

(1964) 10 GUJ CK 0003
In the Gujarat High Court

Laljimal Premasukhdas and Another

APPELLANT

Vs

B.K. Kombrabail, Div. Superintendent, W.R. and Another

RESPONDENT

Date of Decision : 01-10-1964

Acts Referred:

Constitution of India, 1950 — Article 226, 226, 302, 391
Defence of India (Amendment) Ordinance, 1962 — Section 3
Defence of India Rules, 1962 — Rule 125, 125

Citation : (1965) 6 GLR 282

Hon'ble Judges : N.M. Miabhoy, J;J.B. Mehta, J

Bench : Division Bench

Judgement

N.M. Miabhoy, J.—This group of five writ petitions filed under Article 226 of the Constitution of India raises common questions about the constitutional validity of a certain Order to be presently mentioned and its true construction. The facts leading up to the presentation of those petitions though not the same are similar. Mr. Nanavati concedes that the ultimate result of these petitions does not depend upon individual facts therein but depends entirely upon the decision reached on the questions of law. Therefore it is not necessary for us to set out the facts obtaining in each of the five petitions. However in order to understand the points of law involved it is necessary that we should state the facts of one of those petitions. We propose to set out the facts obtained in Special Civil Application No. 592 of 1964. Petitioner No. 1 therein is a partnership Firm of which petitioner No. 2 is a partner. Petitioner Firm placed an order on 4th July 1964 with M/s. Milap and Co. Rajkot for purchase of 660 tins of groundnut oil which oil was to be dispatched to Naila in Madhya-Pradesh. In performance of this contract Milap and Co. delivered on 19th July 1964 a consignment of 660 tins to the railway authorities at Paddhari station to be despatched to Naila and obtained a railway receipt on the same day in its own favour as consignee. On 20th of July 1964 Milap and Co. issued an invoice in the name of petitioner Firm for the price of the oil drew a Hundi on petitioner Firm and delivered those documents to the local branch of the Punjab National Bank together with the Railway receipt which was

endorsed by Milap and Co. in favour of the Bank. The Bank presented on 24th of July 1964 the Hundi to petitioner Firm. Petitioner Firm retired the Hundi on 28th of July 1964 whereupon the Bank endorsed the railway receipt in favour of petitioner Firm on the same day. The railway authorities had in the meantime placed the oil tins in a railway wagon and on 22nd of July 1964 the railway wagon had reached Rajkot station in the course of its journey from Paddhari to Naila. On that day the Government of Gujarat issued the impugned Order called the Gujarat Ground-nut (Transport Control) Order 1964 (hereafter called the Order simpliciter). The Order was issued in exercise of the powers conferred upon the State of Gujarat (hereafter called the State) under Rule 125 of the Defence of India Rules 1962. This Order prohibited persons from transporting inter alia by rail among other things groundnut oil from any place in the State to any place outside the State except under and in accordance with a permit. On this Order being communicated to the railway authorities the further course of the journey of the wagon was interrupted. The railway authorities issued a notice on 6th August 1964 to Milap and Co. intimating to that Firm the publication of the Order calling upon it to unload the oil tins or to take delivery at any station in Gujarat and intimating that if this was not done within a certain period of time the tins in question would be auctioned off. The notice stated that the consignment had been detained at Rajkot. On 8th of August 1964 petitioner Firm sent telegrams to the Western Railway and the South Eastern Railways complaining about the delay in the delivery of the consignment in question. On 11th of August 1964 the second petitioner came to Rajkot and contacted Milap and Co. The latter informed the second petitioner about the contents of the notice and the fact that the consignment had been detained at Rajkot. On 11th August 1964 Milap and Co. wrote a letter to the railway Authorities stating that the movement of goods in transit was not affected by the Order and that petitioner Firm herein was entitled to get delivery of the goods at Naila under the contract of bailment by the virtue of the fact that the railway receipt had been endorsed in its favour. Thereafter petitioners presented the present petition on 14th August 1964. Petitioners pray for a declaration that the Order is ultra vires Article 301 of the Constitution and that respondents be restrained by an appropriate writ from enforcing the provisions of the Order. Respondent No. 1 is the Divisional Superintendent (Commercial) Western Railway Rajkot and respondent No. 2 is the State. Petitioners further pray for the issuance of a writ of or in the nature of mandamus or any other writ direction or order for quashing or setting aside the directions contained in letter dated 6 August 1964 of the first respondent addressed to Milap and Co. and a further direction against the first respondent to move the consignment in question to its destination at Naila and to deliver the same to petitioners. Both the respondents have appeared in response to a notice of this Court. The facts narrated above are all admitted by respondents. They however challenge the submissions of law on the basis of which the petition is based. As already stated all the petitions raise the same questions of law. Therefore they were placed for hearing on one and the same date. They have been heard together and this common Judgment will dispose of

all the petitions.

2. Before setting out the three contentions on which the petitions are sought to be supported it would be convenient to set out the impugned Order. It will be convenient to set out the Order in full specially as it is a very short Order. The Order is as under:

Defence of India Rules, 1962.

No. GG-144-DIR. 1064/9770-G. In exercise of the powers conferred by Rule 125 of the Defence of India Rules 1962 the Government of Gujarat hereby makes the following order namely:

1. Short title extent and commencement.--

(1) This Order may be called the Gujarat Ground-nut (Transport Control) Order 1964.

(2) It extends to the whole of the State of Gujarat.

(3) It shall come into force at once.

2. Restriction on transport outside State.--

(1) No person shall transport or cause to be transported or offer or accept for transport whether by road rail water or air ground-nut whole (with kernel) or ground nut seeds or ground-nut oil from any place in the State of Gujarat to any place outside the State of Gujarat except under and in accordance with a permit issued in this behalf by the State Government or the Director of Civil Supplies Gujarat State.

(2) Nothing contained in Sub-rule (1) shall apply to the transport of ground-nut whole (with kernel) or ground-nut seeds or ground-nut oil

(i) On Government account; or

(ii) Under and in accordance with military credit notes.

3. The contentions raised are:

(1) The Order violates the provisions of Article 391 of the Constitution of India and is not saved either by Article 302 or any other provision of Part XIII of the Constitution.

(2) Goods in transit are not within the purview of Clause 2 of the Order.

(3) The Order does not bind the Union of India and its employees as the expression person used in Clause 2 aforesaid cannot in law include the Union of India and its employees.

4. Before undertaking a detailed discussion of the three points it will be useful if the constitutional and legislative background under which the Order was made is first set out. After the Chinese aggression on 8th September 1962 on 26th of

October 1962 the President of India issued a proclamation under Article 352 declaring the existence of a grave emergency whereby the security of India was threatened by external aggression. On the same day the President issued an Ordinance called the Defence of India Ordinance 1962 which Ordinance was amended on 3 November 1962 by the Defence of India (Amendment) Ordinance 1962. Section 3 of the Ordinance empowered the Central Government to make such rules as may appear to it necessary or expedient for certain purposes mentioned therein including the rules for maintaining supplies essential to the life of the community. Sub-section (2) thereof empowered that Government without prejudice to the generality of the powers conferred by Sub-section (1) to make rules to provide for or empowering any authority to make orders providing for a number of matters including those mentioned in Clause (23) thereof. That clause empowered the Central Government to provide for or to empower any authority to make orders providing for the control of trade or industry for the purpose of regulating or increasing the supply of and the obtaining of information with regard to articles or things of any description whatsoever which may be used...for maintaining supplies essential to the life of the community. The Ordinance was replaced on 12th December 1962 by the Defence of India Act 1962 (hereafter called the Act). Section 48 Sub-section (2) thereof provides inter alia that any rules made under the Defence of India Ordinance 1962 as amended by the Defence of India (Amendment) Ordinance 1962 shall be deemed to have been made under the Act as if the Act had commenced on 26th October 1962. It is not in dispute that the Act and the rules constitute emergency legislation. Section 3 Sub-section (3) Clause (iv)(b) enacts that the rules made under Subsection (1) may further confer powers and impose duties upon any State Governments respects any matter notwithstanding that the matter is one in respect of which the State Legislature has no power to make laws. Section 40 Sub-section (2) empowers the State Government to delegate by order any duty which the Act or the rule confers or imposes on the State Government in such circumstances and under such conditions as may be specified in the Order to any officer or authority not being an officer or authority subordinate to the Central Government. Section 41 enjoins that the rules made under the Act shall be laid before each House of Parliament and gives a right to annul or modify such rules to Parliament. Section 43 enacts that the provisions of the Act or rules made thereunder or any order made under any such rule shall have effect notwithstanding any thing inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act. The aforesaid Order was published under Rule 125 of the Defence of India Rules 1962. That rule is enacted for the general control of industry etc. Sub-rule (2) thereof provides that if the Central Government or the State Government is of opinion that it is necessary or expedient so to do amongst others for the maintenance or increase of supplies essential to the life of the community or for securing the equitable distribution and availability of any article or thing at fair prices it may by order provide for regulating or prohibiting the production manufacture. Supply and distribution use and consumption of

articles or things and trade and commerce therein. Sub-rule (3)(a) of Rule 125 enacts that without prejudice to the generality of the powers conferred by Sub-rule (2) an order made thereunder may provide for regulating by licences permits or otherwise...movement transport...of articles or things of any description whatsoever. It is in pursuance of the powers aforesaid that the State Government promulgated the impugned Order. Article 358 of the Constitution provides for the suspension of Article 19 during emergencies. It is not disputed that on the issue of the proclamation of emergency Article 19 of the Constitution became suspended. Under Article 359 the President has the power of declaring by order that the right to move any Court for the enforcement of the fundamental rights mentioned in the Order shall remain suspended during the subsistence of the proclamation. In pursuance of this power the President issued Orders on 3rd November 1962 and 11th November 1962 by which the Presidentsuspended the right to move any Court for the enforcement of the fundamental rights enshrined in Articles 14 21 and 22 of the Constitution if the person deprived of such rights has been so deprived under the Defence of India Ordinance or any rule or Act or order thereunder. It is noteworthy that the freedom enshrined in Article 301 does not become suspended under Article 358 nor can the right to move any Court for the enforcement of that freedom be suspended by the President under Article 359.

