

(1992) 04 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 738 of 1992

Jamshed N. Guzdar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 29-04-1992

Acts Referred:

Bombay City Civil Court and Bombay Court of Small Causes (Enhancement of Pecuniary Jurisdiction and Amendment) Act, 1986 — Section 1
Bombay High Court Letters Patent (Amendment) Act, 1948 — Section 3
British North America Act, 1867 — Section 101
Constitution of India, 1950 — Article 138, 14, 19(1), 2, 214

Citation : AIR 1992 Bom 435 : (1992) 3 BomCR 494 : (1992) 94 BOMLR 984

Hon'ble Judges : S.P. Kurdukar, J; S.H. Kapadia, J

Bench : Division Bench

Advocate : T.R. Andhyarujina, Aspi Chinoy, Milind Sathe, S.A. Divan and J.R. Gagrath, C.M. Mehta, instructed by M/s. Gagrath and Co, for the Appellant; Aspi Chinoy, instructed by . Mulla and Mulla and C.B. and E. for Bombay Bar Association in support, Anil B. Divan, Miss Rajni Iyer, instructed by . Kanga and Co., for Indian Merchant Chamber in support. Ashok Desai for Indian Merchants Chamber in support. V.R. Manohar, Advocate General, N.T. Saraf Panel, counsel with B.P. Pandya, Hon. Asst. to the Advocate General, C.J. Sawant, Spl. Counsel, N.T. Saraf, K.K. Singhvi, S.D. Mogre and B.C. Dave, Bombay City Civil Court Bar Association, Intervenor, M.P. Vashi, for Bombay Small Causes Court Bar Association - Intervenor Ajit P. Shah, D.S. Bhosale for Bar Council of Maharashtra and Goa - Intervenor, A.J. Rana instructed by . M/s. Kanga and Co., for Incorporated Law Society, for the Respondent

Judgement

1. The Petitioner, who is the Chairman of Airfreight Limited and claims to be the Director of 14 other Public Companies espousing the cause of litigants in Greater Bombay, by way of public interest litigation has filed this writ petition under Article 226 of the Constitution of India challenging the constitutional validity of the Bombay City Civil Court and Bombay Court of Small Causes (Enhancement of Pecuniary Jurisdiction and Amendment) Act, 1986 (Maharashtra Act No. XV of 1987) -- hereinafter referred to as "the impugned Act".

2. Apart from challenging the competency of the State Legislature as regards the impugned Act the Petitioner has also sought a declaration that the Notification dated 20th August 1991 -- Exh. B to the petition, issued by the State of Maharashtra is illegal, arbitrary and violative of Article 14 and Article 19(1)(g) of the Constitution of India.

3. This petition raises pure questions of law relating to the legislative competence of the State Legislature. In order to appreciate rival contentions raised before us we deem it necessary in the first instance to refer to the Bombay City Civil Court Act, 1948 :--

On May 10, 1948, the Provincial Legislature of Bombay passed Act No. XL of 1948 called "Bombay City Civil Court Act", 1948. It was passed with a view "to establish an additional civil court for Greater Bombay". The provisions of the Act which are relevant for the purpose of the present petition may be set out :

"1(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint in this behalf.

3. The State Government may by notification in the Official Gazette, establish for the Greater Bombay a court, to be called the Bombay City Civil Court. Notwithstanding anything contained in any law, such court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs. 10,000/- in value, and arising within the Greater Bombay, except suits or proceedings which are cognizable -

(a) by the High Court as a Court of Admiralty or Vice-Admiralty or as a Colonial Court of Admiralty, or as a Court having testamentary, intestate or matrimonial jurisdiction, or

(b) by the High Court for the relief of insolvent debtors, or

(c) by the High Court under any special law other than the Letters Patent; or

(d) by the Small Cause Court :

Provided that the Provincial Government may from time to time, after consultation with the High Court, by a like notification extend the jurisdiction of the City Court to any suits or proceedings of the nature specified in Clauses (a) and (b).

4. Subject to the exceptions specified in S. 3 the State Government may by notification in the Official Gazette, invest the City Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within the Greater Bombay and of such value not exceeding twenty-five thousand rupees as may be specified in the notification.

12. Notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court :

Provided that the High Court may, for any special reason, and at any stage

remove for trial by itself any suit or proceeding from the City Court."

3A. The Act received the assent of the Governor General about the same time. It came into force on August 10, 1948 by notification issued by the Provincial Government and published in the Official Gazette. Simultaneously with the passing of the above Act, the Bombay Legislature also enacted Act No. XLI of 1948 called the Bombay High Court Letters Patent Amendment Act 1948. By S. 3 of that Act, Clause 12 of the Letters Patent was amended by adding the following words;

"the High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Causes Court at Bombay or the Bombay City Civil Court."

On January 28, 1950 the Provincial Government of Bombay issued the following notification No. 2346/5 in the Official Gazette :

"In exercise of the powers conferred by S. 4 of the Bombay City Civil Court Act, 1948 (Act XL of 1948) the Government of Bombay is pleased to invest with effect from and on the date of this notification, the City Civil Court with jurisdiction to receive, try and dispose of suits and other proceedings of a civil nature not exceeding twenty-five thousand rupees in the value and arising within the Greater Bombay subject however to the exceptions specified in S. 3 of the said Act."

4. The jurisdiction of the City Civil Court continued under the aforesaid provisions of the Act till by S.19 of the Maharashtra Act No. 46 of 1977 the jurisdiction of the City Civil Court was raised not exceeding Fifty-thousand rupees in value arising within Greater Bombay. This position continued until the Maharashtra Act No. XV of 1987 was passed by the State Legislature sometime in 1987. Under this amended provision (Mah. Act No. XV of 1987) the words, "not exceeding Fifty-thousand rupees in value" were deleted and consequently the City Civil Court came to be invested with unlimited pecuniary jurisdiction. Although this Mah. Act No. XV of 1987 was passed in the year 1987, the State Government did not enforce the Act till the impugned notification came to be issued on August 20, 1991. Under this notification the State Government appointed the first day of May, 1992, to be the date on which the provisions of Maharashtra Act No. XV of 1987 shall come into force.

5. By virtue of this notification under the impugned Act all suits and other proceedings of civil nature arising within the Greater Bombay subject to exceptions contained in S. 3, shall hereinafter will be required to be filed in the City Civil Court at Bombay. Result of this impugned Act is that the suits and other proceedings of civil nature filed in this Court under Clause 12 of the Letters Patent will not be received and tried on the Ordinary Original Civil Jurisdiction of this Court. It is this impugned Act, which is being enforced on and from 1st day of May 1992 has given rise to this petition challenging the legislative competence of the said impugned Act and the notification dated August 20, 1991.

6. We must at this stage make it clear that Legislative competence of Mah. Act No. XVII of 1987 (Abolition of Letters Patent) is not subject matter of challenge in this writ petition.

7. At the outset we must mention that several intervenors in favour of and against the constitutionality of the impugned Act and impugned notification filed their applications and we permitted them to intervene in the matter and put forth their view points.

8. Mr. Andhyarujina learned counsel appearing for the writ petitioner raised three contentions:--

(1) Act XV of 1987 is ultra vires of the Maharashtra State Legislature as it is a legislation relating to the constitution of High Court and falls under List 1 Entry 78 of Seventh Schedule i.e. Union List of the Constitution and, therefore, only Parliament can pass such legislation. The impugned Act changes the constitution of the High Court by abolishing Ordinary Original Civil Jurisdiction of the High Court. The impugned Act taken together with Act XVII of 1987 (Abolition of Letters Patent) constitutes a legislative plan or scheme to abolish a substantial part of civil jurisdiction of High Court.

(2) Having regard to the conditions existing in Bombay City Civil Court it was unreasonable exercise of statutory power to bring into operation the impugned Act even if the Act is intra vires.

(3) The impugned Act was brought into operation by issuing impugned notification which was in misuse of the power by State Government and for extraneous reasons.

9. Substantially Mr. Ashok Desai, Mr. Rana and Mr. Chinoy adopted arguments of Mr. Andhyarujina. But, however, in addition to these three contentions they also put forth the arguments relating to the interpretation of Entries 77 and 78 in List 1 and Entry 11-A in List III of Seventh Schedule to the Constitution. Reference to their submissions will be made at appropriate places.

