

(1966) 04 MAD CK 0013

In the Madras High Court

Case No : Writ Petition No's. 331 and 369 of 1965 (P)

D. Gobalouslyamy

APPELLANT

Vs

Union Territory of Pondicherry and Others

RESPONDENT

Date of Decision : 06-04-1966

Acts Referred:

Constitution of India, 1950 — Article 123, 363, 73(1)
Government of Union Territories Act, 1963 — Section 18(2), 34
Merger Act, 1962 — Section 10, 9
Pondicherry (Administration) Act, 1962 — Section 10, 4, 4(2), 6, 9

Citation : AIR 1968 Mad 298

Hon'ble Judges : M. Anantanarayanan, O.C.J.; Ramakrishnan, J

Bench : Division Bench

Judgement

M. Anantanarayanan, Offg. C.J.

1. These are two related writ petitions for the issue of writs of quo warranto, which originally sought for writs of mandamus, instituted by Sri. D.

Gobalouslywami, an Advocate--Conceil practising in the Pondicherry Courts for over 19 years, and currently President of the Bar Association. he

challenges the orders of appointments of Sri S. Maharajan as the President of the Tribunal Superieur d'Appeal in Pondicherry and of Sri R.

Krishnamurthi as the Puisne Judge of the same Court. Very broadly stated, the grounds of attack are that a Process Verbal, which was conducted

between the French and the Indian delegations on 15-3-1963, and which has to be regarded as integral with the treaty of Cession, has guaranteed

certain rights to the citizens of Pondicherry in respect of the judicial organisation and the qualifications of the judiciary, which have been infringed by

the abrupt change made evident by these appointments.

(2) It is common ground between the writ petitioner and the Government of Pondicherry as well as the Union of India, (Respondents 1 and 2) that

these appointments were made in the wake of two notifications, the first promulgated by the Central Government by virtue of the powers conferred

on it under S. 4(2) of the Pondicherry (Administration) Act 1962 dated 12-10-1963 and the second termed the Pondicherry Judicial Officers

(Qualifications) Rules 1963, promulgated by the President of India on 5-10-1963, and that the appointments were based upon the modifications

ensuing from those orders. The contention is that one of the notifications, that is the one issued by the President of India, purporting to be in

exercise of powers conferred by the proviso to Art. 309 of the Constitution, cannot be sustained on that basis and is unconstitutional.

In brief, therefore, it is claimed that the appointments of those two officers, who do not possess the degree in law of a French university known as

Licencie en droit, and who do not have the requisite knowledge of the French language, cannot be validly supported because of the infringement of

a justiciable guarantee embodied in the Process-Verbal, and also because the Presidential promulgation bringing into existence new rules for the

qualifications of the judiciary at Pondicherry, earlier referred to, is unconstitutional. Indisputably, these are grounds of great interest and

importance, and deserve careful consideration at the hands of the Court.

(3) At the outset, the change in the nature of the writ sought and the interest of the petitioner in the proceedings may be briefly referred to.

Originally, the writs were of the character of proceedings in mandamus because of the proposals for appointment, had not been entirely

implemented by then; later, following the appointments, they were altered into writs of *qua warranto*. Sri Arunachalam contends for the writ

petitioner, that he is a person interested, though not a rival claimant to these offices, as he will be adversely affected by the change in the judicial

organisation, resulting from the introduction of Judges not qualified in French law, and not having the requisite knowledge of the French language.

A person possessing an interest of this kind can complain; vide *Srikrishan v. State of Andhra Pradesh* AIR 1957 A.P. 734.

With regard to the nature of the injury sustained, reference is also made to *Dr. P. S. Venkatasami v. University of Mysore*, AIR 1964 Mys 159. I

shall proceed on the assumption that the writ petitioner has a right to complain, and to seek these reliefs at our hands, if he can show that the

orders of appointment infringed a guarantee, which is part of the Treaty of Cession, and which is so implemented by the Pondicherry

(Administration) Act XLIX of 1962, that the guarantee is justiciable in the Municipal Courts of India; again, that he has a right to relief if he can

show that the order of the President introducing changes in qualifications for judicial officers of the Pondicherry, under the provision to Art. 309 is

unconstitutional. These are different limbs or branches of the same and main argument directed towards the appointments.

(4) The arguments involve a careful exposition of the history of the French settlement of Pondicherry, with regard to the aspect of the constitutional

history of the settlement. It is also essential to refer to the previous. Decrets as envisaging the organisation of Court, on the qualification of judicial

officers, and, further, the terms of the Treaty of Cession, the Proces-Verbal and the relevant sections of the Act XLIX of 1962. The entire history

can be conveniently divided into three phases, or stages. The essential facts here are as follows:

(4-A) It appears that by a Decret of February 1701, the French Law was first introduced into the French settlement of Pondicherry. The Royal

Ordinance of 7th February 1942 is the basis of the French Judicial system as prevailing at Pondicherry. It is noteworthy that, though the area was

under the British occupation from 1793 to 1816, for 23 years, the French judicial system continued to function intact, and the French law was

administered in Courts of the settlement (V Schmit). There is a decree, dated 22-8-1928, which is of considerable importance because several

provisions of this decree were replaced by the notification of Central Government earlier referred to under Sec. 4(2) of the Pondicherry

(Administration) Act 49 of 1962; it is this decree which originally provided for the classification of Courts in French colonial territories including

Pondicherry" and the qualifications of the judiciary. There is another decree, dated 12-6-1947, relating to the hierarchy of Courts at

Pondicherry, and a third, dated 18th May 1952 determining the composition of the Tribunals. On 15th December 1952, the Code de travail

(Labour Code) was implemented by the establishment of a Labour Court. This is the first phase of the constitutional history of this settlement.

