

(1963) 12 GUJ CK 0008

In the Gujarat High Court

Case No : Special Civil Application No. 145 of 1961

Jayantilal Amratlal Shodhan

APPELLANT

Vs

F.N. Rana and Another

RESPONDENT

Date of Decision : 05-12-1963

Acts Referred:

Bombay Reorganisation Act, 1960 — Section 87
Constitution of India, 1950 — Article 13, 226, 245, 246, 258
Land Acquisition Act, 1894 — Section 3, 4, 5A, 6

Citation : AIR 1963 Guj 80 : (1964) 5 GLR 481 : (1963) 5 GLR 405

Hon'ble Judges : N.M. Miabhoy, J;A.R. Bakshi, J

Bench : Division Bench

Advocate : I.M. Nanavaty, for the Appellant; B.R. Sompura, Asstt. Govt. Pleader and M.G. Doshit, of Bhaishankar Kanga and Girdharlal, for the Respondent

Final Decision : Dismissed

Judgement

MIABHOY, J.—This is a petition under Articles 226 and 227 of the Constitution of India. The petitioner Shri Jayantilal Amratlal Shodhan prays for a writ of mandamus or any other appropriate writ or direction or order for setting aside two notifications u/s 4 and 6 and proceedings u/s 5-A of the Land Acquisition Act, 1894. (I of 1894) (hereinafter called the ("Act")) and for directing the respondents Nos. 1 and 2 not to take action under those notifications and proceedings. Alternatively, the petitioner prays for a writ of certiorari or any other writ, direction or order for quashing the enquiry u/s 5-A of the Act and for setting aside the notification u/s 6 of the Act.

2. The petitioner is the owner of final plot No, 686 of the Ellisbridge Town Planning Scheme No.3, situated in Moje Chhadavad, City. Taluka, Ahmedabad, admeasuring 7018" square yards. The respondent No. 1 was, at the relevant time, the Commissioner, Baroda Division, Baroda. He issued a notification u/s 4 of the Act on 1st September, 1960, notifying that about 3200 square yards out of the above plot were needed or were likely to be needed for a certain public

purpose. This notification was published in the Gujarat Government. Gazette. By this notification, the respondent No. 1, acting u/s 3(c) of the Act, also appointed respondent No. 2 as the Additional Special Land Acquisition Officer to perform the functions of a Collector u/s 5-A of the; Act. The petitioner was served with a notice u/s : 4(1) of the Act on or about 24th September, 1960. In response to this notice, the petitioner filed, on 6th October, 1960, his objections u/s 5-A of the Act before the respondent No. 2, These objections were probably rejected by the respondent No. 3. Ultimately, on 19th January, 1961 the respondent No. 1 published a notification dated 10th January, 1961, u/s 6 of the Act declaring that 3387 square yards of the above final plot were required for the public purpose of the; construction of a telephone exchange building in the Ellisbridge area of the city of Ahmedabad. He also appointed by the same notification the respondent No. 2 to perform the functions of a Collector under the Act. The present petition is directed against the notifications u/s 4 and 6 of the Act issued by the respondent No. 1 and the proceedings" taken by the respondent No. 2 u/s 5-A of the same Act.

3. The above two notifications and proceedings were challenged in the petition on a number of grounds. On or about 30th of March, 1962, with the permission of this Court, the petitioner added a fresh ground which was incorporated as paragraph 4-A in the petition. Mr. Nanavaty, the learned counsel for the petitioner, however, at the time of the hearing of this petition, did not press all the grounds taken in the petition. He pressed the ground incorporated in the amended paragraph 4-A as the main ground in support of this petition. At the commencement of his arguments, Mr. Nanavaty formulated also five other points for our decision. But, at the end thereof, he gave up points Nos. (v) and (vi), presently to be mentioned. The result is that only four points require determination in the present petition. The points which were formulated by Mr. Nanavaty were as follows:

(i) That the respondent No. 1, the Commissioner, Baroda Division, Baroda, had no authority, in law, to Issue the two notifications u/s 4 and 6 of the Act.

(ii) That even if any such authority was purported to be conferred upon, the respondent No. 1, by the President of India under Article 258 ; Clause (1) of the Constitution, the delegation was invalid, because it contravened the provisions of Article 77 of the Constitution inasmuch as the order of the President under Article 258 was not made and expressed in the name of the President and was not authenticated as specified in the rules made by the President under Clause (2) of Article 77 of the Constitution.

(iii) That the respondent No. 1 had no authority, in law, to confer powers of a Collector under the Act on respondent No. 2.

(iv) That the enquiry conducted by the respondent No. 2 u/s 5-A of the Act was a quasi judicial enquiry and that enquiry was bad inasmuch as it was not conducted by the respondent No. 2 in the manner in which a quasi judicial

enquiry requires to be conducted under the law.

(v) That the enquiry u/s 5-A of the Act was not held as required, by the rules framed by the State Government u/s 55 of the Act.

(vi) That the notification u/s 6 of the Act was mala fide inasmuch as it was made in spite of the fact that the "enquiry u/s 5-A of the Act disclosed that there were no materials on the record which would sustain a notification under that section.

As already stated, Mr. Nanavaty gave up the last two points during the course of "the hearing though he did so after he had developed them up to a certain stage.