5. In order to understand the submissions at the bar it is necessary to set out in brief a resume of the provisions contained in Part XIII of the Constitution in which Article 331 occurs which Article is alleged to have been violated by the Order. Article 331 enshrines the freedom of trade commerce and intercourse throughout the territory of India. In this case we are concerned with the freedom of trade and therefore in the rest of the judgment we shall refer to that kind of freedom only. The freedom enshrined in Article 331 of the Constitution is not an absolute freedom. It is controlled by the other provisions of Part XIII of the Constitution. Though the freedom is so controlled it is noteworthy that it is not controlled by the other provisions of the Constitution. The important provisions in Part XIII which control that freedom are to be found in Articles 33) to 395. Firstly the freedom is subject to the provisions contained in any existing law as defined in Article 355 Clause (10). It is also subject to any law made before the commencement of the Constitution (Fourth Amendment) Act 1955 in so far as it relates to the carrying on by the State or Corporation owned or controlled by the State of any trade to the exclusion complete or partial of citizens or otherwise. It is also subject to a similar power of Parliament or Legislature of the State to make laws in respect of the last mentioned topic. All this is provided for in Article 305. We are however not concerned with this control in the present case and no mention was made thereof in the course of the arguments. The further controls on the aforesaid freedom may be viewed differently from the point of view of the powers of Parliament and the State Legislature. Article 302 says that Parliament may by law impose such restrictions on that freedom between one State and another or within any part of the territory of India as may be required in public

interest. This power of Parliament is subject to a restriction mentioned in Article 303 Clause (1). This restriction is that Parliament shall have no power to make any law giving preference or to make any discrimination between one State and another by virtue of any entry relating to trade in any of the lists mentioned in Second Schedule; nor shall it have power to make any law authorizing any one to give any such preference or to make any such discrimination. This restriction on the power of Parliament does not apply when Parliament declares by any law that it is necessary to give preference or make discrimination or to authorize giving or making of such preference or discrimination for the purpose of dealing with a situation arising out of scarcity of goods in any part of the territory of India in which contingency the Parliament has the power to make any law giving preference or making discrimination or authorizing the giving or making any such preference or discrimination in respect thereof. The powers of controlling that freedom given to the State Legislature are slightly different from the powers given to the Parliament. The State Legislature has also been given the power of imposing restrictions on the freedom of trade as may be required in the public interest; but two conditions are imposed on the exercise of such power. The first condition is that before introducing a bill for the purpose the State Legislature shall obtain the previous sanction of the President and the second condition is that the restriction so imposed on the freedom shall be reasonable. The State Legislature also suffers from the same disability which the Parliament suffers from in the matter of making a law relating to preference or discrimination between one State and another. However that Legislature has not been given the power to give preference or make discrimination by law for the purpose of dealing with a situation arising from scarcity of any goods in any part of the territory of India. Though this is so the State Legislature has been given the power notwithstanding the restriction placed on it under Article 303 to impose a tax subject to the restrictions mentioned in Clause (a) of Article 304. From the contentions raised in this case it is quite clear that we are not concerned with the power of the State Legislature and therefore no mention thereof will be made in the course of this judgment except where the provisions contained in Part XIII relating to that power are necessary for construing the provisions of Article 302 on which the State place reliance in the alternative for the purpose of justifying the impugned order. The power that we are concerned with in the group of these petitions is the power of Parliament to impose restrictions mentioned in Article 302. From the aforesaid resume it is quite clear that the freedom of trade enshrined in Article 301 is not an absolute freedom. It is subject to the power of Parliament to make laws imposing such restrictions as may be required in the public interest. It is in the context of the aforesaid provisions that the first contention raised by Mr. Nanavati falls to be decided.

6. Before dealing with the aforesaid contentions in detail it will also be convenient to mention here the factual background in which the Order was made which is to be found in the affidavit in reply of Mr. R.R. Pathan filed on behalf of second respondent. Mr. Pathan says that prices of groundnut and groundnut oil

were showing an upward tendency since the beginning of the year and that the wholesale price of groundnut oil for one tin of 16 Kgs. which was Rs. 32/in the month of March 1964 shot up to Rs. 42-75 nP per tin in the months of May and June 1964. He further says that similarly the retail price of such oil which was Rs. 2-15 nP per kilo in March 1964 shot up to Rs. 2-60 nP per kilo in the latter period. He also says that during the aforesaid period Government received a number of complaints about the high rates for groundnut oil and about the tendency of traders to export groundnut and groundnut oil from the State of Gujarat to earn higher prices. He avers that large quantities of groundnut and groundnut oil had been exported from Gujarat and that a need was felt that some steps should be taken to prevent the further frittering away of the existing stock so that the common man may get groundnut oil at reasonable prices. According to the affidavit it was in these circumstances that the impugned Order was passed.

7. Now as already stated the first ground of attack is that the impugned Order violates Article 331 of the Constitution of India. It will be convenient to reproduce that Article which is as follows:

Subject to the other provisions of this part trade commerce and intercourse throughout the territory of India shall be free.

Therefore the first question for consideration is whether the impugned Order violates the freedom of trade enshrined in Article 301. There is no dispute and cannot be any as regards the content of that freedom so far as the present case is concerned because the content which is relevant for the purposes of the present case is no longer *res integra* and has been determined by two decisions of the Supreme Court in which the true meaning and extent of the concept of freedom of trade came up for consideration. The first of these cases is that of *Atiabari Tea Co. Ltd. and Khaverbari Tea Co. Ltd. v. The State of Assam and others* reported in AIR 1951 SC 239. In that case at page 250 Gajendragadker J. (as he then was) speaking for the majority observed as follows:

There is no doubt that the sweep of the concept of trade commerce and intercourse is very wide; but in the present case we are concerned with trade and so we will leave out of consideration commerce and intercourse. Even as to trade it is really not necessary to discuss or determine what trade exactly means; for it is common ground that the activity carried on by the appellants amounts to trade and it is not disputed that transport of goods or merchandise from one place to another is so essential to trade that it can be regarded as its integral part. Stated briefly trade even in a narrow sense would include all activities in relation to buying and selling or the interchange or exchange of commodities and that movement from place to place is the very soul of such trading activities.

At page 254 His Lordship after referring to the principle that Constitution must be read not in *vacuo* but as occurring in a single complex instrument in which one

part may throw light on another observed as follows:

Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301 would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate direct or remote adopts in our opinion an extreme approach which cannot be upheld. If the said argument is accepted it would mean for instance that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are therefore satisfied that in determining that limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be:

Does the impugned restriction operate directly or immediately on trade or its movement?

Therefore it is clear that in *Atiabari's* case Their Lordships determined the content of freedom of trade as including in any case the freedom of flow or movement of goods and the test which Their Lordships applied for the purpose of determining whether a restriction does or does not violate that freedom was to ask the question whether that freedom operates directly or immediately on trade or its movement. This enunciation of the concept of freedom of trade was approved by the majority of Their Lordships in the case *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, . But Their Lordships observed that enunciation required to be qualified in one respect. At page 1424 Their Lordships approved the definition of freedom given in *Atiabar's* case and explained the qualification as follows:

The interpretation which was accepted by the majority in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, is correct but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution.

As already stated none of the learned Advocates appearing in this case raised any question in regard to the concept of freedom of trade as explained above and its application to the facts of the case. Impugned Order in terms prohibits transport of oil from any place in the State of Gujarat to any place outside the State of Gujarat. Therefore it is not disputed that prima facie the impugned Order impinges upon the free flow and movement of oil from the State of Gujarat to a place outside thereof. The test for determining whether the Article is violated laid down in the *Atiabari Tea Co.* case was also approved in the *Automobile*

Transport (Rajasthan) Ltd. case. Mr. Nanavati contends that this test is satisfied in the present case. On the other hand Mr. Sompura and Mr. Mangaldas Shah on behalf of the respondents contend that the impugned Order is only regulatory of the trade in oil and its movement and therefore directly comes within the purview of the principle laid down in Rajasthan's case wherein it was held that if a measure is regulatory it is within the concept of freedom and does not amount to a restriction.

8. Therefore the first controversy which requires to be resolved in the present case is whether the aforesaid Order is a restriction within the meaning of Article 302 so that it requires to be justified under that Article or whether the Order is regulatory of the trade so that it does not violate the freedom of trade. Now in support of this plea Mr. Sompura very strongly relies upon that part of the Order which envisages the movement of goods under a permit issued in that behalf by State of Gujarat or the Director of Civil Supplies Gujarat State. Mr. Sompura contends that the latter provision in the Order brings out its regulatory character and shows that it was not intended as a restriction. In support of this contention Mr. Sompura very strongly relies upon the case of Chandulal Jethalal Jayaswal v. The State of Gujarat reported in IV Gujarat Law Reporter 1033 This regulatory aspect of the freedom was dealt with at length by the majority judgment in Rajasthan's case and the basis of that concept was explained at pages 1419 and 1420. Their Lordships observed as follows at page 1419:

As the language employed in Article 301 runs unqualified the Court bearing in mind the fact that that provision has to be applied in the working of an orderly society has necessarily to add certain qualifications subject to which alone that freedom may be exercised.

Their Lordships then extracted a passage from the judgment of Griffith C.J. in *Duncan v. State of Queensland* (1916) 22 CLR 556 which is as follows:

But the word free does not mean extra legem any more than freedom means anarchy. We boast of being an absolutely free people but that does not mean that we are not subject to law.

Their Lordships then referred to the dissenting opinion of Fullagar J. in *McCarter v. Brodie* (1950) 80 CLR 432 and ultimately wound up the discussion in the following words at page 1420:

It is here that the contrast between freedom (Article 331) and restrictions (Articles 302 and 304) clearly appears: that which in reality facilitates trade and commerce is a restriction and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade but the distinction if it has to be drawn is real and clear.

In this connection the observations made by Lord Porter in *Commonwealth of*

Australia v. Bank of New South Wales 1953 A.C. 235 may be reproduced with advantage. The learned Lord stated that in the application of these general propositions in determining whether an enactment is regulatory or something more or whether a restriction is direct or only remote or incidental there cannot fail to be differences of opinion. The learned Lord also further observed that since the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual that freedom must necessarily be delimited by considerations of social orderliness. It is in the light of these principles that the controversy between petitioners and respondents has got to be resolved. Now in determining this controversy as to whether the measure in question is a regulation of or a restriction on trade it is necessary to determine the impact which the measure has on the movement of trade. If the measure is enacted in the interests of trade with a view to facilitate its movement or flow or is conceived to make an orderly society thrive then the measure may be regulatory in nature. On the other hand if the measure hampers the free movement or flow of goods and it is not undertaken in the interests of trade or to preserve social orderliness then prima facie the measure will be a restriction. In determining this question in a majority of cases it may be useful to determine in the first instance whether the impact of the measure on the trade is direct and immediate. If the measure satisfies this test but it is found to hamper the free flow of trade then prima facie it will not be a regulation but a restriction. If on the other hand the measure is not intended directly to deal with the movement or flow of trade but has been enacted because the Legislature has in hand some other problem of society to deal with and the Legislature intends to deal with the trade in order to carry out its policy in relation to that other problem and if the effect on the freedom of trade is not direct but is only consequential then the measure will be prima facie regulatory unless there are strong reasons for holding that the social orderliness was used only as a camouflage for impinging upon the freedom of trade. Mr. Sompura is right in contending that in resolving this controversy the Order must be read as a whole and not cut up into pieces and that it should not be read in isolation of the context of circumstances in which the Order had come to be promulgated. The rival contentions on this aspect of the problem are as follows. Mr. Nanavati contends that the first part of the Order is a direct and immediate prohibition on the trade to move oil beyond the barriers of the Gujarat State and amounted to a complete prohibition in that respect. On the other hand Mr. Sompura contends that having regard to the provision for issue of permit for such movement it is not correct to regard the Order as a complete prohibition. He contends that the restriction on movement had to be imposed because the State felt that it was necessary to conserve the oil resources of the State in order that the oil may be available to the common man in the State and that too at reasonable prices. He argues that it was in order to achieve this objective that the State had to place the aforesaid restriction. He argues that it was not the objective of the State to hamper the free flow of trade between State and State. The objective was to permit that free flow but not so as to hinder the aforesaid objectives which the

State had in mind. Therefore the contention is that the measure was not a total prohibition and that free flow of trade had not been completely prohibited. Mr. Sompura contends that the main objective was to regulate the supply of oil in the State and to regulate its export. On the other hand Mr. Nanavati contends that the provision for issue of a permit is made entirely dependent upon the absolute discretion of the State Government and the Director of Civil Supplies Gujarat State; that there is nothing either in the Order or in any of the several measures constituting the parent authority to provide the guide-lines for the determination of that discretion. Mr. Nanavati argues that as the impugned Order stands the trader is bound to be at the absolute mercy of the permit-issuing authorities and that it is impossible to say or to anticipate as to under what circumstances the export would or would not be permitted. Mr. Sompura as already stated strongly relies upon the decisions in Chandulals case already referred to. In that case there was a similar provision for issue of a permit or a licence which was also left to the absolute discretion of the authority concerned. Mr. Sompura says that an argument similar to the one which is advanced by Mr. Nanavati in the present case was also advanced in that case but that it was rejected by Shelat C.J. and that not only that we should follow that decision but that we are bound by the same. At page 1053 the learned Chief Justice has made the following observations:

Mere requirement of a licence therefore is not enough to constitute a direct and immediate impediment against trade or commerce first because it forms part of regulatory provisions enacted for the purpose of preventing a particular abuse or mischief which abuse or mischief is detrimental to public health and secondly because the aim and purpose of the two impugned sections is not to create any obstruction or impediment in the way of a legitimate trade in genuine French Polish and Varnish.