10. Mr. Advocate-General appearing for the State of Maharashtra opposed each of the contentions raised on behalf of the petitioner and urged that impugned Act is passed by the State Legislature in exercise of its legislative powers in terms of Entry 11-A in List III of Seventh Schedule and the challenge to the legislative competence has no merit. He urged that the State Government has neither acted unreasonably in exercise of its statutory power to bring into operation the impugned Act nor it has misused the said power. He also denied the allegation that the impugned notification was issued for any extraneous reasons. Learned Advocate-General further urged that having regard to the statement of Object and Reasons contained in the Legislative Bill No. 1 of 1986 preceding the impugned Act, the State Legislature in its wisdom thought fit to pass impugned Act and after passing the said Act, the impugned notification to implement the said Act from 1st May 1992 was published. Learned Advocate General then urged

that once it was found that the State Legislature was competent to pass the impugned Act, then the contentions raised on behalf of the petitioner invoking doctrine of pith and substance will carry no merit. The impugned Act as well as the impugned notification, learned Advocate General urged, cannot be said to have been passed and issued for extraneous reasons. As far as compliance of the High Court recommendations providing infrastructure for City Civil Court is concerned, the learned Advocate General relying upon the affidavit in reply filed on behalf of the State of Maharashtra urged that this issue raises several disputed questions of facts and this Court in writ jurisdiction cannot go into these questions. He heavily relied upon the affidavit-in-reply of Mr. Abhimanyu Madhavrao Shindekar, Under Secretary to Government, Law and Judiciary Department, dated 10-4-1992 and urged that the State Government has made sufficient budgetary provisions for providing infra-structures and it will continue to do the same in future also. Learned Advocate-General therefore urged that petition is devoid of any merits and the same be dismissed.

11. Mr. Andhyarujina learned counsel for the petitioner sought to draw support to sustain his challenge to the legislative competence relating to the impugned Act, from the following decisions :

- (1) State of Bombay v. Narottamdas Jethabhai, AIR 195 SCR 51;
- (2) State of Maharashtra Vs. Kusum Charudutt Bharmha Upadhye, ; and
- (3) Umaji Keshao Meshram and Others Vs. Radhikabai and Another, ;

We may first refer to the decision of the Supreme Court in State of Bombay v. Narottamdas; (supra) which has exhaustively dealt with scope and ambit of Entry 53 in List I (Federal List) and Entries 1 and 2 in List II (Provincial List) of the Seventh Schedule to Government of India Act, 1935. Those entries are similar to the entries 77, 78, 95 in List I and Entries 3 (prior to 42nd amendment) and 65 in List II and Entries 11-A (after 42nd amendment) 46 in List III of the Seventh Schedule of the Constitution. It may also be stated that decision in Narottamdas's case still holds the field. (See Indu Bhusan De and Others Vs. State of West Bengal and Others,). Relevant entries in these Lists of Seventh Schedule of Government of India Act, 1935 and Constitution of India are as under :--

LIST I LIST II LIST III

Government of India.

Entry 53 : Jurisdiction and powers of all courts except Federal Court with respect to any matters in this List and to such extent as is expressly authorised on Part IX of this Act, the enlargement of appellate jurisdiction of the Federal Court and the conferring thereon of supplemental powers.

Entry 1 : Administration of justice constitution and organisation of all Courts except Federal Court and fees taken therein.

Entry 15 : Jurisdiction and powers of all Courts except Federal Court with respect to any of the matters in this List.

Entry 2 : Jurisdiction and powers of all courts except Federal Court with respect to any of the matters in this List; procedure in Rent and Revenue Courts.

Entry 4 : Civil procedure including the Law of Limitation and all matters included in the CPC of the date of the passing of this Act.

Constitution.

Entry 77 : Constitution, Organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court.

Entry 3 : Administration of justice Constitution and Organization of all Courts, except Supreme Court and High Court etc. prior to 3-1-1977.

Entry 11-A : Administration of justice; constitution and organisation of all Courts except Supreme Court and High Court (after 3-1-1977);

Entry 78 : Constitution and organisation (including vacations) of the High Court except provisions as to officers and servants of High Courts; persons entitled to practise before the High Court.

Entry 65: Jurisdiction and powers of all courts except Supreme Court with respect to matters in List 11.

Entry 46 : Jurisdiction and powers of all courts except the Supreme Court with respect to any of the matters in List III.

Entry 13 : Civil Procedure including all matters included in the CPC at the commencement of this constitution, limitation and arbitration.

Entry 79 : Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory. Entry 95 : Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

12. Bare perusal of the above entries will indicate that Entries Nos. 77 to 79 in List 1 of Seventh Schedule to the Constitution are new entries. Entry 95 is similar to Entry 53 in List I of Govt. of India Act, 1935. While drawing our attention to entry 78. Mr. Andhyarujina urged that the words, "constitution and organisation" therein must necessarily include topic relating to general jurisdiction of the High Court and in that event Parliament alone has got jurisdiction to pass the impugned law. He then drew our attention to Article. 246 of the Constitution to show the scheme as to how Parliament and State Legislators can legislate in different fields. He also drew our attention to Article 254 of the Constitution and urged that in terms of the said article inconsistency if any can be resolved. It is undisputed that prior to 42nd Amendment (i.e. prior to 3-1-1977) Entry 3 in List II to the Seventh Schedule was in the State List. The State Legislature had

exclusive power under the said entry relating to administration of justice, constitution and organisation of all Courts except Supreme Court and High Court etc. However, after 42nd Amendment to the Constitution, this entry 3 was bodily lifted and placed in the concurrent list (i.e. List III) as entry 11-A. According to Mr. Andhyarujina the phrase "constitution and organisation" used in Entry 11-A in the concurrent list also finds place in entry 78 in the Union List. Submission of Mr. Andhyarujina is that "constitution and organisation" of all courts except the Supreme Court and the High Court has been carved out by way of an exception from entry 11-A of List III and incorporated in Entries 77 and 78 respectively. The State Legislature is therefore competent to pass the law as regards the administration of justice, constitution and organisation of all courts except the Supreme Court and the High Court. The State Legislature can legislate on the topics contained in Entry 11-A in respect of all courts except the Supreme Court and the High Court. If Entry 11-A is considered in juxtaposition to entry 77 and in particular entry 78 in List I, it is clear that the Parliament alone can legislate on topics falling under entries 77 and 78 respectively. According to Mr. Andhyarujina the expressions "constitution and organisation" used in entry 78 has been lifted from entry 1 of List II of Govt. of India Act, 1935 and this expression has been judicially interpreted by the apex court to mean not only setting up of the High Court, its building, appointment of Judges, but it must necessarily include conferment of general jurisdiction in order to administer justice. In support of this submission he strongly relied upon the decision rendered by the Supreme Court in *State of Bombay Vs. Narothamdas Jethabai and Another*, and urged that the ratio of the said judgment must apply on all fours while interpreting the words, "constitution and organisation" used in Entry 78 this expression cannot be read in isolation and also cannot be read to mean only establishment of the High Court, appointment of Judges, court building etc. but must necessarily include general jurisdiction to administer justice. If this construction is not placed on Entry 78 it will be just a body without soul. He further urged that general jurisdiction must be read in the phrase, "constitution and organisation" and any other construction in that behalf will lead to absurdity and illogical results. In support of this submission he relied upon certain passages from the decision of the Supreme Court in *Narottamdas*" case (supra).

13. In order to appreciate the above submission, we may briefly indicate the controversy that was raised before the Supreme Court in *State of Bombay Vs. Narothamdas Jethabai and Another*, . It was a case wherein the legislative competence of the Provincial Legislature as regards the Bombay City Civil Court Act, 1948 was challenged. The 1st respondent in this appeal was Narottamdas who presented a plaint to the Prothonotary and Senior Master of the High Court for filing a summary suit against the 2nd respondent therein to recover sum of Rs. 11,704-5-4 alleged to be due under promissory notes. This suit was instituted in the High Court in contravention of a notification dated 20-1-1950 issued u/S. 4 of the City Civil Court Act under which suits up to the pecuniary limit of Rs. 25,000/- could be heard only by the City Civil Court, and not by the

High Court. As the question of jurisdiction was of importance the matter was referred to the Chamber Judge. On 23-2-1950 the learned Judge admitted the plaint holding that S. 4 of the said Act was ultra vires the Provincial Legislature and the notification under it was consequently inoperative and that the High Court had jurisdiction to hear the suit. The 1st respondent thereupon took out summons for judgment against the 2nd respondent. On the application of the Advocate General, the State of Bombay was impleaded as defendant at that stage and the proceedings were transferred to a Division Bench of the High Court.* The Division Bench upheld the view of the Chamber Judge and returned the cause to him for disposal on the merits. The State of Bombay, dissatisfied with this decision preferred appeal to the Supreme Court.

14. Two questions were raised in the said appeal before the Supreme Court :

(1) Whether the City Civil Court Act was ultra vires the Legislature of the Province of Bombay in so far as it dealt with the jurisdiction and powers of the High Court and City Civil Court with respect to matters in List I of Seventh Schedule, Govt. of India Act, 1935; and

(2) Whether section 4 of the Act was void as it purported to delegate to the Provincial Government legislative authority in the matter of investing the City Civil Court with extended jurisdiction.