4. We propose to take up the second point first inasmuch as the learned Assistant Government Pleader raised a preliminary objection to that point being urged. "The teamed Assistant Government Pleader contended that the petitioner had not urged that ground anywhere in the petition and the present petition was not founded upon that ground at all. It was, therefore, contended that the petitioner should not be allowed to raise that point for the first time inasmuch as, thereby, the respondents would be denied the valuable right of meeting that objection which they would have done if the point had been mentioned in the petition. In our judgment, the objection is valid and must be upheld. Mr. Nanavaty admitted that, in the original petition, there was nothing which would support the above contention. But, Mr. Nanavaty very faintly relied upon the newly added paragraph 4-A in support of his contention that the point was raised by him in that amendment. The newly added paragraph is as follows:

"The petitioner submits that the and respondent is Commissioner of Divisions, State of Gujarat and the notification No. 880, dated 24th July, 1959, relied upon by 2nd respondent for issuing the impugned notifications entrusts the powers of Central Government to Commissioner of Divisions, State of Bombay. There being no entrustment of powers under Article 258 of the Constitution to the 2nd respondent as Commissioner of Divisions, Gujarat State, he has no authority or power to issue the impugned notifications and the impugned notifications are illegal and ultra vires and deserve to be set aside".

We fail to understand as to how point No. (ii) is mentioned even remotely in the above paragraph 4-A. This paragraph raises only point No. (i). It does not contain even the germ of anything which can be urged in support of point No. (ii). In our judgment it will be doing injustice to the respondents if the aforesaid point is now allowed to be raised by the petitioner. If the petitioner is so allowed, respondents will be deprived of the chance of bringing on record materials which they may have in their possession which can have successfully met the challenge that the provisions of Clause (2) of Article 77 of the Constitution were not complied with.

5. We propose to deal with point No. (iv) before dealing with the earlier points. We propose to do so because Mr. Nanavaty concedes that that point is no longer res integra in this Court and is covered by a decision of this Court in Patel

Gandalal Somnath and Others Vs. State of Gujarat and Others, . In that case, exactly the same question had arisen for decision. The question for decision was whether¹ a proceeding u/s 5-A of the Act was a quasi-judicial proceeding or an administrative proceeding. The decision of this Court was that the proceeding was an administrative proceeding. Consequently, the fourth point must fail.

6. Therefore, the points which survive for consideration are points Nos. (1) and (iii) which we propose to deal with seriatim.

7. In order to understand the arguments which were addressed by Mr. Nanavaty in support of his first contention, it is necessary, first of all, to read Section 4 and 6 of the Act. Section 4 empowers "the appropriate Government" to publish a notification under it if it appears to it that land, in any locality, is needed or is likely to be needed for any public purpose. Similarly, Section 6 empowers also "the appropriate Government" to issue a notification under that section if it is satisfied that any particular land is needed, inter alia, for a public purpose. Now, the expression "the appropriate Government" is defined in Section 3, Clause (ee) of the Act to mean "in relation to acquisition of land for the purposes of the Union, the Central Government". It is common ground that plot No. 686 aforesaid is being acquired for the purposes of the Union. Therefore, it is not disputed that the proper authority empowered to issue notifications u/s 4 and 6 is the Central Government. It is common ground that both the aforesaid notifications u/s 4 and 6 of the Act were not issued by the Central Government. They were issued by the respondent No. 1 who is the Commissioner for Baroda. But, the respondents' case is that the respondent No. 1 is entitled to exercise the powers of the Central Government by virtue of the entrustment of such powers by the President of India under Clause (1) of Article 258 of the Constitution. In fact, in both the notifications aforesaid, the respondent No. 1 has made a reference to the entrustment of such power by Government of India notification, Ministry of Home Affairs, No. G.S.R. 880, dated 24th July. 1959, issued under Clause (1) of Article 258 of the Constitution. A copy of the original notification has also been brought on the record by the respondents. Under that notification, the President of India has been pleased to entrust, with the consent of the Government of Bombay, to the Commissioners of Divisions in the State of Bombay, the functions of the Central Government under the Land Acquisition Act, 1894, in relation to acquisition of land for the purpose of the Union within the limits of the respective territorial jurisdictions of the said Commissioners, subject to the same control by the Government of Bombay as was from time to time exercisable by that Government in relation to acquisition of land for the purpose of the State. Clause (1) of Article 258 is as follows :

"Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends".

Mr. Nanavaty contends that, in order that an officer of the State may lawfully

acquire the authority to function for and on behalf of the Central Government, it is necessary that the entrustment by the President must be with the consent of the State Government. Now, from the above notification, dated 24th July, 1959, it is quite clear that the consent that was obtained was the consent of the Government of Bombay, Mr. Nanavaty contends that, on the date on which the two impugned notifications were issued, the State of Bombay was no longer in existence and the respondent No. 1 was not and could not be the servant of the State of Bombay and that he was the servant of the new State of Gujarat. The respondents admit this position. There is no dispute that, on the 1st of May, 1960, a new State known as the State of Gujarat was brought into existence and that, as from that date, the First Schedule to the Constitution under the heading "The States" was amended so as to show the name of Gujarat against entry No. 4. This was done by the Bombay Reorganization Act, 1960 (Act II of 1960) (hereinafter called the "Reorganization Act"). By Section 3 of the Reorganization Act, several territories were assigned to the State of Gujarat and the other territories of the former State of Bombay were assigned to a State called Maharashtra, which name was added against entry No. 7 of the First Schedule to the Constitution. Therefore, the position on the date on which the two impugned notifications were issued was that the State of Bombay was no longer in existence, or, in any case, the State of Gujarat was not the State of Bombay. A new State had been brought into existence. There was a Commissioner stationed at Baroda under the Bombay regime. It is not disputed that that officer continued also under the new State of Gujarat. But, the contention of Mr. Nanavaty, in support of his first objection, is that the consent which was given by the old State of Bombay does not ensure for the benefit of the State of Gujarat and consequently, the respondent No. 1 does not retain the power which had been conferred upon that officer by virtue of the above notification, dated 24th of July, 1959. The contention was that in order that the respondent No. 1 might exercise the authority in the same fashion as the former Commissioner under the Bombay State did, it was necessary for the President to obtain fresh consent from the State of Gujarat and to issue a notification or order under Clause (1) of Article 258 of the Constitution. The answer of the respondents to this contention was that the above notification, D/- 24th of July, 1959, did not become extinct on account of the Reorganization Act and that that notification would continue to operate by virtue of the provisions contained in Section 87 of the Reorganization Act. That section is as follows:

"87. Territorial extent of laws. -- The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Bombay shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

The part II referred to in this section comprises Sections 3 and 4. some provisions of which we have mentioned already. The expresison "appointed day"

in Section 87 means 1st of May, 1960. The effect of Section 87 of the Reorganization Act is that any law in force immediately before 1st May, 1960, in any territory of the State of Bombay would continue to be in force after that date unless otherwise provided by a competent Legislature or other competent authority. Therefore, the point which requires determination in the present petition is whether the notification, dated 24th July, 1959, aforesaid was or was not "law in force before 1st of May, 1960" and whether it would or would not survive as such law after the formation of the new State of Gujarat. The controversy centres round the nature and character of the notification issued by the President under Clause (1) of Article 258 aforesaid. The contention of Mr. Nanavaty is that that notification is only an executive act of the President and is not a law in force within the meaning of Section 87 of the Reorganization Act. On the other hand, the contention of the learned Assistant Government Pleader is that the notification is a law in force and will survive and continue to invest the respondent No. 1 with the same power under the Land Acquisition Act which he had before 1st of May 1960.

8. In order to understand and appreciate the arguments of Mr. Nanavaty, it will be useful to quote Clauses (2) and (3) of Article 258 also:

"(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof".

"(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers, or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties".

If we analyse Clause (1) of Article 258, we obtain the following points:

- (i) It is the President who is empowered to act under the clause.
- (2) The power conferred is one of, entrustment,
- (3) That power is to be exercised with the consent of the Government of a State.
- (4) The persons on whom the power can be conferred are (i) the State Government, or (ii) its officers.
- (5) The functions which are to be entrusted are those "in relation to any matter to which the executive power of the Union extends".
- (6) The entrustment may be either conditional or unconditional.
- (7) The power can be exercised notwithstanding anything contained in the

Constitution.

It is not necessary to examine all the above ingredients which constitute the clause. The most important point which requires to be determined, as already stated is the nature and the scope of the power of entrustment and the legal effect of any notification or order which may be issued by the President in exercise of that power. This is the central fact which has got to be ascertained for the disposal of the present petition. It may be mentioned that the Clause does not require that the President must act under the Clause by the issue of a notification. Therefore, the fact that a notification has been issued in this case is not of much consequence. The President whilst exercising the function under Clause (1) may act in any mode provided it is not inconsistent with any other provision of the Constitution. It is not disputed that the President may exercise the function under Clause (1) by only making an order and doing nothing more. Therefore, the character of the impugned notification cannot derive any strength from the fact that it is a notification. It may be considered as an order made by the President and got published by him in the Government Gazette. Another important ingredient to be noticed is the subject-matter of the power of entrustment. The subject-matter is mentioned as function in relation to any matter to which the executive power of the Union extends. Now, the extent of the executive power of the Union is mentioned in Article 73, Clause (1), and it comprises of the matters mentioned in Sub-clauses (a) and (b). It is not necessary to examine the matters referred to in Article 73, Clause (1), at this stage. We will do this if it is found necessary at a later stage. For the sake of convenience, we may describe the power exercisable by the Union Under Article 73 as the executive power of the Union, Reverting to Clause (1) of Article 258 , it is clear, therefore, that the power or the function which can be entrusted by the President either to the State Government or to its officers is the executive power or function of the Union.

9. Now the argument of Mr. Nanavaty is that the power conferred by Clause (1) of Article 258 upon the President to entrust the executive function of the Union to a State Government or its officers is itself an executive power. In other words, the submission is that, when the President exercises the function of entrustment, he exercises an executive and not legislative function. From this, Mr. Nanavaty further submits that, therefore, any order or notification which the President may issue under Clause (1) of Article 258 aforesaid will not be a legislative act and, consequently, it will not be a law within the meaning of Section 87 of the Reorganization Act. This argument assumes that no executive activity can ever lead to the enactment of a law. We do not propose to examine the validity of this submission at this stage. "First, we propose to address ourselves about the validity of the submission that the function performed by the President under Article 258 , Clause (1) of the Constitution is an executive function. Now, in support of this submission, Mr. Nanavaty makes the following points. Firstly, he submits that our Constitution divides the functions of the State into three categories, viz., (i) the legislative, (ii) the judicial, and (iii) the executive, and

that each of these functions is assigned to a different and a separate organ of the State. He further submits that the aforesaid function of entrustment, being neither legislative nor judicial, can only be placed in the third category of executive function. . In support of this contention, Mr. Nanavaty very strongly relies upon the following observations made by Their Lordships of the Supreme Court in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, :

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away".