In that case the learned Chief Justice was considering the constitutional validity of Sections 59C and 59D of the Bombay Prohibition Act and the impact of those sections on the trade in French Polish and Varnish. However in our judgment there is a material difference in the context in which the provision for permit or licence was introduced in those sections and the context in which they have been introduced in the impugned Order. The decision in that case was mainly based on the view that the restriction imposed in that case did not constitute a direct and immediate impediment against the trade in French Polish and Varnish and that the restriction was consequential and that the main object for introducing the aforesaid two new sections was to prevent these articles being abused as substitutes for intoxicant liquor. This is what the learned Chief Justice observed in that case:

Prima facie it would appear from a reading of the provisions of Sections 59C and 59D that the effect would not be directly or immediately to impede the trade in these articles but to regulate their trade with a view to prevent these articles being abused as substitutes for intoxicating liquor. It may be that regulating

trade in these articles may result in consequence which is restrictive, but in view of the principle laid down above, that by itself would not be enough.

It is possible that a trader concerned in an inter-State trade in these articles may find the necessity of obtaining a licence or a pass or a permit somewhat irksome but that does not constitute an impediment in the way of such trade or commerce.

In our judgment reading the impugned Order as a whole there is no doubt whatsoever that the intention of the Order-making authority is to hit the trade in oil directly by prohibiting the traders from transporting oil beyond the barriers of the Gujarat State. In our judgment therefore the impugned Order has a direct and immediate impact upon the movement of oil from the State of Gujarat beyond its barriers. We may not enter into a discussion of the question as to whether the prohibition embodied in the Order is total or partial. We may not also enter into any discussion as to whether a total prohibition always amounts to a restriction and cannot be regulatory. In any case in our view unless there are strong grounds for holding otherwise a total prohibition must be *prima facie* held to be a restriction and not regulation and we have no doubt whatsoever that the Order read as a whole amounts to a total prohibition and the question for consideration is whether the conferment of an absolute discretionary power upon an authority to issue a permit removes the prohibition from the category of restriction. In this connection the observations made by Fullagar J. in *Mr. Carter v. Brodie* 80 Commonwealth Law Reports 483 at page 4985 are quite apposite and with respect we propose to follow them. The observations are as follows:

It is quite impossible in my opinion to distinguish the present case from the case of a simple prohibition. If I cannot lawfully prohibit altogether I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a licence does not alter the true character of what I am doing. This was indeed, as I have pointed out one of the two things that were really decided in *James v. Commonwealth* though it was naturally treated as more or less self-evident and the contrary view does not seem to have been very seriously argued. Such cases as *Melbourne Corporation v. Barry* and *Swan Hill Corporation v. Bradbury* do not of course afford exact parallels to such cases as the present because they turn primarily on the meaning of the word regulate in a statute but they are in my opinion precisely in point since one thing that they make plain is that if a legislative body cannot lawfully prohibit altogether it cannot lawfully prohibit subject to an administrative discretion to exempt from the prohibition. It is quite true to say that regulation may involve partial prohibition but it is quite untrue to say that total prohibition subject to discretionary exemption or licensing is merely partial prohibition within the meaning of that proposition.

In our judgment having regard to the fact that the discretion to issue permit for export is absolute and unregulated and having regard to the fact that the Order directly and immediately prohibits transport of oil from the State of Gujarat

beyond its barriers the Order as a whole must be regarded as not a regulatory Order but one which imposes a restriction upon the movement of oil which hampers the trade in oil and having regard to the fact that it is intended to be directly hit by the Order it directly impinges upon the freedom of trade enshrined in Article 301. Under the circumstances in our judgment the submission made by Mr. Sompura and Mr. Mangaldas Shah that the prohibition in question is regulatory of the trade and not restrictive thereof must be rejected.

9. Therefore, there is no doubt whatsoever that in order to sustain the Order it is necessary for the respondents to justify the restrictions embodied in the Order under the provisions contained in Part XIII of the Constitution. The respondents justify that restriction under Article 302 of the Constitution which may be read in full:

302. Parliament may by law impose such restrictions on the freedom of trade commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

In order to sustain a legislation under this Article it is necessary that (i) the legislation must be made by Parliament; (ii) that the restriction must be such as may be required in the public interest. We may at once proceed to state that Mr. Nanavati does not challenge the Order on the ground that it does not satisfy the second requirement of the Order being in public interest. Mr. Nanavatis contention however is that the Order is not an Order made by Parliament. Mr. Nanavati does not dispute that the Order is law in the sense that it is a direction issued by an authority empowered to make law which it may be the bounden duty of every citizen to obey unless it is vitiated by the vice of unconstitutionality. Having regard to the context of legislative history which we have already mentioned there is no doubt that the Order is made by the State of Gujarat by virtue of the power to make such an Order derived by the provisions of the Act and the Defence of India Rules 1952 Mr. Nanavati concedes that therefore ordinarily the Order would have the force of law and would be binding on the citizens. But Mr. Nanavati's contention is that the Order is not law made by Parliament within the meaning of Article 302 aforesaid. Mr. Sompura concedes that this is so in the sense that the Order is not an Order passed by Parliament itself. Mr. Nanavatis contention is that the Order is passed by a delegate of Parliament and not by Parliament itself. On this the further contention of Mr. Nanavati is that the Order does not satisfy the first condition laid down in Article 302 of the Constitution. The argument is that in order to sustain a restriction it is necessary that Parliament itself must make the law imposing the restriction and that a restriction imposed by subordinate legislation is not within its purview. This is the central point on which the first contention of Mr. Nanavati is based. Therefore the point for determination is whether subordinate legislation is or is not within the purview of Article 302. In other words the point for consideration is whether it is necessary that a restriction under Article 302 must be imposed only by the parent legislation of Parliament and not by its subordinate legislation.

Mr. Nanavati contends that though under the ordinary general law a subordinate legislation has the same force as the legislation by the parent authority and may have the force of law such a legislation is not contemplated by Article 302 and is excluded by it for the reasons to be presently noticed. Mr. Nanavati supports this line of argument firstly on the ground that the words used in Article 302 are Parliament may by law whereas in some other Articles the words used are by or under law. He contends whereas under the first-named phraseology legislation is required to be Made by Parliament itself and cannot be made by its delegate under the second-named phraseology law can be made by its delegate also. In our judgment this argument must be at once rejected as unsound. The same argument was advanced but was rejected as unsound in the case of *D.S. Garewal Vs. The State of Punjab and Another*, . The words which Their Lordships were called upon to construe in that case were the words used in Article 312 as amended by the Constitution (Removal of Difficulties) Order (2 of 1950). The relevant words in Article 312 were Parliament may by law provide for the creation of one or more all-India services common to the Union and the States. At page 517 Their Lordships held that these words did not necessarily exclude delegation. We may mention that Mr. Nanavati does not raise the question that the impugned Order suffered from the vice of excessive delegation. Such a question was not raised before us at all. The question that is raised is that though the Order may be valid as subordinate legislation it is ineffective because such legislation does not come within the purview of Article 332 the same being excluded by the language of that Article. In our judgment the decision in *Garewal's case* points out the correct approach which is to be adopted in construing a provision of the type that we have to deal with in the present case. In paragraph (7) at page 516 Their Lordships first observed that it was well settled that it was competent for the Legislature to delegate to other authorities the power to frame rules to carry out the purposes of law made by it and that it was clear that delegation of legislative functions can be given to executive authorities within certain limits. After so observing Their Lordships proceeded to deal with the arguments of the Learned Counsel and pointed out the correct approach in the following words:

Mr. Chatterjee contends that no delegation whatsoever was possible under Article 312 and that the Constitution required that Parliament should itself frame the entire law relating to the regulation of recruitment and the conditions of service of all-India services. We have therefore to see whether there is anything in the words of Article 312 which takes away the usual power of delegation which ordinarily resides in the Legislature.

Thereafter, Their Lordships examined the difference in language between Article 312 and certain other Articles and as already stated Their Lordships rejected the argument based on difference in language. Thereafter, Their Lordships observed as follows:

We are of opinion that these words do not necessarily exclude delegation and it

will have to be seen in each case how far the intention of the Constitution was that the entire provision should be made by law without recourse to any rules framed under the power of delegation.

Mr. Sompura contends that the argument of Mr. Nanavati must be rejected on the simple ground that the Article will have to be re-written substantially to uphold Mr. Nanavati's contention. Mr. Sompura contends that in the latter case the words by itself between the words Parliament and may will have either to be introduced or the word statute will have to be introduced between by and law. He also contends that the distinction between a statute law and the law having the force of a statute is well-known and that the use of the word law alone without the use of the words like statute law or enacted law indicates the mind of the Constitution-makers that all laws whether made by Parliament or by its delegated authority are intended to be included under Article 302 of the Constitution. In our judgment this argument must be treated in the same manner as the converse argument was treated in *Garewals case*. The absence of the aforesaid words though a relevant circumstance to be taken into account is by no means conclusive. The broad submission of Mr. Nanavati also deserves to be rejected on the basis of another authority of the Supreme Court in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, . In this case Their Lordships were considering the validity of a tax on the sale of hides and skins under Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules 1939. Their Lordships upheld the tax though it was imposed by a rule only and not by State legislation in the following words:

This rule was made by the Governor in the exercise of power conferred on him u/s 19 of the Act and would therefore have statutory force. In fact Subsection (5) of Section 19 provides that the rules shall have effect as if enacted in the Act. We therefore do not agree that Rule 16 is not a law which would fall within a law made by the State Legislature.

The levy was upheld under Article 304(a) of the Constitution, therefore in our judgment the question must be determined on a true and correct interpretation of Article 302 in the light of the context in which the Article occurs and the circumstances in which the provisions were made bearing in mind the principle that the burden lies on the petitioners to show that subordinate legislation was excluded from the purview of Article 302 of the Constitution.

10. Mr. Nanavati contends that the question must be answered (i) in the light of the avowed object which the Constitution-makers intended to achieve by enacting Article 301 which is the pivotal Article in Part XIII in the light of its historical background and the set up of Part XIII in which Article 302 occurs; (ii) in the light of the fact that legislation is required to be made in public interest which is left to the subjective satisfaction of Parliament and the effect of holding that subordinate legislation is permissible will be that the matter will be left to the subjective satisfaction of the subordinate law-making authority; and (iii) in the light of the juxtaposition with Clause (2) of Article 303 of the Constitution

wherein a further condition has been laid down that before legislation on the topic of giving preference or making discrimination is made Parliament itself must declare the existence of scarcity of articles. Mr. Nanavati submits that the cumulative effect of a consideration of all these points necessarily must lead to the conclusion that delegated legislation was excluded from the purview of Article 302 of the Constitution. In our judgment none of the aforesaid arguments has any merit. On the contrary in our judgment not only there are weighty grounds why the constitution-makers could not have excluded subordinate legislation but there is intrinsic evidence in Part XIII itself indicating that such kind of legislation was intended to be included.

