises Nos. 29 and 98, Ashutosh Mukherjee Road, and 1, Mohini Mohan Road, described in the schedule below and altogether measuring more or less, 0.0891 of a hectare (0.2201 of an acre), are needed for the aforesaid public purpose at the public expense within the Ward No. 73 of the Calcutta Municipality in the City of Calcutta."

4. In this application under Article 226 of the Constitution the petitioner is challenging the notification dated 24th September, 1973, under the Land Acquisition Act, 1894, and the declaration u/s 6 of the said Act dated 10th September, 1974. In this application under Article 226 of the Constitution the declaration u/s 6 has been challenged on the ground of violation of Article 14 of the Constitution. The circumstances and the manner in which the question of Article 14 has been raised in this application will be discussed later. It was, urged that inasmuch as Article 14 was involved in this application under Article 226 of the Constitution the hearing of the application should be adjourned during the Emergency. On the other hand, it was contended on behalf of the respondents that in view of the decision of the Division Bench of this Court the hearing should not be adjourned. I will deal with this contention and the relevant decisions on this aspect of the matter at the appropriate time.

5. First, however, it is necessary to deal with the challenge to the notification u/s 4 of the Act. The notification has been challenged on the ground of vagueness. I have set out the said notification u/s 4 hereinbefore. Sub-section (1) of Section 4 of the Land Acquisition Act, 1894 provides that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. Thereupon it deals with certain acts to be done upon the notification being issued. Section 5-A of the Act provides for objections to be filed against the said notification and thereupon after consideration of the said objections and recommendation by the Collector a declaration as contemplated in Sub-section (1) of Section 6 has to be issued. The challenge to the impugned notification u/s 4 in this case is that the same was vague. It has to be mentioned that the purpose of notification u/s 4 of the Act is to carry on preliminary investigation with a view to find out after necessary survey and other incidental acts whether the land was adopted for the purpose for which it was sought to be acquired. It is also the purpose of the notification to give opportunities to those who are entitled to file objections. For the proposition that notification u/s 4 was for preliminary investigation reliance may be placed on the observations of the Supreme Court in the case of Babu Barkya Thakur Vs. The State of Bombay and Others, . Whether in a particular case the notification is vague or not depends upon the facts and circumstances of that case. In the case of Munshi Singh and Others Vs. Union of India (UOI), the Supreme Court had occasion to deal with a notification which merely mentioned that the land was needed for "planned development of the area". The Supreme Court found that where the notification merely mentioned that the land was needed for planned development of the area and there was no proof that the interested persons were either aware of or were shown the scheme or the master plan in respect of planned development, it was held that the persons were unable to object effectively and, therefore, the acquisition proceeding was liable to be quashed. In the case of Aflatoon and Others Vs. Lt. Governor of Delhi and

Others, the Supreme Court observed that the notification u/s 4(1) must specify the particular purpose for which the land was needed or was likely to be needed as otherwise the matter specified in Section 4(2) could not be carried out. The question, whether, the purpose specified in the notification in Section 4 was sufficient to enable objections to be filed u/s 5-A would depend upon the facts and circumstances of each case. There the Supreme Court found that in the case of acquisition of a large area of land comprising of several plots belonging to different persons, the specification of the purpose could only be with reference to the acquisition of the whole area. Therefore, the notification stating that an area of 34.070 acres of land was needed for public purpose, namely, the planned development of Delhi was a valid notification and the petitioners in that case were found not to be prejudiced. In the instant case before me the notification clearly states that the acquisition was for; the purpose of construction of Mass Rapid Transit System and other connected works relating to the said system from Dum Dum to Tollygunge in the City of Calcutta and a Plan was given indicating the premises in question. It is true that the layout plan of Mass Rapid Transit System was not given in respect thereof. That did not prevent or could not prevent the petitioner from making an effective objection to the proposed acquisition. Indeed, as mentioned hereinbefore the notification u/s 4(1) was for preliminary investigation. The petitioner thereupon approached the office of the Land Acquisition Collector and obtained the information that the acquisition was for the purpose of installing A. C. Plant in the said premises. It must also be mentioned that though there is no statement to that effect that Mass Rapid Transit System from Dum Dum to Calcutta is a fairly well publicised and well known factor in Calcutta; the proposal for its implementation in some form or other is well known to the inhabitants of Calcutta. It would be unreal in my opinion to ignore that factor by this Court in an application under Article 226 of the Constitution. Judged in that background and in the background of the facts and circumstances of the case I am unable to accept the contention that the notification u/s 4(1), being Annexure "B" to the present petition is vague.