Mr. Nanavaty contends, and this is not disputed by the learned Assistant Government Pleader, that the performance of the aforesaid function of entrustment is not the performance of any judicial function. Mr. Nanavaty further contends that the above function is not also a legislative function. According¹ to Mr. Nanavaty, the only legislative function which has been assigned by our Constitution to the President is, the function of promulgating Ordinances under Article 123 during recess of Parliament. Mr. Nanavaty submits that the only way in which the President. can exercise the legislative function is under Article 123 and, inasmuch as the function under Clause (1) of Article 258 is not to be performed in that manner, the activity of the President under that Clause is not a legislative activity. We do not propose to consider the validity of this submission either. The only criticism which one can make against this submission is that Article 123 cannot be read in such a way as necessarily, to circumscribe the legislative power only in the mode mentioned therein. That Article is not intended to circumscribe the powers of the President which otherwise he may possess under the Constitution by restricting the exercise of them to the mode mentioned in Article 123 . But, for the purposes of the present argument, there is no doubt whatsoever that the function under, Clause (1) of Article 258 is. not a legislative function within the meaning of Article 123 . But, that does not mean that the function must automatically come under the third category of executive function. It will be noticed that the observations on which Mr. Nanavaty relies are prefaced by the word "ordinarily". The aforesaid observations, in our judgment, were not intended by Their Lordships to-mean that the powers and functions mentioned in the Constitution must rigidly, come within the purview of any one of the aforesaid categories. An examination of the question on its own merits, in our judgment, reveals that the function of entrustment stands in a category by itself and does not necessarily lend itself easily to be placed under one or the other of the three categories mentioned above in the first" instance, the above observations, were made by Their Lordships whilst examining the meaning and the connotation of Article 162 of the Constitution, which is in the same terms as Article 73 except with a slight difference which is not material for the purposes of our discussion. Now, if we examine the language of Article 73, we find that, although it does not define what an executive function, is, it does mention the matters over which the executive power is exercised. The exercise of the

executive power is to be over (a) the matters with respect, to which Parliament has power to make laws, and (b) the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. It is true that this definition of the extent of the executive power is not exhaustive. There are some other Articles in the Constitution which expressly designate the powers conferred under them as executive powers. Instances of those are to be found in Articles 257 and 257 which occur in Part XI, Chapter II, in which Article 258 occurs under the same heading "Administrative Relations". The powers conferred under these Articles do not come within the purview of clauses (a) and (b) of Article 73 (1) and yet the exercise of those powers are expressly described as falling within the extent - of the executive power of the Union. In Article 257, it is enjoined that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State and the Union Government has been given the right to give such directions to a State as may appear to the Government of India to be necessary for that purpose. Under Article 257, it is enjoined that every State shall exercise its executive power in such a manner as not to impeach or prejudice" the executive power of the Union and a power is given to the Union to give such directions to the States as may appear to be necessary to the Government of India for the purpose. Under the same Article, a power is given also to the Union to give directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance. Under the same Article, some further powers have been given to the Union over the State in respect of certain other matters. All these powers have been, in express terms, stated to fall within the ambit of "the executive power of the Union". But, it is noteworthy that the power or the function conferred upon the President under Clause (1) of Article 258 does not say in express terms that that power is within the ambit of the executive power of the Union. We may mention that our Constitution confers a number of functions upon the President without expressly designating them either as legislative, judicial or executive. For example, under Article 72, the President has been given the power to grant pardon. Under Article 78, Clause (a), which enumerates the duties of the Prime Minister, the President derives (1) the power to be informed of all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation; (2) the power to be furnished information relating to the administration of the affairs of the Union and proposal for legislation; and (3) the power to call upon the Prime Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister, but which has not been considered by the Council. Under Article 80, Clause (a), the President has been given the power to nominate 12 members to the Council of States. Under Article 86, the President has got the power to address either House of Parliament or both houses assembled together and to send messages to either House with respect to a bill then pending in Parliament or otherwise. Under Article 124, the President has got the power of appointing the Judges of the Supreme Court. We

need not enumerate exhaustively all the functions which have been specially conferred upon the President by various Articles of the Constitution. It is enough to say that the powers conferred upon the President by the Constitution are found reposed in a number of Articles of the Constitution. Now, obviously, all these powers, though they have not been mentioned to be in the nature of legislative or judicial functions, do not automatically fall within the purview of the third category of executive functions. The argument must certainly fail in respect of the power to grant pardon, which, according to all constitutional jurists, is the exercise of a judicial function. In our judgment, if all the aforesaid other powers were automatically to be described as executive powers without examining the content and the scope of each of the powers, it might lead to a number of complications and difficulties. If all these other functions were to be regarded as executive functions of the Union, then, according to Article 53, these powers can be exercised not only by the President personally, but also through the officers subordinate to him. Not only this, but if these other powers fall within the executive field of the Union, then, under Clause (3) of Article 53, the Parliament will have the right of conferring those functions on authorities other than the President by enacting a suitable law. Having regard to the importance and the nature of some of the aforesaid functions and the purpose for which those functions have been conferred upon the President, the argument will require the closest scrutiny if the result thereof is going to be that those functions can be delegated by the President to his subordinate officers or by the Parliament to the same authorities. The Constitution having reposed those functions in the highest dignity of the State, in our judgment, it would not be proper to hold off-hand that those powers could also be exercised by persons other than the President. The Constitution having reposed those functions in the President, *prima facie*, the view must prevail that those functions can be performed by the President alone, of course, subject to the provisions contained in Article 74. But, it is important in this connection to notice the difference between the language used in Article 53 and Article 74, Article 53 relates to the executive power of the Union, whereas Article 74 relates to the exercise of the Presidential functions. In respect of the latter functions, whether they fall within the legislative, judicial or any other field, the Constitution has enjoined that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions. The President being the nominal head of our State, there is considerable force in the argument that, in the exercise of all his functions, to whatever field they may belong, the President is bound to consult and act according to the advice of the Council of Ministers. But, this is so not only with respect to the executive functions, but with respect to all other functions, whether they fall in the three recognized categories or not. The President is bound to consult his Council of Ministers in respect of all these functions. But the functions which can be delegated either by the President or by Parliamentary legislation are only those which may be described as the executive functions of the Union and not the functions of the President. Under the circumstances, we are not convinced that the argument that any function exercised by the President which does not fall within the purview of the

legislative or judicial function must necessarily be designated as an executive function. As in the case of the exercise of the power to grant pardon, the nature, the scope and the content of the power itself must be examined before putting any function within one or the other category. An examination may not necessarily put the function into one of these recognized categories; it may have to be placed in the category of miscellaneous functions. Therefore, in our judgment, the point raised by Mr. Nanavaty cannot necessarily be answered in favour of the petitioner by merely holding that the exercise of the function of entrustment under Clause (1) of Article 258 pertains neither to the legislative nor to the judicial activity of the President.