15. This judgment was rendered by a 5 Judge Bench of the Supreme Court. The Full Court held that the impugned Act was a law with respect to a matter enumerated in List II and was not ultra vires; Legislature had exercised its powers and determined that the City Civil Court should be invested with pecuniary jurisdiction up to Rs. 25,000/-and/or that was left to the discretion of the Provincial Legislature to determine all conditions under which the Court should be invested with the enhanced jurisdiction; S. 4 did not involve any delegation of legislative powers but was an instance of conditional legislation and was not ultra vires or invalid on this ground. The impugned Act was in pith and substance a law with respect to a matter covered by List II, the fact that it incidentally affected the suit relating to promissory notes being items 28 and 53 in List I, would not affect its validity and the suit was accordingly not cognizable by the High Court. As far as interpretation of items 1 and 2 of List II of Govt. of India Act, 1935 was concerned the opinion was divided.

16. Mr. Andhyarujina in support of his submission drew our attention to a passage from the judgment of His Lordship Fazl Ali, J. which reads as under State of Bombay Vs. Narothamdas Jethabai and Another, :--

"For the purpose of correctly deciding the question raised, we must first try to understand the meaning of the following items in Entry 1 of List II, "administration of justice, constitution and organisation of all courts except the Federal Court". A reference to the three Legislative Lists shows that "administration of justice" is entirely a provincial subject on which only the Provincial Legislature can legislate. The same remark applies to "constitution and

organisation of all courts except the Federal Court". The expression "administration of justice" has a wide meaning and includes administration of civil as well as criminal justice, and in my opinion Entry I in List II, which I have quoted, is a complete and self-contained entry. In this entry no reference is made to the jurisdiction and powers of courts, because the expressions "administration of justice" and "constitution and organisation of Courts", which have been used therein without any qualification or limitation are wide enough to include the power and jurisdiction of courts, for how can justice be administered if Courts have no power and jurisdiction to administer it, and how can courts function without any power or jurisdiction.

His Lordship further went on to observe :

"In my opinion, the correct view is to hold that it is not necessary to call into aid either Entry 4 of List III or any of the provisions of the Canadian Constitution in this case, and that the words, "administration of justice; constitution and organisation of courts", are by themselves sufficient to empower the Provincial Legislature to invest a new court with all the power which has been conferred upon it by the impugned Act."

His Lordship Mahajan, J. who agreed with their Lordships Fazl Ali, J. and Mukherjee, J. while upholding the decision of the Bombay High Court in *Mulchand Kundanmal Jagtiani Vs. Raman Hiralal Shah*, observed as follows *State of Bombay Vs. Narothamdas Jethabai and Another*, :

"It seems to me that the legislative power conferred on the Provincial Legislature by item 1 of List II has been conferred by use of language which is of the widest amplitude (administration of justice and constitution and organisation of all courts). It was not denied that the phrase employed would include within its ambit legislative power in respect of jurisdiction and power of Courts " established for the purpose of administration of justice. Moreover, the words appear to be sufficient to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Province. Legislation on the subject of administration of justice and constitution of Courts of justice would be ineffective and incomplete unless and until the Courts established under it were clothed with the jurisdiction and power to hear and decide causes. It is difficult to visualise a statute dealing with administration of justice and subject of constitution and organisation of Courts without a definition of the jurisdiction and powers of those courts as without such definition such a statute would be like a body without a soul. To enact it would be an ideal formality. By its own force it would not have power to clothe a Court with any power of jurisdiction whatsoever....."

".....The Parliament by making administration of justice a provincial subject could not be considered to have conferred power of legislation on the Provincial Legislature of an ineffective and useless nature."

His Lordship at page 92(of 1951 SCR 51) : (at p. 84 of AIR 1951 SC 70) of the

report has then added :

"It is significant that no other Legislature has been given the power to bring into existence a Court. A Court without powers and jurisdiction would be an anomaly as it would not be able to discharge the function of administration of justice and the statute establishing such a Court could not be said to be a law on the subject of administration of justice. It is a fundamental principle of the construction of a constitution that everything necessary for the exercise of powers is included in the grant of power. Everything necessary for the effective execution of power of legislation must, therefore, be taken to be conferred by the constitution with that power. It may be observed that in exercise of legislative power under item I of List II a Provincial Legislature can alter the constitution of the existing Courts, can abolish them, reorganise them and can establish new Courts."

17. Mr. Andhyarujina then drew our attention to the passage from the judgment of His Lordship Mukherjee, J. and it reads thus *State of Bombay Vs. Narothamdas Jethabai and Another*, :--

".....It is to be noted that the right to set up Courts and to provide for the whole machinery of administration of justice has been given exclusively to the Provincial Legislature Under S. 101 North America Act the Parliament of Canada has a reserve of power to create additional Courts for better administration of the laws of Canada but the Indian Constitution Act of 1935 does not give any such power to the Central Legislature. Courts are to be established by the Provincial Legislature alone. The word "Court" certainly means a place where justice is judicially administered The appointment of Judges and officers or the mere setting apart of a place where the Judges are to meet, are not sufficient to constitute a Court. A Court cannot administer justice unless it is vested with jurisdiction to decide cases and "the constitution of a Court necessarily includes its jurisdiction."

18. His Lordship Mukherjee, J. while dealing with the question of conflict of entries provided a test of harmonious construction relating to entries 1 and 2 in List II, Entry 53 in List I and Entry 15 in List III. It was then observed (at p. 88 of AIR) :

"Entry 1 of List II uses the expression "administration of justice and constitution of all courts" in a perfectly general manner. No particular subject is specified to which the administration of justice might relate or for which a Court might be constituted. It can, therefore, be legitimately interpreted to refer to a general jurisdiction to decide cases not limited to any particular subject. The other three items on the other hand relate to particular matters appearing in the three Lists and what they contemplate is the vesting of jurisdiction in Courts with regard to such specific items only. In one case the jurisdiction is "general" as is implied in the expression "administration of justice", while in the other there the jurisdiction is "particular" as limited to particular matters and hence exclusive."

19. Mr. Andhyarujina urged that if this ratio is applied to the scheme of the

entries in Seventh Schedule, it must resultantly follow that entry 78 in List 1 deals with general jurisdiction of the High Court and this general jurisdiction flows from the expression "constitution and organisation of High Court". Special jurisdiction arises by reason of conferment of special powers/jurisdiction and this special jurisdiction is referred to in Entry 95 List 1 Entry 65 List II, Entry 46 List III in Seventh Schedule of the Constitution, as compared to Entry 53 in List 1 Entry 2 in List II and Entry 15 in List III to the Seventh Schedule of the Government of India Act, 1935. Relying upon the above ratio arising from the majority judgment of the Supreme Court in *State of Bombay Vs. Narothamdas Jethabai and Another*, . Mr. Andhyarujina urged that the general jurisdiction of a High Court must be read only with reference to "constitution and organisation" in Entry I List II of Govt. of India Act, 1935 and not with administration of justice in the said List. This Entry 1 in List II of Govt. of India Act, 1935 is bodily lifted and incorporated in our Constitution by dividing into two entries; constitution and organisation of the High Court having been put in Entry 78 of List 1 whereas administration of justice, constitution and organisation of all courts except Supreme Court and High Court has been put in Entry 3 in List II prior to 42nd Amendment and after 42nd Amendment it has been put in the concurrent list as Entry 11-A in List III of Seventh Schedule to the Constitution. Mr. Andhyarujina therefore submitted that the general jurisdiction must go along with phrase "constitution and organisation of the High Court" used in Entry 78 of List 1 and if this be so, Parliament alone will have jurisdiction to pass the law in that behalf and the State Legislature could not have passed the impugned Act to take away the general jurisdiction of the High Court in civil suits and other proceedings of civil nature from the Original Side of the High Court.

20. Mr. Ashok Desai, Mr. Aspi Chinoy and Mr. A. J. Rana supported Mr. Andhyarujina.

21. The learned Advocate General while opposing the above interpretation placed by Mr. Andhyarujina submitted that a fair reading of Entries 1 and 2 in List II of the Govt. of India Act, 1935 indicates that general jurisdiction forms part of administration of justice in item 1 of List II and not in the expression "constitution and organisation" in the said entry. However entry 2 in List II dealt with special jurisdiction as it was in respect of matters falling in that list. The learned Advocate General submitted that this is also borne out by the words jurisdiction and powers of all courts except Federal Court in Entry 53 of List I of the Govt. of India Act, 1935 and also from entry 15 List III of Govt. of India Act, 1935. According to the learned Advocate General, therefore, in the light of the above three distinct topics, the framers of the Indian Constitution divided the three topics and sprinkled them into various entries in List I, II and III of the Seventh Schedule to the Constitution of India. Entry 77 accordingly deals with constitution, organisation, jurisdiction and powers of the Supreme Court whereas Entry 78 deals with only constitution and organization of the High Court and not with jurisdiction and powers of the High Court. According to the learned Advocate General omission of the words jurisdiction and powers in Entry 78 in

juxtaposition to the inclusion of the said words i.e. "jurisdiction and powers" of the Supreme Court in Entry 77 clearly indicates that the jurisdiction and powers of the high Court is dealt with as a separate topic and it would come within "administration of justice" under Entry 3 of List II. Mr. Advocate General further contended that the significance of omission of the words "jurisdiction and powers" from entry 78 in contrast to entry 77 cannot be lost sight of and therefore the only conclusion which could be drawn from the said omission in entry 78 is that the general jurisdiction of the High Court falls in entry 3 in List II dealing with "administration of justice" which is now 11-A in List III.