(5) The second phase, or state, commences with the merger agreement, dated 21-10-1954, entered into between the high contracting powers of

India and France. This agreement included Pondicherry and took effect on 1-11-1954, thereafter, this is known as the date of the de facto

transfer. The settlement of Chandranagore alone was excluded and it was transferred to India by a separate treaty; vide Union of India (UOI) Vs.

Manmull Jain and Others, . During this period of de facto transfer. Pondicherry was administered by the Government of India under (a) the Foreign

Jurisdiction Act XLVII of 1947 and (ii) and French Establishment Administration Order, 1954. Three cases of the Supreme Court throw a flood

of light on the constitutional development of this phase. They are the first case of N. Masthan Sahib Vs. Chief Commissioner, Pondicherry, , the

subsequent N. Masthan Sahib Vs. Chief Commissioner, Pondicherry, , on the replies of Union Government to the questions referred to by the

Supreme Court, and K.S. Ramamurthi Reddiar Vs. The Chief Commissioner, Pondicherry and Another, . As pointed out by the Supreme Court,

in view of the unilateral action, there was no immediate integration and the entire situation was governed by the treaty.

(6) We now pass on to the third phase, which is the vital phase, for the purpose of our present analysis the merger agreement dated 21-10-1954,

followed by the Treaty of Cession, dated 28-5-1956. In International Law, as we shall see, such a treaty does not come into immediate effect by

the mere virtue of the existence, it has to be ratified by the high contracting parties, and quite sometime elapsed before the ratification took place.

The de jure transfer took effect on 16-8-1962, and this is known as the appointed day, a clear reference thereto being embodied in Act XLIX of

1962. Act XLIX of 1962 came into effect on 5th December 1962 and by the Fourteenth Amendment Act of the Constitution. Pondicherry was

merged in the Indian Union as a Union territory, under Entry No. 9 of the First Schedule Part II. After this we have the enactment of the

Government of the Union Territories Act XX of 1963, to which also some reference is essential. I propose, first, to examine the Treaty of Cession

itself, then to examine the Process Verbal and the two affidavits now available, concerning its precise status and character, and subsequently to

examine the Decret dated 22-8-1928 on the aspect of the qualification of judicial officer at Pondicherry. I shall next proceed to the two

notifications one of the Central Government and one of the President, which led up to the challenged appointments. Some discussion of the legal

aspects is also necessary on the question whether the Treaty of Cession by itself is justiciable, and can be enforced in any municipal Court.

(7) Assuming that it cannot be enforced, but has to be implemented by the law of the land before any right guaranteed under the treaty is

justiciable, Sri Arunachalam argues that, in any event, Act XLIX of 1962 is such a clear implementation, and that it incorporates, by reference to

not merely the treaty itself, but also the Process Verbal which embodies the guarantee. There is finally the question whether the Presidential

promulgation under the proviso to Art. 309 is unconstitutional, as alleged, and whether the guarantee of the Process Verbal can be said to be

infringed by the appointments even if it be assumed that the guarantee is justiciable. Finally, there is the question of the language of the Courts in

Pondicherry, and the refinement which has now been introduced by the Official Language Act enacted by the Pondicherry Legislature, Act III of

1965, when the writs were pending; we certainly agree that that is a development that we are bound to take note of, in considering the exercise of

our powers under Art. 226 of the Constitution.

(8) Only certain vital provisions of the Treaty of Cession need now concern us. Under Art. 2, the high contracting parties agree that the

constitutional changes in the establishments will be made, after ascertaining the wishes of the people. Similarly, Art. 3 lays it down that the

Government of India succeeds to the rights and obligations resulting from binding Acts of the French Administration, Art. 5 relates to those who

desire not to be governed by the Indian nationality; and Art. 14 to legal proceedings instituted prior to 1-11-1954 which should be judged in

conformity with the previous basic legislation and procedure; to enable this the existing courts in the establishments were to continue to function

Arts. 12, 15, 21, 24, 25 and 28 relate to the saving of various institutions, record, judicial and otherwise, the French College at Pondicherry, the

French Institute and the acceptance of French diplomas and degrees as equivalent to those awarded by the Indian Universities. Under Art. 28,

French language was to remain the official language, unless the elected representatives of the people decide otherwise. Article 29 is of great

importance, and it lays down that all questions pending at the time of the ratification of the Treaty of Cession, were to be examined and settled by a

commission, comprised of the three representatives each of the French and the Indian Government. There is an annexed protocol, which is

certainly part of the treaty, and Art. 8 of this protocol recognises the property rights of the French Government in various buildings at Pondicherry.

(9) Before proceeding to the Process Verbal we may briefly note two provisions of the Pondicherry (Administration) Act XLIX of 1962, which

are vital to the present context. Section 4 of this Act refers to the continuance of existing of this Act refers to the continuance of existing laws and

their adaptation, and, under Sec. 4(2).

For the purpose of facilitating the application of any such law in relation to the administration of Pondicherry and for the purpose of bringing the

provisions of any such law into accord with the provisions of the Constitution.

The Central Government, may make adaptation and modifications, by repeal or amendment, of laws in force, within 3 years from the appointed

day. It will be noted that of the two promulgations that led to the appointments, one by the Central Government dated 12-10-1963, was under

Sec. 4(2), and it repealed Arts. 1, 2, 9 and 51 to 59 (both inclusive) of the decret dated 22-8-1928 relating to judicial officers. Another vital

section of Act XILX of 1962 is Sec. 6; it enacts:--

Subject to the provisions of the Treaty of Cession, all rights, liabilities and obligations of the Government of the French Republic..... shall, as from

the appointed day, be the rights, liabilities and obligations of the Central Government"".

According to Sri Arunachalam, it is this provision of the enactment, implementing the Treaty of Cession by reference and incorporating it thereby,

which gives the writ petitioner the right to invoke the Process Verbal as a justiciable guarantee.