11. Mr. Nanavati contends that the main object of part XIII of the Constitution was to secure economic unity of India and that the attainment of this objective will be considerably impaired if delegated legislation were permitted. He contends that if delegated legislation were so permitted, economic balkanisation will take place inasmuch as the delegated authorities will be thinking in terms of their regional economic interests. Mr. Nanavati draws our attention to paragraph (34) in *Atiabari Tea. Co. case* at page 247 wherein Gajendragadakar J. after tracing the historical background of Part XIII observed as follows:

It was realised that in course of time different political parties behaving in different economic theories or ideologies may come in power in the several constituent units of the union and that may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the state Legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole.

We fail to see how this object would come to be frustrated if subordinate legislation is permitted under the authority of Parliament. In this connection we must bear in mind that there is a vital distinction between direct State legislation and subordinate legislation undertaken under the authority of Parliament. It may be that when a State Legislature acts in matters of trade it may take into consideration only its own local problems and interest but surely when Parliament is legislating on the subject of restriction on trade it would take into consideration the aforesaid main objective and would also bear in mind whether that objective would or would not be frustrated if subordinate legislation is permitted. It is for the Parliament to consider this problem and if the Parliament in its wisdom considers that a particular piece of legislation should be undertaken by its delegate instead of by itself there is no reason why Article 302 of the Constitution should be differently construed merely on the off chance that the delegate may be influenced by local interests or considerations. It is not difficult to envisage that if the delegate behaves in that manner it may not be difficult for Parliament to step in and to remedy the mischief or to revoke the power of subordinate legislation. But we fail to see how the fact that a delegate is likely to

err can itself be regarded as a good reason for holding that the aforesaid main objective would be frustrated. There is another flaw in this argument. Though there is no doubt that Article 301 was enacted with the aforesaid lofty object it is not correct to say that was the only object which the Constitution makers intended to secure by enacting Part XIII. As pointed out in *Automobile Transport (Rajasthan) Ltd.* case there were two other objectives which the Constitution-makers had in view. The other two objectives have been mentioned at page 1416 in the following words:

...second the regional interests must not be ignored altogether and third there must be a power of intervention by the Union in any case of crisis to deal with particular problems that may arise in any part of India.

Therefore it is not correct to say that regional interests were altogether out of sight of the Constitution-makers in enacting Part XIII of the Constitution. Whilst it may be legitimate to bear the main objective in mind in construing Article 302 it would be altogether improper if the objective which is inherent in that Article itself is totally ignored. The objective of that Article appears to be to secure public interest. The Constitution-makers have empowered Parliament to impose restrictions if those restrictions are necessary or required in public interest. It is easy to see that in some cases public interests may demand that the interests of a region should be either given preference or should be discriminated in order to advance the economy of India as a whole or to relieve distress in particular localities. Parliament may not in all cases have local or particular knowledge necessary to deal with situations of such special kind and in order to carry out the duty imposed on Parliament under Article 302 Parliament may feel impelled to leave such problems to be dealt with by authorities on the spot. Under the circumstances we are not impressed by the argument that there is either anything in the historical background of Part XIII or the objectives intended to be achieved thereby which would necessarily negative an intention to impose restrictions by subordinate Parliamentary legislation.

12. Mr. Nanavati next contends that the requirement of public interest has been left to the subjective satisfaction of Parliament and if subordinate legislation were permitted to impose restrictions such a satisfaction would be necessarily left to the delegates and it is inconceivable that the Constitution-makers could have left such an important function to be performed by delegates of Parliament. In support of his argument that the requirement of public interest is left to the subjective satisfaction of Parliament Mr. Nanavati strongly relies on a passage in *Atiabari Tea Co.* case wherein Their Lordships opined that the requirement was not justiciable. This is what Their Lordships have stated in paragraph (53) at page 254:

Incidentally we may observe that the difference in the provisions contained in Article 302 and Article 304(b) would prima facie seem to suggest that where Parliament exercises its power under Article 302 and passes a law imposing restrictions on the freedom of trade in the public interest whether or not the

given law is in the public interest may not be justiciable and in that sense Parliament is given the sole power to decide what restrictions can be imposed in public interest as authorised by Article 302. On the other hands Article 304(b) requires not only that the law should be in the public interest and should have received the previous sanction of the President but that the restrictions imposed by it should also be reasonable. Prima facie the requirement of public interest can be said to be not justiciable and may be deemed to be satisfied by the sanction of the President; but whether or not the restrictions imposed are reasonable would be justiciable and in that sense laws passed by the State Legislatures may on occasions have to face judicial scrutiny. However this point does not fall to be considered in the present proceedings and we wish to express no definite opinion on it.

There is no doubt that this passage does not constitute the decision of Their Lordships. Having regard to the fact that the aforesaid observations have been made incidentally and that Their Lordships have definitely stated in the last part of the passage that they did not wish to express any definite opinion on the subject there is also no doubt that the observations do not constitute even a dictum which must be followed by this Court Mr. Nanavati sees the force of this contention. But all the same he contends that the aforesaid observations though not of a binding nature are weighty and must be followed. He submits that the observations may be taken as part of his argument. Having regard to the fact that the observations are not even obiter dicta it would be our duty to consider the argument on its own merits. Ordinarily we would hesitate considerably to depart from even incidental observations even though made in passe by Their Lordships unless impelled to do so by weighty and overwhelming grounds. However we feel that we are relieved of performing this duty because Their Lordships themselves have definitely disagreed with the aforesaid observations and expressed a contrary view in *Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam*, . In that case Gajendragadkar J. speaking for the majority has made the following observations at page 938:

The next question to consider in dealing with the validity of the Act which has been passed under Act. 304(b) is the extent of the dispute that is justiciable in law. Article 304(b) provides that notwithstanding anything in Article 301 or Article 303 the Legislature of a State may by law impose such reasonable restrictions on the freedom of trade commerce or intercourse with or within that State as may be required in the public interest provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. It would thus be clear that an Act passed under Article 304(b) can be held to be valid if it is shown that the restrictions imposed by it are reasonable and in the public interest. It is true that before a Bill is introduced in that behalf the previous sanction of the President has been obtained; but that does not take away the jurisdiction of the Court to consider the question as to whether the Act passed with the previous sanction of the President satisfies the requirements of Article

304(b). Since Act. 304(b) permits restrictions to be imposed on the freedom of trade the Constitution has made it clear that the said restrictions can be sustained only if they are reasonable and required in the public interest. This position is not disputed by Mr. Setalvad before us.

Thereafter, Their Lordships have referred to the observations made in *Atiabaris* case already extracted herein. and proceeded to observe further as follows:

However this point did not directly arise for the decision of the Court and so those observations should not be read as definitely expressing the opinion that the requirement of public interest does not become the subject-matter of adjudication in proceedings before the Court when the validity of an Act passed under Article 304(b) is questioned.

Though the observations in *Kherbaris* case were made with respect to the question as to whether the requirement of public interest in Article 304(b) is or not justiciable there is no doubt whatsoever that the same observations apply with equal force to the requirement of public interest envisaged in Article 302. In respect of the above observations in *Kherbaris* case Mr. Nanavati faintly observed that the requirement of public interest was conceded at the bar and did not constitute the decision of Their Lordships. We are not satisfied that the observations aforesaid were based upon any concession at the bar. The observations made by Their Lordships are their own and after having definitely stated that the issue was justiciable. Their Lordships have proceeded only to observe that the position as laid down by them was not disputed by the Learned Counsel for the State appearing before them. Even apart from this there cannot be any doubt that the aforesaid requirement is not left to the subjective satisfaction of Parliament. The language used is such that the requirement of public interest is not left to the satisfaction of Parliament but the requirement qualifies the restriction which is to be imposed under the Article by Parliament. In other words the power which is given to Parliament is not to impose all or any restriction which it may like; but the power is limited by the fact that the restriction imposed must be such as is required by public interest. The language is capable of only one construction that the requirement must be such as must be objectively established and is not one which is to be entertained by Parliament as a subjective fact. For the aforesaid reasons in our judgment there is no basis for this branch of argument of Mr. Nanavati for holding that subordinate legislation is excluded.

13. Next Mr. Nanavati contends that there are two indications in the provisions of Part XIII of the Constitution which show that subordinate legislation could not have been intended to be allowed. He says that even a high authority like the State Legislature has not been permitted to legislate on restrictions on freedom without obtaining the previous consent of the President. Secondly he further submits that if Parliament deals with a situation arising out of scarcity of goods in any part of India in the matter of preference or discrimination it cannot do so simpliciter without making a declaration in the law itself that it was necessary to

do so. He says that it does not stand to reason that when such restraints have been placed on such high-powered authorities that the Constitution makers could have intended to permit a delegate to make a law on such an important subject as imposing restrictions on the freedom of trade. He argues that a freedom which has been considered to be so sacrosanct as not to be touched even by emergency legislation and the right to move any Court for the protection whereof cannot be suspended even by a Presidential fiat even in such an emergency could not have been intended to be allowed to be impaired by so subordinate an authority as a legislative delegate of Parliament which may include any officer of the Government. In our judgment the first argument is not a weighty consideration and the second argument is based upon a misreading of Clause (2) of Article 303 of the Constitution. On the contrary as we shall presently point out that Article contains intrinsic evidence which negatives the very contention for which Mr. Nanavati fights. As we have already pointed out there is a vital distinction between State legislation and subordinate legislation undertaken under the control of Parliament. There is no doubt that probably in the interest of economic unity the main power of imposing restrictions on trade has been entrusted to Parliament and the provision for obtaining Presidential sanction by Legislature of a State has been introduced with a view to see that the Central Government has the final voice in the matter so that regional considerations may not impair the vital interests of the nation. But at the same time when a delegate of Parliament undertakes a subordinate legislation it does so under the aegis and control of Parliament itself. The Parliament in spite of delegation remains the final controller of that legislation. When delegating its authority to legislate the Parliament may be expected to bear in mind that the main objective underlying Part XIII of the Constitution does not become frustrated. In our judgment Clause (2) of Article 303 of the Constitution imposes the requirement that a declaration of the type mentioned therein should be made probably because thereby the Constitution was empowering the Parliament to undertake a piece of legislation which was by way of an exception to a disability imposed to give preference or make discrimination and the power so conferred was of so great and vital in importance that the Constitution-makers thought that should the Parliament think fit to undertake legislation on the subject it should be permitted to do only after making a solemn declaration that such a piece of legislation for giving preference or making discrimination was necessary. In our judgment Clause (2) of Article 303 in itself contains internal evidence to the effect that delegation was contemplated. We shall examine this topic and the arguments urged against this view by Mr. Nanavati just in a moment.