10. The same discussion also leads us to the conclusion that the function performed by the President under Clause (1) of Article 258 of the Constitution cannot be equated with the executive power of the Union mentioned in Article 73 and the other Articles of the Constitution in which a reference is made to the said executive power.

11. But, that does not necessarily mean that the function performed by the President under Clause (1), Article 258, is not an executive function. An executive function in modern times takes within its connotation a large number of powers. It is not merely the execution of the will of the State or a power to administer its laws. The executive function in modern times also includes, besides execution of laws, such powers as the maintenance of public order, the management of nationalised Industry and services, the direction of foreign policy, the conduct of military operations and the provisions or supervision of such services as education, public health, transport and State insurance, (vide Halsbury's Laws of England, Third Edition, Volume II, page 187). Therefore, it still requires to be ascertained, in spite of our conclusion that the Presidential function of entrustment under Clause (1) cannot be equated with the executive power of the Union, whether that function can properly belong to one of the aforesaid or similar activities which, in modern times, is included in the connotation of the word "executive power".

12. Now, on this aspect, Mr. Nanavaty made the following submissions. He contrasted the provisions of Clause (2) with the provisions of Clause (1) of Article 258 and submitted that, as the function under Clause (2) was legislative in nature, the function mentioned in Clause (1) must necessarily be of a different kind and that, therefore, the latter function was of an executive character. Secondly, he submitted that the power which was to be delegated under Clause (1) of Article 258 was undoubtedly executive power. He stated that, therefore, the power of delegation must also necessarily be executive. Thirdly, he submitted that the Presidential function under Clause (1) of Article 258 of the Constitution was to be exercised in the manner laid down in Article 77, Clause (1), and that the provisions of the latter indicated that that mode was to be utilized for exercise of the executive functions. Now, in our judgment, some of the aforesaid submissions are fallacious and none of them is valid. In the first instance, we do

not see any logic in the contention that because the function mentioned in Clause (2) of Article 258 is legislative, the function mentioned in Clause (1) must necessarily be non-legislative. On the contrary, as we shall presently point out, the nature of the function to be performed by the Parliament under Clause (2) may indicate that the Presidential function to be performed under Clause (1) aforesaid is of the same kind. We do not see how, because the matter delegated is of an executive nature, the power of delegation must also necessarily be of the same ilk or colour. The argument that the Presidential function under Clause (1) of Article 258 is to be exercised in the manner indicated in Article 77 , Clause (1) is itself a point in controversy We did not permit Mr. Nanavaty to raise that point for the reasons already given. But, even so we may point out that, if our conclusion is correct "that the Presidential function under Clause (1) of Article 258 is not the executive function of the Union, but, falls within the special category of miscellaneous Presidential functions, then, it is very doubtful whether the provisions of Article 77 , Clause (1), can be applicable to the Presidential function under Clause (1) of Article 258 of the Constitution.

13. There was one more point, which Mr. Nanavaty mentioned, which was based upon the provisions of Clause (3) of Article 258 , which also, in our judgment, has no merit. Clause (3) aforesaid casts a duty upon the Government of India, to pay to the State Government concerned such sum as the State Government has to incur by way of extra costs of administration in connection with the exercise of the delegated powers and duties of the Union. We fail to see how this provision can throw any light or help us in ascertaining the nature of the aforesaid Presidential function.

14. For the aforesaid reasons, we have come to the conclusion that none of the submissions made by Mr. Nanavaty aforesaid can be accepted and that, in any case, none of those submissions is determinative of the nature and character of the Presidential function performed under Clause (1) of Article 258 , (15) On the other hand, the learned Assistant Government Pleader canvassed the broad proposition that any notification or order issued under any statute is a "law in force" within the meaning of Section 87 of the Reorganization Act. The learned Assistant Government Pleader submitted that if this was so in respect of a statutory notification or order, then a fortiori it would also be so in respect of a notification or order issued under the Constitution. The argument was based essentially upon the definition of the word "law" given in Section 2 (d) of the Reorganization Act, which is as follows:

" "law" includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay".

This definition takes within its ambit, amongst other things, an order and a notification which has the force of law. We have already mentioned before that Clause (1) of Article 258 does not contemplate the issue of any notification. The