(10) Concerning of Process Verbal, itself, we have (i) the text of this document which was executed by Sri Rajeshwar Dayal on behalf of the

Government of India and by the Ambassador of France in India on behalf of the French Republic on 16th March 1963, and (ii) the two affidavits

concerning its character and status. Sri Arunachalam contended that prima facie it was the implementation of Art. 29 of the Treaty that I have

earlier set forth. Hence it is an integral part of the treaty, and binding on the Government of India. Since this has been incorporated by a reference

under the terms of Section 6 of Act XLIX of 1962, these appointment which infringe the guarantee of Process Verbal are liable to be struck, down

and even in the municipal Courts of the land. The actual guarantee which is contained in sub-para (3) of Sec. 1 is in the following words:--

The Indian delegation stated that the Government of India did not contemplate any sudden reform of the judicial organisation in Pondicherry.

Changes which would be necessary to bring the system in Pondicherry in harmony with that prevailing in the rest of India will be introduced

gradually, allowing a reasonable period of transition"".

(11) I shall immediately pass on the nature of this document as made evident by the two affidavits on record. The first affidavit is the supplemental

affidavit of Mr. Shetty, the legislative and Judicial Secretary to the Government of Pondicherry and this includes by reference a note prepared by

Sri Rajeshwar Dayal at the time of the diplomatic pourparler between the high contracting parties, just prior to the Process Verbal. In this note, Sri

Rajeshwar Dayal makes it clear that the Process Verbal was not in consequence of proceedings between the parties under Art. 29 of the treaty,

nor does it constitute any minutes of the implementation thereof. On the contrary, this was not the fixed commission contemplated by Art. 29 of

the treaty at all, as the parties agreed that invoking that article ""would lead to rigidity of approach and several matters raised would be excluded"".

This was a friendly and informal discussion and the Process Verbal is a record of the conclusions then arrived at. At a later stage of the hearing of

these writ petitions it was felt that the affidavit of Mr. Shetty who was quite unaware of the true nature of the Process Verbal may be inadequate,

and the learned Government Pleader Pondicherry on behalf of the respondent was requested to see if further light could be thrown on the subject.

(12) We have now on record the affidavit of Sri Krishna Rao, Director of Legal and Treaties Division, Ministry of External Affairs and of the

Government of India at the time, who was personally acquainted with the precise circumstances under which the Process Verbal came into

existence. He states that an aide memoire was first furnished by the Government of France, that discussions were then held between the

representative on both sides from 13th November 1962 to 15th March 1963, and that the agreed conclusions were incorporated in the Process

Verbal. This was not in terms of Article 29 of the Treaty, and it was not the minutes of any joint commission, as contemplated under Art. 29.

Certainly these very explicit statements of responsible authorities must be accepted, but, even so, the further question remains whether, under

International Law, the Process Verbal ought to be regarded as integral with the Treaty of Cession, or otherwise.

Next, we have the question whether the Process Verbal has been incorporated by reference under Sec. 6 of Act XLIX of 1962, and is, therefore

justiciable in the Municipal Courts? The nature of a Process Verbal executed under such circumstances, has also come in for a certain amount of

discussion. Finally, we have the related questions arising from (i) the modifications of the Decret, dated 22-8-1928, by the notification of the

Central government under Sec. 4(2) of Act XLIX of 1962, (ii) the validity of the Presidential Order under the proviso to Art. 309 and (iii) the

question of the status of the French language in Pondicherry Courts, and the requirements that the Judges should be adequately acquainted with

that language. I shall first discuss the matter of the justiciability of the Treaty of Cession, or any alleged annexure to it, such as the Process Verbal,

by virtue of the implied incorporation through Act XLIX of 1962. Admittedly, this is the most controversial area of the extensive argument that

have been addressed to us.

(13) I may immediately state that, whatever might be the Constitutional situation in the United States, where it appears that an international treaty

may be considered as part of the law of the land (vide Volume I of Schwarzenberger page 14, etc., 1957 Edn.), because of the impact of Art. 6 of

that Constitution, the situation is entirely different both in the United Kingdom, and in India. Indeed, a plethora of cases may be claimed to be

available to establish, that no international treaty entered into between India and any foreign country is justiciable in a municipal Court there in any

sense. Such a treaty is invested with the character of an act of State, and no claim based thereon could be enforced in a Municipal Court. *Dalmia*

Dadri Cement Co. Ltd. Vs. The Commissioner of Income Tax, . I find that the clearest statement of the law can be gathered from Lord Mcnair's

Laws of Treatise 1961 Edn. one of the most authoritative treatise on this aspect of the International Law. The learned author observes as follows,

page 81:--

In this matter of the Municipal effects of treaties the United States. In the United Kingdom as we shall see, with a very limited class of exception

no treaty is self executing; no treaty requiring municipal action to give effect to it can receive that effect without the co-operation of Parliament

either in the form of a statute or in some other way. Whenever a treaty, or anything done in pursuance of it is likely to come into question in a Court

of law or require for its enforcement in a Court of law or require for its enforcement the assistance of a Court of law the question at once will arise

whether any action required on the part of the executive or the Courts of law to give effect to the provisions of the treaty is or is not, already

authorised by the existing law of the land. If the answer to this question is in the negative, the Crown must induce Parliament to legislate"".

The following authorities on this aspect of the law, represent some of the important land marks of the case law that is available; they are inter alia

Salaman v. Secretary of State of India, 1906 1 KB 613, Nabob of Carnatic v. East India Co., (1793) 30 ER 521, West Rand Central Gold

Mining Co. v. Rex (1905) 2 KB 391, etc. In the State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala, , the Supreme Court dealt with the

dicta of Marshall C. J., in the United States v. Percheman (1830) 8 Law Ed. 604, to the effect that a change of sovereign did not affect the

property rights of the subjects, and certain propositions were recognised, of which propositions Nos. 8, 9 and 10 now concern us. They were to

the effect that, while municipal Courts have the power and jurisdiction to investigate and ascertain the rights recognised or acknowledged by the

new sovereign, it is only where there is such an acknowledgment or recognition that they could be enforced; in any controversy as to that, the

burden of proof lay on the claimant.