6. It was, then, contended that the declaration u/s 6 was bad because it was urged that the petitioner had suggested certain alternative sites and at one stage the Collector had forwarded the suggestion for alternative sites to the Requiring authority, namely, the authority in-charge of Mass Rapid Transit System. Indeed, the requiring authority had intimated that the premises suggested by the petitioner would be sufficient to serve the purpose of acquisition but for technical consideration they preferred the premises of the petitioner in question. Thereupon the Land Acquisition Collector wrote to the Executive Engineer of the requiring authority to arrange for the appearance of an expert to satisfy the Collector during the inspection that there were reasons for technical preference, of the premises in question. But the grievance of the petitioner is that without being satisfied about the reasons for technical preference for the premises in question, the Collector had recommended the acquisition of the premises in question. It was urged that the Collector in making the recommendation and

report u/s 5-A of the Act had abandoned his jurisdiction and abdicated his powers. The Collector did not, it was urged, investigate whether there were valid reasons for technical preference for the premises in question. In the case of *Shri Mandir Sita Ramji Vs. Lt. Governor of Delhi and Others*, the Supreme Court had occasion to consider the effect of Section 5-A of the Act. There the objection that certain lands belonged to the religious institution and would come within the purview of the exempted class of lands in the notification raised questions of fact and, therefore, the Land Acquisition Collector was required to enquire into and give a hearing and make recommendation as provided in Section 5-A. The Supreme Court found that his failure to do so showed that he had declined to exercise his jurisdiction. The fact that the ultimate decision had to be made by the State Government did not relieve the Collector of his statutory duty to enquire into the objection and make his recommendation. The observance of the procedure laid down by the statute before depriving a person of his property was necessary to generate the feeling that rule of law prevailed in this country. When a procedure was prescribed by the legislature, it was not for the Court to substitute a different one according to its notion of justice. A decision by the Government on the objection, when the Collector afforded no opportunity of being heard to the objector, would not be proper. The Supreme Court found that the power to hear the objection u/s 5-A was that of the Collector and not of the appropriate government. It was no doubt true that the recommendation of the Land Acquisition Collector was not binding on the Government, and the Government might choose either to accept the recommendation or to reject it but the mandatory requirement of the section was that when a person's property was proposed to be acquired, he must be given an opportunity to show cause against it. The fact that the Collector was not the authority to decide the objection did not exonerate him from his duty to hear the objector on the objection and make the recommendation. Sub-section (1) of Section 5-A provides that any person interested in any land which has been notified u/s 4(1), as being needed or likely to be needed for a public purpose may, within thirty days from the issue of the notification, object to the acquisition of the land or of any land in the locality. Sub-section (2) of Section 5-A stipulates that every objection under Sub-section (1) shall be made to the Collector in writing and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such objections and after making such further enquiry, if any, as he thinks necessary, submit the case for decision of the appropriate government together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the appropriate government on the objections shall be final. Therefore, the Collector was required to give an opportunity to make the objection to the person interested and thereupon, if such objection was filed, to consider the said objection and for that purpose to give a hearing and thereupon to make a report together with the recommendation on the objection filed but the ultimate decision on the objection would be of the State Government. In this case it has to be mentioned that the petitioner submitted two alternative premises for