22. Learned Advocate General further submitted that the above interpretation of general and special jurisdiction placed by him could also be supported and justified from another angle. The expression, "constitution and organisation of the High Court in Entry 78 of List I, deals with the constituent power which flows from Articles 2, 3, and 4 of the Constitution and which power is a larger power as compared to the legislative power of the appropriate Legislatures under the three lists. According to the learned Advocate General Entries 77 and 78 used the words "constitution and organisation" because after coming into force of the Constitution the Supreme Court was required to be set up and so also the High Courts were required to be established or reconstituted. In this context learned Advocate General relied upon various articles of the Constitution to show that the expression constitution and organisation of the High Court in Entry 78 is referable to articles 2, 3 and 4 of the Constitution and also to Art. 214 of the Constitution.

23. The learned Advocate General therefore submitted that the Constitution of the High Court would include establishment of the High Court but once the Court is constituted the incidental powers which are required to be vested in the High Court would be referable to Articles 3 and 4 of the Constitution read with Articles 214 to 230 of the Constitution. It was accordingly Submitted that after the High Court is constituted or re-constituted, the law conferring general jurisdiction would fall under entry 11-A of List III dealing with administration of justice and not under entry 78. The learned Advocate General therefore submitted that the State Legislature alone was the sole repository of power to confer jurisdiction under Entry 3 of List II prior to 42nd Amendment 1976 and thereafter both the Parliament as well as the State Legislature could confer general jurisdiction under Entry 11-A of List III of the Constitution.

24. Mr. K. K. Singhvi learned counsel appearing on behalf of the Bombay City Civil Court Bar Association as intervener adopted the arguments made by the Advocate General in support of the legislative competence of the State Legislature to enact the impugned Act. After careful thought to the submissions made before us, we find considerable substance in the submissions of the learned Advocate General. We have already set out in extenso the ratio of the majority judgment of the Supreme Court in *State of Bombay Vs. Narothamdas Jethabai and Another*, . At the outset, we must observe that Entries 1 and 2 in

List II of VIIth Schedule to Government of India Act, 1935, was a provincial list and dealt with administration of justice; constitution and organisation of all Courts as also jurisdiction and powers of all Courts except the Federal Court. It was construed by the Supreme Court in *Narottamdas (supra)* as composite entry dealing with the subject administration of justice. However, under our constitution the position has changed and there has been a division in respect of the various topics covered by Entries. 1 and 2 in List II of the VIIth Schedule of the Government of India Act, 1935. Entry 78 in List 1 gives power to the Parliament in relation to constitution and organisation of the High Court excluding therefrom administration of justice, jurisdiction and powers. This exclusion, in our opinion, is meaningful and with definite purpose in relation to bifurcation or division of legislative powers relating to conferment of general jurisdiction. Entry 77 in List 1 is a composite entry dealing with constitution and organisation, jurisdiction and powers of the Supreme Court; whereas Entry 78 deals with only constitution and organisation of the High Court. It means that from Entry 1 in List II of the Government of India Act, 1935 dealing with administration of justice, the framers of our Constitution culled out Entry 78. This construction of ours is not only harmonious but necessary in the context of the scheme relating to division of legislative powers of the Parliament and State Legislatures. Entry 78 in List 1 therefore deals with constitution and organisation of the High Court etc. excluding general jurisdiction which is dealt with in Entry 11-A in List III to the VIIth Schedule. While Entry 95 of List I, Entry 65 of List II and entry 46 of List III deal with special jurisdiction. This view of ours also finds support from the majority decision of the Supreme Court in the case of *State of Bombay Vs. Narothamdas Jethabai and Another*, . His Lordship, Mahajan, J. in his judgment at page 90 (of 1951 SCR 51) : (at p. 83 of AIR) of report has observed as under :--

"The Parliament by making administration of justice a provincial subject could not be considered to have conferred power of legislation on the Provincial Legislature of an ineffective and useless nature."

At page 92 (of SCR) : (at p. 84 of AIR) of the report it is then held :

"It is significant that no other Legislature has been given the power to bring into existence a court. A court without powers and jurisdiction would be an anomaly as it would not be able to discharge the function of administration of justice and the statute establishing such a court could not be said to be a law on the subject of administration of justice."

At page 93 (of SCR) : (at p. 84 of AIR) of the report it was further held :

"By making administration of justice a provincial subject and by conferring on the provincial Legislature power to legislate on this subject and also on the subject of constitution and organisations of courts, Parliament conferred on that Legislature an effective power which included within its ambit the law making power on the subject of jurisdiction of courts. The Provincial Legislature could therefore bring

into existence a court with general jurisdiction to administer justice on all matters coming before it within certain territorial and pecuniary limits, subject of course to the condition that such general jurisdiction may be expressly or impliedly taken away by the provisions of other laws."

At page 103 (of SCR) : (at p. 88 of AIR) of the report while dealing with the conflict and resolving the same with regard to various entries His Lordship Mukharjea J. observed at under :--

"In my opinion, the proper way to avoid a conflict would be to read entry 1 of the Provincial List, which contains the only provision relating to constitution of Courts and administration of justice, along with the group of three viz. entry 53 of List I, entry 2 of List II and entry 15 of List III with which it is supposed to be in conflict, and to interpret the language of one by that of the other."

At page 104 (of SCR) : (at p.88 of AIR) of the report, Mukharjea J. observed as under :

"It can, therefore, be legitimately interpreted to refer to a general jurisdiction to decide cases not limited to any particular subject. The other three items on the other hand relate to particular matters appearing in the three Lists and what they contemplate is the vesting of jurisdiction in courts with regard to such specific items only. In one case the jurisdiction is "general" as is implied in the expression "administration of justice", while in the other three the jurisdiction is "particular" as limited to particular matters and hence exclusive." Applying the above ratio of the Supreme Court in the case of State of Bombay Vs. Narothamdas Jethabai and Another, , we are of the opinion that Entry 11A in List III of the VIIth Schedule deals with administration of justice which includes general jurisdiction. The decision of the Supreme Court in Narottamdas's case (supra) clearly lays down that the law conferring general jurisdiction is a part of administration of justice under 11A and cannot be read into entry 78 as contended by Mr. Andhyarujina. It may be further mentioned that from this decision in Narottamdas's case (supra) it is clear that special jurisdiction was referable to Entry 53 in List I, Entry 2 in List II and Entry 15 in List III of VIIth Schedule of Government of India Act, 1935 for two reasons : Firstly, said entries were with respect to specific matters in the respective lists and, therefore, it was construed to be dealing with special jurisdiction, whereas Entry 1 in List II did not deal with any specific matter in List II and therefore, it was construed to be general jurisdiction. Secondly, special jurisdiction is also found in Entry 53 of List I, Entry 2 in List II and Entry 15 of List III because it was in consonance with legislative practice which was prevailing at the time when Government of India Act, 1935, came into force. It may be mentioned that unlike Canadian law, on which heavy reliance is placed by Mr. Andhyarujina, under the Government of India Act, 1935 a specific entry for special jurisdiction finds place in Entry 2 in juxtaposition to Entry 1. There is also no such entry 2 under the Canadian Constitution. It is also relevant to note that special jurisdiction under Entry 2 was in recognition of legislative practice in England as well as in India dealing with

topics in the List II (Example -- Indian High Court Act, 1961, Government of India Act, 1935, Letters Patent of the Bombay High Court, 1865 and different Civil Courts Acts).

25. Now, at this stage, we may refer to a decision of the Supreme Court, which is heavily relied upon by Mr. Advocate General in *O.N. Mohindroo Vs. The Bar Council of Delhi and Others*, . This case arose out of Advocates Act (Act No. 25 of 1961). The question that arose before the Supreme Court was whether S. 38 of the Advocates Act was ultra vires the Entries 26 and 77 and 78 to the VIIth Schedule to the Constitution of India. This was a decision rendered by 5 Judge Bench of the Supreme Court. After setting out the relevant provisions of the Constitution and Advocates Act, the Supreme Court in para 5 has referred to the question that fell for its consideration. It reads thus :--

"The question which falls for consideration is one of interpretation of entries 77 and 78 of List 1 and entry 26 of List III. If it is held that it is entry 26 of List III under which the Act was enacted, clause (2) of Article 138 would apply and in that case a special agreement with the State Government becomes a condition precedent to the enactment of 38 of the Act. In that case the difficulty would be to reconcile entries 77 and 78 of List I with entry 26 of List III."