That a Treaty of Cession or other treaty between high contracting parties is not justiciable per se in municipal Court, but must be implemented by

national legislation before the Courts can enforce any right thereunder, is also clear from Smt. Bimla Devi Vs. Chaturvedi and Others, . Also see

Union of India (UOI) Vs. Manmull Jain and Others, , Maharaj Umeg Singh and

Others Vs. The State of Bombay and Others, , relates to Art. 363

of the Constitution and the Bombay Merged Territories Areas (Jagir Abolition) Act 1953 (Act XXXIX of 1954), the Supreme Court laid it down

that the letter of guarantee were beyond the jurisdiction of the Court, by virtue of Article 363. As stated by Lord Dunedin in *Vajesinghji v.*

Secretary of State, AIR 1924 PC 216, "Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign

only such rights as that sovereign has, through his officers, recognised.....even if in a Treaty of Cession it is stipulated that certain inhabitants

should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts".

(14) As far as the United Kingdom is concerned, the two leading decisions are: *Hoani Te Henbeu Tukino v. Aotea District Maori Land Board*,

1941 AC 308 and *Republic of Italy v. Hambros Bank Ltd.*, and *Gregory*, 1950 1 Ch 314. The latter case is particularly significant, as the Judge

(Vaisey J.) strongly felt that something has occurred which was against his judicial conscience, in the matter of the transfer of the assets of King

Victor Emanuel III of Italy in England, as it was apparently due to some misunderstanding, infringing a clearly expressed undertaking between high

contracting parties; the learned Judge stated that he ended as he began in an atmosphere of some bewilderment. Still, though the learned Judge felt

oppressed thereby, he came to the conclusion that the financial agreement per se was neither cognisable nor justiciable in the High Court. the

situation, as such, in indeed beyond controversy.

At the first blush it might appear as if the statements in *State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala*, , may be authority, in regard to

the propositions 8, 9 and 10 in the judgment of Rajagopala Aiyanger J. for the view that even an obligation, like that embodied in the present

Process Verbal might be justiciable, because of an implied agreement or recognition. But a study of the entire judgment is convincing that no

departure from the established law was intended in this respect; whether the agreement be express or implied, an agreement between his country

and another foreign power will not be justiciable in the Municipal Courts of this country; it must be made part of the law of the land, by

incorporation, express or implied; before a citizen could invoke any right based

on such an agreement. So much being clear, we shall next proceed to analyse how precisely the Process Verbal stands, as an entity in diplomatic usage and in International Law.

(15) Before during so, I must briefly refer to the Decret of 1928, and to Arts. 1, 2, 9 and 51 to 56 (both inclusive) of that Decret, that were repealed by the notification of the Central Government. It appears that during the phase of the de facto merger, the Pondicherry was under a Chief Commissioner, by virtue of an order under the Foreign Jurisdiction Act, 1947 dated 30-10-1954. The Courts, Tribunals and establishments were functioning under the pre-existing law, and appointments to them were governed by the Decret already referred to. But, certain administrative exigencies arose, particularly following the de jure transfer, and (in October 1963) of the extension of various Indian enactments to Pondicherry. It is now conceded, for instance, that the entire criminal law administration has radically changed, because of the introduction of the Indian Evidence Act, the Indian penal Code and the Criminal Procedure Code.

The repealed articles of the Decret provide for manning the Courts by persons having the requisite French law degree (Licentie en-droit) and for appointments to the Superior Court of Appeal, Magistracy, etc. Sri Arunachalam argued that even this repeal has left intact the other portions of the Decret, which concern promotions to judicial posts at Pondicherry, the entire French colonial judicial Cadre being treated as one unit for this purpose; the argument was that, since these provisions were intact, Sri Maharajan could not be appointed straightway, as President of the Superior Court of Appeal. The argument is unsubstantial, and it rests on a misconception. As this may be the convenient point to elucidate one important aspect of sub-para (3) of Sec. 1 of the Process Verbal, that I have quoted verbatim earlier, I shall proceed at once to do so.

The guarantee embodied in that clause, in so far as it relates to the judicial organisation, has not been disturbed at all, except to the extent rendered inevitable by the very Treaty of Cession. Thus, under the Merger Act, Act XLIX of 1962, Sections 9 and 10, this Court inherits the powers of the Cour de Cassation the Cour Superiur d' Arbitrage and the Conceil d' Elat of France. It could not be otherwise, since Pondicherry ceased with the ratification of the Treaty of Cession, to be part of colonial France. The same

argument must apply to any of the articles of the Decret of 1928, relating to the French Colonial Judicial Cadre. But in all other respects, so far, the hierarchy of Courts at Pondicherry, namely, the Justices of the Peace, the Courts of First Instance, the Superior Court of Appeal manned by three Judges, and the Council of Administrative law (Concil-de-contentieux) have not been altered in structure or interlinked gradation; they remain intact.

It is the introduction of the criminal law of India, which has alone rendered it essential that a District Magistrate (Judicial) should also function at Pondicherry. If the argument relates to the structure of the Courts, it has to be repelled, apart from any question of the justiciability of the clause of the Process Verbal or of incorporation by reference. If the argument relates, instead to the suddenness of the change, by the two appointments of Indian Judges, not having the requisite degrees of French Law, as President and Member of the Superior Court of Appeal it has of course to be scrutinised on the merits.

(16) We have been at some pains to ascertain the status of a Process Verbal in diplomatic usage, and in International law, accepting the two affidavits on record that this document came into existence between the high contracting parties, not as formal minutes of a procedure followed under Art. 29 of the Treaty of Cession, but as a subsequent informal consultation and agreement unrelated to Art. 29. In Harrap's French and English Dictionary Process Verbal is defined as "'an official report, proceedings, minutes, of meeting; record of evidence, etc'". There is another significance in this term in the French processual law relating to claims, as a report of police officer who takes down the particulars of a minor offence "'(delit)'".