acquisition, namely, premises Nos. 61 and 63, Ashutosh Mukherjee Road. The owner of one of the premises, namely 63, Ashutosh Mukherjee Road, by a letter intimated her willingness to the acquisition of the property. There is no evidence that the owner of the other premises, viz., 61, Ashutosh Mukherjee Road had expressed his or her willingness. Furthermore, it appears from the affidavit of the Land Acquisition Collector that the Executive Engineer, M.R.T.S. (Railways) by a letter dated 19th July, 1974, had intimated to the Land Acquisition Collector that Premises Nos. 61 and 63, Ashutosh Mukherjee Road together would serve the purpose but in conclusion it was intimated in the letter that the authority of M.R.T.S. preferred the premises No. 98, Ashutosh Mukherjee Road for technical consideration. At one stage the Collector wanted to be satisfied that there were grounds for preference for 98, Ashutosh Mukherjee Road from technical point of view. Later on, it appears that he made his recommendations without enquiring into the question whether there was any ground for preference on technical reasons for Premises No. 98, Ashutosh Mukherjee Road. The question, is, whether in the facts and circumstances the Land Acquisition Collector has acted in violation of duties imposed upon him in terms of Section 5-A of the Act. It has been further mentioned as it appears from the affidavit-in-opposition of the Land Acquisition Collector that premises No. 98, Ashutosh Mukherjee Road being the premises in question of the petitioner is a single storied building but premises Nos. 61 and 63, Ashutosh Mukherjee Road were three storied buildings and the Collector has emphasised that apart from anything else the acquisition of these two premises in place of premises No. 98, Ashutosh Mukherjee Road would entail more cost. Therefore, it appears that the Collector has made his recommendations for acquisition of the premises in question on the ground that though alternative premises were available and suitable for the purpose of requiring authority the requiring authority has expressed preference for the premises on question. Furthermore, alternative accommodation suggested by the petitioner would entail payment of more compensation. If the Land Acquisition Collector has acted on these considerations, in my opinion, it cannot be said that he has abandoned his function u/s 5-A of the Act. Even if it be said that it was his duty to enquire whether there were valid reasons for preference on technical grounds, the other ground that he has mentioned, namely, acquisition of the two alternative premises in question would entail payment of more compensation is by itself a valid ground for declining to accept the objection filed by the petitioner. Furthermore, in this case, the question that the Land Acquisition Collector had to determine whether there was valid objection to the acquisition, if the purpose of acquisition was public purpose and if the premises in question proposed to be acquired was a suitable premises; in these circumstances the fact that there was alternative suitable premises would not, in my opinion, entitle the objector to ask the Collector not to recommend the acquisition of the premises in question. In this case, therefore, the Collector was not obliged, in my opinion, to consider whether there were technical reasons for preference of the premises in question unless it was suggested that the preference of the requiring authority was not a genuine preference but was for oblique or mala fide purpose. In such a

case whether there are valid grounds for preference indicated by the requiring authority or not would become a relevant factor for consideration. But in the instant case there is no allegation that preference alleged by the requiring authority was for any oblique or ulterior purpose. In these circumstances, if the Collector has made his recommendation taking into consideration the preference though not supported by reasons of the requiring authority together with the fact that the proposed alternative sites would entail payment of more compensation for acquisition, in my opinion, it cannot be said that the Collector has not discharged his functions u/s 5-A of the Act or had abdicated his discretion in this matter. After all it should be borne in mind that decision on the objection will be of the appropriate Government and the decision of the appropriate government on the objection will be final. In the aforesaid view of the matter, I am unable to accept the contention that the declaration u/s 6(1) was invalid because the Collector had not exercised his function properly in making the recommendation u/s 5-A of the Act.

7. Counsel for the petitioner, then, contended that the petitioner was entitled to be heard before the State Government took the final decision. He submitted that the decision to make a declaration u/s 6(1) affected property rights. Therefore, it should be read in the section that the person concerned has a right to be heard. Reliance was placed on the observations of the Supreme Court in the case of Union of India (UOI) Vs. Col. J.N. Sinha and Another, where the Supreme Court observed that rules of natural justice were not embodied rules nor can these be elevated to the position of fundamental rights. Their aim was to secure justice or to prevent miscarriage of justice. These rules could only operate in areas not covered by any law validly made. These did not supplant the law but merely supplemented it. If a statutory provision could be read consistently with the principles of natural justice, the courts should do so. But if a statutory provision either specifically or by necessary implication excluded the application of the rules of natural justice then the court could not ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether exercise of a power conferred should be made in accordance with the principles of natural justice or not depended upon expressed words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of the power. In this case, it was contended on behalf of the petitioner that statutory provision of Section 6 could be read consistently with the principles of natural justice by reading in the provision that before a decision for declaration u/s 6(1) was taken the aggrieved party was entitled to be heard and for that purpose was entitled to have a copy of the report made by the Collector u/s 5-A of the Act.