In para 6, the Supreme Court reiterated rule of construction of entries in the three lists to the VIIth Schedule of the Constitution. It is observed as under :

"It is well recognised rule of construction that the Court while construing entries must assume that the distribution of legislative powers in the three Lists could not have been intended to be in conflict with one another. A general power ought not to be so construed as to make a nullity of a particular power conferred by the same instrument and operating in the same field when by reading the former in a more restricted sense, effect can be given to the latter in its ordinary and natural meaning."

After setting out entries 77, 78, 95, 85 and 46 in respective lists to 7th Schedule, the Supreme Court in para 6 has observed as under :--

"The scheme for conferring jurisdiction and powers on courts is (a) to avoid duplication of courts, Federal and State Courts as in the Constitution of the United States, (b) to enable Parliament and the State legislatures to confer jurisdiction on Courts in respect of matters in their respective lists except in the case of the Supreme Court where the legislative authority to confer jurisdiction and powers is exclusively vested in Parliament. In the case of the Concurrent List both the legislatures can confer jurisdiction and powers on courts except of course the Supreme Court depending upon whether the Act is enacted by one or the other. Entry 3 in List II confers legislative powers on the State in the matter of Administration of justice, constitution and organisation of all Courts, except the Supreme Court and the High Courts, officers and servants of the High Court procedure in rent and revenue Courts, fees taken in all Courts except the Supreme Court. It is Clear that except for the constitution and organisation of

the Supreme Court and the High Courts the legislative power in the matter of administration of justice has been vested in the State Legislatures. The State legislatures can, therefore, enact laws, providing for the constitution and organisation of Courts, except the Supreme Court and the High Courts and confer jurisdiction and powers on them in all matters, civil and criminal except the admiralty jurisdiction. It would of course be open to Parliament to bar the jurisdiction of any such court by special enactment in matters provided in List I and List III where it has made a law but so long as that is not done, the Courts established by the State Legislatures would have jurisdiction to try all suits and proceedings relating even to matters in Lists I and III. Thus, so far as the constitution and organisation of the Supreme Court and the High Courts are concerned, the power is with Parliament. As regards the other Courts, entry 3 of List II confers such a power on the State Legislatures. As regards jurisdiction and powers, it is Parliament which can deal with the jurisdiction and powers of the Supreme Court and the admiralty jurisdiction. Parliament can confer jurisdiction and powers on all courts in matters set out in List I and List III where it has passed any laws. But under the power given to it under entry 3 in List II, a State Legislature can confer jurisdiction and powers on any of the Courts in respect of any statute whether enacted by it or by Parliament except where a Central Act dealing with matters in List I and III otherwise provides."

While pointing out the difference between Entries 77 and 78 the Supreme Court in para 8 has observed as under :--

"It will, however, be noticed that entries 77 and 78 in List I are composite entries and deal not only with the constitution and organization of the Supreme Court and the High Courts but also with persons entitled to practise before the Supreme Court and the High Courts. The only difference between these two entries is that whereas the jurisdiction and powers of the Supreme Court are dealt with in Entry 77, the jurisdiction and powers of the High Courts are dealt with not by entry 78 of List I but by other entries".

In this case, the Supreme Court has dealt with the scheme envisaged in Entries 77 and 78 as also the ambit and scope thereof. In our opinion, this decision squarely supports our view that Entry 78 deals with only Constitution and organisation of the High Courts and the topic of jurisdiction and powers is covered by other entries and not by Entry 78. This decision of the Supreme Court also supports our view that there is substantial difference between conferment of general jurisdiction and powers in Entries 77 and 78 in List I to the VIIth Schedule of Constitution. From this decision of the Supreme Court, in our opinion, it must follow that general jurisdiction is separate topic from constitution and organisation of the Courts and further this topic must go along with administration of justice under entry 11-A in List III.

26. Mr. Advocate General also drew our attention to the judgment of the Supreme Court in *Indu Bhusan De and Others Vs. State of West Bengal and Others*, . This decision is rendered by the two Judge Bench. This judgment arose

out of a judgment of the Calcutta High Court reported in *Indu Bhushan De and Others Vs. The State of West Bengal and Others*, . Facts of this reported decision were that the petitioner before the High Court Indu Bhushan challenged constitutionality and scope and ambit of Calcutta City Civil Court Act (No. 23/63) and amendment to the said Act by the City Civil Court (Amendment) Act, 1969, increasing the pecuniary jurisdiction of the City Civil Court. A contention that was raised before the Calcutta High Court was as to whether, the State Legislature was competent to establish additional Courts in the City of Calcutta and pass impugned legislation. He also challenged further amendment by which the pecuniary jurisdiction of the City Civil Court was increased. It was contended on behalf of the petitioner Indu Bhushan that the State legislature had no authority to establish any additional Court. Main argument was based on the effect of Art. 247 of the Constitution of India. It was contended that Art. 247 of the Constitution overrides all other provisions relating to establishment of any additional Court after coming into operation of the Constitution. The learned single Judge negated constitutional challenges laid by the petitioner and held that the Act was intra vires. Appeal to the Division Bench also came to be dismissed. Against the said concurrent judgments of the Calcutta High Court, the matter was taken to the Supreme Court. It was contended before the Supreme Court that the Parliament alone had legislative competence to make law affecting jurisdiction of the High Court and, therefore, the State Legislature had no power to pass any law dealing with jurisdiction of the High Court. While dealing with this contention, the Supreme Court after setting out entries 77, 78 and 95 in List I, Entries 3 and 65 in List II and Entry 46 in List III of the VIIth Schedule of the Constitution has reiterated and reaffirmed the view taken by the Constitution Bench in the case of *State of Bombay Vs. Narothamdas Jethabai and Another*, . The Supreme Court observed (at p. 1785 of AIR) :

".....The other learned Judge constituting the Bench took the same view namely "administration of justice" authorised making of law conferring on, or taking away from, courts jurisdiction to entertain cases. This decision of the Constitution Bench clearly negatives the claim of the appellant that the impugned Act was ultra vires the jurisdiction of the West Bengal Legislature. Admittedly, the Act received Presidential assent and was, therefore, competent to bring about a change in the prevailing position obtaining under the letters patent of the Calcutta High Court."

In paragraph 4, the Supreme Court observed :

"A similar challenge as in the present case had also been raised before the Calcutta High Court in the case of *Amarendra Nath Roy Chowdhury Vs. Bikash Chandra Ghose and Another*, and a learned single Judge relying on the decision of the Constitution Bench referred to above had held that the Act was intra vires the State Legislature. We are of the view that the decision of the Constitution Bench is a clear and binding precedent against the Appellant's stand."

In our opinion, the above decision of the Supreme Court in the case of Indu

Bhusan De and Others Vs. State of West Bengal and Others, clearly lays down that powers of the legislature to confer or take away general jurisdiction of the Courts is a separate topic and that forms part of the administration of justice and not part of constitution and organisation of the Courts.

27. Mr. Andhyarujina, learned Counsel appearing for the petitioner, while trying to distinguish the decision in O.N. Mohindroo Vs. The Bar Council of Delhi and Others, urged that a limited controversy fell for consideration before the Supreme Court as regards interpretation of Entry 26 in List II of the VIIth Schedule to the Constitution. While deciding the said controversy the Supreme Court has considered the entries 77, 78, in List I, but that decision is confined to Entry 26 in List III, in the context of the Advocates Act, 1961. No arguments were advanced before the Supreme Court as to whether general jurisdiction of the High Court forms integral part of "constitution and organisation" of the High Court in Entry 78 in List I. Counsel urged that the Supreme Court had no occasion to consider the ambit and scope of Entry 3 in List II of the VIIth Schedule to the Constitution. Mr. Andhyarujina, therefore, urged that the decision in Mohindroo's case (supra) is clearly distinguishable having regard to the controversy raised in this petition. The observations of the Supreme Court quoted hereinabove do not apply to the present case. In view of our above discussion, we are unable to accept the submission of Mr. Andhyarujina.

28. While distinguishing the decision of the Supreme Court in Indu Bhusan De and Others Vs. State of West Bengal and Others, , Mr. Andhyarujina urged that facts of that case show that it involved a question of increase in pecuniary jurisdiction from Rs. 10,000/-to Rs. 50,000/-and from Rs. 50,000/- to Rs. 1,00,000/- of Calcutta City Civil Court, whereas in the present case, it is unlimited increase of pecuniary jurisdiction of the Bombay City Civil Court which has resulted in total abrogation of original side civil jurisdiction of this Court. This decision of the Supreme Court in Indu Bhusan (supra) is, therefore, clearly distinguishable and it will not apply in the present case. In our judgment, the jurisdiction will form part of administration of justice and accordingly it will fall in entry 3 of List II (Now Entry 11-A).