(17) Even in diplomatic usage, the term appears to suffer from some degree of ambiguity. We have consulted two authorities, both of which are standard treatises namely (i) Oppenheim's International law, Volume I (8th Edn.) and (ii) McNair's Law of Treatise, 1961 End.

According to Oppenheim at page 792:--

A Process Verbal is the official record or minutes of the daily proceeding of a conference and of the provisional conclusions arrived at'". The

learned author states that "'A treaty, being a contract, must not be confused

with various documents having relation to treaties, but not in themselves treaties, namely..... a Process Verbal"". McNair states at pages 14, 15 that the Process Verbal ""may from an adequate record of an informal engagement agreement"". The learned author adds: ""There is no reason based on its informality, why such a record should not constitute adequate evidence of an international engagement..... What matters is the intention of the parties"".

In the two affidavits, the first containing the note of Sri Rajeshwar Dayal and the second which is the affidavit of Sri Krishna Rao, we find no hint or

suggestion that the Process Verbal is not an important undertaking, binding upon the Union Government. Certainly, it may not be evidence of

procedure under Art. 29 of the Treaty, and apparently it is not an embodiment of the conclusions arrived at, by the adoption of that procedure.

But, even if informal procedure had been substituted between the high contracting parties, it is indeed difficult to suppose that the mutual obligations

thereby arrived at, and embodied in the minutes, were not to be regarded as strictly binding. Actually, that is not the position taken by the Union

Government. But even if the Process Verbal be binding on the Union Government, that does not help the writ petitioner at all. He must show,

firstly, that the spirit of the guarantee has been infringed by the appointments, and secondly, that this guarantee is part of the Treaty of Cession,

incorporated by Sec. 6 of Act XLIX of 1962, and, therefore, justiciable in the Municipal Courts of this land.

(18) Even if we assume that the guarantee had been infringed by the mere appointments of two persons not having the French law degrees, within

such short time as about two years after the de jure merger, which it could be very reasonably contended, is not a gradual but an abrupt transition,

the question still remains whether this is any right justiciable before us. The learned Government Pleader for the respondents has argued that the

structure of the Courts has remained intact, that at least one French knowing Judge, who is a *Licencie en droit* is a member of the Superior Court

of Appeal, always associated with the President and the other member, and that such a modification in the personnel alone, necessitated by the

introduction of the laws of India in a large volume into the Pondicherry State, may not be said to offend the guarantee.

But this apart, we are certainly satisfied that the Process Verbal is not part of the Treaty of Cession, and cannot be so regarded in International

Law, and in any view, is not incorporated by reference as part of the law of the land, I think it is sufficient to be very brief here, in view of the

ground that has been already covered. Conceivably even minutes or memoranda that came into existence subsequent to a treaty, could be part of a

treaty, but as Oppenheim points, out, this kind of supplementary documents is often termed as Protocol, and must not be confused with a Process

Verbal. It is at least doubtful whether, as a matter of strict International Law, the Process Verbal could be regarded as integral with the treaty, in

the same sense that the annexure of Protocol, with regard to the property rights of the French Government in certain buildings, undoubtedly is. In

any event, the incorporation by reference in Sec. 6 of Act XLIX of 1962 cannot extend beyond the treaty and annexure, for the simple reason that

the Act came into existence on 5-12-1962, while the Process Verbal came into existence on 16-3-1963. Further, there is absolutely nothing in S.

6, which might warrant an inference that a document that might subsequently come into existence, should also be presumed to have been

incorporated by a necessary implication.

(19) The entire matter of incorporation of one enactment into another was considered extensively by the Full Bench of this Court in A.M.S.

Mohammed Kasim Vs. The Assistant Collector of Central Excise, Madurai, , a decision to which I was a party. It may not be necessary to refer

to the detailed analysis in that judgment, but it is noteworthy that in that judgment different modes of incorporation have been discussed, as also the

consequence of incorporation. As I observed.

Either the ipsissima verba are preserved in the interpreting statute, or a form of reference is used which admits of no ambiguity whatever.....

there is a more and more marked disinclination to confuse mere reference, citation or application of the legal principle of an earlier statute, with

statutory incorporation proper"".

But one case of very great interest that I have discussed there is the Queen v. Smith, 1873 8 QB 146, where certain appeal sections were taken to

be incorporated by a form which said, "constructively" though not "expressly". That is as far as the law has gone in this respect. Even so, I think it

is impossible to contend that there is a constructive incorporation of the Process Verbal or any part of it, in Sec. 6 of Act XLIX of 1962. It follows

that the guarantee, assuming that it has been infringed by the appointments, is not justiciable, in the Municipal Court. On that ground alone, the writ

petitioner has to fail.

(20) Before passing on to the matter of official language, and certain ancillary considerations relating to the present situation of the Pondicherry Bar

and the judicial organisation there, I shall deal with the question of the alleged unconstitutional character of the particular order promulgated by the

President under the proviso to Art. 309. The learned Government Pleader argues that even if this order had not been promulgated, the

appointments could be sustained, as there is a virtual vacuum or interrugnum created by the other valid notification which takes away a large part of

the Decret of 1928, relating to the judicial organisation at Pondicherry and qualifications for the judiciary. My learned brother proposes to examine

the argument relating to the validity of the Presidential Order, separately by means of a detailed analysis in his judgment. It may, therefore, be

sufficient that I confine myself to quite a brief analysis, why, in my view, the Presidential Order under the proviso to Art. 309 is perfectly

sustainable.