8. The true principle for deciding this question is to find out what is the procedure prescribed by the Legislature and then to decide whether the procedure enjoined involves determination of question which requires adherence to the principles of natural justice. It is only then that the question arises

whether the legislature has by either express words or by necessary implication indicated that the rules of natural justice should or should not be followed, and if so what rules ? But where a procedure has been prescribed by the legislature, it is not for the Court to substitute a different one according to its own notion of justice. In the instant case, the scheme of the Act provides that at the first stage the appropriate Government has to be satisfied that a particular land or a particular area of land is needed for a public purpose and to make a declaration to that effect u/s 4(1) of the Act. Thereupon Section 5-A provides for objections to be filed and provides for objections to be heard upon notice to the parties concerned. It imposes an obligation on the Collector to make further enquiry, if it is necessary and to make a report containing its recommendation on the objections. The final authority for decision on this objection is, however, the State Government. On a consideration of the report of the Collector a declaration u/s 6(1) of the Act follows if the State Government decides to acquire the land in question and reject the objections of the objectors. In the scheme Section 5-A specifically provides for hearing of objection. Sub-section (2) of Section 5 enjoins that the records of the proceedings before the Collector are to be transmitted to the State Government. Sub-section (1) of Section 5-A of the Act also enjoins that the Collector should together with the record of the proceedings held by him and the report send his report containing the recommendations on the objections. The Collector is obliged to submit the case for the decision of the appropriate Government together with his recommendation. In this background I am of the opinion that the scheme specifically excludes any question of hearing or further opportunity at the stage of Section 6(1) Where specific provision has been made for hearing objection by Sub-section (2) of Section 5-A, it must be presumed that the legislature intended to give no further hearing or no other opportunity. As a matter of fact, if the scheme is so read, then in my opinion, it cannot be said that Section 4 read with Section 5-A and Section 6(1) of the Act provides any arbitrary power or postulates a procedure destructive of the principles of natural justice. Justice, natural or otherwise, does not require that every step in the decision must be upon hearing to the parties to be affected. If that is the position then, in my opinion, it cannot be said that the petitioner was entitled to any hearing u/s 6(1) of the Act. It cannot also be said that the petitioner was entitled to a copy of the report in question. The responsibility has been given to the appropriate Government to make a declaration u/s 6(1) of the Act after taking into consideration all relevant facts, including these objections of the objectors heard upon notice and opportunity to the objectors. In my opinion the procedure cannot be challenged on the ground that it is violative of the principles of natural justice or purports to give arbitrary power to the acquiring authority.

9. In this connection a further question arises. Counsel for the petitioner contended that if it be held that Section 6(1) of the Act did not provide for any opportunity of being heard or any opportunity of making representation, then the same would be violative of Article 14 of the Constitution. The problem, therefore, is whether, the question whether Section 6(1) of the Act is violative of Article 14

of the Constitution, can be considered at this stage during the continuance of the Emergency.

10. In the petition I find only two paragraphs regarding Articles 14 and 19 of the Constitution. In paragraph 30 of the petition it has been alleged as follows:

"30. Your petitioner states that the said sections are ultra vires your petitioner's rights to acquire, hold and dispose of property guaranteed under Article 19(1)(f) and the same are ultra vires your petitioner's fundamental rights under Article 14, 19 and 31 of the Constitution of India."

Again in Ground No. XXX it has been stated as follows:

"XXX. For that the said sections are ultra vires the fundamental rights of the petitioners and/or each of them, to acquire, hold and dispose of property guaranteed by the Constitution, particularly Articles 14, 19 and 31 thereof." Apart from the aforesaid averments, I find no other averments indicating what sections are violative of either of Article 14, 19 or 31 of the Constitution of India. No argument was made before me about violation of Article 19 or 31 of the Constitution, the only argument was in respect of Article 14 of the Constitution. From the averments set out hereinbefore it is manifest that no cause of action challenging the Section 6(1) as violative of Article 14 of the Constitution has been indicated in the said averments made. After all, if a provision is contended to be violative of a provision of the Constitution it is necessary to indicate how and in what manner the said provision is violative of the Constitution. There is no such indication either in paragraph 30 or in ground XXX of the petition. On this state of pleading I am clearly of the opinion that there is no cause of action for contending that the provision of Section 6(1) of the Act is violative of Article 14 of the Constitution. Therefore, in this case really no question of examination of violation of Article 14 arises because there is no cause of action as such of violation of Article 14 of the Constitution, It was only in the argument of counsel for the petitioner that a case of violation of Article 14 was made out. The question, therefore, that whether, in those circumstances, this court at this stage can go into the question of violation of Article 14 does not arise for consideration.