29. Mr. Andhyarujina then heavily relied upon the decision of the Special Bench of this Court in State of Maharashtra Vs. Kusum Charudutt Bharmia Upadhye, . According to the learned Counsel, the scope of Entry 78 of List I is no more res integra, in view of the above judgment of the Special Bench of this Court. According to Mr. Andhyarujina, the conclusion in para 120 of the said judgment and in particular Conclusion No. 7, support his contention that the words "constitution and organisation" in Entry 78 include general jurisdiction and, therefore, the Parliament had exclusive jurisdiction to enact impugned law and not the State Legislature. Conclusion No. 7 in para 120 of the said judgment reads as under :

"Under the Constitution, Parliament has by ordinary law the power to constitute and organize, that is, to create, new High Courts as also to enlarge or abridge

the jurisdiction of all High Courts, including the High Courts which were in existence at the commencement of the Constitution."

Mr. Andhyarujina placed reliance on conclusion 7 in para 120 of the said judgment also to support his contention that the authority is with the Parliament to enlarge or abridge the jurisdiction of the High Court and State Legislature has no competency to enact the law by which jurisdiction of the High Court could be abridged and/or totally abrogated. In reply to the contention raised by Mr. Andhyarujina the learned Advocate General pointed out that if one looks at formulation of the question which arose for decision in the said case, as reflected in para 6 of the said judgment, it indicates that the controversy which is before us was never controversy before the Special Bench of this Court, and therefore, conclusion No. 7 referred to hereinabove cannot be extended to this case. The learned Advocate General, in any event submitted that the said conclusion No. 7 is per incuriam as the Special Bench did not consider the judgment of the Supreme Court in the case of O.N. Mohindroo Vs. The Bar Council of Delhi and Others, . In fact the said judgment was not cited and considered by the Special Bench of this Court in the above case. One reason may be stated, viz., that the Full Bench of this Court (Nagpur) in Shankar Naroha Salunke v. Gyanchand Kothari on 3rd September 1980 in Letters Patent Appeal No. 3 of 1979 with L.P.A. Nos. 10, 11 and 17 of 1979 and L.P.A. No. 34 of 1980, had taken a view that after the Constitution of India came into force, it is only the provisions of the Constitution of India and not the provisions of ordinary law which could form the basis of jurisdiction of the High Court. While disagreeing with the judgment of the Nagpur Full Bench, the Special Bench after considering the history of the establishment of this Court came to the conclusion that establishment of this Court was not only based on the provisions of the Constitution but it was also on the basis of ordinary laws. Mr. Andhyarujina placed heavy reliance on para 68 in support of his contention that Entry 78 in List I refers to constitution and organisation of the High Court which includes jurisdiction. He placed reliance on the following passage :

"The Supreme Court held that the words of the said entry were sufficiently wide in their amplitude to enable Parliament to set up Courts and to constitute and organise, that is to say, to create, new or special Courts, subject to the limitation mentioned in the said Entry as regards the Supreme Court and the High Courts. The same phraseology as in the said Entry 11A occurs in Entry 78 in List I in the Seventh Schedule, and the same interpretation, therefore, must apply to it, and Parliament has, therefore, under the Constitution by ordinary law the power to constitute and organise, that is to say, to create, new High Courts. This in fact is what Parliament has done in a number of cases when the States were reorganised or a new State formed or admitted into the Union. This is in fact what Parliament did for the erstwhile State of Andhra Pradesh by S. 28 of the Andhra State Act, 1953 (XXX of 1953) which Act formed a new part A State to be known as the State of Andhra. Part V of the State Reorganisation Act, 1956 (XXXVII of 1956), did it for certain new and reorganised States and Part IV of the

Bombay Reorganisation Act, 1960 (XI of 1950) constituted and established a new High Court for the State of Gujarat created by the said Act. All these Acts were ordinary laws."

As stated hereinabove, this passage finds place in" para 68 of the said judgment of the Special Bench, but it was in the context of disagreeing with the judgment of the Full Bench in the case of Shankar Salunke (supra). In these circumstances, it cannot be said that the Conclusion No. 7 in para 120 of the judgment constitutes a ratio of the decision of the Special Bench in the case of State of Maharashtra Vs. Kusum Charudutt Bharmha Upadhye, , as contended on behalf of the petitioner. The distinction referred to hereinabove drawn by us is also based on the judgment of the Supreme Court in the case of O.N. Mohindroo Vs. The Bar Council of Delhi and Others, . Since we have come to the conclusion that the judgment of the Special Bench of this Court in State of Maharashtra v. Kusum (supra), was not dealing with the controversy which has arisen in the present case and since observations of the Special Bench of this Court were in quite different context with regard to Entry 78 List I, we are of the opinion that further reliance placed by the learned Counsel for the petitioner on the decision of the Supreme Court in Umaji Keshao Meshram and Others Vs. Radhikabai and Another, would not be correct. We may usefully draw support for our conclusion as regards interpretation, scope and ambit of Entry 78 by relying upon a passage from the Constitutional Law of India by an eminent Jurist Shri H.M. Seervai, at page 2508, 3rd Edition which reads as under :

"List I of G.I. Act 1935, contained no entry in respect of the constitution and organisation of High Courts, so that Entry 78 List I in our constitution makes a departure from the provisions of the G.I. Act, 1935. In that Act "administration of justice" constitution and organisation of all Courts, except the Federal Court, was included in Entry I, List II, and "jurisdiction and powers of all the Courts except the Federal Court" was included in Entry 2, List II. The fact that the constitution and organisation of High Court is different from the jurisdiction of the High Courts is not only clear from these entries in the G.I. Act, 1935, but is also clear from Entry 79, List I of our Constitution."

Mr. Ashok Desai, learned Counsel appearing for one of the Intervenors broadly submitted that under Government of India Act, 1935. Item 53 of List I, Item 2 of List II, Item 15 of List I which deal with special jurisdiction constitute a trichotomy and that trichotomy has been maintained under our constitution by way of Entry 95 of List I, Entry 65 of List II and Entry 46 of List III. Mr. Desai further submitted that the special jurisdiction conferred by the trichotomy referred to above, cannot be used to destroy or abrogate general jurisdiction in Entry 78 in List I. According to Mr. Desai, it is only the Parliament, who could confer or take away the general jurisdiction of the High Court under Entry 78 of List I. In view of what is stated hereinabove and since arguments on the interpretation of above entries advanced by Mr. Desai were similar to the interpretation placed on the above entries by Mr. Andhyarujina for the petitioner,

and since we have dealt with in extenso hereinabove, with the said interpretation, it is not necessary to once again deal with these submissions made by Mr. Desai.

30. Similar were the arguments advanced by Mr. Rana, learned Counsel appearing on behalf of one of the Intervenor, in support of the petition. Therefore, it is not necessary to once again deal with in detail separately his arguments.

31. Mr. Chinoy, learned Counsel appearing for one of the intervenors in support of petition submitted that Entry 3 of List II (Before 1977) was a plenary entry and it covers the entries filed from which a specific entry is carved out by way of Entry 78, and, therefore, entry 78 is a specific entry for which only Parliament could legislate and not the State Legislature because the specific will exclude the general. For the same reasons stated hereinabove we are unable to agree with the submissions of Mr. Chinoy.

32. Mr. Andhyarujina, learned Counsel appearing for the petitioner thereafter drew our attention to the Full Bench judgment of the Madhya Pradesh High Court in Balkrishna Das and Others Vs. Perfect Pottery Co. Ltd. and Others, . The question that fell for consideration in that case was as to whether the State Legislature was competent to enact Madhya Pradesh Ucha Nyayalaya Samapti Adhiniyam (Act 21 of 1981). The majority judgment struck down The said Act being unconstitutional. Since the subject of L.P.A. is a part of the "constitution and organisation" of the High Court under entry 78, the Parliament alone was held competent to pass such law. It may be stated that the decision of the Supreme Court in O.N. Mohindroo Vs. The Bar Council of Delhi and Others, was not cited before the High Court. In view of our above discussion and conclusions with great respect, we are unable to agree with the majority judgment of the Madhya Pradesh High Court. On the same reasoning we are unable to agree with the Full Bench decision of the Allahabad High Court in Hakim Singh Vs. Shiv Sagar and Others, to the extent of interpretation of Entry 78.

33. At this stage we must state that a writ petition No. 1953 of 1987 was filed by one Shri J. B.China petitioner against the State of Maharashtra in this Court challenging the constitutionality of the Maharashtra Act No. XVII of 1987 (Abolition of Letters Patent Appeal), which is similar to the Act in the case of Madhya Pradesh. This writ petition came to be transferred to the Supreme Court at the instance of the State of Maharashtra and, therefore, we do not wish to express any opinion in this behalf.