(21) The argument of Sri Arunachalam on this aspect has first to be considered. Learned counsel points out that Art. 1 of the Constitution itself

was amended by the VIIth Amendment Act of 1956 and that as the Article now stands, there is a clear discernible division between (i) Territories

of the States (ii) Union territories specified in the Ist Schedule and (iii) such other territories as may be acquired. The Union Territories, such as

Pondicherry, ought not to be confused either with the territories of the State, or with such other territories as may be acquired; the Union territories

constitute a class apart. Article 309 declares that the appropriate legislature may regulate the recruitment and conditions of service of persons

serving the State or the Union in the latter case such as the officers of the customs, Income Tax, excise and other services, while the proviso states

that it will be competent for the President to make rules and regulations in this regard, until there is appropriate legislation by the concerned

Legislature; as Basu points out in his Commentary on the Constitution of India,

4th Edn., Volume IV page 501, the proviso is "'a transitional proviso empowering the executive to make rules having the force of law'".

(22) The argument of learned counsel is that this power cannot conceivably relate to the services of the Union territories, which form a totally distinct category Article 308 also, as it stands, include all States except the excluded State of Jammu and Kashmir, but does not include Union

territories. The only power of the President to make Regulations for the Union territories is according to learned counsel to be found in Art. 240 of

the Constitution. But first of all, this power is limited to the making of Regulation and such Regulation made under Art. 240(2) can only repeal or

amend any Act of Parliament, or any existing law, which, under Art. 336(10), means a law made before then commencement of the Constitution,

by any Legislature, etc. The argument is that this will not include the supersession of Ducrets that were in force in the French colony of

Pondicherry. In any event, the learned Government Pleader concedes that the power under Art. 240 cannot be invoked, in the present case,

because the promulgation was subsequent to the date appointed for the first meeting of the Pondicherry Legislature, vide the first proviso to Art.

240. If Art. 240, be thus excluded, the power of the President has to be gathered either under Art. 309 already referred to which, according to Sri

Arunachalam, cannot be made applicable to Union territories, or from other Articles of the Constitution dealing with the power of the President to

make rules having the force of law.

(23) In this regard, after careful consideration, I think that the power of the President will extend to the making of rules having the force of law,

even for the Union territories, until such time as the Parliament legislates in this regard or the Legislature of the Union territory does so. It is here

that Art. 246(4) of the Constitution is relevant, as well as the authority of *Mithan Lal Vs. The State of Delhi and Another*, . As observed by Basu

(4th Edn.,) Vol. IV, p. 168), Parliament under Art. 246(4) is clearly given the power to make laws with regard to the Union territories, even with

respect to subjects included in the State List. Moreover, such a right of the Parliament is explicitly recognised under S. 18(2) of the Government of

Union Territories Act 20 of 1963, which, again, by implication, refers to Art. 246(4) and to the constitutional power vested in Parliament.

The question is, if Parliament has this power, does the President have the power to make rules having the force of law, in this regard, till the

Parliament thinks it fit to legislate or the Union territory Legislature does so? I think that this question must be answered in the affirmative having

reference to the very clear terms of Art. 73(1) of the Constitution. Article 123 being also relevant, though in a subsidiary sense. Under Art. 73(1),

the executive power of the Union, namely, the power of the President extends to "the matter with respect to which Parliament has power to make

laws" and this, as we have already seen, will include the power to make laws for a Union territory, in regard to the services. Article 123 might be

said to embody the legislative powers of the President, by promulgation of Ordinance, except when the Houses of Parliament are in session.

This, read along with Art. 309, will clearly indicate that, till the Union Parliament or the State Legislature thinks it fit to take action in respect of

services, including the judicial services, the President may make valid Regulations. Indeed, that must be so, for, as pointed out in *Satya Dev*

Bushahri Vs. Padam Dev and Others, , the President was in the position of the Executive Head of the Part C States, and he has hence

responsibilities closely allied to that of a Rajpramukh or Governor. In the light of the analysis of the powers of the President, as appearing in the

Constitution, it would seem abundantly clear that (i) the executive power of the President to make regulations having the force of law extends to the

entire area of parliamentary legislative competency; and (ii) that, of course, is transitional in character, since it will be necessarily superseded by

parliamentary legislation, or by the legislation of the State Legislature. That not having taken place, so far, the notification must be considered

wholly valid.

(24) Before passing on to the matter of the present set-up, and the procedure of the Courts at Pondicherry, in relation to the composition and

background of the Pondicherry Bar, I shall deal very briefly with the question of the official language.

(25) Sri Arunachalam for the writ petitioner would seem to maintain a distinction between the language of the Courts and the official language

based upon the different uses of these terms in Part XVII of the Constitution, particularly the heading of Chap. III of Part XVII. HE points out that

even the headings of chapters and the marginal headings in a Constitution, unlike an enactment, may be taken as having a binding force. This apart,

I am unable to see why the dichotomy, which is preserved in the Constitution, for a special purpose, should be brought into the matter of the

language of the Courts at Pondicherry, when the Treaty of Cession and the subsequent legislation are perfectly explicit. As I think, I have earlier

observed, under Art. 28 of the Treaty of Cession, the official language is to be French, until the elected representatives decide otherwise. This is

incorporated in S. 34 of the Act 20 of 1963, under which the Legislative Assembly of the Union territory may be law adopt any one or more of the

languages in use in the Union territory or Hindi, as the official language.

There is a specific proviso that French should be the official language at Pondicherry, to be used for all official purposes, so long until the

Legislative Assembly of the Union territory of Pondicherry decides otherwise. The Legislative Assembly has decided otherwise, and the

consequence is the Official Language Act of the Pondicherry Legislature, that I have referred to earlier, under which the Tamil and English have

been elevated to the status of official languages, to come into effect upon a date to be notified. hence, the question is largely academic, owing to

an event that has taken place subsequent to the institution of the writ petitions. Even if the date be not actually notified, yet, clearly the intention is to

bring these languages into force as official languages, and until that is done, the procedure that seems to prevail is that there is prepared a French

text of the judgments of the Superior Court of Appeal, which will be the official text of the judgment.