function can as well be performed by making a simple order. Therefore, Mr. Nanavaty does not dispute that the notification under Clause (1) of Article 258 , even if it is construed as a Presidential order will come within a part of the definition of the word "law". That is not a point which is disputed by any side. But, before we consider the validity of the above submission of the learned Assistant Government Pleader, we may dispose of an argument which Mr. Nanavaty submitted to repel the submission of the learned Assistant Government Pleader and which argument, if upheld, would go to the root of the matter. Mr. Nanavaty contended that the expression "law in force" used in Section 87 of the Reorganization Act was construed by this Court in a decision, presently to be mentioned, and that the construction placed thereon by that decision was binding on this Bench and, therefore, the submission of the learned Assistant Government Pleader was without any force. The decision on which Mr. Nanavaty relied is the decision of the special Bench in *State of Gujarat Vs. Gordhandas Keshavji Gandhi and Others*, . In this case, the question which arose for the decision of the special Bench was whether a judicial precedent was a "law in force" within the meaning of Section 87 of the Reorganization Act. The majority view was that it was not so. This view was taken by four learned Judges of the High Court -- the learned Chief Justice and the learned Justices Shelat, Bhagwati and Mody. However, two judgments were delivered by the learned Judges constituting the majority. One judgment was delivered by My Lord the Chief Justice K. T. Desai, with which Shelat and Mody, JJ. fully concurred. Another judgment was delivered by Bhagwati, J. In support of his argument, Mr. Nanavaty firstly relied upon the view expressed by Bhagwati, J. in his judgment. Mr. Nanavaty read extensively from several passages in that judgment. But, the main passage on which he relied was the one at p. 376 (of Guj LR): (at p. 183 of AIR) wherein the learned Judge, after mentioning that the intendment o? the words "law in force" should satisfy two requirements, made the following observation:

"It is only if these two conditions are satisfied that the law can come within the scope and ambit of Section 87. Such law would obviously be only statute law".

Mr. Nanavaty contends that, therefore, the majority view in the above case has been that the expression "law in force" means only statute law and nothing else. "Mr. Nanavaty conceded that such a view was not taken by the judgment delivered by My Lord the learned Chief Justice. But, he contended that, though this was not so, Mr. Justice Bhagwati, being one of the Judges taking the majority view, the above passage was constituted the ratio of the decision and was binding on all the Division Benches of this Court. We do not think we can accept this submission. The ratio of the majority decision is that the expression "Jaw in force" does not take within its connotation a judicial precedent. In our judgment, unless Mr. Nanavaty is able to point out to us that the reasoning which Bhagwati, J. has given was adopted by the other three learned Judges, that reasoning cannot be regarded as constituting the principle on which the aforesaid decision was based. In our judgment, the ratio of the decision has to be found in that part

of the judgment of My Lord the learned Chief Justice, which is reported at p. 284 (of Guj LR): (at p. 132 of AIR), wherein My Lord the learned Chief Justice made the following observation:

"As the language of the section indicates it must be a law in force, that is, it must be a law in operation as such and it must extend or apply to the territories referred to in the said section. It must be a law enforceable in every Court having jurisdiction to enforce it, including the Supreme Court"

In our judgment, this passage constitutes the ratio of the case and what the majority of the special Bench has decided is that in order that a law may be in force, it must be enforceable in every Court Having jurisdiction to enforce it. Moreover, the question for decision before the special Bench was whether, a judicial precedent was or was not a "law in force". Therefore, the observations made by Bhagwati, J. must" necessarily be confined to this question. The special Bench was not called upon to decide whether an order or a notification could or could not embody a law within the meaning of Section 87 of the Reorganization Act. In fact, if the special Bench were to take any such view, it is obvious that that view would be untenable as it would be opposed to the definition of the word "law" as given in Section 2(d) of the Reorganization Act. Therefore, if the present case is to be decided with reference to the interpretation placed upon the expression "law in force" in the special Bench, the question for enquiry would be whether the above Presidential notification was a law in the sense that such a law was enforceable in Courts having jurisdiction to enforce it. In our judgment, therefore, the fact that the notification is not a statute law does not constitute an impediment to its being a law in force within the meaning of Section 87 of the Reorganization Act. We will advert, a little later, to another argument of Mr. Nanavaty which was based upon a distinction which he sought to make between "enforceability" and "recognition". We will also discuss a little later whether the Presidential notification does or does not satisfy the interpretation placed by the special Bench upon the expression "law in force" aforesaid.

16. Reverting to the argument of the learned Assistant Government Pleader, we will examine the various authorities on which the learned Assistant Government Pleader relied in support of the proposition for which he canvassed. Chronologically, the authorities are *State of Bombay v. F. N. Balsara* AIR 1951 SC 318 , *The State of Madhya Pradesh Vs. G.C. Mandawar* , *Kailash Nath and Another Vs. State of U.P. and Others* , and *Madhubhai Amathalal Gandhi Vs. The Union of India (UOI)*, . In AIR 1951 SC 318 , the Supreme Court was dealing with an order u/s 139 of the Bombay Prohibition Act. Their Lordships held that an order made by the Provincial Government in exercise of the power conferred by that Section owed its legal efficacy to that section and, therefore, in the eye of the law, the notification had the force of law as if made by the Legislature itself. These observations, however, must be read in the context of the facts of that case. If they are divorced from the context, then, they are likely to mislead one in understanding the true import of the decision. We cannot understand Their