34. Mr. K. K. Singhvi, learned Counsel appearing for the intervenor to oppose the writ petition drew our attention to various decisions of other High Courts which have taken a similar view like ours on interpretation of Entry 11-A of List III and Entry 78 of List I. The said decisions are as follows :

1) Kochupennu Kochikka Vs. Kochikka Kunjipennu and Others,

- 2) AIR 1965 Mysore 76;
- 3) Pramatha Nath Mitter and Others Vs. Hon"ble The Chief Justice of the High Court at Calcutta in the State of West Bengal and Others, ;
- 4) Indo-Mercantile Bank Ltd. Vs. Commissioner, Quilon Municipality, ;
- 5) Ruth Chowdhary Vs. Bakhtawar Chowdhry, ;
- 6) K. Kumaraswami Kumandan and Bros. Vs. Premier Electric Co., .

35. Coming to another limb of argument of Mr. Andhyarujina, regarding pith and substance of the impugned Act, he submitted that the Parliament alone has the power to confer or take away general jurisdiction of the high Court under Entry 78 and, therefore, the State Legislature in the guise of increasing the pecuniary jurisdiction of the Bombay City Civil Court could not have abrogated the ordinary original civil jurisdiction of the High Court relating to civil suits and other proceedings of civil nature. Referring to the statement of objects and reasons contained in Bill No. 1/1986, Mr. Andhyarujina submitted that its true intention, design and scheme was to abrogate 2/3rd jurisdiction of the original side of the Bombay High Court and, therefore, in pith and substance the impugned legislation dealt with legislative powers of the Parliament under entry 78. Mr. Advocate General rightly submitted that this argument of the petitioner would not survive if he is right in his submission relating to the interpretation of entry 11-A in List III.

36. The effect of impugned Act is to abrogate substantially Original Civil Jurisdiction of the High Court but since the impugned Act is within the competence of State Legislature, doctrine of pith and substance has no application. We may however complete our judgment in this behalf by making reference to the decisions cited by Mr. Andhyarujina on this topic :

- 1) Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., ;
- 2) K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa, ;
- 3) (1908) AC 504;
- 4) (1899) SC 580;
- 5) (1924) AC 328;
- 6) (1939) AC 117 : AIR 1939 PC 53;
- 7)(1932) AC 41;
- 8) AIR 1949 FC 81;
- 9) In Re: The Special Courts Bill, 1978, ;

37. Mr. Andhyarujina learned Counsel then branded the impugned Act as colourable legislation and sought to apply Us basic test to decide as to whether

there is fraud on the Constitution. In support of this submission. Mr. Andhyarujina relied upon large number of authorities. However it is well settled that thing which cannot be done directly cannot be done indirectly. This is the basic test of colourable legislation. However, in the present case, the test of colourable legislation as propounded by the learned counsel will not apply in view of the fact that we have already come to the conclusion that the impugned Act falls within Entry 11-A of the concurrent list and has been assented to by the President and, therefore, the State Legislature was fully competent to enact the impugned law. We may, however, refer to the decisions relied upon by Mr. Andhyarujina :

- 1) Ashok Kumar alias Golu Vs. Union of India and others,
- 2) Mansing Surajsingh Padvi Vs. The State of Maharashtra, .

38. Mr. Singhvi in support of the impugned Act submitted that apart from Entry 11A of List III, Entry 13 of the Concurrent List should also be read. He further submitted that Entry 46 in the Concurrent List deals with special jurisdiction in respect of matters in List III. He then urged that one of the matters in the concurrent list is Civil Procedure including CPC on the commencement of the Constitution. The State legislature is competent to enact the impugned Act under Entries 13, 46 and 11A in in the Concurrent List. According to Mr. Singhvi the impugned Act also covers Ss. 6 and 9 of the CPC and, accordingly the State Legislature was competent to legislate under item 13 of List III. He further submitted that notwithstanding the provisions of Letters Patent as applicable to the proceedings before High Court (Original Side), the CPC is also applicable to the said proceedings. In this connection he relied upon a decision of the Supreme, Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, .This contention would be inconsistent with the decision in State of Bombay Vs. Narothamdas Jethabai and Another, . Mr. Andhyarujina rightly drew our attention to the observations of the Supreme Court in the case of State of Bombay Vs. Narothamdas Jethabai and Another, , which negated the submissions of Mr. Singhvi. After referring to the ratio of the judgment in G.P. Stewart Vs. Brojendra Kishore Roy Chaudhury, , the Supreme Court observed that expression, "civil procedure" in the Concurrent List must be held to have excluded matters relating to jurisdiction and powers of the Courts since special provision is made for those matters elsewhere. To hold otherwise would be to wipe out 2nd entry in the legislative list (Item 2 List 11 of the Seventh Schedule in the Govt. of India Act, 1935). This observation of the Supreme Court clearly shows that CPC does not deal with conferment of civil jurisdiction. On the same analogy it must be held that item 11A deals with conferment of general jurisdiction and if that distinction is kept in mind, then the question of invoking entry 13 in List III of the Constitution does not arise.

39. It was then urged by Mr. Andhyarujina that assuming that the impugned Act is intra vires having regard to the existing conditions in the Bombay City Civil Court, it was unreasonable exercise of statutory power to bring into operation

the impugned Act. In this behalf he also urged that the impugned Act was brought into operation in exercise of powers for extraneous reasons. The action of Government of Maharashtra is violative of Arts. 19(1)(g) of the Constitution. This contention is based on the footing that as on to-day, there is no infrastructure ready in the present set up of the City Civil Court to cope up with additional burden of new civil suits and other proceedings of civil nature which will be filed after 1-5-1992.

40. In this behalf, Mr. Andhyarujina . drew our attention to the averments contained in paragraphs Nos. 37 to 40 of the petition. The petition sets out the number of suits that are pending in the City Civil Court as well as in the High Court yearwise. There is also reference to the ratio of disposal in para 37. It has been stated that the Principal Judge of the City Civil Court in 1988, had recommended to the High Court that in order to clear the arrears he would need strength of 75 Judges. If jurisdiction of the High Court is abrogated naturally the new suits will be entertained by the City Civil Court and it will need further strength of 20 more Judges. Petition further recites that in all 120 Judges would be needed to man the City Civil Court to deal with old and new cases (civil and criminal). Shri Abhimanyu Madhavrao Shindekar, Under Secretary to the Government of Maharashtra, Law and Judiciary Department, in his affidavit dated 10th April 1992, in para 9 has stated as under :--

"With reference to contents of para 37 of the petition, I say and submit that the contents therein are misleading. I further say and submit that in view of the impugned Act, 20 Additional Posts of Judges in the City Civil Court and proportionate increase in staff is already sanctioned by the respondents and budget provision is made for increase of staff of 277 posts including 20 posts of Judges and an amount of Rs. 60,00,000/- is provided for salary of the increased staff of the City Civil Court for the year 1992-93 and provision of Rs. 27,00,000/- is also made in the budget for office expenses for the year 1992-93. I further say and submit that provision is made for 8 Court Halls in the existing old Secretariate building in which there are at present 40 Court halls and there would be in all 48 Court Halls for the use of the City Civil & Sessions Court in the old Secretariate Building. I further say and submit that the respondent is finding premises in New Bombay for housing Special Courts working under N.D.P.S. Act and, therefore, these 4 Judges and their Courts may go to New Bombay. I further say and submit that besides 48 Courts Halls which would be ready soon provision of 13 more Court Halts is also being made by taking steps for getting premises in possession of Computer Cell on the ground floor of the Old Secretariate Building vacated and as this premises wherein Police Computer Cell are working have 6500 Sq. fts. area, at least 5 to 6 Court Halls could be created. I further say and submit that in addition to this premises, there are 3 barracks in the City Civil Court building complex and Government is taking steps to take these 3 barracks vacated. I further say and submit that area of these 3 barracks is 12,100 sq. fts. and after these 3 barracks are vacated the staff of the City Civil Court can be shifted to these 3 barracks and area occupied by the staff about 12,125 sq.ft. will

be available for creating some Court Halls and about 13 to 14 Court Halls would be created in the near future. I further say and submit that total number of Court Halls in the City Civil Court building complex would come to 62 Court halls and this would satisfy the immediate need of the City Civil Court. I further say and submit that an amount of about Rs. 13,00,000/- is already spent for creating of 8 Court Halls and further specific amount is likely to be spent before 1-5-1992 about which provision has already been made in the budget for the year 1992-93."