14. In our judgment none of the arguments advanced by Mr. Nanavati for holding that subordinate delegation was not permissible has any merit and every one of them deserves to be rejected. On the contrary there are some other grounds which confirm the presumption that such delegation is not excluded. In the first instance it is important to notice that the restrictions are required to be imposed in public interest. In deciding the question in hand we must bear in mind that we

are construing a constitutional provision which is intended to operate for all times. The power to impose restrictions is not only between one State and another but also inside the territory of any particular State. We must bear in mind the fact that power may be required to be exercised in times of emergency. We must also bear in mind that the freedom of trade does not get either abrogated or suspended in time of emergency. In such times and specially if Parliament is not in session immediate action may be required to be taken in public interest. Sudden legislative action may be necessary in such times. Even in peaceful times on a subject of such a fluid nature rapid adjustment to meet changing economic political and social circumstances may be required. The needs of different parts of India may not be the same at all times. It may be too late before the Parliament may become aware of a local emergency and the needs of a particular part of a territory. These considerations which justify subordinate legislation in general are as much applicable to a legislation in respect of which a duty is cast upon Parliament under Article 302. In fact if such a power is excluded from Parliament then the regional interest which Their Lordships stated in Automobile Transport (Rajasthan) Ltd. case is intended to be protected by Part XIII may be seriously impaired if not completely frustrated. Apart from this Clause (2) of Article 303 of the Constitution as already stated clearly indicates that legislation can be done by delegation. In that clause Parliament has been given the power of not only making law giving a preference or making a discrimination but it has also been given a power of making law authorising the giving of any preference or authorising the making of any discrimination. In our judgment this clearly means that Parliament has got the power of authorising another functionary to give preference or make discrimination. Mr. Nanavati however contends that the proper interpretation of the aforesaid part of the clause is that delegation can be made only to an executive authority and not to a legislative authority. In support of this Mr. Nanavati contends that the expression authorising is inappropriate and that the Constitution would have used the expression delegating instead of authorising if subordinate legislation was intended to be permitted. We are unable to agree with this submission. The expression authorising is of general application and can be applied both to subordinate delegation as also to executive delegation. Mr. Nanavati further contends that the requirement of a declaration as contemplated by Clause (2) of Article 303 itself negatives the idea of delegation. We are unable to appreciate as to how this result can be arrived at. It is not necessary for us to decide in the present case as to whether law must declare that it is necessary to make the law or whether what is required is a declaration that it is necessary to give preference or make discrimination or to authorise someone else to do so. In any case there is no good reason why the function of making such a declaration cannot be left to be performed by the delegate of Parliament. On the contrary having regard to the fact that the legislation on the topic is to be undertaken to meet a contingency arising out of a scarcity of goods one might well presume that such a function may be left to the people in charge of the particular locality in which the scarcity arises. Mr. Nanavati then contends that it is

incomprehensible that having regard to the legislative practice of delegation the Constitution would have expressly mentioned such a power of delegation in Clause (2) aforesaid. This argument is not only self-destructive but it destroys the very basis of the whole structure of the argument on which the aforesaid part of Mr. Nanavati's contention is based. If as Mr. Nanavati contends such a practice is established then the absence of any direct provision in Article 302 on the subject of legislative delegation cannot have any repercussions whatsoever. On the other the main point to be considered whilst dealing with Clause (2) of Article 303 is as to who is the person who is intended to be authorised to give preference or to make discrimination. There is no warrant for the contention of Mr. Nanavati that the authority so authorised must be executive and none else and that the only manner in which that authority could act should be by an executive fiat and not by a legislative order. On the contrary the language used is so elastic that the law on the subject can authorise action either by executive fiat or legislative order. In fact there does not seem to be any good reason as to why on a topic of the aforesaid importance authority can be conferred on a subordinate authority like an executive over which Parliament would be exercising only an indirect control and the same cannot be conferred on a legislative delegate over whom Parliament will have a direct and complete control.

15. For the aforesaid reasons we have come to the conclusion that there is no substance in the general argument of Mr. Nanavati that subordinate delegation is not within the purview of Article 302 of the Constitution.

16. Mr. Nanavati however has one more arrow to his bow. He contends that there is a distinction between a law made by Parliament and a law made by a delegate of Parliament. He contends that it is the first type of law which is envisaged by Article 302 and not the second. He contends that the first type of law is Parliamentary law and the second type though law which has the force of Parliamentary law is not Parliamentary law by itself. The short answer to the aforesaid contention of Mr. Nanavati is the aforesaid two decisions already noted. They are *D.S. Garewal Vs. The State of Punjab and Another*, and *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, . In both the cases laws enacted by rules were held to be laws made by the appropriate Legislature 4 under Part XIII though they were made by the delegate. Probably to wriggle himself out from this difficulty Mr. Nanavati qualified the aforesaid broad submission by stating that the only delegate legislation which would come within the expression "Parliamentary law" would be that which was directed to be laid before the Houses of Parliament or that in which in the parent legislation it was enacted that the subordinate legislation would be a part of the main legislation. It is necessary therefore to see the validity of this additional contention of Mr. Nanavati. Before we do this we may say that though Section 41 of the Act requires rules made by the Central Government to be placed before the Houses of Parliament there is no provision for placing the Orders made under such rules before those Houses and that though Section 43 of the Act provides that an Order made in pursuance of the aforesaid emergency legislation will have an

overriding effect over other pieces of legislation it does not in terms enact that the Order will become enacted or engrafted in the Act or will become a part and parcel of the same. Mr. Nanavati says that in Garewals case there was a provision for laying the rules before the Houses of Parliament and in Firm A.T.B. Mehtab Majids case there was a provision that the rule shall have the same effect as if it was enacted in the Act. He contends that in both these cases the rules were held to have been enacted by Parliament because of the aforesaid two provisions. The sub mission of Mr. Nanavati may be justified so far as the case of Firm A.T.B. Mehtab Majid and Co. is concerned though in our judgment it is inaccurate to contend that the decision was based only on the aforesaid ground. But there is even no such justification for such a submission in Garewals case. Reading the judgment in that case as a whole there is no doubt whatsoever that the judgment is not based on the ground that the rule in question was to be laid before the Houses of Parliament. Even apart from this there is no basis in principle or on authority for the purpose of making a distinction between a subordinate legislation which is required to be placed before the parent body or a legislation which by virtue of the parent enactment becomes part of that enactment on the one hand and a subordinate legislation in respect of which there is no such provision on the other. In our judgment the former provisions are enacted not with a view to show the difference in the authorship of law but they are so enacted with a view to maintain a Parliamentary control or check over that legislation. Mr. Nanavati relies upon the following passage in Halsburys Laws of England Third Edition Volume 36 page 476 article 723:

723. Meaning and scope of subordinate legislation.-Subordinate legislation is legislation made by a person or body other than the Sovereign in Parliament by virtue of powers conferred either by statute or by legislation which is itself made under statutory powers.

But this passage is not intended to make a distinction between the authorship of parent and subordinate legislations. It is intended only to indicate the meaning of subordinate legislation. Moreover? the following passage in our judgment in Halsburys Laws of England in the same volume at page 484 article 732 completely negatives the aforesaid distinction which Mr. Nanavati seeks to make:

732. Authority equal to that of statutes.-Subordinate legislation has if validly made the full force and effect of a statute and this is so whether or not the statute under which it is made provides expressly that it is to have effect as if enacted therein. Thus, if an instrument made in the exercise of delegated powers directs or forbids the doing of a particular thing the result of a breach thereof is in the absence of provision to the contrary the same as if the command or prohibition had been contained in the enabling statute itself. Similarly if such an instrument authorises or requires the doing of any act the principles to be applied in determining whether a person injured by the act has any right of action in respect of the injury are no different from those applicable where damage results from an act done under the direct authority of a statute.

As pointed out by Craies on Statute Law Sixth Edition at page 304. "laying a piece of subordinate legislation before the parent authority is of three kinds: (i) laying without further procedure; (ii) laying subject to negative resolution; and (iii) laying subject to affirmative resolution. It is obvious that in the case of first two kinds of laying though subordinate legislation may be laid before the parent body nothing further may be done by the parent authority at all and even if anything is done in the second kind of laying the validity of the legislation before the negative resolution is passed ordinarily is not affected. The first type of laying and the second type in those cases where no negative resolution is passed and the subordinate piece of legislation obtaining before such a negative resolution is passed all cannot be classified as standing on the same footing as the third type of laying or that piece of parent legislation which enacts that the subordinate piece of legislation would become a part and parcel of the parent legislation. The provision for laying is made in the first two kinds of laying in order that Parliament may remain aware of subordinate legislation and if need be and if so advised may either annul or modify the same. That provision is intended not to show any difference in the authorship of legislation but to ensure Parliamentary control. As regards the provision that the subordinate legislation shall be a part and parcel of the parent legislation the effect of that provision according to Craies at page 311 is still undecided and awaits an authoritative pronouncement. It is true that in Lockwoods case Lord Herschell expressed the opinion that the effect of those words was to make a subordinate legislation as completely exempt from the judicial review as the statute itself. Mr. Nanavati heavily relies upon this principle. However in our judgment it is difficult to see how even this opinion of Lord Herschell can help Mr. Nanavati in establishing his aforesaid contention. All that the opinion means is that the subordinate legislation will be impressed with the quality of the parent legislation in so far as the exemption from judicial review can be granted to the parent legislation itself. But we fail to see how it can have any repercussion on the question of authorship of the subordinate piece of legislation which really is the question which requires to be decided. My learned brother very rightly drew the attention of Mr. Nanavati to the decision in Roop Chand Vs. State of Punjab, which appears to be a case more apposite if not on all fours on the subject for decision. In that case an appeal was decided by a delegate of a State Government. The appeal was u/s 21 Sub-section (4) of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (Punj. 50 of 1948) The delegation was u/s 41 Sub-section (1) of that Act. The question for consideration before Their Lordships was whether the decision of the appeal by the delegate of the State Government was a decision by the State Government itself or whether that decision was a decision of the delegate so that the decision could be further treated by the State Government which has the powers of revising the decision of all its officers. Sarkar J. delivering the judgment on behalf of the majority decide the question as follows at page 1505:

The question then arises when the Government delegates its power for example

to entertain and decide an appeal u/s 21 (4) to an officer and the officer pursuant to such delegation hears the appeal and makes an order is the order an order of the officer or of the Government? We think it must be order of the Government. The order is made under a statutory power. It is that statute which creates that power. The power can therefore be exercised only in terms of the statute and not otherwise. In this case the power is created by Section 21(4). That section gives a power to the Government. It would follow that an order made in exercise of that power will be the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains the power of the Government for the Government can only delegate the power given to it by statute and cannot create an independent power in the officer. When the delegate exercises the power he does so for the Government. It is of interest to observe here that Wills J. said in *Huth v. Clarke* (1890) 25 Q.B.D. 391 that the word delegate means little more than an agent. An agent of course exercises no powers of his own but only the power of his principal. Therefore an order passed by an officer on delegation to him u/s 41(1) of the power of the Government u/s 21 is for the purposes of the Act an order of the Government.

Mr. Nanavati however tried to distinguish this case on the ground that the delegation in that case was of an administrative function and not of a legislative function. This is so. But we fail to see how that makes any difference in the application of the principle on which the case is based. The decision is not based on the nature of the kind of function which was delegated. It is entirely based on the nature of the authority of the delegate. There is no reason why the aforesaid principle should not apply to a legislative delegate and should be restricted only to an executive delegate. In this connection Mr. Nanavati places reliance upon the observations made by Their Lordships of the Supreme Court which have been reproduced under the head-note (b) in *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*, . But those observations were made by Their Lordships with a view only to indicate that the organ of the State is not determinative of the kind of function which it performs but what is determinative is the nature of the function itself. We fail to see how this principle can affect the application of the aforesaid principle in *Roop Chands* case.