Lordships to have laid down by the aforesaid observation that every order which owes its legal efficacy to a statute has the force of law. In this case, the Provincial Government had issued an order exempting intoxicants specified in column- No. 1 of the schedule to a certain notification from the provisions of the Act specified against them in column No. 2 of that schedule. Therefore, in Our judgment, Mr. Nanavaty is right in submitting that this was a case of subordinate legislation. By Section 139, the Legislature had given a discretion to the Provincial Government to exempt intoxicants from the provisions of the Act and it is quite obvious that, if the Provincial Government acts in exercise of such, a discretion, the action of the Provincial Government, would be the result of a legitimate delegation made to it by the Legislature in respect thereto. We cannot, therefore, agree, that the aforesaid case lays down a general principle that every notification issued under a statute has necessarily the force of law. In (S) Kailash Nath and Another Vs. State of U.P. and Others, , their Lordships were dealing with a notification u/s 4 of the U. P. Sales Tax Act by which it was provided that the provisions of Section 3 of that Act which related to the levy of sales tax shall not apply to the sales of cotton cloth or yarn manufactured in Uttar Pradesh made on or after 1st December, 1949 with a view to export such cloth or yarn outside the territories of India on the condition that the cloth or yarn was actually" exported and proof of such actual export was furnished. In connection with such a notification, Their Lordships observed that the notification having been made in accordance with, the power conferred by the statute had statutory force and validity and, therefore, the exemption was as if it was contained in the parent Act itself. In our judgment, these observations were also made in connection with a notification which obviously was issued by the Uttar Pradesh Government in exercise of its power of subordinate legislation which had been conferred by the Uttar Pradesh Sales Tax Act itself. In Madhubhai Amathalal Gandhi Vs. The Union of India (UOI), , their Lordships were examining a contention urged by the learned Solicitor General that a notification issued u/s 4 (1)(b) of the Securities Contracts (Regulation) Act (1956) could not be challenged under Article 13 (2) of the Constitution because the petitioner in that case had failed to challenge the validity of the Act under which the notification was issued. Their Lordships repelled this contention by reference to the definition of the word "law" as given in Article 13, Clause (3), Sub-clause (a) of the Constitution. That definition included, inter alia, a notification. Their Lordships observed:

"Therefore, the validity of a notification issued by the State, it being law, is as much vulnerable to attack as that of the Act itself on the ground that it infringes any of the fundamental rights". u/s 4 (1) (b) of the Securities Contracts (Regulation) Act, (1956), power is given to the Central Government to grant recognition to a stock exchange on satisfaction that the stock exchange was willing to comply with any other conditions which the Central Government after consultation with the governing body of the stock exchange and having regard to the area and the nature of the securities dealt with by it, might impose for the

purpose of carrying out the objects of the Act. It would appear, therefore, that a notification issued under the aforesaid provision was also in the exercise of the power of subordinate legislation delegated by the Legislature to the Central Government. However, the learned Assistant Government Pleader contended that whatever might be said regarding the above cases, the case reported in *The State of Madhya Pradesh Vs. G.C. Mandawar*, was directly a case in which a notification, not of the aforesaid nature, was held to be a "law in force". The case did not actually deal with any notification, but with a resolution of the Government fixing a scale of allowance under Rule 44 of the Fundamental Rules. The contention before Their Lordships was that such a resolution would be "law" as defined in Article 13, Clause (3) Sub-clause (a) of the Constitution and, if the resolution infringed Article 14, then, the resolution was void. In dealing with this contention, Their Lordships observed as follows at p. 495 :

"Mr. Nambiar, the learned counsel for the respondent, did not dispute the correctness of this position. But he argued that when once the Government passed a Resolution fixing a scale of allowance under Rule 44, that would be law as defined in Article 13 (3) (a) of the Constitution, and if that law infringed Article 14, it could be declared void. That is a Contention which is clearly open to him, and the question therefore that falls to be decided is whether the Resolution dated 26-9-1948 is bad as infringing Article 14."

Mr. Nanavaty, however, contended that the above observations of Their Lordships do not constitute a decision of the Court and are not even in the nature of obiter dicta. According to him, the observations were only casual observations and assumed for the purposes of the argument that the resolution was a "law" within the meaning of Article 13 (3) (a) of the Constitution. Assistance was sought to be derived for this contention by the observation that "such a contention was open to Mr. Nambiar". It is true that Their Lordships have not discussed the question as to whether the resolution in question was "law" or not and have examined a contention, after stating that it was "law", whether it infringed Article 14 or not. But, we are unable to hold that the observation was a casual observation or that the contention of Mr. Nambiar was presumed to be correct. In our judgment. Their Lordships have really examined the contention of Mr. Nambiar on the basis that the resolution in question was "law" and that Their Lordships could have done this only on the basis that, in their judgment, the resolution constituted "law" as defined under Article 13 (3) (a) of the Constitution. However, in our judgment, it is difficult to read this case as laying down the law that every resolution of the Government must be regarded as "law" within Article 13 (3) (a) of the Constitution irrespective of the scope, nature and content of the resolution.

17. However, the above discussion leads only to a negative conclusion that the Presidential activity under Clause (1) of Article 258 of the Constitution cannot be put in one or the other of the recognised categories of legislative, judicial or executive power. Such a conclusion however, does not help in solving the problem raised by Mr. Nanavaty. In order that the respondent may succeed, it is