11. But inasmuch as some contentions were urged before me, in my opinion, it is necessary to deal with the position. It must be made clear that this is not an application for variation or vacation of any interim order. Even in a case where the question of Article 14 or Article 19 is involved during Emergency, whether the Court could hear an application for an interim order or for variation or vacation of the interim order, different considerations might arise. This is also not a case where the Act in question is immune from challenge as having been placed in the 9th Schedule of the Constitution as was the position in the case before the Division Bench of this Court in the case of *Union of India v. Dhirubhai Gokuldas Vora* (1976) 1 Cal LJ 148. In that case there was an interlocutory application made in connection with a Mandamus appeal. The appellants Dhirubhai Gokuldas Vora and others preferred an appeal against a judgment and order passed by Mr.

Justice Banerjee on the 24th November, 1975, adjourning the hearing of the application under Article 226 of the Constitution sine die on the ground of Proclamation of Emergency. In the application it was prayed that the impugned order be stayed and the earlier order dated 6th January, 1975, be vacated. The State Government submitted that it had not yet formed any opinion about the detention of the petitioner. On behalf of the Union of India it was also submitted that no order for detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, had yet been made against the petitioner. In that view of the matter, the prayers of the writ application were found to be not tenable. Since the prayers were not tenable, the order for interim injunction was also beyond the scope of the writ application. It was found in that case that in the context of the facts of that case as the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, had been placed in the 9th Schedule in an action by way of a writ application for infringement of the fundamental right, there was, no justification in that case to adjourn the original application under Article 226 of the Constitution sine die in view of the Proclamation of Emergency.

12. In the case of *Kanhaiyalal Agarwala v. Union of India*, reported in (1976) 1 Cal LJ 293 at p. 303 of the report S. K. Dutta, J., delivering the judgment of the Division Bench observed, *inter alia*, as follows:

"Mr. Chakraborti has further submitted that in view of the orders issued by the President suspending enforcement of the rights under Articles 14, 19, 21 and 22, the impugned orders of ad interim injunction must be vacated. It is well known that the interim orders are given in aid of the main relief sought for in the action. If, therefore, it is not permissible to have enforcement of the rights under the said articles during the period of emergency in any action it is obvious that such right also cannot be enforced temporarily within the period of emergency which will be of the effect of interim injunction. Accordingly, we are of opinion that such injunction, which amounts to enforcement of the aforesaid rights during the pendency of the proceedings, though temporarily, is not available during the period of emergency. There has been an argument that, as the proceedings for enforcement of such rights are suspended, if there has been any interim injunction enforcing such rights at the time of the notification of the orders suspending such rights, the proceeding cannot go on during the period of emergency with the result that the interim relief enforcing the rights under the said articles would be and continue to be available to the claimants in the proceedings in spite of their suspension. The order suspending proceedings for enforcement of the fundamental rights does not amount to or imply suspension of the proceeding in respect of other rights which may also be sought to be enforced along with the rights suspended. Such proceedings and any injunction in respect thereof may continue if other rights are sought to be asserted. But it cannot be said that by reason of the interim order, such suspended rights will continue to be enforced contrary to the provisions of the orders which suspend their enforcement. Accordingly the interim orders which enforce such rights

during the period of emergency must necessarily be suspended. There is, therefore, ample substance in Mr. Chakraborti's contention that the interim order which purports to enforce the fundamental rights as aforesaid cannot be allowed to continue and the interim order in aid of securing such fundamental rights during emergency has got to be vacated."