(26) I may here add that the entire situation is somewhat confused and obscure, for the reason that continental systems of jurisprudence are so

different from the one inherited by this country from the British days. In Indian Courts, judicial precedents are not merely of persuasive force, but

are binding upon subsequent Benches or Judges, and do, within their own sphere, create law; judge-made law is thus known to our Courts, and

relied on in our Courts, whereas, apparently, the continental system differs profoundly, and places almost an entire reliance upon the text of the Act

or Code, and not on binding precedents. That resulted in Pondicherry as elsewhere, in the delivery of judgments which were not intended to

persuade even an appellate Tribunal; they were more or less of the character of decrees, and, after making a very brief reference to the principles

or the articles of law relied upon, merely proceeded to state the conclusions, by a highly condensed process of reasoning.

These judgments were found to be quite inadequate, and, indeed, likely to frustrate the ends of justice, when the appellate jurisdiction of the Court

was established, and had to function within the ambit of Act 49 of 1962. For that reason, the Superior Court of Appeal is now pronouncing

judgments of a widely different character, and till the date of notification under the Official Languages Act, which has received the assent of the

President, I do not think that anything more need be done than that French texts of such judgments should be prepared and should be made

available to parties and to the Court of Appeal, as required. On this aspect, therefore, it is impossible to strike down the impugned appointments.

(27) But that does not imply, for a moment, that a great deal ought not to be done to allay any reasonably apprehensions that persons like the

petitioner might have, that the guarantee embodied in the Process Verbal will not be respected; I must affirm that I do not take the affidavits on

record, or the arguments of learned counsel for the Union of India, as implying, in the slightest, the contention that the assurances of the Process

Verbal are not to be taken as solemn assurances by high contracting parties, to be respected. This necessarily implies that, compatible with such

changes as may be absolutely essential in the interests of judicial efficiency, and here I may add that the assurances of the Process Verbal itself is in

relative terms, and not unqualified, the transition should be as smooth as possible. Before parting with the writ petitions, and since we have devoted

some attention to this aspect of the matter, a few observations may not be amiss; they may be valuable, on the contrary, as affording a basis for

consideration of further developments by the Government of Pondicherry. I must here explicitly add that these observations do not relate to the

introduction of the laws and procedure of India, upon the civil side also into the Pondicherry State, for, that is outside the ambit of these petitions.

These observations are confined to the present status of the Bar at Pondicherry, to any present procedures of the Superior Court of Appeal, and

to considerations arising from the need to apply the Code Civil of France and French laws to all pending cases, and further to cases that might

arise for some little time at least in future.

(28) We gather, from what has been reliably stated before, us, that, prior to the agreement of merger, the Superior Court of Appeal at Pondicherry

not merely applied the French law and the French procedure (Code Civil) but also functioned according to the continental system of jurisprudence.

Indeed, it could not otherwise be the case. Though it appears that certain Advocates did address verbal arguments to Court, and sometimes at

length, these were quite individual exceptions; largely, the procedure was the continental one of preparing the respective desires or conclusions, to

be interchanged a number of times, as written submissions to Court. A study of these resulted in a judgment, which was, again, in conformity with

continental system of jurisprudence, mainly, the citation of the relevant provisions of the law and almost a form of decree with the bare steps of

reasoning alone indicated.

We agree that, having regard to the few person now practising as Advocates at Pondicherry who alone can practise before the Superior Court of

Appeal under the law as it stands today, their ages, their ignorance of English, and the difficulty of adaptation to a wholly different system of

submission of verbal arguments at length, expounding the points of the case, it may be very wise to combine as many elements of the former system

as possible, with well-known procedure, instead of totally superseding them. We understand that Advocates are permitted to address the Court in

French, and there is the consolation that at least one of the Judges will be qualified in French law, and fully acquainted with the language.

Fortunately, the system at present in vogue appears to permit the co-opting of persons learned in French law, and available at Pondicherry, to

serve as ad hoc Judges.

It appears to me that such an expedient could be freely resorted to during the essential transitional period, both to see that members of the limited

Bar at Pondicherry are not frustrated in the exercise of their profession, and also to see that, until the language of the Court be English or Tamil, as

wholly permitted by law (and even in the contingency the necessity to understand and apply French law may continue for sometime), the Judges or

a majority of the Judges are able to follow the arguments in French, and to read the laws in French. I must reiterate that whatever can be done to

observe the spirit of the assurances of the Process Verbal, during the transitional period, should surely be done, since the solemn obligation of the high contracting parties are not denied at all before us. With these observations, the writ petitions are dismissed. The parties will bear their own costs.

Ramakrishanan, J.

(29) I had the advantage of perusing the judgment of my Lord the officiating Chief Justice and I entirely agree with the conclusions and order

proposed. I wish, however, to add the following observation: One of the principal arguments of the learned counsel for the writ petitioners is that

the impugned notification of the President, dated 5-10-1963, the Pondicherry Judicial Officers (Qualifications) Rules, 1963, purporting to be

issued under the powers conferred on the President, by Art. 309 of the Constitution of India, is ultra vires because the said Article of the

Constitution does not confer on the President, such a power in regard to a Union Territory. It may be recalled that this notification provides for the

equivalence between the degree in law of an Indian University sand the decree in law of a French University known as Licencie en droit with the

proviso that knowledge in French for an Indian law degree holder would be deemed an additional qualification, for appointment to judicial posts in

Pondicherry.

The learned counsel's argument is that Art. 309 of the Constitution, as amended by the Seventh Amendment which empowers the President to

make rules, regulating the recruitment and conditions of service of persons appointed to services and posts, will apply to services and posts in

connection with the affairs of the Union, while a similar power is vested in the Governor of a State for services and posts in connection with the

affairs of the State, but that employment in a Government service under the Union territory of Pondicherry will fall under neither category, so that

the deriving of the power under this Article by the President for promulgating the impugned notification is unconstitutional.