necessary for the respondent to show That the notification issued by the President under, Clause (1) Article 258 , aforesaid is "law in force". As already stated, this Court has interpreted that expression in : State of Gujarat Vs. Gordhandas Keshavji Gandhi and Others, , to mean that it must be "a law enforceable in every Court having jurisdiction to enforce it, including the Supreme Court". According to thia interpretation, the notification must, firstly, be a law and that it must be enforceable in every Court as such law. Now, the expression "law" as used in this interpretation must necessarily mean something other, than the various instruments mentioned in Section 2 (d) of the Reorganization Act; otherwise, it would be only arguing in a circle. It is also quite obvious that, the term "law" as used, in the later part of Section 2 (d) of the Reorganization Act. must mean law in general and not the specific kinds of laws mentioned in first part of the definition itself. Now, "law" has been defined either as a command issued by the State to its subjects and enforced through the agency of Courts of law by the sanction of physical force or that which is recognized and administered by the Courts. The question, therefore, which requires to be considered is whether the notification aforesaid can be regarded as a general command of the President which is bound to be recognized and administered by the Courts of Law. Now, in our judgment, the answer to this question must necessarily depend upon the true scope and nature of any particular notification issued by the President under the power vested in him under Clause (1) of Article 258 and no general rule can be laid down on the subject. The answer will have to be given on the legal impact which the Presidential notification makes on the Act as a whole and the legal effect it imparts to the two impugned notifications. If we turn to Section 4, we find that that section empowers the appropriate Government to form an opinion regarding the need of any land for a public purpose. If we turn to Section 6, we find that that section empowers the appropriate Government to make a declaration that any particular land is needed for such a purpose after it is satisfied that it is so. Sections 4 and 6, therefore, not only cast a duty upon the appropriate Government to formulate an opinion or a belief, but also empower them to act Upon such opinion or belief. In our judgment, when the appropriate Government acts under Sections 4 and 6, the action is taken by them in accordance with the duty prescribed by the two sections aforesaid and in accordance with the powers conferred by the same sections. Now, the effect of a notification under Clause (1) of Article 258 would be to substitute the officer concerned for the appropriate Government mentioned in Sections 4 and 6. The result of this would be that that officer would come to be substituted in Section 4 and 6 for the appropriate Government and thereby that officer would exercise the same power and perform the same duty which the appropriate Government was required to do under the two sections. Therefore, the activity of the President in making the notification has the effect of substituting, in two sections of a statute, an officer in place of the appropriate Government on whom the power is primarily conferred by the Act. In our judgment, this activity stands at least on the same pedestal as the activity of subordinate legislation, if not on a higher one. In any

case, a power of the above nature" and effect and conferred on the President by the Constitution cannot stand on a lower footing than a similar power which, if conferred by the Act itself, will stand. Can it be said that, when powers of the appropriate Government are so transferred by the President under the Constitution itself and the result of which notification is to substitute One authority for another under the statute law of the land that these notifications would not be the commands of the President to the subjects and would not be notifications which would be recognized and administered by Courts of Law? In this connection, one test may be usefully applied. When the notifications were first issued by the Bombay Government, were they not such as were enforceable or recognizable by Courts of Law? That is, if, under the Bombay regime, action was taken by the Commissioner u/s 4 and 6 could anyone have successfully challenged it on the ground that the same was not within the ambit of law? Or, supposing if the President were to issue a fresh notification empowering the Commissioners under the present regime to exercise the powers under Sections 4 and 6, can anybody challenge the action of the Commissioners under the Act on the ground that the powers conferred on them are not in accordance with law? In our judgment, the Commissioner derives authority to issue the impugned notifications by virtue of the fact that he gets substituted in Section 4 and 6 by virtue of the Presidential notification and this clearly means that the latter has the force of law inasmuch as it substitutes one authority for another in statute law. Under the circumstances, in our judgment, the two notifications are "laws in force" in the sense that they are laws which are enforceable at law through the agency of Courts or are such notifications as are bound to be recognized by a Court of Law and administered as the law of the land. This conclusion is, to a certain extent, strengthened by the fact that the activity of the President in issuing the aforesaid two notifications is almost analogous to the activity which has been prescribed by the Constitution for Parliament under Clause (2) aforesaid. The Constitution expects the President to achieve the same result in matters similar to the matters dealt with by Section 4 and 6 of the Act by exercising his authority under Clause (1) as the Constitution expects the Parliament to achieve by exercising the authority conferred on it under Clause (2) aforesaid.

18. Mr. Nanavaty, however, contended that there was a distinction between recognition of a law and its enforceability. He contended that a notification does not become law if it is only to be recognized by a Court of Law unless it also requires to be enforced. We do not think that this distinction should make any difference in the determination of the question as to what law is. Every law does not require to be enforced. There are some laws which it would be enough only to recognize. When Courts pass declaratory decrees, they do so only on the basis of the recognition of laws, although, by passing of such decrees, they do not enforce the same.

19. For the aforesaid reasons, we have come to the conclusion that the two impugned notifications are laws in force and they survive after the bifurcation of

the State of Bombay into the States of Maharashtra and Gujarat.

20. The next point of Mr. Nanavaty was that the respondent No. 1 had no authority in law to confer powers of a Collector under the Act on respondent No. 2. In our judgment, there is no substance in this contention also. u/s 3, Clause (c) of the Act, the expression "Collector" has been defined to include "..... any officer specially appointed by the appropriate Government to perform the "functions of a Collector under this Act". Now, the notification issued under Clause (1) of Article 258 of the Constitution is in general terms and, by that notification, the President has entrusted the Commissioners of divisions the functions of the Central Government under the Land Acquisition Act, 1894. The appointment of a special officer under the aforesaid part of the definition of "Collector" is one of the functions which the Act has entrusted to the Central Government. Therefore, by virtue of the above definition, read with notification under Clause (1) aforesaid, it is quite clear that the Commissioner will have the power of appointing a special officer to perform the functions of a Collector. The only argument which Mr. Nanavaty could urge in support of his above contention was that the appointment of a special officer was not to be made u/s 4 or Section 6 of the Act and that there was no section in the Act which conferred a special authority on the appropriate Government to appoint a special officer. He contended that such a power could not be implied only from that part of the statute which defined a, particular term. His contention was that the definition did not in terms say that the appropriate Government was empowered to appoint a special officer. According to him. Section 3(c) only defined who the Collector was" and stated that a special officer appointed by the appropriate Government would be such a Collector. In our judgment, there is no substance in this argument also. It is true that the definition does not in specific terms empower the appropriate Government. But, in our judgment, the power is there by necessary implication and, as already stated, having regard to the general language used in the notification under Clause (1) of Article 258, such a power is derived by the Commissioner who gets substituted in place of the appropriate Government wherever such an expression is used in the Act.

21. For the above reasons, the petition must fail and is dismissed. Rule discharged with costs.