17. However even if there was any substance in the aforesaid contentions of Mr. Nanavati in our judgment there is considerable force in the argument of Mr. Sompura that the efficacy given to the impugned Order u/s 43 of the Act puts it at least on the same pedestal if not higher. as an Order which was required either to be placed before the House of Parliament or which was made a part and parcel of the Act. As already observed that section given an overriding effect to an order made under any rule made under the Act to other pieces of legislation. Mr. Nanavati contends that this section however is intended only to give an overriding effect to the Order and nothing more. Apparently this is so. But there does not appear to be any reason in principle as to why such a provision should stand on a lower footing than a provision which makes the subordinate

legislation a part and parcel of the main enactment and that which is required to be laid before the parent authority and nothing further. There is a direct Supreme Court case in which a provision similar to Section 43 of the Act came up for consideration and wherein Their Lordships definitely stated that the Order made under such a section declared not merely the will of the delegate but of the Legislature itself. In that case of *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, the validity of an order made under the Cotton Textiles (Control of Movement) Order 1948 was challenged. That Order was made under the Essential Supplies (Temporary Powers) Act 1946 Section 6 of that Act was couched in the same terms as Section 43 of the Act. Whilst dealing with Section 6 Their Lordships expressed themselves as follows at page 469:

By enacting Section 6 Parliament itself has declared that an order made u/s 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the legislature itself has declared its will that way in Section 6. The abrogation of the implied repeal is by force of the legislative declaration contained in Section 6 and is not by force of the order made by the delegate u/s 3. The power of the delegate is only to make an order u/s 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act. Parliament being supreme it certainly could make a law abrogating or repealing by implication provisions of any preexisting law and no exception could be taken on the ground of excessive delegation to that act of the Parliament itself. There is no delegation involved in the provisions of Section 6 at all and that section could not be held to be unconstitutional on that ground.

In our judgment these observations completely negative the approach of Mr. Nanavati and the contentions raised by him.

18. Before we conclude our judgment on the first submission of Mr. Nanavati we may mention that Mr. Mangaldas Shah appearing for the first respondent makes two submissions. Firstly he relies upon Article 353 He contends that even if there is any substance in the contentions raised by Mr. Nanavati the aforesaid Clause (b) confers a definite power upon the Parliament to undertake legislation by delegation during the subsistence of a proclamation of emergency. Having regard to our aforesaid conclusions we do not think it necessary to decide the validity of this contention. We only note that even if there is any force in the contention the delegate according to Clause (b) can be either the Union or the officers of the Union and that in any case that power cannot sustain the authority of the State Government. In that view it is also not necessary for us to consider the various submissions which were made by Mr. Nanavati as to the true interpretation of Clause (b) aforesaid. Mr. Mangaldas Shah also relies upon Section 3 Sub-section (2) of the Act which in terms says that the rules may provide for and may empower any authority to make orders providing for the matters therein

enumerated. However this sub-section only confers a power upon the Central Government to delegate its authority. The power of the Central Government to delegate its authority is not in issue. What is in issue is the status of a delegate visa-vis the principal and we fail to see how Sub-section (2) of Section 3 of the Act can assist us in determining that question.

19. That brings us to the second point raised by Mr. Nanavati. Mr. Nanavati's contention is that the true interpretation of the Order is that it does not prohibit the railway authorities from transporting goods. He contends that the word transport means initiation of transport and does not cover the subsequent stages of transport. Mr. Nanavati's contention is mainly based on the observations made by Ray C.J. in *State Vs. Haricharan Rakshit*, . In that case the learned Chief Justice observed after referring to the definition of the word transport in Concise Oxford Dictionary that The conceptions of two termini and the act of conveying from one to the other are implicit in its connotation. An act of transport cannot be undertaken and even contemplated without them. Mr. Nanavati contends that once the goods leave the terminus of origin then the transport has in the eye of law begun and therefore having regard to the fact that the oil in question was already on the rails on the date of the promulgation of the Order there was no further act of transport required to be done by the railway authorities. Mr. Nanavati contends that what the railway authorities were doing on 22nd of July 1964 was not an act of transport but an act of continuing the transport and that the latter concept was not included in the Order and did not come within the mischief thereof. Mr. Nanavati contends that in interpreting an Order the Court must bear in mind the direction given by the Act itself in Section 44 which is that any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence. It is difficult to see how this direction can be called in aid for construing or interpreting the Act or Rule or Order made under the Act. Prima facie it appears to be a direction issued to the executive authorities as to how they should act in pursuance of the Act. But even if the section is to be called in aid we fail to see how it can in any way control the ordinary meaning of any expression used in the impugned Order. There are several infirmities in the argument of Mr. Nanavati based upon the aforesaid observations. In the first instance those observations do not bear the meaning which Mr. Nanavati seeks to attach to it. It is for this reason that Mr. Sompura relied upon certain other observations which appear in the passage from which the aforesaid observations are extracted. In the second instance the observations must be read in the context of the problem which Their Lordships were called upon to solve in the aforesaid case. In that case a person was travelling in a Second Class compartment as a passenger from the State of Orissa to a place outside thereof and was carrying with him a quantity of cloth the transport of which was prohibited under the Order impugned therein. The person was prosecuted on the ground that he had contravened the provisions of an Order

which prohibited the transport of such a quantity of cloth from the State of Orissa beyond its border. The main defence which was urged on behalf of the accused in that case was that the passenger had a locus penitentie until the border of the Orissa State was reached and the offence cannot be said to have been complete unless and until the train in which he was travelling had left the border of the Orissa State or unless it had in any case left the last station of that State on its way to the first station outside the State. The learned Judges constituting the Bench found some difficulty in answering the question. But a perusal of the three judgments delivered in that case shows that Their Lordships did not think it necessary to decide the aforesaid question because the penal clause prohibited not merely the transport but also an attempt to do so and all the learned Judges were unanimously of the opinion that the facts of the case brought the accused within the mischief of that part of penal clause. The learned Chief Justice however thought it necessary to express his views as to the correct meaning of the word transport because he differed with certain observations made by Das J. on that topic in the case. The utmost that can be said in favour of the present petitioners on the basis of the observations made by Ray C.J. is that the transport was not complete until the boundary of the Orissa State was crossed or until a situation was reached where the train after having left the last railway station on its border was proceeding towards the territory of the neighbouring State. The decision at the most show that the transport was not complete as none of the latter contingencies had been reached. But that is not the same thing as stating that the act of transport becomes complete the moment the goods leave the place of its origin. If that were the view of the learned Chief Justice he would have expressed a definite opinion on the subject based his decision thereon and there would be no necessity for him to undertake decision on the further question as to whether the goods in question were not required to cross the border of the Orissa State. On the other hand the definition of the word transport as given by the learned Chief Justice with which we entirely agree would show that transport has three conceptions the conceptions of two terminii and locomotion. When a person is said to transport goods from one place to another what is intended to convey is that he moves the goods from the terminus of origin to the terminus of destination. Thus the whole process of moving the goods from the place of origin to the place of destination is included in the concept of transport. From this it is quite clear that locomotion is as much an essential ingredient of the concept of transport as the two terminii. In our judgment this being so the fact that the Order does not mention in specific terms that the continuance of transport was also included within its scope does not matter at all. Locomotion being as much essential as the other two ingredients it was not necessary for the Order to mention the same specifically. There is another point of distinction between the Orissa case and the present case. In that case the passenger himself was carrying the goods and he was in possession of the same. Therefore having regard to those facts it was open to the passenger to contend that though originally he might have intended or even made preparations for transporting goods from Orissa territory to non-Orissa territory it

was open for him to change his mind at any intermediary place in which case no transport would ever take place. On the contrary in the present case the goods were in the possession of a railway carrier which under its contract of bailment was bound to carry the goods outside the territory of Gujarat after the promulgation of the Order. There is no doubt whatsoever that the goods were being carried beyond the borders of the Gujarat State and but for the interruption would have been carried to a place outside the border. The whole object of the aforesaid Order was to conserve the oil resources of the State and to prevent the goods from crossing the borders after the promulgation of the Order. If the interpretation which Mr. Nanavati contends for were to be accepted it is quite clear that the aforesaid object would be completely frustrated. Mr. Nanavati tries to meet this argument by contending that the acts other than the act of transport which has been expressly prohibited in the Order all relate to acts which are anterior to the initiation of the transport. Therefore he contends that the interpretation of the word transport must take its colour from those expressions too. It is difficult to accept the principle underlying this reasoning. We cannot agree that the meaning of the expression transport must take its colour from the words which follow the same specially when there cannot be any doubt in the interpretation of that word. Moreover we cannot agree that the expression "caused to be transported" refers only to the initiation of transport. In our judgment that is a general expression which would take in its purview not only the causing of transport at the first stage when it leaves the place of origin but at all places intermediate between the place of origin of transport and the terminus of destination. Though the two termini are ingredients which constitute the act of transport the soul thereof is the movement of goods and it is this movement of goods from a place in the State of Gujarat to a place outside thereof which is intended to be hit by the Order. In our judgment any other interpretation of that Order is likely to create a number of difficulties which would frustrate the very object which the Order has intended to achieve. Mr. Nanavati also contends that the Order is intended to reach only the acts of the owners of goods and not the non-owners like bailees. We cannot accept this argument at all. The prohibition contained in the Order for acceptance of the transport which can only be done by a non-owner is a simple answer to the aforesaid argument. For the above reasons we have come to the conclusion that there is no merit in the second contention of Mr. Nanavati and the same also deserves to be rejected.

20. That brings us to the third and the final contention of Mr. Nanavati. That contention is that the Order does not apply to the Union of India and consequently its servants. The argument is supported on two grounds. Firstly it is contended that the expression person used in the Order cannot appropriately be applied to the Union of India. It is contended that the Union of India is neither a legal nor a juristic body and that to such a body the expression person is totally inappropriate. In our judgment the matter is no longer *res integra* and is covered by a direct authority of the Supreme Court in *State of Punjab Vs. Okara Grain Buyers Syndicate Ltd. and Others*, -a case which we shall also have to refer

in extenso in regard to the second branch of this contention. In regard to a similar contention this is what Their Lordships observed at page 679:

The State is an organised political institution which has several of the attributes of a corporation. Under Article 300 of the Constitution the Government of the Union and the Government of a State are enabled to sue and be sued in the name of Union of India and of the Government of the State as the case may be. It would not therefore be improper to speak of the Union and the State as constitutional entities which have attributes defined by the Constitution.