(30) Article 309 is found in Part XIV under the head "Services under the Union and the States". Before the Seventh Amendment, Art. 308

contained a definition, that the expression "State" in this part meant a State in Part A or Part B of the First Schedule but after the Seventh

Amendment the expression "State" is defined as not to include the States of Jammu and Kashmir. The reason for this modification was presumably because, prior to the Seventh Amendment, Part C States were administered by the Union, and such States had to be excluded from the connotation of the word "State" in Part XIV, but after the amendment, Part C States were abolished, and the new classification of Union territories was included in the definition in Art. 1 of the Constitution. But it is important to remember that even before the amendment, the protection conferred under Art. 311 of the Constitution, which is also found in Part XIV, was available to members of services under the Government in Part C States.

It is sufficient to refer to Union Territory Tripura v. Gopalchandra, AIR 1968 SC 601, where though the point was not specifically discussed, it was held by implication that the protection under Art. 311 of the Constitution was available to Government servants employed in Part C States. If the contention of the learned counsel for the petitioner is to be upheld, it will follow that after Seventh Amendment, when the Union territories have come to take the place of Part C States, such protection would be automatically lost. I do not think that such a result was intended or was unconsciously allowed to follow, when the Constitution was amended by the Seventh Amendment. The more rational view is to treat Government employees in Union territories, as persons employed in connection with the affairs of the Union. In this context, there is a clear distinction between the affairs of the Central Government and the affairs of the Union.

It has been pointed out in Satya Dev Bushahri Vs. Padam Dev and Others, that the affairs of the Central Government can be different from the affairs of a Part C State and the President as the head of a Part C State, occupies a different position from that as the head of the Central Government. By a logical extension of this principle one can hold that, when the President administers a Union territory, he occupies a position different from that of the head of the Central Government, and when he promulgates rules for the control of services and posts in a Union territory, those rules are for services and posts in connection with the affairs of the Union, and the power so exercised falls squarely under Art. 309.

(31) The learned Government Pleader for the State of Pondicherry urged that,

apart from Art 309, the promulgation of the impugned rule will fall within the executive power of the Union, exercised through the President. Art. 73(1)(a) of the Constitution provides that the executive power of the union shall extend to the matters with respect to which Parliament has power to make laws, and Art. 245(4) gives Parliament power to make laws, with respect to any matter for any part of the territory of India, not included in a State notwithstanding that such matter is a matter enumerated in the State List. Article 246(4) will obviously cover a Union territory. The power of the President exercised under Art. 309 can be viewed as an aspect of the general executive power conferred under Art. 73(1)(a) read with Art. 246 applied for the specific purpose of dealing with service conditions; therefore, whether Art. 309 will strictly include the rule-making power for a Union territory or not, nevertheless, the general executive power conferred by Art. 73(1)(a) read with Art. 246(4) of the Constitution will validate the impugned notification, in respect of the Union territory. I am of the opinion that this argument is also entitled to weight, and, therefore, no room exists for declaring the notification of the President abovementioned as unconstitutional and ultra vires.

(32) I propose to advert briefly to one more point. While, on a strict view of the relevant statutory provisions, and in particular Act 49 of 1962, and the scope of the incorporation of the Treaty of Cession by virtue of Sec. 6 of the above Act, the guarantee of a gradual transition contained in the Process Verbal may not be justiciable in writ proceedings, I am in entire agreement with my Lord, the officiating Chief Justice, that it would be expedient if adequate measures are taken by the authorities concerned, to ensure that for some more limited period, the Superior Court of Appeal at Pondicherry is so constituted that at least a majority of the Judges comprising it, are adequately qualified so as to be able to follow the arguments in French and to read the laws in French. One can concede that the President of the above Court of appeal, who is also the head of the judicial administration in the State, as well as the District and Sessions Judge, for administering Indian law should be one well conversant with the Indian system of jurisprudence, because of the speedy extension of several Indian enactments to the Pondicherry State; for example, the criminal law and procedure now administered are now entirely Indian, and progressively more and

more branches of the civil law are also being extended.

The learned Government Pleader for Pondicherry represents that the time may not be far off when, with the approval of the Legislature, the Indian

CPC will be extended to supplant the French Civil Code. But until such a stage is reached, there will persist a dichotomy of two systems of

jurisprudence, the French, derived from the European continental system, and the Indian, derived from the Anglo-Saxon system, existing side by

side, but in this dichotomy, Superior Court of Appeal will have necessarily to administer the French system. A great deal has, therefore, to be said

for the view urged before us by the petitioner, who is the President of the Bar Association at Pondicherry, that for the transitional period, the

Superior Court of Appeal should consist of a majority of Judges familiar with the French law and French language.

While the impugned Presidential notification of 1963 provides for knowledge of French as an additional qualification, it will certainly look odd if for

manning the highest civil Tribunal in the territory, this additional qualification is treated as unnecessary, in order to suit administrative exigencies. It

may, perhaps, be held from the administrative point of view on this, however, we have no precise date before us to express a categorical opinion

that for a small territory like Pondicherry, two parallel permanent Tribunals at the highest level, one for dealing with French law and another for

dealing with Indian law, may be too expensive. But here, as pointed out by my Lord, the officiating Chief Justice, the system in vogue under the

French law, of co-opting ad hoc (interimaira) Judges to the Superior Court of Appeal, if necessary from a lower rank in the hierarchy of judicial

officers, can come to the rescue, and at best one puisne Judge, qualified in the French law, may be co-opted besides the existing permanent puisne

Judge, who is qualified under the French law, without duplicating the permanent staff, and incurring heavier expenditure on that account. In a matter

like this, the salutary principle that justice should not merely be done but should appear to be done will hold good, and it is from this point of view

that the above suggestion is now made in this judgment, for the earnest consideration of the authorities concerned.

(33) NRK/G.G.M.

(34) Petitions dismissed.