41. Mr. Andhyarujina urged that assuming what stated in para 9 of the said affidavit is correct, as on today there are only 40 Court Halls. New 8 Court Halls are under preparation. Budgetary provision made by the State Government as reflected in para 9 of the said affidavit cannot be said to be sufficient to meet recommendations of the High Court. Mr. Ashok Desai during the course of hearing filed an application on behalf of one of the intervenors, calling upon the State Government to produce correspondence that was exchanged between the High Court and the State Government. Mr. Advocate General, was fair enough to produce the correspondence dating from 15-5-1988 to 19-2-1990, which, according to the petitioner, is only a part of the correspondence and not full. This additional paper book taken on record and marked "X" for identification. From the correspondence it is noticed that the High Court had recommended creation of new posts of 20 additional Judges in the City Civil Court. Letter dated 7th September 1988 from the High Court was in response to the query made by the State Government in regard to the impugned Act. This recommendation was made in 1988 on the footing that the impugned Act was being brought into operation soon and to cope up with new workload. This number of 20 Judges was in addition to 75 Judges as recommended by the Principal Judge to clear the existing arrears. By now arrears have mounted and, therefore, the present requirement of Judges would be more than what was felt in the year 1988. With this background, if we peruse the affidavit filed on behalf of the State Government, we are of the opinion that as on to-day there is no substantial compliance as regards infra-structure. The date of enforcement of the impugned Act is just two days away. Return filed on behalf of the State Government is totally silent as regards accommodation for new additional Judges who will be appointed in near future. The State Government will have to make provision thereof. Mr. Andhyarujina drew our attention to the fact that the three sitting Judges of the Bombay City Civil Court were required to file writ petition No. 1853 of 1990 in this Court seeking directions to the respondents State Government to make residential accommodation available to them. This writ petition is pending for final hearing and it would not be proper to comment upon this subject. It may, however, be stated that under the interim order passed by this Court, the State Government has now given accommodation to these Judges.

42. Mr. Singhvi, learned Counsel however urged that these are some inevitable problems which can be worked out in passage of time. He urged that on this ground impugned notification need not be struck down. As far as implementation

of notification from 1-5-1992 is concerned, in our opinion, it is somewhat a hasty step without application of mind on the part of the State Government to implement the impugned Act without providing infra-structure as recommended by the High Court. The High Court exercises judicial and administrative control over the subordinate courts in the State of Maharashtra. It would be a matter of concern for the High Court to see that the litigants in Courts do not suffer hardship due to want of adequate infra-structure. Under the constitutional scheme, the High Court has to perform its vital role and duties in respect of the administration of justice and, therefore, if infrastructure is not provided till this date, result would certainly be violation of fundamental rights of the litigants under Art. 14 and Art. 19(1)(g) of the Constitution of India. We may usefully refer to the decision of the Supreme Court in *All India Judges' Association Vs. Union of India and others*, , in which the Supreme Court has referred to the duty of the State to provide infrastructure which includes residential accommodation to the Judicial Officers in the sub ordinary judiciary. The said judgment refers to this aspect as duty cast upon the State Government to give suitable residential accommodation to the Judges (see paragraphs 28, 29, 31, 35 and 40).

43. Mr. Singhvi however submitted that the impugned notification dated 20th August 1991 is not purely an executive act but it is an executive exercise of legislative power. In this connection Mr. Singhvi relied upon a judgment of the Supreme Court in the case of *A.K. Roy and Others Vs. Union of India (UOI) and Others*, . Briefly it may be stated that issue before the Supreme Court was as to whether the Supreme Court could issue a writ to the Government to bring or not to bring the law into force. Answer was in the negative. The Supreme Court came to the conclusion that it was not an executive power but it was executive exercise of legislative power and, therefore, no writ could be issued. Mr. Singhvi then relied upon another decision of the Supreme Court in *AIR 1981 1127 (SC)* . He placed reliance on para 15 of the judgment which reads as under :--

"It was also said that neither the Gultekdi market nor the Turbhe Market had any convenience or facility or was ready for use on the date on which it was notified as the Principal Market for the concerned market area. On the material placed before us we are satisfied that all reasonable conveniences and facilities are now available in both the markets, whatever might have been the situation on the respective dates of notification. We refrain from embarking into an enquiry as to the situation obtaining on the dates of notification. We do say that a place ought not to be notified as a market unless it is ready for use as a market with all reasonable facilities and conveniences but we do not conceive it to be our duty to pursue the matter to the extreme limit of quashing the notification when we find that all reasonable facilities and conveniences are now available. While a notification may be quashed if nothing has been done beyond publishing the notification, in cases where some facilities and conveniences have been provided but not some others which are necessary the Court may instead of quashing the notification give appropriate time-bound directions for providing necessary facilities and conveniences. On the facts of the present case, we are satisfied that

all reasonable facilities and conveniences are now provided. We are also satisfied that the traders have been making one desperate Attempt after another to avoid moving into the new markets and they have been successful in stalling the notifications from becoming effective for quite a number of year."

44. Mr. Singhvi submitted that the above observations clearly indicate that it is not permissible for the High Court under Art. 226 of the Constitution to decide as to whether sufficient and adequate reasons existed for bringing the law into operation. In that case, issue was with regard to shifting of market of agricultural produce from Greater Bombay to New Bombay. It was in this context the Supreme Court observed that since adequate facilities were provided at New Bombay no interference was called for. However, in para 15 of the judgment, the Supreme Court has made it clear that if the said facilities were not to be provided at New Bombay, then the Court could have certainly interfered with and they would have passed appropriate orders as demanded by the situation. This passage has been relied upon heavily by Mr. Andhyarujina to contend that even in matters of conditional legislation, this Court can give appropriate directions if facts before the Court clearly indicate that adequate infrastructure has not been provided.

45. In the present case, we are not dealing with only case of traders but also the State Government's decision to implement the impugned Act by the impugned Notification in which the High Court also has to play an important role. As mentioned hereinabove, we are dealing with the topic of administration of justice. The High Court exercises judicial and administrative control over subordinate Courts in the State of Maharashtra and having regard to the interest of the litigants in the City of Bombay and having regard to the fact that there is already an institution which is working for the last 125 years, it would not be appropriate to rush through the implementation of the impugned Act without providing adequate infrastructure. It cannot be overlooked that from 1987 till this day, the State Government has not implemented the impugned Act and one of the reasons for non-implementation appears to us that the State Government was unable to provide the infrastructure including appointment of new Judges as per the recommendations of the High Court. Having regard to the peculiar circumstances which are existing in Bombay, in our opinion, it would not be in the interest of administration of justice as also in the interest of litigants or the institution to rush through in such a haste and implement the impugned Act by impugned Notification dated 20th August 1991 from 1st May 1992.

46. Learned Advocate General during the course of his arguments made statement that new appointments of City Court Judge will be made shortly. Further we cannot overlook the fact that pending suits and other proceedings of civil nature prior to 1-5-1992 being retained in the High Court and in view of the fact that 8 Courts Halls are under preparation, we are of the opinion that ends of justice will be met if instead of quashing the impugned notification, the implementation of the Act under challenge is deferred and postponed till 2nd

October 1992. This will also enable the State Government to carry out recommendations of the High Court. In view of the statement made by the learned Advocate General, we are satisfied that the process of providing infrastructure by the State Government is already set in motion and, therefore, it would not be in the interest of administration of justice to quash the impugned notification but instead we defer its implementation till 2nd October 1992. By this time we hope the State Government will be able to do the needful. Liberty to apply.

47. Mr. M. T. Saraf, learned Penal Counsel for the State requested the Court to permit him to correct a bona fide mistake that has crept into para 6 of the affidavit dated 10-4-1992 of Mr. Abhimanyu Madhavrao Shindekar. Affirmative assertion in line 2 of para 6 be read in the negative or as denied. We accept this statement and record denial in that behalf.

48. In the result we pass the following order:

1) The Bombay City Civil Court and Bombay Court of Small Causes (Enhancement "of Pecuniary Jurisdiction and Amendment) Act, 1986 is valid and intra vires the Constitution.

2) The implementation of the Notification No. CCS 2990/62(12) dated 20th August 1991 shall stand deferred till 2nd October 1992 as indicated above.

Writ petition is disposed of in the above terms. Parties are directed to bear their own costs.

49. At this stage, Mr. Andhyarujina orally applies for leave to appeal to the Supreme Court under Art 132(1) read with Art. 134A of the Constitution of India. Mr. Andhyarujina submitted that substantial questions of law are involved as to the interpretation of the Constitution. Issue involved herein is also of great public importance dealing with the general jurisdiction of the High Court. There is no unanimity of opinion amongst various High Courts as regards interpretation of Entries 78 in Lists I and II A in List III. He then drew our attention to the decision of the Supreme Court in State of Jammu and Kashmir and Others Vs. Thakur Ganga Singh for self and on behalf of other shareholders of Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Limited and Another, , Mr. Andhyarujina there-fore submitted that the petitioner be granted certificate of fitness under Art. 134A of the Constitution of India.

50. Mr. Saraf the learned Advocate appearing for the State of Maharashtra submitted that this Court has relied upon the judgments of the Supreme Court. No substantial question of law as to the interpretation of the Constitution is involved. He, therefore, urged that the Court-should reject the application made on behalf of the petitioner.

51. After hearing Counsel for the parties, we hereby grant certificate to the petitioner under Art. 132(1) read with Art. 134A of the Constitution as the case involves a substantial question of law as to the interpretation of the Constitution.

52. Ordered accordingly.