The observations were made by Their Lordships in connection with the argument that the State of Punjab was not a person within the meaning of the Displaced Persons (Debts Adjustment) Act 1951. The observations which Their Lordships made in connection with this contention are applicable with equal force to the contention that the Union of India is not a "person within the meaning of the Order. The second branch of Mr. Nanavatis argument is based on the wellknown principle that a Government is not bound by a statute unless it is either expressly mentioned therein or its mention is necessarily implied. Mr. Nanavatis contention is that neither the Union of India nor any State is mentioned expressly or by necessary intendment in the Order. The argument is founded on the undisputed fact that the Western Railway administration to which the goods were consigned is of the ownership of the Union of India. The argument further proceeds in the assumption that if the Order does not bind the Union of India it would also not bind the servants of that Union whilst they are acting in their capacity of such servants. For the present the question as to whether in a particular case though the Government may not be bound the servants may or may not be so bound may not be undertaken for decision. On the other hand Mr. Sompura contends that the Union of India is expressly mentioned in the Order and that in any case there is a clear indication that it is mentioned by necessary implication. From these rival contentions it is quite clear that the main principle on which the argument is founded is not in dispute. In fact that principle is no longer *res integra* and has been held by the Supreme Court to be applicable to this country in more than one case. The problem arose for decision in the case of *Director of Rationing and Distribution Vs. The Corporation of Calcutta and Others*, . In that case Their Lordships decided by a majority that the principle of English law that the Crown is not bound by any statute unless it is either expressly or by necessary intendment mentioned was applied to India by Their Lordships of the Privy Council in *Province of Bombay v. Municipal Corporation of the City of Bombay* and another 73 Indian Appeals 271 and that the principle so recognised by Their Lordships of the Privy Council was the common law of this country at the date when the Constitution was passed and that such a law was preserved by Article 372 of the Constitution and was a part and parcel of the post-Constitution law of this country. The decisions in *The State of Bihar Vs. Rani Sonabati Kumari*, and *State of Punjab Vs. Okara Grain Buyers Syndicate Ltd. and Others*, were also based on the recognition of the same principle.

21. Therefore the main question for enquiry in the present case is whether the respondents prove that the Union of India is included in the expression person either expressly or by necessary intendment. The argument of Mr. Sompura is that in any case the Union of India must be taken to have been expressly mentioned in the Order. The argument is based on the ground that the railways inside the territory of Gujarat are all owned by the Union of India. This is not a point disputed by Mr. Nanavati. Mr. Sompura therefore contends that when the Order prohibits any person from transporting by rail groundnut oil the prohibition is directed entirely against the Union of India and no one else. The contention of Mr. Sompura is that the prohibition against transport by rail or acceptance for transport by rail is applicable only to the railways owned by the Union of India and no one else. We shall examine some arguments advanced by Mr. Nanavati against this aspect of the matter just in a moment and shall show that those arguments are not valid. Prima facie there is considerable force in the argument of Mr. Sompura. However we do not propose to rest our judgment merely on this aspect of the matter. In deference to the elaborate arguments which were addressed to us in the course of the reply and the counter-reply and in view of the importance of the case we propose also to examine the validity of the proposition that in the present case the Union is included by necessary implication. That at once raises a controversy which came into prominence only at the time of the reply of Mr. Nanavati and for which he had to ask for our permission which we thought fit to grant. In the course of his first address in support of the petitions we were not impressed by the contentions of Mr. Nanavati on this part of his third submission mainly on the basis of the State of Punjabs case aforesaid and we thought that the matter was concluded by that authority. Therefore the arguments in the course of Mr. Sompuras and Mr. Mangaldass replies were addressed to us only as to whether the Order read as a whole did or did not necessarily take within its purview the Union of India and the railway servants. However in the course of his reply Mr. Nanavati stated that he would like to refer to the other three authorities referred to above-the Privy Council case and the case of Director of Rationing and Distribution and Sonabati Kumari decided by the Supreme Court-and show that the only test which can be applied for the purpose of determining whether the Union of India or any State is excluded from the aforesaid principle by necessary implication is the test of complete frustration of the beneficent purpose for which the impugned legislation was enacted. He then contended that no other test could be applied. Mr. Nanavatis contention is that if this rigid test is applied to the facts of the present case it is not at all satisfied. Alternatively Mr. Nanavati contends that even if the less rigid tests were applied the Order does not satisfy any of them.

22. In order to resolve the above controversy it is first of all necessary to refer to the Privy Council case aforesaid *Province of Bombay v. Municipal Corporation of the City of Bombay* and another. In that case the question which arose for decision was whether Sub-section (1) of Section 222 and Section 265 of the City of Bombay Municipal Act 1888 expressly or by necessary implication bound the

Crown. The High Court of Bombay held that the Crown was bound by necessary implication. The Bombay High Court so held on the ground that the legislation could not operate with reasonable efficiency unless the Crown was so bound. This test was rejected by Their Lordships of the Privy Council. The second test which was propounded before Their Lordships of the Privy Council in that case was the test that the statute in question was enacted for the public good. Their Lordships rejected this test also at page 276 and made the following observations on which Mr. Nanawati heavily leans:

Their Lordships prefer to say that the apparent purpose of the statute is one element and may be an important element to be considered when an intention to bind the Crown is alleged. If it can be affirmed that at the time when the statute was passed and received the royal sanction it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the Court is asked to draw this inference it must always be remembered that if it be the intention of the legislature that the Crown shall be bound nothing is easier than to say so in plain words.

Their Lordships then examined the tests which were applied in some Scottish cases and held that those tests were not applicable to law in England and in India. Applying the aforesaid strict test of complete frustration Their Lordships disagreed with the conclusion of the High Court of Bombay and held that the Crown was not bound by the aforesaid two provisions contained in the City of Bombay Municipal Act 1888 As already stated this Privy Council case was approved in the Director of Rationing and Distribution case aforesaid. In the course of the discussion of the law on the subject Their Lordships of the Supreme Court observed as follows at page 1359 as regards the tests to be applied for determining the question of implied intendment:

This is further enforced by the rules that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless the Statute being for the public good it would be absurd to exclude the King from it.

It was contended in the State of Punjabs case that the last observation was intended to include the test of public good which had been rejected by Their Lordships of the Privy Council in the Province of Bombays case. However Their Lordships rejected this contention and held that the aforesaid part of the passage is not capable of that construction that that part had to be read not in vacuo and divorced from the rest of the judgment but in conjunction with the express approval of the rule of construction as explained by the Privy Council. Having regard to this definite pronouncement we must proceed on the basis that the test of public good cannot be applied for the purpose of determining the implied intention of the Legislature. But in the Director of Rationing and Distribution case Their Lordships applied the following test whilst disposing of an alternative argument that even if the State was not bound in express terms it must be

deemed to have been bound by necessary implication. This test is to be found in paragraph (12) reported at page 1361 in the Judgment of Sinha C.J. in Director of Rationing and Distribution case:

But no specific provisions of the statute in question have been brought to our notice which could lend any support to this alternative argument. It has not been shown to us that if the section which was sought to be applied against the Government were held not expressly to apply to Government the law will lose any of its efficacy or that its working will be hampered in any way.

In Rani Sonabati's case the question that was raised was whether the State was included by necessary implication as one of the persons who could be proceeded against under Order 39 Rule 2 Sub-rule (3) of the Code of Civil Procedure. Their Lordships reached the conclusion that the State was so included on the grounds that the State was bound by the CPC the scheme of the Code being that subject to any special provision made in that regard as respects Governments, it occupies the same position as any other party to a proceeding before the Court; that even apart from the scheme of the Code the State as a party defendant is plainly within the terms of Order 39 Rule 2(3) of the Code; and that the expression person has in Order 39 Rule 2 (3) been employed merely compendiously to designate every one in the group of defendants and not for excluding any defendant against whom an order of injunction is primarily passed. Similarly in State of West Bengal Vs. Union of India, Their Lordships in resolving the same problem observed that:

In considering the true meaning of words or expressions used by the Legislature the Court must have regard to the aim object and scope of the statute to be read in its entirety. The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire Statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs.

But, Mr. Nanavati's contention is that all these latter principles for ascertaining the implied intention of the Legislature were thrown overboard in the State of Punjabs case and that Their Lordships have ultimately reverted to the test of complete frustration which was enunciated by Their Lordships of the Privy Council in the Province of Bombays case. Therefore it is necessary to examine the ratio underlying the decision in the State of Punjabs case. We have already extracted above the test which was indicated by Their Lordships in the Director of Rationing and Distribution case and that in the State of Punjabs case it was pointed out that the test of the public good which had not been approved by Their Lordships of the Privy Council had not been departed from by Their Lordships in the case of Director of Rationing and Distribution. In fact Their Lordships at page 677 in the State of Punjabs case expressly held that the principle as explained by Their Lordships of the Privy Council must be deemed to have been accepted and approved by the Supreme Court in the case of Director of Rationing and Distribution. After so holding Their Lordships in the State of

Punjab case quoted the passage from the Privy Council case in which the test of complete frustration was enunciated. After so quoting the passage Their Lordships observed as follows at page 677:

In the view we take of the construction of the provisions of the Act before us in the light of the principles of construction formulated by Lord Du Parc we do not consider it necessary to examine whether there are any further limitations qualifications or exceptions to the rule as applied to Indian statutes as have been accepted in the United Kingdom which have been set out and expounded at pages 438-443 of the sixth edition of Craies on Statutes. We shall therefore proceed to examine the provisions of the Act on the footing that the test for determining whether the Government is bound by a statute is whether it is expressly named in the provision which it is contended binds it or whether it is manifest that from the terms of the statute that it was the intention of the Legislature that it shall be bound and that the intention to bind would be clearly made out if the beneficent purpose of the statute would be wholly frustrated unless the Government were bound.

It is on the aforesaid passage that the contention of Mr. Nanavati is based. We have given our anxious consideration to all that Mr. Nanavati has to say on the subject. We have come to the conclusion that the aforesaid passage cannot be regarded as an indication that Their Lordships intended to throw overboard the tests which had been applied in the earlier cases. There are two very good reasons for holding against the contention of Mr. Nanavati. Firstly immediately after the aforesaid passage Their Lordships refer to Rani Sonabatis case and the case of the State of West Bengal v. Union of India and reproduce the tests which were laid down in both those cases and in paragraph (15) at page 678 after referring to those tests Their Lordships further proceed to decide the question in hand after making the following observation:

We shall therefore proceed to consider the terms of the Act in the light of these principles and see whether debts due to displaced persons by the Government are within its scope by reason either of the words used or by reason of the same being necessitated by the policy purpose or provisions of the Act.

It is true that actually Their Lordships have not applied the less stringent tests for the final determination of the question as to whether the State of Punjab was or was not included in the scope of the Displaced Persons (Debts Adjustment) Act 1951 But that is because Their Lordships came to the conclusion that the stringent test was satisfied in that case. That such was the conclusion of Their Lordships is further indicated by the way in which the conclusion has been expressed by Their Lordships in paragraph (27) at page 682 wherein Their Lordships have stated as follows: Adopting therefore the very principle for which the learned Advocate General contends we consider that the test formulated by Lord Du Parc...is satisfied in the case of the provisions of the Act now before us. It is quite obvious that in view of this conclusion Their Lordships will not thereafter undertake to decide whether the less rigid tests were or were not

satisfied. Secondly on general principles there does not appear to be any good reason as to why the exploration of the implied intention of the Legislature should be restricted by the application of the aforesaid test only. The true question to be decided is each case in whether the Legislature has indicated its intention by necessary implication that the State was bound. The Legislature may express its implied intention in more than one way and the law knows of a number of aids for the purpose of discovering the implied and necessary intention of the Legislature. In determining this question specially in Indian conditions one has to bear in mind that the law relating to the immunity of the State from the operation of a statute is now applied in India not on the ground that it is part of the prerogative of the Crown or the Sovereign but it is applied as a part and parcel of the common law of the land. It is also to be borne in mind that the principle which was enunciated by Their Lordships of the Privy Council and approved by the Supreme Court is a principle relating to the construction of a statute and embodies only a presumption capable of being displaced. It is quite obvious that the presumption can be displaced in a variety of ways known to law. In any case there is nothing in the main principle of construction which should demand that only the stringent test should be applied to the exclusion of all other tests known to law for rebutting a presumption. It is true that in considering the question of rebuttal of the presumption one must always bear in mind the fact that a mere indication of the intention to the contrary is not enough but that the contrary intention must follow by way of a necessary implication. It is true that the aforesaid stringent test was applied by the Privy Council in the Province of Bombay's case. It is true that the negation of the principle of the loss of efficiency may be regarded as an indication of the negation of loss stringent tests. But the observations made by Their Lordships of the Privy Council must be read in the context of the fact that Their Lordships were called upon to construe the provisions of a general nature and that there was nothing else in the two sections to be construed on the basis of which a contention could be urged that the less rigid tests could apply to the facts of that case. In our judgment even if one were to take the view that the Privy Council case implies that the stringent test is the only test it cannot be taken now as representing the correct law on the subject in view of the aforesaid two Supreme Court decisions which we have already mentioned above. In our judgment the respondents are entitled to urge in opposition to Mr. Nanavati's contention that the Order will lose its efficacy or that its working will be hampered unless the Union of India is bound and that the scheme of the Order discloses that the Union of India was necessarily included therein.