13. So far as the aforesaid observations dealt with the question of an application under Article 226 of the Constitution where Article 14 was involved in respect of an Act which was not in the 9th Schedule of the Constitution, the same were obiter. With respect, however, I may point out that in the Proclamation of the President issued on the 27th June, 1975, it has been specifically observed that the right of any person to move any court for the enforcement of the rights under Articles 14, 21 and 22 of the Constitution as well as the proceedings pending in any court in the enforcement of the rights are suspended. It is necessary to remind myself that what is suspended firstly, (is) the right to move any Court for the enforcement of the rights conferred under Article 14, Article 21 and Article 22 and secondly, all proceedings pending in any Court for the enforcement of those rights. It is necessary, therefore, to set out the Proclamation which is as follows:

"In exercise of the powers conferred by Clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended, for the period during which the proclamation of emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971, and on the 25th June, 1975, are both in force.

This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any order made before the date of this order under Clause (1) of Article 359 of the Constitution."

14. The only decision which dealt with this question, in my opinion, is the decision of the Supreme Court in the case of Makhan Singh Vs. State of Punjab (and connected appeals), . In that case the Supreme Court observed at p. 393 of the report as follows:

"(13) Since the object of Article 359(1) is to suspend the rights of the citizens to move any Court, the consequence of the Presidential Order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the Order has been issued, because the Order takes away the right to move any court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh

proceeding falling within the mischief of Article 359(1) and the Presidential Order issued under it is instituted after the Order has been issued, it will have to be dismissed as being incompetent. In other words, Article 359(1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the Proclamation or for such shorter period as may be specified in the Order." The rights involved in those articles are not suspended. Only the right to move the Courts for enforcement of those rights is suspended by the first limb of the declaration. Secondly the proceedings pending in any Court for enforcement of those rights are suspended, not against the rights involved in these pending proceedings. As the Supreme Court has observed in the last mentioned decision that the order takes away the right to move any Court and during the operation of the order the said right cannot be exercised by instituting a fresh proceeding contrary to the order. It, therefore appears to me that, there is no question of suspended rights being continued to be enforced contrary to the orders which suspend their enforcement, in a case where interim order was granted before the issue of the order, where the Court was not moved by any fresh proceeding after the order. For the aforesaid reasons in an application where the infringement of Article 14 was involved in respect of a statute which was not in the 9th Schedule of the Constitution and in respect of which a rule nisi was issued before the issue of the order suspending the right to move the Court I had to adjourn the hearing of the application, -- see the case of Jagadish Ch. Agarwal Vs. Union of India (UOI) and Others, . In that case there was no question that Article 14 had not been properly involved, nor was there any application made for vacating the interim order in the suspended proceeding. Another learned single Judge in the case of K. C. Bose and Co. (P) Ltd. v. Calcutta Dock Labour Board (1976) 1 Cal LJ 377 has considered this question. The learned Judge has referred to the case of Bhupendra Ratilal Thakkar and Another Vs. Commissioner of Income Tax, Gujarat-I and Others, as well as the case of Shri Kartar Singh and Others Vs. Shri Piara Ram and Others, . In none of these cases the question, whether, during the Emergency in matters where infringement of Articles 14 and 19 are involved the proceedings would remain suspended or not, was considered. From the fact that the Supreme Court did consider the applications no inferential ratio of the decisions of the Supreme Court, in my opinion, can be drawn. The learned Judge has observed that the decision in Jagadish Chandra Agarwala's case has lost its force in view of the decision of the appeal court in Vora's case. In my opinion the facts of that case were different. Be that as it may, I have not found myself any answer to the question where in a case in respect of a matter which is not included in the Ninth Schedule, if infringement of Article 14 is involved, whether during the emergency the proceeding can go on for vacating or variation

of the interim order. I have not found myself any satisfactory answer. It is high time that a clear pronouncement on this point is made before the law gets any more enmeshed. I can do no better than to echo the sentiment of Chief Justice Holt when he said "I have stirred these points, which wiser heads in time may settle" (as quoted by Lord Denning in the case of *Rahimtoola v. Nizam of Hyderabad* 1958 AC 379 at p. 424). But in the instant case before me as I find no cause of action for alleged infringement of Article 14; I have decided the contentions urged in this case.

15. In the aforesaid view of this matter this application fails and is accordingly dismissed. The rule is discharged. Interim order is vacated. There will be no order as to costs. Operation of this order is stayed for four weeks.