23. Before we proceed to apply the aforesaid tests the stringent and the less rigid—we may advert to Section 1 Sub-section (2) of the ACt which refers to the person to whom the Act shall apply. The sub-section says that the Act shall apply amongst others to persons in the service of the Government wherever they may be. We may also refer to Rule 4 of the Defence of India Rules 1962 which is in the following terms:

4. Saving-No prohibition restriction or disability imposed by these Rules or by any order made or direction given thereunder not being an order or direction of the Central Government or of an officer specially authorised by the Central Government in this behalf expressly providing the contrary shall apply to anything done by or under the direction of any member of the Armed forces or any public servant acting in the course of his duty as such member or public servant.

The expression "public servant" in the Rules has been defined to include an employee of any railway administration. Section 2 of the Act indicates that the provisions of the Act are intended to apply to public servants. Rule 4 indicates that a public servant may do an act which is contrary to the prohibition embodied in any rule made under the Act or in an order made under the rule provided however the prohibition is not imposed by a Central Government or a functionary of the Central Government of the type mentioned in the rule. We do not propose to hold that the aforesaid two provisions necessarily indicate that the Order in question applies to the Union of India or its servants. Mr. Sompuras contention seems to be that the aforesaid provisions indicate the mind of the Legislature that in any case the public servants were bound by the provisions of the Act and the Rules and Orders made thereunder. In the first instance the aforesaid provisions do not apply in terms to the Union Government or the State Government. They apply to public servants. Secondly the fact that the provisions apply to such servants do not necessarily mean that any and every rule or any order which is published thereunder applies to such servants. Whether the provisions so apply or not would depend upon the terms of each Order. Thirdly a converse argument was negated by Their Lordships of the Privy Council in the Province of Bombays case. Therein Their Lordships were pressed with the argument that an inference of necessary implication might be drawn from certain express references to the Crown in other parts of the Municipal Act itself and from the fact that by the Government Building Act 1899 the Legislature had provided for the exemption of Government buildings from certain municipal laws. The argument was that no express provisions saving the rights of the Crown would be necessary if the Crown were already immune. In our judgment this reasoning must apply to the converse argument also. But Mr. Nanavatis contention is that Rule 4 aforesaid definitely indicates that in no case a Government servant will be bound by any prohibition imposed by any authority other than the Central Government and that therefore the Order can never be construed as one binding on the public servant acting in the course of his duty as such public servant. We are unable to agree with this line of reasoning also. The language of Rule 4 does not show that such is the result. All that Rule 4 means is that inspite of a prohibition imposed upon a public servant by an order of a functionary other than a Central Government or its officer of the aforesaid type the act of a public servant is immune from such prohibition if he does the act in the course of his duty. We agree with the submission of Mr. Sompura that the aforesaid rule has not been enacted to indicate that no rule or order can be made

binding on any public servant by functionaries other than the Central Government or its above kind of delegate but it is intended to provide only that if any act is done by a public servant contrary to the prohibition etc. then the act itself is immune from the prohibition. Rule grants immunity to the acts of the public servants and not to the public servants themselves. In other words it is not open to any one to contend on the strength of the aforesaid rule that a Government servant is not bound by a rule or an order and therefore the public servant shall not carry out the directions embodied in the rule or order. It is the right of the Government servant alone to do acts contrary to those directions if he is required to do so in the discharge of his public duty.

24. In our judgment having regard to the language of the rule or the order and the basic fact that in the State of Gujarat the only person which operates a railway is the Union Government there cannot be any doubt that the Union of India was intended to be governed by the Order itself. Mr. Nanavati seeks to get out of this position by contending that the prohibition contained in the Order can apply and be implemented in all respects even if it is held not to bind the railway administration. He submits that transport by rail can be also by a Passenger and it is only this class of transport which is intended to be prohibited by the Order. He also contends that when a person is prohibited from causing oil to be transported by rail it is obvious that the person intended is other than the railway administration. He further submits that the prohibition against the offer for transport can only apply to a person other than the railway administration. In our judgment there are several objections to reading the Order in the aforesaid manner. Firstly the way in which Mr. Nanavati reads the Order is wholly artificial. There is no reason why transport by rail should be restricted only to transport by a railway passenger specially when one bears in mind that the object of the Order is to reach the whole of the stock of oil lying in the State of Gujarat. It cannot be doubted that the quantity of oil transported by railway passengers would be wholly insignificant. Moreover the aforesaid line of reasoning must completely break down in the case of prohibition against the acceptance of oil for transport by rail. In our judgment this part of the Order would be rendered completely nugatory if the railway administration were to be excluded from the operation of the Order. Mr. Nanavati tries to argue that the prohibition against the acceptance for transport is only intended to operate against the transport by road water or air. We cannot agree with this. There is no doubt that the prohibition against acceptance of transport is directed against all the four modes of transport including rail mentioned in the Order. Moreover as we have already indicated motion is the soul of transport and that the Order prohibits this movement of oil by railway which movement having regard to the aforesaid premises can only be by the railway administration. If the contention of Mr. Nanavati were right then the whole Order would have been drafted in a different manner and specially the clause relating to the prohibition against acceptance of transport by rail would not have been there at all. In Rani Sonabatis case Their Lordships came to the conclusion that the State must be taken to have been

expressly included in the expression person in Order 39 Rule 2(3) as that expression includes a defendant and as the State under the CPC can be a defendant against whom an order of injunction can be issued. In our judgment on the aforesaid interpretation and on a parity of reasoning the Union of India must be taken to have been expressly included in the Order.

25. Moreover in our judgment the strict test must also be taken to have been satisfied in this case. We have already mentioned the factual background in which the Order was published. The beneficent object of the Order is to make oil available in the State of Gujarat to the common man and that too at reasonable prices. It is true that according to the affidavit of Mr. Pathan the State was not actually aware of the stock of oil which was in the actual course of transport at the time when the Order was promulgated. It is also true that for reasons of public policy the State Government has not disclosed the actual stock of oil which was within the State of Gujarat on the date of the issue of the Order. There is some dispute between the petitioners and the respondents as to the actual quantity of oil required in the State of Gujarat for consumption by citizens and for its equitable distribution. Though it is not possible to know the exact proportion which the quantity of oil in transit bore to the total stock in the State of Gujarat or the total stock required having regard to the figures made available by the first respondent the total quantity in transit cannot be regarded as insignificant. In any case if that quantity of oil were to go beyond the borders of the State it is quite clear that the rise in price which had already been from Rs. 2-15 nP. to Rs. 2-60 nP. per kilo would either not be arrested or would in any case be not brought down and so the object of giving relief to the poor would be frustrated. In our judgment having regard to all the facts of the case the conclusion can easily be reached that the beneficent purpose for which the Order was published was likely to be wholly frustrated if the Union of India the only owner of the rail transport was to be excluded from the operation of the Order.

26. That being so, it is quite clear that the less rigid test would be satisfied too. It cannot be denied that perhaps with the exception of the road transport the railway transport would be the principal means of moving oil from the State of Gujarat. If the Union of India were to be excluded from the operation of the Order and its servants were directly to be taken away from such operation there is no doubt that the working of the Order would be considerably hampered. It is true that having regard to the provision contained in Rule 4 still there would be a discretion left with the railway employees to do acts contrary to the prohibition contained in the Order. But there is a clear distinction between an officer acting within the discharge of his duty for which he would be certainly answerable to his employer and a situation wherein such an officer is not bound at all by a prohibition. In the latter class of cases the whole class of railway employees would not be bound by the provisions of the Order and in order to effectively prevent the export of oil from the State of Gujarat the State will have to undertake other measures for checking transport of oil outside the State by rail the enormity of which would completely break down the machinery of the

Government inasmuch as at every railway station watch will have to be kept to see that the citizen does not hand over oil to a railway employee. In our judgment there is no reason for holding as to why the State Government should reduce itself to such a position where the smooth working of the Order would be completely frustrated and it would not be in a position to reach a class of persons who though not acting in the discharge of the public duties would be completely exempt from the provisions of the Act. Mr. Nanavati lays stress upon the fact that in the case of a breach of the Order the Union Government would be criminally responsible. He specially relies upon that passage in the case of Director of Rationing and Distribution wherein Their Lordships remarked that the immunity of Government from the operation of certain statutes and particularly statutes creating offences is based upon the fundamental concept that the Government or its officers cannot be a party to committing a crime. This is certainly a circumstance to be taken into account But at the same time that circumstance is not in itself an insuperable difficulty which must negative a conclusion which otherwise follows from a reading of the impugned legislation itself. As observed by Their Lordships of the Privy Council in the Province of Bombay's case the Scottish principle that a penal statute does not bind the Crown even by express legislation does not apply in England and in India. The railway administration though it is owned by the Union Government is not directly run by it but is run through its servants. Even supposing that the Union Government would be penally responsible for the acts of its servants done in breach of the Order-a supposition not very much warranted in law-as pointed out by Their Lordships of the Supreme Court in Rani Sonabatis case and in the State of Punjab's case the fact that a State or Corporation cannot be imprisoned cannot be regarded as a sure indication of its exclusion from a penal provision. The provision of a penal statute can still be enforced by imposing a fine upon the delinquent State or Corporation.

27. For the foresaid reasons we have come to the conclusion that there is no merit also in the final submission of Mr. Nanavati and the same must be rejected.

Before we conclude we may mention that Mr. Mangaldas Shah had raised a point before us that the petitioners are not entitled to maintain the present petitions on the ground that they had not become the owners of the oil in question on the date on which the Order was promulgated. In view of the importance of the matter we have not thought it fit to consider if the petitions can or cannot be dismissed on this ground. We have not done so specially when such a point was not raised for and on behalf of the State which is the vital party which is concerned in the matter. We may also mention that we have not thought it fit to consider that in any case the petitioners must fail on the ground that even if the Union is not included as being within the purview of the Order no writ of mandamus can issue against the first respondent on the ground that the issuance of such Order would mean that the consignors or the petitioners would be causing the oil to be transported which would be a breach of the Order and which would make the consignors or the petitioners criminally responsible and

that a writ of mandamus cannot issue at the instance of a party who is out to commit the breach of a valid order or who is out to commit an offence. We have also not thought it fit to express any opinion on the latter aspect of the matter because the same was not raised before us for decision by any of the parties.

Therefore, in our judgment there is no merit in any of the petitions and the same deserve to be dismissed.

Rule discharged in each of the petitions with costs.